STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Harold Cartwright, #355084

Applicant,

v.

Transcript of Record
Case No.: 2019-CP-02-01582

State of South Carolina,

Respondent.

June 24, 2022
Aiken, South Carolina

B E F O R E:

The HONORABLE ROBERT BONDS

A P P E A R A N C E S:

Zachary Jones, Representing the State of South Carolina

Dwayne C. Phillips, Representing the respondent

SHARON G. HARDOON, CSR
Official Circuit Court Reporter, III

THE COURT: All right, Counsel. Good morning.

MR. CARTWRIGHT: Good morning.

THE COURT: Mr. Cartwright, good morning, sir.

We are here today on respondent's motion to alter or amend the order granting post-conviction relief pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. So let me do this, for the record, could I get my attorneys to introduce themselves, please, beginning with the attorney for the respondent?

MR. JONES: Thank you, Your Honor. My name is Zachary Jones. I'm an assistant attorney general with the Attorney General's Office, PCR Division.

THE COURT: Yes, sir. Thank you very much. And for Mr. Cartwright?

THE COURT: His mic may not be working. Mr. Phillips?

MR. PHILLIPS: Can you hear me now?

THE COURT: All right, great. Mr. Phillips, could you introduce yourself, sir, for the record.

MR. PHILLIPS: Yes, Your Honor. Good

morning. It's Attorney Dwayne Phillips for the petitioner -- or the applicant, Mr. Cartwright, Harold Cartwright.

THE COURT: All right. Attorney General, since this is your motion, sir, I have -- for the record, I want you to know I have reviewed your brief and I'm happy to hear from you, sir.

MR. JONES: Thank you, Your Honor.

Before I begin, I was wondering how Your Honor would like us to conduct this hearing, if you'd want me to go through each of the 15 issues I addressed in the brief one by one? I tried to be as thorough as possible in the brief. But we can do that, or if Your Honor had any specific questions.

THE COURT: No. I'll tell you, let's just go through them one by one. I think that's the best way to knock this out because you were thorough, and I appreciate that. Because, quite frankly, there are a lot of different issues that I think that we need to address. A lot of issues were raised, and I think we're under an obligation to address each one.

MR. JONES: Yes, sir.

THE COURT: So I'm happy to hear from

you, sir. We'll discuss one issue at a time. You want to address that issue and then have Mr. Phillips respond to that issue, sir?

MR. JONES: Whatever Your Honor would prefer.

THE COURT: Mr. Phillips, is that satisfactory, sir?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Honestly, I think that would -- yeah, I really think that's going to be easiest for me as we go through it. It will help me with my notes that I may be taking. So let's go ahead and do that, Attorney General, if that's all right. When you finish with that argument, just let us know. And then I will allow Mr. Phillips to respond, sir. Okay?

MR. JONES: Okay.

THE COURT: Yes, sir. Go right ahead.

MR. JONES: Thank you, Your Honor.

The first general overarching issue that I'd like to address is the applicant's cumulative error doctrine arguments. As I pointed out, the -- this case involved 55 total allegations of ineffective assistance of counsel. And for many of them, there were no specific findings of

prejudice made in the order, including in the 15, and I believe 13 out of the 15 issues on which this Court actually granted relief.

And then the Court's order concludes with a general finding of cumulative prejudice based on the total number of errors alleged. So, of course, I'm going to go through each of those 15 issues and try to explain why they were not errors.

But, just in general, I wanted to point out that our State has not recognized cumulative error as grounds for post-conviction relief. And, are -- and, in fact, that doctrine has been rejected expressly by the Fourth Circuit and by the majority of Federal Circuits who have dealt with the Federal equivalence of ineffective assistance claims.

I also further believe that -- and submit that the -- that the cumulative error standard is, in fact, contrary to the policy rationale of *Strickland* and to the straightforward reading of *Strickland*, which requires for each allegation of ineffective assistance of counsel a showing of both deficiency and prejudice individualized to that allegation.

So the idea that one -- one general finding of cumulative prejudice based on multiple alleged deficiencies can substitute for that as no basis in *Strickland,* or in any other precedence relied on by the State Supreme Court or the State Appellate Courts or the Federal Courts.

So with that out of the way, that alone, I believe, merits at least a new order setting forth specific findings of prejudice. However, I don't believe that any of the issues merit that treatment in the first place.

First of all, we have the allegation of the failure to object to the qualification of the State's expert in child sexual abuse dynamics.

Now, this Court's order found that a -- that the failure to object to the qualification of Dr. Benedetto as an expert in child sexual abuse dynamics was deficient because the trial court limited Trial Counsel to questioning the witness about her qualifications rather than about the reliability and validity of the field itself.

First of all, it's worth pointing out that Trial Counsel did object to the qualification of the expert witness on the grounds that she had not shown the reliability of the field, and then

the trial court overruled that objection.

So raising the issue again, I submit, would not likely have resulted in a different result, which is, of course, the test for prejudice under *Strickland*.

Second, it's -- the difference between the qualification of an expert and the admissibility of an expert's testimony is -- that distinction is important in this case because the reliability questioning goes to the admissibility of the expert's statement rather than the qualification.

So to the extent Mr. Cartwright is arguing that the expert should not have been qualified because she failed to show her -- the reliability of her field, that's erroneous because of the precedent regarding the reliability issue. It goes to admissibility, and I rely on the basis I've cited in my brief for that.

Furthermore, there was no -- Mr. Cartwright stills bears the burden of showing in his PCR proceeding that there could be some evidentiary basis to attack the reliability of child sexual abuse dynamics as a field. And I submit that there is no such basis. It's

routinely -- these kind of experts are routinely called in child sexual abuse cases and CSE cases of all kinds.

And so, presumptively, again, at the PCR stage, there's a presumption that Trial Counsel's performance was not ineffective and it's up to the applicants to produce evidence rebutting that presumption.

So, in this case, without evidence that the field could have been shown to be unreliable, there was no ground to grant PCR in this -- as to this allegation.

THE COURT: All right.

MR. JONES: I'll let Mr. Phillips respond to that.

THE COURT: Hold on one second, Mr. Jones.

What was the last -- without evidence to show the field was not unreliable, what was the last statement, sir? Because that -- actually, that kind of resonated with me, and I was writing that down and I didn't get the rest of it.

MR. JONES: Okay. Yes, Your Honor.

Generally, of course, anytime in any allegation of ineffective assistance of counsel, the burden is on the applicant to show, again,

both the deficiency and the prejudice and to introduce any necessary evidence to suggest that, as in this case, an objection would be successful.

So in order to show that an objection in this case to the reliability of Dr. Benedetto's testimony would be successful, the applicant would have to introduce at the PCR evidentiary hearing some evidence that child sexual abuse dynamics is not a valid or reliable field, and the applicant failed to do that.

THE COURT: I understand. I've got it down. Thank you.

All right. Mr. Phillips, sir, I'm happy to hear from you in response to the information -- the argument of the attorney general.

MR. PHILLIPS: Thank you, Your Honor.

I'll deal with the cumulative error analysis first. Specifically as to the individual specific findings of deficient performance that were there, the main argument, obviously, is the second part that those counsels' errors were so serious as to deprive the defendant of a fair trial, which affected the reliability of the ultimate result.

Now, we don't have the specific findings

of fact for each specific one of those allegations that were raised with that, quote/unquote, "cumulative error analysis." Part of that would be argued, I would say, as a *United States vs. Cronic*, that's 466 U.S. 648, which has the presumption of prejudice. The companion case to *Strickland* is *United States vs. Cronic*, which identifies three distinct situations that you have the presumption of prejudice. And arguably, we would say per se prejudice occurred when there's been a constructive denial of counsel.

The opposition would be, one, although South Carolina hasn't officially recognized based on what the attorney general has submitted, the cumulative error doctrine, they haven't not applied it. It is not controlling -- other jurisdictions are not controlling case law that dictate how this order would be crafted from a cumulative error analysis. There's nothing that says that that is wholly improper as controlling the law in South Carolina.

With that being said, under *Cronic*, a presumption analysis, per se prejudice analysis, I believe when you add up all of these things, you have a constructive denial of counsel, which is

akin to a cumulative error analysis.

So whether it's maybe improperly worded on my part when I drafted the order, however, specifically I still think that each individual allegation -- or each finding of deficient performance still crosses the threshold and meets that burden of proving that there was actual prejudice that the counsels' errors were so serious as to deprive the defendant of a fair trial, what's required to prove prejudice.

But also, in addition to there not being any controlling case law, a cumulative error analysis could be presented into the order. It's nothing that's controlling that says it's not.

Now, again, a backstop to that would that under that *United States vs. Cronic*, the per se prejudice analysis, it could be also argued that under the same rationale, that the prejudice was presumed.

THE COURT: All right.

MR. PHILLIPS: As to -- I believe it was Allegation 13, the failure to object to the legal standard used for qualifying a State's expert witness, the specific argument was that Trial Counsel failed to object to the trial court's

application of an incorrect legal standard, not so much on the actual basis of whether the child abuse dynamics is appropriate.

Yes, there are plenty of experts who have been qualified as that. But as far as the legal standard for which -- that were used that the judge made his determination to qualify that expert witness in that field, where the court -- and this is a unique situation, a case-by-case basis based on this specific trial, where the court limited counsel's voir dire of the witness regarding the qualifications improperly, qualified the witness as an expert in the given field without having gone through that correct proper analysis, and only permitting questioning of the witness, it limited -- and this is an opportunity to question the witness on the reliability and validity after the witness was already deemed an expert improperly, as far as the order of how this is supposed to be done, and the State's direct examination, all of which was held in the presence of the jury instead of in an in camera hearing.

Highly prejudicial situation where an incorrect legal standard was presented. The proper procedure wasn't followed in any way,

shape, or form. It was done all in front of the jury without any objection from Trial Counsel as to that specific issue.

Not whether they could qualify that person as an expert in child abuse dynamics, but from the legal standard itself and the procedure that it was used in qualifying that expert. We're not arguing that as an absolute bar, that you can't have child abuse dynamic experts from being qualified or having them being -- a witness being qualified as a child abuse dynamic witness.

But in this specific case, what occurred, the procedure and everything -- counsel's failure to object to that incorrect standard and the overall procedure was deficient performance and was highly prejudicial and ultimately would affect the outcome of the case.

THE COURT: All right.

MR. JONES: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. JONES: Did you want to have a brief rebuttal by the State?

THE COURT: Yes, sir. I'll give you a brief rebuttal, of course. Yes.

MR. JONES: Thank you.

I would just point out that the United States Supreme Court precedent, and that's the Compo (ph) Tire Company case that I cited stating the trial courts may, in their discretion, omit unnecessary reliability examination from expert qualification proceedings.

And again, that's because qualification and admissibility are different inquiries, and the qualification hearing -- or proceeding does not have -- reliability does not have to be addressed at that stage. It can be addressed at the admissibility stage. So I would submit there was no error in the trial court's conduct of the qualification proceeding.

THE COURT: All right.

MR. JONES: I'll move on now to allegation 14 which is Trial Counsel's failure to object and move to strike Dr. Benedetto's statement that abusers typically seek victims of a particular age.

Your Honor, first of all, the -- the applicant objects -- or raises that issue based on the scope of Dr. Benedetto's expertise. I would submit that it is within the scope of Dr. Benedetto's expertise to testify about the

characteristics typical of child abusers.

Again, the mere fact that her subfield does not specialize in the profiling of child abusers doesn't mean that she lacks the necessary expertise to qualify about the characteristics of child abusers. As an expert in child sexual abuse dynamics, she certainly would be familiar with that to a greater degree than the average juror, which is the test for qualification as an expert.

However, I would say that even if there was some impropriety in that statement, it could not have prejudiced Mr. Cartwright because the testimony in this case did not suggest that he sought victims of one particular age. It's -- the different victims in this case testified that he began abusing them at ages 5, 9 and 13, respectively.

So I fail to see how Mr. Cartwright could have been prejudiced by the State's introduction of a statement that child abusers typically target victims of a particular age.

For that reason, I would suggest there's no ineffective assistance of counsel here.

Furthermore -- and this goes to both allegation 14 and 13 -- the court's order later in

discussing the ineffectiveness of appellate counsel rejects the -- Mr. Cartwright's ineffectiveness claims for appellate counsel on these same issues by stating that there was no prejudice as to either of them. That, of course, is -- and, therefore, no reason to appeal them.

That, of course, is inconsistent with this court's grant of relief on Allegations 13 and 14.

So, if nothing else, the order would have to be amended to resolve that inconsistency, I submit.

That's my position as to allegation number 14.

THE COURT: Mr. Phillips?

MR. PHILLIPS: Yes, sir, Your Honor. One moment.

Yes, Your Honor. Specifically addressing the issue was whether the witness's amended area of expertise focused on the perspective of a child experiencing abuse. But when you have that extra layer, when you go beyond the expertise that's provided, it is necessary for Trial Counsel to object.

I guess I maybe need to clarify

whether -- it the State's position that they believe there's deficient performance and failure to object, but they don't believe it's prejudiced -- or prejudicial?

MR. JONES: No, Your Honor. The State's position is that there was not deficient performance because this was within the scope of Dr. Benedetto's expertise.

Second of all, there was no prejudice even if there had been deficiency because the substance of her testimony was not harmful to Mr. Cartwright.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: So, specifically, certainly the applicant's position is that it was improper testimony as a psychological -- you know, what we would refer to as a profiler when asking about is it typical for an abuser to have a favorite age to sexually abuse when -- and it is -- we argue it's outside the scope of the expertise and has an influential -- as an expert witness, you know, that higher level of influential persuasion on a jury by having that.

Obviously, the case from the specific victims themselves have different ages. However,

with providing that testimony that's outside the expertise of the specific witness, as well as with that profiler type of language, our position is that not only is it deficient performance due to failure to object and move to strike that testimony, but it's also prejudicial that it would deprive him of ultimately the defendant's right to a fair trial.

THE COURT: So, Mr. Phillips, the -- what is the statement -- or what was the testimony that the doctor made that you contend exceeded the scope of her expertise, sir? Remind me of that, sir.

MR. PHILLIPS: Specifically, if you'll give me a second, Your Honor, it's when she essentially testifies that -- the prosecutor asked the question, What was the typical -- What was typical for an abuser to have -- *Is it typical for an abuser to have a favorite age for sexual abuse?*

THE COURT: Right.

MR. PHILLIPS: I think that's -- and then the testimony -- the witness answers in the affirmative. I think that specific set of -- if you need me to pull up the transcript real quick, I can --

THE COURT: No, no. And so just tell me, sir, so why is it your contention that that is outside her scope of expertise? Because what I'm hearing from the State is, as I understand, Attorney General, you would submit that that's not -- initially, I think you would submit that's not outside her scope of expertise.

Am I understand that correctly, sir?

MR. JONES: Yes, Your Honor.

THE COURT: So, Mr. Phillips, explain to me why -- or remind me why you believe this is outside the doctor's scope of her expertise, sir.

MR. PHILLIPS: So, based on the qualification of child abuse dynamics, there is a specific range -- at least what our contention is, there's a specific range of things that are proper for them to testify about when you have specifically the blind experts that think that it's improper to testify about.

When you go into the profiler-type questions that doesn't deal specifically with any -- especially in this case, even relevance to this case, which is why Rule 701 was cited, specifically that it goes beyond the scope of the

testimony that's allowed by a child abuse dynamics to be talking about what a typical abuser is to have a favorite age to sexually abuse when, again, you probably should actually include it in a Rule 403 as well as far as being improperly prejudicial or unduly prejudicial.

With that being said, that -- in that situation, it's not about whether -- specifically, again, they're not testifying as to the specifics of the evidence in the case, but it's beyond the scope of what she was qualified as an expert to do.

I guess it somewhat goes back to the limited qualifications and the basic of when the -- this specific witness was qualified on child abuse dynamics, what was the range of what this witness was limited to testify about in child abuse dynamics.

That essentially testifying about a typical -- what's, quote/unquote, a "typical abuser to have a favorite age," our position is that it's outside the scope of the expertise or at least the qualification of the expertise in this case and that it was improper for it.

Again, we would argue that -- you know, now that I'm fleshing it out, I would also say

that it's unduly prejudicial, that any probative value of that -- the answer to that question is substantially outweighed by the danger of its unfair prejudice to the jury.

So not only is it not relevant and not proper under Rule 701 and 702 as far as the qualification of the expertise, but also under Rule 403 of the rules of evidence.

THE COURT: Mr. Phillips, thank you.

Counsel?

MR. JONES: Thank you, Your Honor.

Just to briefly respond to that, once again, there was no express limitation preventing Dr. Benedetto from testifying as to the characteristics of child abusers. And because that would necessarily be something she would have special training and experience in due to being an expert in child sexual abuse dynamics, once again, we submit that there was no reason for Trial Counsel to object to that statement.

Second of all, Mr. Phillips has argued that the statement was unduly prejudicial. Again, I fail to see how it could be prejudicial to Mr. Cartwright since it was actually inconsistent with part of the State's theory of the case, which

was that these children had been targeted at different ages.

MR. PHILLIPS: Your Honor -- I apologize. I thought he was done.

I was just going to clarify the Rule 403.

THE COURT: Hold on one second. Hold on one second.

Attorney General, what else do you want to tell me in reply, sir?

MR. JONES: That's all, sir. Thank you.

THE COURT: Okay, thank you.

All right. Mr. Phillips, very briefly, sir.

MR. PHILLIPS: Yes, sir. I apologize if the State was not done.

Just that under Rule 403, it also includes confusion of issues to the jury. If it's not relevant, as the State's conceded, then it was improperly presented and prejudicial by being asked by the prosecutor to try to present that into the trial. It's not relevant, as the State's just said.

THE COURT: What is next, Attorney General?

MR. JONES: Next is allegation number 19

on Trial Counsel's failure to sequester -- or to move to sequester the witnesses.

THE COURT: Right.

MR. JONES: The State's position there is that, first of all, moving to sequester the witnesses would not have accomplished anything because there had already been a trial. The witnesses had already heard each other testify.

So, again, the purpose of sequestration is to prevent witnesses from hearing each other so that there can't be any coordination of their testimony. But that ship had sailed by this point. This was the second trial, and all the witnesses had already heard everything every other witness was going to say.

Second of all --

THE COURT: Yeah. But, I mean, my experience over the years has been, Lord, have mercy, just because one witness said something in the first trial, I mean, it's no indication that that witness is going to say it in the second trial, or they can add something to a question.

I mean, how many times do you go in a deposition and take a deposition from somebody and they then go and come to court and they say

something -- I mean, my point is that a sworn statement where someone's making a statement and then they come and they change their statement -- I don't know if they were specifically -- I don't know if they were specifically -- I don't know if they said exactly the same thing, you know, in both trials.

But, I mean, my experience as an attorney -- do we know whether or not the witnesses were sequestered in the first trial?

MR. JONES: I believe they were not. However, I'm not a hundred percent sure on that, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: Your Honor, I don't have the answer for that.

THE COURT: I mean, that certainly is an issue. If they were sequestered, then it's possible that they may not have heard what was said, and then maybe they could have then asked or had conversations with attorneys or transcripts, or whatever the case may be.

But go ahead, sir. I'm just thinking to myself. Go ahead.

MR. JONES: And, again, Your Honor, there

were different defense attorneys at the first trial versus the second trial. So Trial Counsel in this case inherited the case. If there was no sequestration in the first case, our position is that the damage would already have been done, if there was any damage.

However, it's also true that the -- it should also be borne in mind that, first of all, sequestration of witnesses is not a matter of right. It's in the discretion of the Court.

And, in fact, there is State statute that says in cases where one of the witnesses is a victim, the -- that victim may not be sequestered from the proceedings.

In this case, the State's three chief witnesses were the three purported victims. So there is a State statute preventing them from being sequestered. Moving to sequester them would not have been successful as a matter of law.

For that reason, the State suggests that there was no -- there could not have been any prejudice even if, perhaps, the best -- the ideal course of action might have been to seek sequestration, it wouldn't have been granted as to the State's three chief witnesses whose testimony

was the most damning.

THE COURT: All right. Thank you, Attorney General.

Mr. Phillips, what about that? They get to stay in.

MR. PHILLIPS: Not to put the cart before the horse, but I think this only enhances the prejudice of the -- our severance issue. So one of the more reasons why this -- defense counsel should have moved to sever the charges.

Now, again, staying on task to this specific one, there are many additional witnesses that testified in this case. Credibility is the linchpin of this case. It's the key as to whether -- based on the first trial being a hung jury due to a mistrial, ultimately a mistrial.

With that being said, because credibility is the key in the case, although those three individuals were victims, there are family members who, you know, you could make the assumption that they were able to speak. However, there are many additional witnesses beyond those three who testified whose testimony is key to hearing all the other people testify and be consistent with that and taking away that ability from the defense

side -- well, the opportunity through cross-examination to prove inconsistencies and biases and motives that otherwise would be able to be hopefully fleshed out where the defense can -- unfortunately, you'll never know because they weren't sequestered.

With that being said, again, with there being two different defense attorneys in a very short amount of time that the second lawyer had to prepare for the case and coming off the heels of a mistrial due to a hung jury, and credibility being the real key issue in the case, sequestration, in my opinion, although it is generally -- it is a judge's discretion. In this case, I feel if the lawyer would have made the motion, then it would have been granted had that argument been made. And if not, that would have been an issue that would have been reserved for appellate review. It could have been reviewed on direct appeal.

However, because that argument was not made, that failure to object ultimately deprives him of his right to a fair trial by having these witnesses being able to stay in the courtroom.

MR. JONES: Once again, Your Honor, I would just -- I would just suggest that the

existence of the statute -- of that victim protection statute negates any possible prejudice as to this allegation.

The other victim -- or, sorry, the other witnesses in this case, most of their testimony was very minor and not nearly as harmful to Mr. Cartwright as the testimony of the three victims. None of them could have been excluded or sequestered even had Trial Counsel made such a motion.

THE COURT: Let me ask you, Mr. Phillips, any time a lawyer does not or forgets to ask that witnesses be sequestered, then would it be your position that that's --

MR. PHILLIPS: I think I can answer this directly.

THE COURT: That the individual has been prejudiced? Because, I mean, you think about it, that could happen lots of times.

MR. PHILLIPS: Sure. But this case specifically -- again, we're doing everything on a case-by-case basis with discretion. This case is a highly volatile credibility case.

Again, you obviously know that credibility is an issue when you couldn't have a

unanimous jury either way decide the first trial. That shows and proves and illustrates how credibility was. Because you couldn't have a unanimous jury in the first trial. You ultimately had a hung jury.

So coming off the heels of a hung jury --

THE COURT: Well, I think credibility -- I think you're right. Credibility is the issue here. Because one of the attorneys basically said in either opening or closing, If you believe her -- *If you believe them, he's guilty.*

MR. PHILLIPS: I think there's an ineffective assistance issue that was kind of --

THE COURT: Right. But it was done in that fashion. Someone, I don't know who -- said -- I remember Mr. Cartwright's attorney did got and basically created this or couched this case as a complete credibility argument by saying that to the jury. That's -- I think that's my recollection.

Is there any hard evidence in this case -- let me just ask the attorney general. When I say "hard evidence," what I mean is beyond a he said/she said. I don't remember --

MR. JONES: Your Honor --

THE COURT: -- it being an issue with these types of things.

MR. JONES: Your Honor, the only evidence -- hard evidence beyond the witness testimony was the evidence of the -- of Mr. Cartwright's semen found on one of the bed sheets taken from one of the children's rooms.

THE COURT: Right, right, right. Which they got into another issue about what room, as I recollect.

All right. Thank you. Is there anything else, Attorney General, that you want to say as it relates to this one, sir, this matter? Or are we ready to move to the next?

MR. JONES: Your Honor, I'm ready to move to the next issue.

THE COURT: That would be great, sir.

MR. JONES: So the next is allegation 20, which is the failure to move to individually question jurors after the trial judge noted some jurors had approached him about experiencing similar types of allegations in their past.

Again, that was where the trial court asked if any -- in jury collection whether any

member of the jury panel had been a victim or had been subjected to sexual misconduct of some kind.

And then the Court suggested that some number of the jurors had already disclosed that they were -- that they were so affected.

Then later in the trial -- later in the jury selection process, Trial Counsel pointed out one of the jurors, Juror Number 94, and said, Your Honor, we move to strike this juror because this is one of the ones who approached you about having experienced that sort of behavior in the past.

And that's its own issue, what happened to Juror Number 94. But I would submit that it proves Trial Counsel was aware of which jurors were affected or had approached the Court and did take the appropriate steps to have them removed.

Similarly -- however, even if there was some sort of impropriety there, or in failing to have those jurors' numbers and their statements to the Court put on the record, I would submit that it wasn't -- that it can't be presumed to be prejudicial just because we don't have it in the transcript.

Strickland says that jurors are presumed to act according to the law and not to be -- not

to act with bias or prejudice. It's -- as it always is in the case -- in these PCR cases, it's the burden on the applicant to establish that the result of his trial would have been different had -- had Trial Counsel acted differently.

And I -- there is no evidence in here that the -- that any of the those jurors who approached the trial court were subsequently sat on the jury pool or that they allowed those experiences to color their appreciation of the evidence in the case or that they were prejudiced against Mr. Cartwright or in favor of Mr. Cartwright or any kind of -- any kind of proof of their impropriety at all.

So again, with the presumption of lawfulness that's established by *Strickland*, the State submits that the applicant has not met his burden as to this allegation.

THE COURT: Thank you.

Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor.

Being specific with it, under the State's rationale, the Trial Counsel's failure to make these arguments and to make these motions has deprived us with having the very evidence that the

State's saying that we can't prove prejudice with.

In other words, the deficient performance is the very thing that causes us not to have any evidence related to these issues. Had Trial Counsel properly made the motions to do this and proffered the testimony, made sure that this specific -- all the specific answers and questioning -- individual questioning by the judge that was done of these potential jurors, then we would have the very evidence that the State is saying we don't have to prove prejudice.

So the deficient performance in this very nature is ultimately what would, under the State's theory, prevent us from being able to prove prejudice.

So our argument, again, to me in that specific, it's impossible because of the deficient performance. Because the Trial Counsel failed to move to do those things, we don't have that evidence. It makes it impossible to prove the prejudice on that specific issue because of Trial Counsel's failure.

And based on that, it was serious enough to deprive the defendant of his right to a fair

trial and challenge that the result of that trial as being reliable.

THE COURT: All right. Attorney General, anything you want to reply, sir?

MR. JONES: I'd just, once again, point out that in addition to the presumption that the jurors acted appropriately, there's the presumption that Trial Counsel -- Trial Counsel's performance was adequate. Trial counsel moved to strike several jurors and was successful in striking several jurors and did not give his reasons as to all of them.

However, it can be presumed and, in fact, according to *Strickland* should be presumed that if there was any legitimate reason to suspect the impartiality or the partiality of any jurors, that those were the jurors that Trial Counsel struck.

And I believe that's borne out by the fact that we'll get to in the next allegation as to Juror Number 94 where Trial Counsel did explain that he was moving to strike that juror for cause for having approached the trial court in response to the trial court's earlier questioning.

So again, it's -- it can be tough if it's not on the record, but we have -- that's what we

have the presumptions in *Strickland* for.

THE COURT: All right. So do you want to move then to -- or does that address your issues concerning allegation 21, or is there anything else you want to say about allegation 21, sir?

MR. JONES: Your Honor, the only other thing I would say about allegation 21 is that Juror Number 94 was, in fact, struck. The only problem that Mr. Phillips has pointed out with it is that the counsel had to use a peremptory strike rather than -- and did not succeed on the motion to strike for cause.

Your Honor, Trial Counsel did not even use up all of his peremptory strikes. He had ten, and only nine jurors were struck in total. So it's impossible that he could have been prejudiced. He still had peremptory strikes left over and did not move to strike -- did not move to use any of them in the rest of the jury selection process.

So the State submits that even if there was a problem in his failure to properly preserve and argue the issues related to Juror Number 94, it couldn't have prejudiced Mr. Cartwright because he was able to strike Juror Number 94 and he still

had peremptory strikes left over at the end of the jury selection.

THE COURT: All right, thank you.

Mr. Phillips?

MR. PHILLIPS: Specifically to that, our primary issue was, I believe -- pretty much as far as the applicant's position's been pretty well fleshed out. I mean, it's in the order that Trial Counsel testified that he didn't use up all his peremptory strikes because only nine jurors were struck in total and he had some strikes.

The specific issue was that Trial Counsel was deficient for having -- for failing to have those conversations on the record for the argument that Juror Number 94 should have been struck with cause. Obviously, that still has the issue of there being an additional peremptory strike available.

I have nothing else to add to that, Your Honor.

THE COURT: All right. Attorney General, you ready to move to your next contention, sir?

MR. JONES: Yes, Your Honor. That would be Allegation 22. This court found Trial Counsel should have moved to sever the charges in two

separate trials involving the separate victims.

Your Honor, I would submit that these -- all these incidents arose out of a single chain of circumstances, the -- for the reasons set forth in my brief.

However, before I get to that, I would like to point out that the main reason to deny relief on this issue is because it was an exercise of a valid trial strategy by Trial Counsel.

There was -- again, the first trial had ended in a hung jury. So it was far from a sure thing that any subsequent trial would result in a conviction even if it proceeded according to mostly the same -- in the same way with the charges not being severed.

So, first of all, there was no guarantee that Mr. Cartwright would be convicted on the second trial since, like the first trial, all the charges were held in the same proceeding.

Second of all, the Trial Counsel was faced with this dilemma that if he moved to sever the charges and Mr. Cartwright was convicted on multiple -- in multiple trials, that that wouldn't lead to a longer total prison sentence, including potentially life without parole.

So Trial Counsel was put in a very difficult position where on the one hand, again, he could have moved and, perhaps, there was an argument to be made that this was not a single chain of circumstances. Mr. Phillips is making that argument.

However, on the other hand, if he was successful in that, he could expose his client to a greater total prison term, which would have, of course -- you know, we might be sitting here in an alternate universe where Mr. Phillips is arguing that that was deficient performance.

So the -- so I would suggest that it's not the Court's -- it's not proper for the Court to second-guess with the benefit of hindsight the reasonableness of trial counsel's valid trial strategy. All trial strategies involve some degree of risk, and this one was no different.

He was put in a difficult position, and he took a calculated risk that, well, if I go forward with all the charges in this one proceeding, maybe -- you know, there's no guarantee it will result in a conviction because it resulted in a hung jury last time. So, perhaps, this jury will acquit my client and that

he'd be acquitted on all the charges. Or if he was not acquitted on all the charges, he would at least be -- at least escape the harshest possible sentence.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. Well, being direct, not arguing any other -- again, one of the main things that the State has presented here is that we're not speculating on certain things as far as the alternate universe part of it.

But Under *Roseboro v. State*, 317 S.C. 292, it's a 1995 case finding that counsel must articulate a valid reason for employing a certain strategy to avoid finding ineffectiveness where counsel articulates a strategy is measured under objective standard of reasonableness.

Our argument is that when looking at this under objective standard of reasonableness, that it is unreasonable not to move to sever these charges given the significant nature of, one, the number of charges -- really, just walking through the test itself, but just the sheer number of charges in looking at the indictments spanning -- to have three different victims, in this case

three primary complaining witnesses that allege conduct -- there were three distinct large periods of time. Distinct and large periods of time that did not arise out of a single chain of circumstances, that are not proved by the same evidence. It just doesn't fit the test.

And I think when looking at the problem of prejudicial standpoint, how it would affect the outcome of the case, because that's the prejudice standard. There's no way under the standard of reasonableness that it would be reasonable for a defense lawyer not to make a motion to sever given the facts that we have in this case.

As far as saying that he could have been LWOP'd, I mean, he got a 40-year sentence. I mean, that's essentially a life sentence for him as is. Given the very nature of the number of charges, they could have practically LWOP'd him -- in fact, they LWOP'd him on just having one set of charges if he went to trial. Again, it just does not fit the test.

There were two -- two of the main issues that we presented in this PCR that really for me -- personally I felt were incredibly strong, this is certainly one of them, the severance

motion now that -- I think one that Your Honor actually didn't agree with, the Baker indictment issue. But this specific one, Trial Counsel's alleged failure to sever the charges, I believe it's just -- in my opinion, does not fit the test.

When it comes to specifically prejudice in itself, this issue alone is enough of ineffective assistance of counsel that would ultimately result in the requirement of a new trial as far as deprivation of the defendant's right to a fair trial.

Again, I mean, by failing to move, we have the three primary complaining witnesses -- and again, it's not as if it's a small amount of time. There's three distinct large periods of time. They're not all happening at the same time.

They did not arise out of a single chain of circumstances. They're not proved by the same evidence. That's just based on the testimony that was presented at trial by witnesses that were necessary to -- again, when you look over this, I know Trial Counsel said he was afraid about a long term of imprisonment. But, ultimately, any -- if you had the motion to sever, he's facing a long term of imprisonment if it was just for one

alleged victim's case by itself, especially given the very nature and the number of charges, you can't -- where there's smoke, there's fire. The whole argument for propensity evidence --

THE COURT: I would -- Mr. Phillips, I'll tell you, I've just got to agree with you on that one, sir.

Attorney General, I understand your argument. I appreciate your argument. But, I mean, I just -- it's just beyond me why -- to me, of course -- like you said, I'm sitting here in this nice office, and I have to be able to go back and look at everything that took place. I understand that.

But I've also practiced law a long time. You've got three children at the same trial saying -- I don't want to say essentially the same thing, but basically alleging six allegations that the jury ultimately ends up finding Mr. Cartwright guilty beyond a reasonable doubt.

I -- in fairness, Attorney General, you know, I haven't given a whole lot of thought to your whole LWOP argument, sir. And, you know, that -- I haven't really -- I haven't really given a lot of thought to that as part of a trial

strategy, sir, which is I think one of your arguments, or, perhaps, a main argument as it relates to this matter, that that was a potentially valid strategy. But that's a tough one for me. I'll have to do some more thinking on that.

But anything else you want to say, Attorney General, concerning this?

Mr. Phillips, I think I understand your position, sir.

MR. JONES: The only thing I'd like to add, Your Honor, is that there's no guarantee that all -- that even if there had been a motion to sever these charges, there's no guarantee that all three of the victims would have -- it would have been severed into three separate trials, if it was severed at all, if the motion was granted at all, especially as to, I would say, Victims 2 and 3, the second and third chronological victims, who they lived in the same household. They were both stepdaughters of Mr. Cartwright. They both alleged a very similar and rather idiosyncratic form of abuse. These -- that was proved by the same evidence in the case.

You had the testimony of the mother and

testimony of the various investigators who handled both cases at the same time.

I'm sorry, sir.

THE COURT: No, that's all right. Listen, I appreciate you addressing my question.

But in one of them, didn't we have some crazy stuff about photographs and all this evidence about somebody being nude and pornographic stuff on the Internet?

To me, you know -- you know, to me, that one is so completely different than the other two. Not necessarily the abuse, but these other things that are just swirling around out there, they're so different than the other two, aren't they?

MR. JONES: I would submit -- I think, Your Honor, those -- that evidence was only -- was not admitted, but those allegations of pornographic images were brought up by Mr. Cartwright's to explain -- by Mr. Cartwright's attorney to basically explain why he believed his -- I believe that was Victim -- the third chronological victim, fabricated these accusations against him.

THE COURT: I thought he went to the police about that. There was something in the

police -- I can't remember --

Mr. Phillips, did he go to the police about that?

MR. PHILLIPS: He also went on the news in that specific one. It became a very -- that was obviously one of the big arguments by defense counsel as to why the allegation occurred, the motive.

Mr. JONES: Yes, Your Honor. But it was not relied on by the State as proving any element of the charged conduct. Again, it was offered by the defense to explain his theory that that victim was fabricating her allegation.

But as far as, you know, proving the similar elements of the offenses by similar evidence, that was accomplished by overlapping evidence, especially as to Victim's 2 and 3, but I would submit also as to the first victim. And there are other similarities and the timing of the -- of when different periods of abuse began and ended, which suggest that this was one single chain of circumstances. This was just how the -- how the applicant proceeded in this overarching scheme over many years to abuse his daughters and stepdaughters. That's what the evidence

suggested.

THE COURT: All right. Anything else concerning this one, Attorney General?

MR. JONES: No, Your Honor. If everyone's happy, I can move on the next one.

MR. PHILLIPS: I just want to be able to say that the last -- just as far as from the applicant's position, that that goes to the unreasonableness. That it's not trial strategy. That the defense's -- the defense's arguments in presenting that specific -- with that one, again, it's very case-specific or to that one specific alleged victim, making that a big part of their defense only highlights, again, the prejudice which would make it unreasonable to have -- to not move to sever and try these individually.

THE COURT: All right. What's next, Attorney General?

MR. JONES: The next is allegation 23, Trial Counsel's failure to object to truth-seeking language in the Trial Court's preliminary instructions to the jury.

Your Honor, the main thrust of this argument is that those statements were not rejected by the Supreme Court until the case of

State v. Beaty. And, in fact, they were a part of the Supreme Court's bench book charging instructions for Circuit Court judges -- for general sessions judges at the time of Mr. Cartwright's trial.

State v. Beaty was not decided until after Mr. Cartwright's trial. There's no requirement that Trial Counsel has to be clairvoyant or anticipate future changes in the law to appropriately represent their client.

And *State v. Beaty was not -- was not decided. This Court doesn't cite State v. Beaty in its order. It cites State v. Daniels*. However, *State v. Daniels* does not say -- I mean, I looked through *State v. Daniels*. The Court says that *State v. Daniels* stands for the proposition that any references to the word "true" must be removed from the Court's comments to the jury.

That does not appear in *State v. Daniels* anywhere that I could find. So -- and forgive me if I just missed something.

In fairness to Mr. Phillips, there was the case of *State v. Aleksey*, which called into question general statements about the jury's role in the search for the truth in the burden of proof

context.

However, that case expressly held that it was not improper to charge the jury on their role to determine who's telling the truth in the context of witness credibility. And, of course, how can you instruct the jury on what credibility even means if you're not allowed to use the word "truth" or talk about who's telling the truth?

So in that limited context, *State v. Aleksey* said there was error in the trial court instructing the jury about determining who's telling the truth. And that's exactly the context in which the trial judge made these statements.

The general context was saying that, *The jury must judge the believability or credibility of the witnesses. You determine who's telling the truth, the believability of the witnesses, their credibility. It's your civic duty to pay close attention and decide who's telling the truth.*

Again, those are the truth-seeking statements that Mr. Phillips pointed out, and this Court's order, I believe, addressed in the trial court's preliminary instructions. Those, I submit, are clearly within the context of witness credibility, which was expressly permitted by

State v. Aleksey, which was the controlling law at the time of the trial.

THE COURT: All right. Thank you, sir.

Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor. I'll go back and check whether I got the quotation from *Beaty* and *Daniels* mixed up, but I've got *State v. Daniels* pulled up here.

In the conclusion, our Court -- again, that's 401 S.C. 251, *State v. Daniels*. And the conclusion said -- the Court says, judicial instructions to the jury in a criminal case, *Whatever verdict you reach will represent the truth and justice for all parties, that we must see to it that the trial is fair and the verdict is just verdict, that you and I are 'in it together,' that may seem at first blush to be simply harmless phrase intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It's inappropriate to jeopardize the constitutionality of the trial by*

instructing the jury this way.

So again, with *whatever verdict you reach will represent the truth and justice for all parties*, in 2012, our State Supreme Court made it clear that, *It's inappropriate to jeopardize the constitutionality of the trial by instructing the jury this way.*

And I'm reading it directly from the "Conclusions" section: *It is critical that jurors understand the proper application of reasonable doubt standard. The standard does not change with ensuring justice for all parties.*

And, of course, it goes into Justice Pleicones's -- his -- essentially at the end of it, it's essentially, "Justice Pleicones correctly notes that this language" --

THE COURT: Hold on. Slow down a little bit for the court reporter.

MR. PHILLIPS: I apologize.

THE COURT: That's all right.

MR. PHILLIPS: "Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt.

"Thus, I join Justice Pleicones's admonition to the Trial Court to restrict the jury's instructions to the matters of law and from issuing instructions which run the risk of depriving defendants of their right to a fair trial."

So I apologize if I -- I must have put the quote from *State v. Beaty* and had *State v. Daniels*, because I state *State v. Beaty,* I think, after that potentially in my proposed order.

But I think it's pretty clear that the law in 2012 from State v. Daniels was clear that the standard is -- when you're doing jury instructions for the judge not to shift the burden of proof in any way, that the burden must stay on the State the entire time.

And any references that the jury's verdict will be based on anything other than the evidence presented at trial, such as representing the truth and justice for parties, ultimately is an improper burden-shifting argument.

THE COURT: All right.

MR. JONES: Again, Your Honor, I would just repeat that this statement was not made in the context of telling the jury that their verdict

had to be true and just. The Court here was telling the jury that in determining witness credibility, they had to decide who's telling the truth, which is just the definition of witness credibility. And that's why *State v. Aleksey* said that's fine. Asking -- telling the jury -- mentioning the word "truth" when talking about what credibility actually means is appropriate in judicial instructions.

THE COURT: Just to let you gentlemen know, the bench book that I received still has truth throughout the charges. And they just hand it to you and say, "Here." So what happens is you've got to go through it. And every time I see the t-word, that's like a four-letter word. I just etch it out.

So I've done that numerous times. So it's 2020 -- was it this year? 2022, they're still handing out stuff loaded with "truth." But that's another story for another day.

What are we ready to move on to now, Attorney General?

MR. JONES: I'm ready to move on to allegation 25, improper arguments in the Trial Counsel's opening statement. And this is where

the Trial Counsel said in his opening statement that, "If the victims are telling the truth, then the applicant cannot be innocent."

Again, that was Trial Counsel framing the issue in terms of the -- in term so of, again, what the State was going to try to prove and what the applicant's theory of the defense was going to be, which is that the victims were not credible, they all had motivations to lie. Their allegations did not match up with the other evidence.

And so, of course, the Trial Counsel could not have established those defenses without pointing out that the victims' testimony was inconsistent with applicant's innocence and vice versa. Applicant's guilt -- or applicant's innocence was not consistent with the victims' testimony.

So you had to set out at the beginning of trial that the jury should not believe these victims. They were motivated to fabricate their accusations and he set out different motivations for each of them in the course of the trial.

And, again, that's proof by -- his whole statement of -- the small statement that appeared

in Mr. Phillips's proposed order, I submit, was taken somewhat out of context. His whole statement is, "The presumption of innocence means that the accusers in this case are either mistaken or untruthful. That's the position you have to take as you're sitting all the way through this trial, because that's what the presumption of innocence means. If they're telling the truth, he can't be innocent. If he's innocent, they can't be telling the truth."

Again, so he's stating that because of the presumption of innocence, the jury has to approach these victims critically and reject anything they say that doesn't prove beyond a reasonable doubt Mr. Cartwright's guilt.

I submit that that was a perfectly appropriate argument to make. And the mere fact that the solicitor made the same statement, basically, that if these victims are believed, then Mr. Cartwright isn't innocent. I mean, that's just the -- that was the State's theory of the case and the State was going to make that argument anyway.

So I would suggest there was neither deficiency, nor prejudice, as with regard to

allegation 25. It should have been dismissed.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. The specific here was that -- his quote was, *If they're telling the truth, then Mr. Cartwright can't be innocent*, is I believe the quote.

The whole point of raising the issue, although it does play in context with some of the other issues that are raised, was essentially that there are things that the complaining witnesses could say that are true that do not go to proving any of the elements of the offense for which he is charged.

So for defense counsel in his opening to say "If they're telling the truth," clearly, I mean, I understand what defense counsel was trying to mean in that whether specifically to the -- whether there's evidence to satisfy each and every element. But, ultimately, that statement, in and of itself, all the credibility is absolutely at issue.

And the key to me, it's a very reckless statement without him providing the additional context with it. And that's why it was raised.

THE COURT: I'm sorry, but the additional

context being what?

MR. PHILLIPS: Again, specifically the lack of evidence. And again, just because there are other things that they can prove to be as true of things that the girls are saying, but not specifically as to there being no evidence of the actual allegations themselves, I guess that's --

THE COURT: To me it's certainly saying, You've got to believe them in whole. If they're telling the truth, there's only one truth.

And so, I mean, you know, the first thing I tell a jury, they can believe all, some, any, or none. And so I don't know. That kind of -- that's one of the things that concerned me about this is because it sets up these dueling -- I mean, that's it. It sets up one or the other.

MR. JONES: Right.

THE COURT: And my -- you know, that's what struck me, Attorney General, is that it sets up this dynamic that they have to accept one or the other. And I understand what you're doing when you're finding somebody guilty, or a jury is sitting there, guilty or not guilty.

But as it relates to the truth of a particular witness, I mean, they can believe some

of what the witness is saying. They can believe that the witness is lying about certain things.

And so, I don't know, that concerned me about the -- just -- you know, he just -- he laid it out, it's one or the other, and I think -- I don't know -- that's one of the things that concerned me.

I'll let you answer anything in rebuttal to what Mr. Phillips said, sir.

Mr. JONES: Yes, Your Honor. And I would just -- I would say, his position -- Trial Counsel's position that the argument he made was based on the presumption of innocence saying that you have to assume that all of what they're saying, that could implicate my -- that could implicate my client. To the extent it implicates my client is false under the presumption of innocence. Or, In other words -- so, you know, to the extent that he did not say, you have to find that it's all false in order to find my client not guilty. He simply said that, you should start from the presumption that it is all false, and then the State will have, you know, its opportunity to prove it.

But that has to be how you start this

examination, is viewing it with a critical eye and not automatically assuming any of it is true.

So it's a negative version of, I believe -- it's the inverse of what Your Honor was complaining about.

He's not saying, *You have to find it all false in order to find my client innocent*. He's saying, *You should not -- the State has to prove it all true in order for you to find my client guilty*, which I submit would -- is -- and again, as we all know, jurors can find this or that witness truthful or false or individual statements true or false. That's their prerogative.

But I don't think it's an improper argument for Trial Counsel to make to say that, *The witnesses who are testifying against my client, don't automatically believe anything they say. Let the State -- the burden is on the State to prove that everything they say that could implicate my client is true. It's not my client's burden to show anything that they say is false. That just has to be your starting assumption*.

That's all I believe he said.

MR. PHILLIPS: I'll be brief, Your Honor. I think we had three -- each one of us articulated

it a different way I think shows how, again, potentially prejudicial this comment is where you have three lawyers who didn't see it exactly the same way.

And based on, again, Your Honor's position that it's really -- could be almost be akin to a misstatement of law in the sense that a jury does have the ability under the law to believe some of the testimony and disregard some and believe some and not the entire testimony as a whole.

To have all three of us kind of articulate a little bit different shows the confusion that would have been created in a layperson juror's mind right out of the gate in the opening statement.

THE COURT: All right. Attorney General, what you got next?

MR. JONES: Next, I have allegation 33, Trial Counsel's alleged failure to properly impeach a complaining witness with a transcript of the witness's prior testimony.

THE COURT: Yes, sir.

MR. JONES: So this instance occurred when -- I believe the witness was Victim 2, the

second chronological victim. Trial Counsel -- again, the order doesn't specify which -- what part of the trial this took place in. I'm assuming -- and Mr. Phillips can correct me if I'm wrong -- that this refers to when the Court -- when Trial Counsel was questioning Victim 2.

At the prior trial, Victim 2 was testifying about staying at a friend's house, and there was questions about whether this friend was her boyfriend who was involved in drugs.

And then in the second trial, Trial Counsel again tried to question her about whether her boyfriend was involved in drugs and whether she was involved in drugs.

At some point, he brought up a document which was not identified, as far as I could tell, in the record and said, "You see this document?" And was -- I believe, being as charitable as possible to Mr. Phillips, was trying to indicate that there was some sort of inconsistency with what she was testifying at that trial and whatever appeared in this document, but he was unsuccessful in pointing that out.

Again, I'll let Mr. Phillips say what exactly he believed was inconsistent with that

victim's testimony. It was not clear to me, at least from reading -- from reading Mr. Phillips's proposed order or this Court's order. So if nothing else, I would suggest an amendment to clarify what exactly that issue was.

However, again, it's -- as with all these allegations, it's Mr. Cartwright's burden to prove that he was prejudiced by it. And without showing what the inconsistency was alleged to be, the State submits he hasn't met that burden.

So even if there was some deficiency, which could be -- which I don't know see how there was, if there was no actual inconsistency, then there couldn't be any prejudice. Or at least none was proved by the applicant.

I'll turn it over to Mr. Phillips and I'll try to address anything he says in any particular area.

THE COURT: Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor. I was just reading the State's response.

So specifically, I think here is the situation where -- unfortunately, I don't see in my notes where I questioned Trial Counsel exactly what he had in his hand. I believe he did say he

had the first trial transcript with him, but didn't drill down into the specifics as to what exactly in his -- what was the specifics he was trying to impeach as far as that specific issue.

As far as not being able to identify the specific failure as to the inconsistency, I don't have, as the State noted, anything specific to add to that. There is no that this was a direct inconsistency, which clearly Trial Counsel believed he had because of the way the questioning occurred and obviously the document that he had.

And ultimately, the Court basically hurries him up and says he needs to move on.

But unfortunately, as far as having the specifics to show what his intent was as far as the impeachment of an inconsistency, I don't that specific information.

Now, again, deficient performance on the failure to properly impeach in the sense that he started to initiate it, that he had the -- at least with the first trial transcript, that's exactly what he had in his hand at the time. The document that's referenced would have put him in a position to properly cross-examine and impeach and point out any inconsistencies in the witness's

testimony -- prior testimony.

But as the State pointed out, there's nothing specific that we have that would show exactly what that inconsistency was. I believe that's fair to say.

THE COURT: All right. Attorney General, anything else, sir?

MR. JONES: Your Honor, I would just reiterate that without knowing specifically what the alleged inconsistency was, the allegation cannot support a finding of a grant of relief under *Strickland* because there's no clear establishment of prejudice or even of deficiency.

I mean, I grant that Trial Counsel got up there, started to ask a question, and then was told to move on by the Court when he didn't get the response he wanted. But that on its own, Your Honor, without more, there just can't be a finding of ineffective assistance based on that.

THE COURT: What about that, Mr. Phillips?

MR. PHILLIPS: You know, as far as, you know, not having the silver bullet specifically, as pointed out by the State, because we don't know directly what Trial Counsel's intent was on the

impeachment, the actual content of the inconsistency, I -- I don't have any additional response, Your Honor.

THE COURT: All right. I may be leaning toward reconsidering that matter.

All right. What's next, sir?

MR. JONES: Thank you, Your Honor.

The next allegation is allegation 34, which is the Trial Counsel's failure to object and move to strike the DSS caseworker Michelle Price's statement. This was her statement where she said -- where she said that DSS only becomes involved a case --

THE COURT: Oh, yeah. Yeah, yeah. Breaks the law, or the statute, yeah, yeah.

MR. JONES: *If it meets the legal statute*, were her exact words. So -- and the Court found that this language was prejudicial because it lowered the State's burden of proof in the eyes of the jury by suggesting the statutory elements of the offense have already been proved.

Of course, the Trial Counsel maintained he found nothing objectionable in that. And we -- the State would submit that even if there was some deficiency, there couldn't have been prejudice

from just this statement.

The -- there has to be a reasonable probability, of course, that Trial Counsel's failure to object actually caused a different result than what would have happened if he hadn't objected.

The mere possibility -- Trial Counsel admits that it's conceivable that the jury could have misunderstood what the DSS caseworker was saying as suggesting that there had been some independent investigation when there hadn't been.

A merely conceivable possibility that the jury misinterpreted some testimony is not enough to find that Trial Counsel was ineffective for not moving to strike it.

THE COURT: How do you know what weight the jury put on this? I mean, a jury sitting there can hear this, it makes it sound like the box has been checked by a State agency. So, I mean, you're basically saying that maybe the jury could have conceived this having heard that, right?

MR. JONES: Again, like anything could have happened. The fact that something could have happened does not mean it's reasonably likely that

it did happen.

THE COURT: On this one, short of a special interrogatory, you don't know what's going to happen. I mean, this one -- I mean, you've got somebody working for a State agency basically saying something along the lines of they're complying with the statute. I don't know.

MR. JONES: In my --

THE COURT: Go ahead. I'm listening, sir.

MR. JONES: All right. In my motion, I tried to set out that, in the alternative, if the -- the jury could have been moved by the statement more in favor of Mr. Cartwright because the statement essentially says, we don't start an investigation based on any proof of these -- of these claims. We start an investigation just based on whether it meets statutory criteria.

That's the correct way that statement should have been interpreted, and we would submit is the most natural way to interpret the statement, and that, of course, would have been beneficial to Mr. Cartwright because it would have suggested that the mere fact DSS opened an investigation has nothing to do with whether he was actually guilty or not. It could not support

that inference.

So our position is that this statement was just as likely, if not more likely, to help Mr. Cartwright by dispelling what might otherwise be an improper inference, that just because DSS investigated him meant he had some sort of -- meant there was some sort of finding of guilt by DSS.

According to this case worker's testimony, that's not the case. It was based on the statutory criteria only, not based on the investigation. And she goes on to explain that then we began interviewing the families and then we began our investigation.

So in this case -- so that would have clarified -- that would have clinched it that the investigation had not taken place. There was no independent evidence of this. It was just based on the statutory criteria.

THE COURT: Okay, sir.

Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

The applicant's position is that anytime you have a criminal sexual conduct with a minor -- or a criminal sexual conduct case, that certainly in this

type of context with children and DSS is involved, that it is inherently prejudicial by having DSS there. It's -- again, it's, in itself, almost propensity evidence that's being brought in that can either help bolster the State's case, or -- again, depending on the facts of each case. In this case, we have the quote of, "If it meets the legal statute in the State of South Carolina, we take a report to benefit the family.

In other words, what was presented to the DSS worker was enough that they believed it met the elements of the offense and that they were going to start the full investigation.

Which, again, we agreed with Your Honor's assessment in what we presented, that it violated due process and improperly shifted the burden based on the fact that you had a DSS worker, who in itself is, although in a limited context, able to testify in a CSC trial. There are limitations to that testimony.

And this specific testimony not only goes beyond that, adds additional to the charge itself. As Your Honor pointed out, it's impossible to know how the jury understood or tried to, but if you just take it from the plain language, what the

jury heard was that the DSS case worker believed, like an improper bolstering or vouching almost, but it's bolstering of believing -- that they believed there was sufficient evidence to initiate an investigation. It met the statute.

They don't understand what statute is being referenced or what that even means. So in and of itself, Trial Counsel's failure to object and move to strike is not only deficient performance, but certainly highly prejudicial that could deprive Mr. Cartwright of his fair -- of a fair trial.

THE COURT: All right. Anything else, Attorney General, on this one, sir?

MR. JONES: Your Honor, I would just rely on the arguments set forth in my motion.

THE COURT: Yes, sir. What else?

MR. JONES: As to allegation 40, which is Trial Counsel's failure to request a *Jackson v. Denno* hearing to challenge the voluntariness of applicant's consent to the buccal DNA swab, that, I submit, fails for multiple reasons.

THE COURT: Okay. First of all, there's is no evidence that applicant did not consent to the buccal DNA swab, which could have -- again,

we've had the evidentiary hearing. We had the opportunity to introduce some additional evidence. And no evidence was introduced that a *Jackson v. Denno* hearing or equivalent proceeding would even have resulted in the suppression of this evidence.

Second, the Court's order does not explain -- and perhaps I'm missing something -- Trial Counsel's stated reason for failing to request as *Jackson v. Denno* hearing was that he did not believe it was appropriate when it was -- when dealing with physical evidence rather than a confession or an incriminating statement.

And, Your Honor, I've researched this and I cannot find any precedent that suggests *Jackson v. Denno* hearings apply to non-statements.

Again, this was the DNA evidence that was later used to connect the semen found on the bed sheets with Mr. Cartwright. It was not an incriminating statement or a confession. So it should not -- I would submit there's no reason for a *Jackson v. Denno* hearing to consider the issue at all, and Trial Counsel could not have been deficient for failing to request something that there was no precedent suggesting it would be appropriate.

THE COURT: Right.

MR. JONES: Finally, at the trial Mr. Cartwright admitted that the semen found on the bed sheets was his. So the DNA evidence was clearly harmless and could not have prejudiced him even if it could have been excluded, which, again, there's no indication based on precedent or any other law that it would have been excluded. Or, based on any evidence presented at the evidentiary hearing, that it was not obtained consensually.

That's about all I have to say on that one, Your Honor.

THE COURT: Thank you, sir.

Mr. Phillips?

MR. PHILLIPS: On this specific issue, Your Honor, we would rest on what was presented in the proposed order.

THE COURT: All right. Let's take ten minutes.

MR. JONES: Yes, Your Honor. Thank you.

THE COURT: It's 11:38. We'll be back on at about ten to 12:00, okay?

MR. JONES: Yes, Your Honor.

MR. PHILLIPS: Thank you, Your Honor.

(A break was taken at 11:38 a.m. to 11:55 a.m.)

THE COURT: All right. Attorney General, are we going to move on to allegation 43, sir?

MR. JONES: Yes, Your Honor.

THE COURT: I'm happy to hear from you, sir.

MR. JONES: Thank you, Your Honor.

Allegation 43 is Trial Counsel's failure to cross-examination the State's witnesses about alleged discrepancies as to whose bedroom the bed sheets were taken from.

First of all, the -- as with every other allegation, the applicant has the burden in PCR to provide proof of what these discrepancies actually were. And, you know, there's a reference to different photographs taken of the different bedrooms. None of those were presented to the -- at the PCR evidentiary hearing to establish that there was, in fact, a discrepancy.

All we have is that in one trial, it was referred to as the daughter's room. And in the subsequent trial, it was referred to as the son's room.

In reality, according to the testimony of the victims, it was at different times both the son's room and the daughter's room. It was the

son's room while he was staying at the house, and then the daughter claimed in her testimony that she moved into it and that the abuse continued while she was staying in that room.

So the State submits that it's not material whether it's semantically identified as his room versus her room. The point is, it's a room in which she was staying, according to her testimony, and in which she was abused, and that's the room that the bed sheets were taken from that had Mr. Cartwright's DNA on them.

So the State's position is that Mr. Cartwright has not established any -- first of all, the existence of any discrepancy through the alleged photographs. And, second of all, the existence of any prejudice from not pointing out the discrepancy since it does not appear to have been disputed that the bed sheets were taken from a room in which Victim 3 claimed to have been abused.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. Just to make sure I provide the proper response, just to try to make sure -- I mean, the applicant's position is that Trial Counsel had the duty to

conduct a thorough in- -- excuse me -- a thorough cross-examination of these witnesses when the State presented in the first trial one -- essentially one theory in regards to this evidence, and then in the second trial elicited, again, as the attorney general is pointing out, there's testimony that goes that there's two different times.

But, ultimately, the way it was presented from the first trial to the second trial, the applicant's position was that the cross-examination was not adequate in showing, again, essentially the discrepancy of the location of evidence that was credible to the State.

And I guess as far as being specific as to what was presented, again, even at the evidentiary hearing, I know there was a considerable amount of time on this issue, some discussion, obviously, that I remember with Your Honor regarding that specific -- that specific --

THE COURT: Yes, sir.

(Sound interruption.)

THE COURT: Mr. Phillips, I'm waiting on you.

MR. PHILLIPS: Yes, Your Honor.

So, specifically, our argument as far as what was presented in the proposed order, we're going to certainly rely on that and how it was presented going, again, as far as the discussions -- actually, I have to try and remember exactly what Your Honor's specific comments were about this exact issue during the evidentiary hearing. I think that would, obviously, provide additional context as to Your Honor's ultimate ruling in deciding the deficient performance and prejudice in this very nature.

But our specific position is that defense counsel -- Trial Counsel had obviously the duty to conduct a proper cross-examination and failed to do so in pointing out the discrepancies of this evidence.

Now, as far as having properly outlined everything -- because I understand what the State's position is in regards to that. I certainly understand that. That's why I'm trying to be very specific in how I provide my response. Because I don't want to be -- unfortunately, what I'm being now, generalizing everything as far as what was presented, as far as what his position

is.

THE COURT: Well, exactly, Mr. Phillips.

MR. PHILLIPS: I know. I had to candid about it. I understand what his position is. I'm trying not to entirely, obviously, ignore that. I want to specifically address it.

THE COURT: To be honest, the bed sheets were important, as I recollect. But now I did not recall this issue about the two-bedroom deal that the attorney general just brought up. When I say "just brought up," I don't mean that he just dumped this on me now. It's just that I didn't -- I just don't remember that.

MR. PHILLIPS: The Attorney General's Office can correct me if I'm wrong, if he has a different recollection of it. But essentially, in the first trial, the State presents evidence regarding, again, the bedroom. And then in this -- basically, in the second trial, they're saying it's not the same bedroom, the difference between one being the daughter versus the son -- in other words, that the rooms were entirely different between the first trial and the second trial.

And I think what the State's arguing is

that that's not what occurred.

Is that -- and if he clarify that and I'll try to --

MR. JONES: Yes. The State's argument is -- I mean, again, I wasn't at the first trial. I've been going off the transcript. And, of course, the transcript is what controls. So Your Honor is entitled to rely on that.

But my recollection is that in the first trial, the sheets were characterized as coming from the daughter's room. And in the second trial, they were characterized as coming from the son's room.

The problem is that the room in which the daughter claimed she was being abused, one of the rooms, was what used to be son's room before he moved out, and then she started sleeping in there.

So according to that, it could be characterized either as the son's room or as the daughter's room. I don't see that there's a material discrepancy in characterizing it one way or the other.

Now, maybe there might be a discrepancy if there was an actual -- if we had the actual photographs of the different rooms and had some

proof that these different photographs were shown and indicated, that might establish a discrepancy. I still submit it wouldn't be a material discrepancy because, again, the daughter testified she was being abused in both rooms.

However, we don't have those photographs. So even if -- so we don't even need to go that far. As with every other issue, it's applicant's burden to provide any evidence substantiating that there was an actual discrepancy that would have come out on cross-examination if his attorney had more vigorously cross-examined.

So without that proof of discrepancy, I don't see how he can prevail on this issue.

THE COURT: All right. Anything else, Mr. Phillips?

MR. PHILLIPS: No, Your Honor, other than just that I believe the specific response from our position is that Trial Counsel had the duty to try to make sure he drilled down through his cross-examination the fact that the State presented essentially inconsistent evidence the way it was presented.

Obviously, there's testimony saying that it happened in the same bedroom, but with different

individuals; one being the daughter in the first trial, the son being in the second. And that Trial Counsel's failure to properly cross-examine to, at least, extract that fact is the crux of the argument.

THE COURT: Okay.

All right. Attorney General, how about number 45, sir?

MR. JONES: Thank you, Your Honor. As to allegation 45, that's the Trial Counsel's alleged failure to object to the Trial Court's interruptions of applicant's testimony.

The transcript of the trial indicates that there were frequent cases where Mr. Cartwright, on his direct examination, would either go off on a tangent or attempt to testify to something that someone else had told him.

And the Court in those -- in a few of those instances, at least, admonished him to get back on track or to not testify to what other people were saying. I couldn't find any instances in which the Court sort of went beyond that limited role of just correcting this irrelevant or inadmissible testimony.

Mr. Phillips pointed out in his proposed

order that there was one point where the -- after that, kind of, exchange had already occurred, the judge turned to -- or actually, it might have been a leading question by Trial Counsel. The judge said to the solicitor to object more often when you hear leading questions like this.

Again, Your Honor, the State's position is that this was all a valid exercise of the trial judge's inherent power to maintain order and decorum in the courtroom. The -- that includes, and I've got cases cited in my motion for that, the authority to admonish or rebuke or warn a witness because of the witness's language or conduct or to control -- in other words, control the witness if the witness needs to be controlled.

Trial counsel admitted that Mr. Cartwright was not being -- was being rather uncontrollable in terms of giving these non-responsive answers to the questioning or trying to testify as to what someone else had told him, which would be inadmissible.

So in order to keep the trial back on track, the judge had to admonish the -- admonish Mr. Cartwright several times. That might have been -- that might have gone a certain distance

towards giving an impression of what the judge thought of his testimony, but it was unavoidable. I mean, it was just -- there was no -- there was no other way to keep Mr. Cartwright on track. And that's what I submit from -- is evident from the transcript.

Of course, when we're reading the transcript, we don't know the inflection in which these admonishments were given. We don't know the volume at which they were given. I would just, again, submit that -- the presumption that everything was proper, that the judge was not acting improperly, and that Trial Counsel was not inadequate for failing to object to it.

So, for that reason, we would submit that there was no grounds for relief on this allegation.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor.

In fairness to the attorney general who wasn't there for the hearing, the testimony that was presented provided by Trial Counsel addressing these issues explained, I think, in terms of how specifically the trial judge and his demeanor and --

THE COURT: Mr. Phillips, is this where the witness got into basically describing his dealings with Judge Early and went and, basically, was trying to explain, for lack of better words, why he did not want to object to things? Is that where that came up? There was a bunch of conversation about that, sir.

MR. PHILLIPS: That's where my recollection of it occurred. Because that was part of it when we were asking, you know, as far as failing to object. And then, of course, it got brought up again. Because you had -- we had two different defense counsels in this case, and we addressed the issue with both of them.

Initially, the first -- and both lawyers said similar things about -- I think one of the -- I can't -- this is a paraphrase, not a direct quote, you know, of Judge Early. It's just the way Judge Early was. That's how he ran his courtroom. You knew not to basically object any further or make certain arguments or motions or say certain things because of the way it would come across to the jury, and how he would basically treat you for the remaining portion of the trial.

And again, none of that makes it proper. And given -- just walking through that set of the scenario where a jury sees a judge interjecting -- instead of being a neutral and detached gatekeeper, but asserting himself into the trial and telling the prosecutor to object more, and specifically, you know, challenging or -- again, no doubt judges have a responsibility to maintain order and decorum.

However, applicant's argument is that this went far beyond that, that it exceeded that inherent power and it ultimately became highly prejudicial in such that Trial Counsel had a duty to object and to try to -- again, failure to object to stop the Court from conducting this type of inherently prejudicial conduct with the defendant directly as well as with counsel himself.

THE COURT: Attorney General?

MR. JONES: Your Honor, I would just submit that there is no -- that the only possible -- that any potential inference of impartiality is purely speculative based on all of this.

Again, we don't know -- first of all, the

judge never said or make any suggestion he didn't believe Mr. Cartwright or he didn't think Mr. Cartwright was innocent, or anything like that. It was simply trying to keep him on track.

And the fact that he had to do it a bunch of times and had to admonish Mr. Cartwright and the solicitor to try and keep Mr. Cartwright's testimony on track, that was necessitated by -- in pursuance of the Court's responsibility to maintain decorum in the courtroom.

Without further evidence that there was some egregious violation of that, of the judge's partiality or appearance of violation, again, we submit that the record simply establishes there was a breach of decorum. The Trial Court corrected the breach of decorum. And that's -- that was within the Trial Court's authority and was not objectionable.

THE COURT: All right. What's next, Attorney General?

MR. JONES: Next, I believe this is the last one, Your Honor, allegation 48, the failure to object to the Trial Court's jury instruction that the testimony of a victim need not be corroborated.

THE COURT: Yes, sir.

MR. JONES: That instruction was recently rejected in *State vs. Stukes.* I say recently, but 2016. But the point is, it was rejected after the close of the case, after the end of Mr. Cartwright's trial.

So, once again, Trial Counsel has no responsibility to foresee future changes in the law and object on that basis even if he could.

But, again, at the time of applicant's trial, the instruction was expressly permitted by Supreme Court precedent, and that case is *State v. Rayfield*, which expressly held that jurors may be instructed that a victim's testimony need not be corroborated.

So again, Trial Counsel had no basis to object on the express precedent that was available to him at the time. The fact that that has later been rethought is simply not enough to establish defense --

THE COURT: I understand your argument.

What about that, Mr. Phillips?

MR. PHILLIPS: Going directly to the responses, although Trial Counsel does not have to be clairvoyant or have to anticipate, I think they

do have a reasonable duty to anticipate reasonable changes in the law, challenges that -- clearly in the law that are based -- that are inherently -- that are unconstitutional based on a review on the standard or reasonableness if that's what we would say, touched on many things on the law as reasonableness.

Many lawyers back at that point were challenging that statute for many years. I know even myself. But under a standard of reasonableness, clearly the lawyers in *State v. Stukes* didn't have to be clairvoyant to make the argument to challenge that instruction as being unconstitutional. And they were successful in doing so, and ultimately that changed the law.

So although the -- Trial Counsel doesn't have to be clairvoyant, I think Trial Counsel has a duty to have a reasonable anticipation of potential changes in the law and identifying things that are unconstitutional in the law in making those arguments. This was unconstitutional -- held later unconstitutional, and a reasonable attorney would have made that objection.

THE COURT: All right.

MR. JONES: Your Honor, just to rebut that, I would suggest that if Your Honor adopted that, that would totally abrogate the clairvoyance doctrine in every case. It's very common for, you know, this or that instruction or this or that action of the Trial Court to, from time to time, be declared unconstitutional. And it's true that that is the result of enterprising attorneys who raise those issues.

However, if we adopt Mr. Phillips's version of the clairvoyance doctrine, it would just impose a duty on every attorney to object every time there is -- like there is any conceivable argument even if it has been -- even if there's been a case like this one where what he's objecting to was expressly permitted by binding Supreme Court precedent. We submit that that's taking the doctrine much too far and essentially abrogating it completely.

THE COURT: All right.

MR. JONES: Your Honor, I want to apologize. I skipped right over allegation 47. That's just another objection to the truth-seeking language in the Court's jury instructions. This time the closing jury instructions. It's very

similar to the earlier one, and most of the same law applies.

THE COURT: All right. Anything else you want to tell me, Attorney General?

MR. JONES: There were some minor issues. One was in regards to Allegation 9, which was a very general objection, I believe, to closing -- to jury instructions.

This Court dismissed that allegation without prejudice in its order. And I would submit that any allegation that's denied and dismissed should be dismissed with prejudice because a PCR applicant only gets one bite at the apple. So...

THE COURT: I think that would be correct, Mr. Phillips.

MR. PHILLIPS: Understood.

THE COURT: All right. That's fine.

Yes, sir. What else?

MR. JONES: The only other things are the inconsistencies in, again, Your Honor's disposition of Mr. Cartwright's claims of ineffective assistance of appellate counsel. I believe the first and second argument -- or allegation alleged, Your Honor correctly, in my

view, denied and dismissed those.

But in the order, Your Honor states that the -- that as discussed in Allegations 13 and 14, there was no deficiency shown from either of these statements of Dr. Benedetto or problems with Dr. Benedetto's testimony. That's inconsistent with Your Honor's actual disposition of Allegations 13 and 14, which did not address the prejudice. And, in fact, found that Mr. Cartwright was entitled to relief based on those grounds.

So I would suggest that if Your Honor submits an amended order that that inconsistency be resolved.

THE COURT: Mr. Phillips, let me hear from you on that.

MR. PHILLIPS: I really specifically want to make sure -- could he clarify that one time? I apologize. I want to make sure I'm -- I don't want to go off a tangent myself.

MR. JONES: Forgive me if I'm getting the numbers wrong, but I believe it's ineffective of appellate counsel, Allegations 1 and 2. Your Honor's order states -- I'm mistaken. I'm sorry. It's Allegations 2 and 3. Your Honor's order

states, and I quote, "As discussed in response to applicant's allegation 13, the Trial Court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge." And, therefore, there could not have been -- the jury could not have been improperly influenced, et cetera.

So that discussion does not actually appear in the Court's disposition of Allegation 13. It's possible that this is just a clerical error where the Court copied and pasted perhaps from the State's proposed order as to these appellate allegations and without addressing the --

THE COURT: Are you saying in the appellate I said one thing, and on the trial I said the other? There's an inconsistency of those two?

MR. JONES: Yes, Your Honor.

THE COURT: I should be consistent one way or the other? Is that what you're telling me, sir?

MR. JONES: Yes, Your Honor. And I would prefer it if it was consistently in favor of the State, but, of course, that's up to you.

THE COURT: Good one. Good one.

All right. Mr. Phillips, what about the position that he states that the order is inconsistent and that, basically, if I find that the appellate lawyer, for lack of better words, didn't mess up, then the same type of thing and I would be found to show that the trial lawyer didn't mess up? Is that correct, Attorney General?

MR. JONES: Well, specifically, I think the glaring problem from our perspective is that each of those allegations in the appellate section expressly reference the earlier allegations and say that there was no problem with it. That's the inconsistency. There might be some reason to distinguish the appellate performance from the trial performance. That's up to Your Honor.

THE COURT: All right.

MR. JONES: But those sections there, of course, are --

THE COURT: What about that, Mr. Phillips? What about between the appellate and the trial?

MR. PHILLIPS: We have no issue in resolving the inconsistency. Now, as a whole, the

issues of ineffective assistance of appellate counsel are not outcome determinative on ineffective assistance of Trial Counsel. The way they were couched, at least the allegations, were in the event Trial Counsel had properly preserved those issues where they would have been able to be appealed.

Whether the issues were preserved for appellate review is really kind of step one. And then the next step was if they were preserved for appellate review, then it was ineffective assistance of counsel not to raise those issues.

So I certainly have no issue with the State's argument as far as resolving any inconsistency in the order regarding that. However, the issues themselves, outside of the inconsistency -- just because, again, that you have ineffective assistance of appellate counsel issue that directly relates to an ineffective assistance of Trial Counsel issue, in and of itself, does not automatically render the other one improper other than to clarify any inconsistency that directly cuts at, you know, at the ineffective assistance of trial.

But the specific allegation was whether

if it was preserved, then the appellate counsel had a duty to raise it.

And obviously, the standard -- the case law is different for ineffective assistance of appellate counsel, definitely much more latitude in deciding what issues to raise than basically the burden that's on Trial Counsel.

THE COURT: All right. What else, gentlemen?

MR. JONES: I believe that's all from the State. In fairness to Mr. Phillips, I would agree broadly that it could be possible to have consistent findings in the appellate section and in the trial section of this order. The only I would say facial inconsistency is the explicit references to Allegations 13 and 14 in the appellate section of the order.

THE COURT: All right. Mr. Phillips, anything else?

MR. PHILLIPS: Yes, Your Honor. In closing, the applicant doesn't waive any of the issues raised and argued at the evidentiary hearing and raised in the proposed order. I wanted to preserve that for appellate review as well. All the other issues that were raised, and,

obviously, that the Court decided differently on, if it was raised in the applicant's proposed order, that we're not waiving any of those issues and that we stand fast, obviously, with those issues.

The other issue that Your Honor -- one of the issues that Your Honor disagreed with the applicant on that -- as I noted earlier, that I feel is a very strong issue related to ineffective assistance of counsel is the indictment issue arguing under *State v. Baker*.

If Your Honor gives me one moment, I'll get it.

The argument was that the Trial Counsel failed to move to quash the 28 indictments against the applicant is unconstitutionally over broad and vague, specifically arguing that Trial Counsel was ineffective in failing to make those allegations to -- or failing to make the motion to quash the indictments because each indictment for the alleged offenses occurred at unspecified times over an entire year. The combined indictments covered a total period of over 18 years. And our argument was that in looking at *State v. Baker*, that did occur after that case -- that specific

case. There's certainly case law that goes prior to *State v. Baker*. But *State v. Baker* is a good case to, kind of, outline the law from 2015 that counsel was ineffective for failing to move to quash.

Personally, again not waiving any of the other issues, the two issues that applicant's counsel believes to be very strong issues was one that Your Honor agreed with, the motion for severance, that Trial Counsel failed in moving to sever. And then, of course, this other issue on the failure to move to quash the indictments.

THE COURT: All right. Attorney General?

MR. JONES: Your Honor, just, you know, Mr. Phillips had the same opportunity to file a Rule 59 motion addressing that specific issue, that the State had to address the other 15 issues that we addressed, and is bringing it up for the first time here on this motion for reconsideration.

Well, I suppose not for the first time since it was addressed earlier. But we still have not had notice that this would be considered at the -- at this hearing.

However, I would just submit that this

Court's order considered the *State v. Baker* issue very thoroughly in its discussion of the indictments and rejected that allegation and denied it -- dismissed it with prejudice I believe correctly, and I believe that the Court's analysis was proper.

THE COURT: All right. Thank you-all. You-all did a very thorough job of this case for and against Mr. Cartwright on that. And the State's done a great job. And Mr. Phillips, you've done a good job. It's been interesting. I've enjoyed it.

What I'm going to do is, I'm going to probably for the next two weeks -- I'm on vacation next week, but I'll be in chambers the following week. I'll try to put together -- I may supplement my order and just address the matters that came up today in a supplement. I'll decide how I'm going to deal with that. I'll work with Monica and we'll come up with something. But I hope to have the answer to you-all in the near future. Okay?

MR. PHILLIPS: Yes, Your Honor.

MR. JONES: Thank you, Your Honor.

(End of hearing.)

CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in General Sessions, Richard County, South Carolina.

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

February 15, 2023

_____
Sharon G. Hardoon, CSR
Official Circuit Court Reporter, II