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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-001088

Harold Cartwright,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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13. Did the PCR court err in finding Counsel was deficient for not objecting to the trial court's instruction that the testimony of the victim need not be corroborated, when that instruction was expressly permitted at the time of Respondent's trial?

STATEMENT OF THE CASE

Respondent was indicted by the Aiken County Grand Jury for numerous charges of criminal sexual conduct and lewd act.[1] On November 12–13, 2012, Respondent, represented by Robert J. Harte, Esq., proceeded to a jury trial before the Honorable Thomas A. Russo. A new trial was ordered due to a hung jury.

On April 15–18, 2013, Respondent proceeded to a second jury trial before the Honorable Doyet A. Early, III. Respondent was represented by Michael Routzong and David Hayes (collectively, "Counsel"). Following trial, the jury found Respondent guilty as indicted. Judge Early sentenced Respondent to a total of forty years' imprisonment.

Respondent subsequently filed a Notice of Appeal, and both the South Carolina Court of Appeals and this Court affirmed Respondent's convictions and sentences. *State v. Cartwright*, Op. No. 2015-UP-466 (Ct. App. filed September 30, 2015); *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018).

Summary of Trial Testimony

Respondent had three children with Melinda Lively, his first wife: a daughter ("Victim 1") and two sons. After Respondent's divorce from Lively in 1997, he married Buffy Brown in 1999. Prior to marrying Respondent, Brown had two daughters ("Victim 2" and "Victim 3").

At trial, Victim 1 testified Respondent began making her perform oral sex on him when she was four years old. At age five, she told Lively about the abuse, but Lively did not contact police because Respondent threatened to kill her, Victim 1, and himself. Eventually, Victim 1 spoke with DSS about Respondent's abuse, but Respondent convinced her to recant. Victim 1

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[1] The complete list is provided in the State's Rule 59(e), SCRCP, motion. (App.p.2050–51).

testified the abuse continued multiple times every year until 1995, when she was ten. Victim 1 did not mention the alleged abuse again until she was contacted by detectives from the Aiken County Sheriff's Department in 2011 as part of an ongoing investigation into the alleged abuse of Victims 2 and 3. She testified that she waited from 1995 until 2011 to disclose the abuse because she was afraid of Respondent. (App.pp.268–90).[2]

Victim 2 testified Respondent began abusing her in 2000, when she was nine, by making her perform oral sex on him. The abuse continued until 2001, when Victim 2 disclosed the abuse to DSS. As a result of her disclosure, Respondent was arrested. However, Victim 2 testified she recanted at the urging of her mother, Buffy Brown. Victim 2 testified that, beginning in 2002, Respondent started going into her room and "humping" her, rubbing his penis on her legs; this abuse occurred several times a week until 2006. In addition, Victim 2 testified Respondent sometimes bribed or forced her to agree to have sexual intercourse with him and threatened to kill her, her mother, Victim 3, and himself. (App.pp.300–31).

Victim 3 testified Respondent began abusing her in 2008, when she was thirteen, by coming into her room before school and "humping" her. She testified he threatened to kill all of them and himself. In addition, Victim 3 testified Respondent began forcing her to have sexual intercourse with him when she was fourteen. She testified Respondent stopped having sex with her in 2010, when Hoss Cartwright, Respondent's son, moved into the house, but continued humping her in her room before school.[3] When investigators questioned Victim 3, she initially

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[2] Lively recalled Victim 1 mentioning the abuse and corroborated her testimony that Lively did not contact law enforcement because she was too afraid of Respondent. (App.p.291, line 7–p.292, line 3).

[3] Hoss testified he could hear Respondent enter Victim 3's room every morning and stay for an extended period of time. (App.p.433, lines 18–24).

denied being abused by Respondent because she was afraid of him. Later, however, she told investigators Respondent molested her. (App.pp.338–76).

Buffy Brown testified[4] she remembered Respondent would spend ten to twenty minutes waking up Victim 2 every morning before school. She admitted pressuring Victim 2 to recant after Victim 2 initially reported the abuse because Respondent convinced Brown he had done nothing wrong. Brown testified Respondent confessed to her on February 19, 2011, that he might have molested Victims 2 and 3. She claimed he told her to wash Victim 3's bedsheets to remove his DNA. Brown, however, did not wash the bedsheets; instead, she consented to a police search of the house and seizure of the bedsheets on February 25, 2011. (App.p.378–93). DNA recovered from semen found on the bedsheets matched Respondent's DNA. (App.pp.453–64; pp.501–14).

The State also called clinical psychologist Dr. Alicia Benedetto. Over Counsel's objection, the trial court qualified Dr. Benedetto as an expert in child sexual abuse dynamics. She acknowledged that she had not spoken to any witnesses or victims in the case. She explained that "Child Sexual Abuse Accommodation Syndrome" could cause abused children to exhibit behaviors that may not make sense to adults, such as delaying or falsely recanting allegations of abuse because of bribes, manipulation, and fear. (App.pp.469–501).

Finally, the State called James Hettich, a guard at the Aiken County Detention Center. He testified Respondent attempted to commit suicide while detained prior to trial. (App.pp.522–26).

Respondent took the stand in his own defense. He denied molesting any of the children and claimed the semen found on the bedsheets came from Buffy Brown masturbating him on his son's bed. He explained that he attempted suicide because he had been detained for thirty days,

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[4] The State and Counsel stipulated that Buffy Brown was medically unavailable due to stage 4 cancer. The State introduced her prior testimony from Respondent's first trial without objection.

couldn't get a bond, was charged with heinous crimes, and had just learned of new charges based on Victim 1's accusations. He suggested that each of the victims had a motive for lying: Victim 1 bore him a grudge for reporting her husband for statutory rape, Victim 2 had been kicked out of his house, and Victim 3 became angry when Respondent confronted her about finding her picture on a pornographic website. (App.pp.551–82).

Present Application

Respondent filed an application for post-conviction relief ("PCR") on June 26, 2019. Respondent then filed an amended application on June 6, 2022, requesting relief based on fifty-five allegations of ineffective assistance of trial and appellate counsel. (App.pp.1507–31). Pertinent to this Petition are the following:

Ineffective assistance of Counsel

. . .

13. Failure to object to improper qualification of the State's expert witness in the field of child sexual abuse dynamics where the trial court (1) limited counsel to *voir dire* of the witness regarding qualifications, (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of the field itself after the witness was deemed an "expert" by the court and directly examined by the State, all of which occurred in the jury's presence
14. Failure to object to and move to strike the expert's testimony that went beyond the scope of her expertise, which was focused on the perspectives of abused children, when the expert testified abusers typically seek victims of a particular age

. . .

19. Failure to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses
20. Failure to object and move for individual voir dire when the trial court told Trial Counsel several jurors had approached him about "similar types of behavior," none of the conversations between the trial court and those jurors were placed on the record, and none of those jurors' number were placed on the record
21. Failure to properly argue that juror number 94's prior conversation with the trial court be placed on the record where juror number 94 indicated the court knew she had a relative who was a victim and the court denied Trial Counsel's motion to strike the juror for cause
22. Failure to move to sever Respondent's charges where the three primary complaining witnesses alleged conduct over three distinct periods of time, not arising from a single chain of circumstances, and not proved by the same evidence
23. Failure to object to the trial court's initial jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth, violative of

due process, and burden shifting

. . .

25. Arguing to the jury that Respondent couldn't be innocent if the victims were telling the truth, where that statement could not be considered a reasonable trial strategy

. . .

34. Failure to object to and move to strike a DSS case worker's testimony that DSS only becomes involved in a case if it "meets the legal statute," lowering the State's burden to prove Respondent's conduct satisfied the statutory elements of the charged offense

. . .

43. Failure to cross-examine the State's witnesses regarding the discrepancy between the testimony given at the first trial that the DNA evidence was taken from Victim 3's room and the testimony at the second trial that the DNA evidence was taken from the victim's stepbrother's room

. . .

45. Failure to object to the trial court's repeated interruption and admonishment of Respondent during his testimony and request that the prosecutor object more often, which gave the impression of partiality before the jury

. . .

48. Failure to object to the trial court's jury instruction that testimony of the victim did not need to be corroborated.

As relief, Respondent requested his convictions and sentences be vacated and his indictments be remanded for a new trial.

The PCR court convened an evidentiary hearing into the matter on February 2–3, 2022, and February 25, 2022. Following the hearing, the PCR court asked for proposed orders from both parties. The PCR court issued an order granting relief. The State filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCP. In response to that motion, the PCR court issued a subsequent order granting relief based on the claims enumerated above and denying and dismissing all other claims. The State now petitions this Court for a writ of certiorari to review the decision of the PCR court.[5]

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[5] The regrettable length of this petition is necessitated by the fact the PCR court found twelve separate grounds of ineffective assistance of counsel. Any one of these twelve, if left unchallenged, would become "the law of the case" and doom the State's appeal.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 180, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

1. The PCR court erred in finding prejudice based on "cumulative error," rather than making specific, individualized findings of prejudice as to each allegation of Counsel's deficient performance.

The PCR court ultimately granted relief based on twelve grounds of ineffective assistance of counsel: Allegations 13, 14, 19, 20, 21, 22, 23, 25, 34, 43, 45, and 48. However, the court made specific findings of prejudice on only two of those allegations: Allegations 34 and 45. The remaining thirty-eight allegations of ineffective assistance of Trial Counsel, as well as all five allegations of ineffective assistance of Appellate Counsel, were denied and dismissed as meritless. At the conclusion of its order, the PCR court states "Trial Counsel provided ineffective assistance of counsel based on cumulative error and the prejudice suffered from the individual allegations that were found by this Court." (App.p.2251).[6] The order goes on to state that "[h]ere, the

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[6] The PCR court's initial order merely stated, "Trial Counsel provided ineffective assistance of counsel based on cumulative error." (App.p.2046). The State challenged the PCR court's invocation of "cumulative error" in its Rule 59(e), SCRCP, motion, arguing that ineffective assistance must be based on individualized analysis of prejudice. Apparently in response to the

Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified eleven (11) [*sic*] errors that individually and cumulatively create prejudice against the Applicant." (App.pp.2251–52). The PCR court's conclusory finding of prejudice based on "cumulative error" was improper.

In a PCR action, the applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

State's argument, the PCR court's revised order appended "and the prejudice suffered from the individual allegations that were found by this Court." The addition of this conclusory language is not a substitute for a proper, individualized prejudice analysis.

(citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). When counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective. *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003); *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). The applicant must overcome this presumption to receive relief. *See Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117–18, 386 S.E.2d at 625. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697.

In this case, the PCR court found Counsel was deficient as to twelve of Respondent's allegations. However, the PCR court did not make any express finding of prejudice as to ten of

those allegations, opting instead to adopt a conclusory finding that Counsel's errors "individually and cumulatively create prejudice against the Applicant" at the end of the order. (App.p.2252). This cursory "cumulative error" analysis is insufficient as a matter of law to sustain a finding of ineffective assistance.

The United States Supreme Court has clearly held that, before any individual act or omission of counsel may be deemed a constitutional error, it must satisfy both the "deficiency" and "prejudice" prongs of the *Strickland* analysis. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("[U]nder *Strickland v. Washington*, . . . an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."). Therefore, unless the acts and omissions of counsel are *individually* shown to be both deficient and prejudicial, they do not constitute "errors," no matter how many of them are added together. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that, regarding ineffective assistance claims, the "cumulative error" doctrine is no longer good law after *Strickland* because "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation."). For these reasons, a majority of federal appellate courts have expressly rejected "cumulative error" analysis for ineffective assistance claims. *See, e.g., Fisher v. Angelone*, 163 F.3d 835, 852–53 (4th Cir. 1998) (collecting cases and holding, "in agreement with the majority of our sister circuits that have considered the issue," that "ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively.").

The "cumulative error" doctrine is at odds with *Strickland* in other ways as well. First, *Strickland* expressly permits a judge to deny an allegation of ineffective assistance merely for failing to prove prejudice, without even reaching the deficiency prong. *Strickland*, 466 U.S. at 697. A "cumulative error" analysis, however, requires deficiency to be adjudicated as to all

allegations of ineffective assistance—regardless of whether the alleged deficiency, by itself, had any prejudicial effect on the applicant's rights—because the judge must still assess the *cumulative* effect of all deficient acts or omissions combined.

Second, one reason the *Strickland* court required proof of prejudice was "to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* The court cautioned that "intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges. . . . Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* at 690. By requiring applicants to show deficiency *and* prejudice as to each allegation of ineffective assistance, the *Strickland* court intended that post-trial review of counsel's conduct would encompass only those errors that jeopardized an applicant's right to a fair trial. "Cumulative error" analysis, however, requires courts to scrutinize even (in the PCR court's words) "errors that are insignificant by themselves" in order to determine if their cumulative effect is prejudicial. (App.p.2251). The "cumulative error" requirement to cavil even the *insignificant* missteps of defense counsel runs directly contrary to the public policy rationale articulated in *Strickland*: protecting "the entire criminal justice system" from the burdensome impact of unlimited allegations that counsel's performance was deficient. *Id.* at 697.

That burdensome impact is evident in this very case: Respondent raised a staggering *fifty-five* total allegations of ineffective assistance in his amended PCR application. For most of his allegations, Respondent did not even attempt to articulate a prejudice argument, relying instead on the "cumulative error" doctrine. Responding to this glut of claims required the State, Trial

Counsel, Appellate Counsel, and the PCR court to endure multiple days of hearings. Ultimately, the majority of Respondent's claims were correctly dismissed as meritless. However, by finding prejudice based on the "cumulative error" doctrine—which has never been approved in the ineffective assistance context—the PCR court's order rewards Respondent's vexatious behavior. As long as PCR courts allow applicants to substitute "cumulative error" arguments for the prejudice analysis required by *Strickland*, PCR applicants will be incentivized to multiply claims against defense counsel based on insignificant defects in performance, wasting judicial resources and burdening the courts with frivolous allegations. This is exactly what the United States Supreme Court warned of in *Strickland*: that unless courts required particularized showings of prejudice, ineffectiveness claims would "become so burdensome . . . that the entire criminal justice system suffers as a result." *Id.*

The PCR court cites only two cases—*State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), and *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995)—for the proposition that "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." Neither case supports the application of "cumulative error" doctrine to claims of ineffective assistance of counsel in PCR actions. *Johnson* concerned a direct appeal alleging error in the trial court's admission of evidence, while *Tennant*, a West Virginia case, concerned a direct appeal in a medical malpractice case. Furthermore, both opinions held that a party seeking to invoke the doctrine must still show *how* the combination of alleged errors affected his trial. *Johnson* held that, although the trial court committed multiple errors, a defendant "must demonstrate more than error in order to qualify for reversal under this ground. Instead, the errors must adversely affect his right to a fair trial." *Johnson*, 334 S.C. at 93. *Tennant* declined to apply

the doctrine, clarifying that "the doctrine should be used sparingly" and is not appropriate when the alleged errors "are insignificant and inconsequential." *Tennant*, 194 W.Va. at 118, 459 S.E.2d at 395.

The PCR court's general finding of prejudice lacks the necessary analysis of how Counsel's alleged deficiencies, individually or in combination, adversely affected Respondent's right to a fair trial. Absent any individualized analysis of how each purportedly deficient act prejudiced Respondent, there is no support for the PCR court's finding that Counsel was ineffective under *Strickland*.[7]

The State asks this Court to issue a writ of certiorari and to reverse the decision of the PCR court. This Court should take this opportunity to clarify, once and for all, that the "cumulative error doctrine" is not a substitute for specific, individualized findings of prejudice in PCR cases.

2. The PCR court erred in finding Counsel was deficient for failing to object to the qualification of an expert in child sexual abuse dynamics, when the transcript reveals that Counsel *did* object.

The PCR court found Counsel failed to object to the trial court's qualification of Dr. Benedetto as an expert in child sexual abuse dynamics. The PCR court's order states the qualification procedure was improper because the trial court limited Counsel to questioning the witness about her qualifications, rather than the reliability and validity of the field itself, and because the qualification procedure occurred in the presence of the jury. The PCR court found

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[7] Despite making no specific, individualized findings of prejudice, the PCR court acknowledges that *Strickland* requires courts to "consider the *specific* impact counsel's error had on the outcome of the trial" and to "analyze how *individual* errors of counsel affect the important factual findings in a particular case." (App.p.2252) (emphasis added). This language is inconsistent with the generalized nature of the PCR court's "cumulative error" prejudice analysis.

Counsel's performance was deficient, but it did not specifically find prejudice or explain how the result of Respondent's trial would likely have been different but for Counsel's conduct.

This Court should reverse the PCR court's finding. First of all, Counsel *did* object to Dr. Benedetto's qualification on the ground she failed to show the reliability of the field her opinion was based on. (App.p.477, lines 1–12). The trial court overruled Counsel's objection. (App.p.477, lines 13–18). The PCR court does not explain how Counsel's objection was unreasonable or how he could have obtained a different result by raising the issue again. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)) ("So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon defense counsel to harass the judge by parading the issue before him again.'").

Second, "the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012).[8] Trial courts may, in their sound discretion, omit unnecessary reliability examination from expert qualification proceedings. *See Kumho Tire Company v. Carmichael*, 526 U.S. 137, 152 (1999) (holding trial judges must be able to exercise "discretionary authority . . . to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods

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[8] The PCR court's order cites *Tapp*, among other cases, in support of its finding that Counsel was deficient for failing to adequately raise this issue. However, *Tapp* clarifies that reliability is relevant to the *admissibility* of expert testimony, not to whether the witness may be *qualified* as an expert. *See Tapp*, 398 S.C. at 388–89, 728 S.E.2d at 474–75; *see also State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding scientific evidence is admissible if "the expert is qualified" *and* "the underlying science is reliable," implying that qualification and reliability are separate inquiries). The court's finding that Counsel should have challenged Dr. Benedetto's qualification proceeding—as opposed to the admissibility of her subsequent testimony—on reliability grounds, therefore, is contrary to the express holding of *Tapp*.

is properly taken for granted"). Even if Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field,[9] the trial court would have had no obligation to conduct one. Likewise, the fact that Dr. Benedetto was qualified in the presence of the jury was not objectionable; like other matters of courtroom procedure, holding a qualification examination in the jury's presence is within the sound discretion of the trial judge. *See Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The challenged aspects of the qualification proceeding are not matters of right, but of sound judicial discretion; Respondent's rights, therefore, were not violated by Counsel's alleged failure to object to them.

In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until *after* she was qualified. Therefore, no prejudice could possibly have resulted from conducting the qualification examination in the presence of the jury.

Because Respondent failed to prove either deficiency or prejudice as to this allegation, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

3. The PCR court erred in finding Counsel was deficient for failing to object and move to strike Dr. Benedetto's statement that "abusers typically seek victims of a particular age" as being beyond the scope of her expertise, when the State's theory of the case was that Respondent did *not* target victims of a particular age.

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[9] Despite claiming Counsel should have attacked the reliability of this field during the qualification proceeding, Respondent has not introduced any evidence or argument that would support such an attack. Therefore, Respondent has failed to prove he was prejudiced by Counsel's failure to challenge the reliability of child sexual abuse dynamics.

The PCR court found Dr. Benedetto's testimony that abusers are often interested in victims of a particular age went beyond the scope of her expertise, which was limited to the perspective of child victims. Although Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise. The court's order does not explain how Respondent was prejudiced by this alleged error.

Dr. Benedetto's statement did not exceed the scope of her expertise. As an expert in child sexual abuse dynamics, Dr. Benedetto would necessarily know more about the typical attributes of child sexual abusers than the average layperson. All that is required for a witness to testify as an expert is that the witness must have acquired, through study or experience, such knowledge or skill that she is more qualified than the jury to form an opinion on the particular subject of her testimony. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997); *see also Graves v. CAS Medical Systems*, 401 S.C. 63, 78, 735 S.E.2d 650, 657–58 (2012) (holding it was error to exclude a witness's opinion testimony merely because the witness did not consider herself an "expert" in the field; the relevant inquiry is not whether the witness is a specialist in the field, but whether her experience and knowledge qualified her to give an opinion on the subject). The mere fact that Dr. Benedetto specializes in helping child abuse victims does not render her unqualified to opine concerning the characteristics of child abusers.

In addition, Dr. Benedetto's statement could not have prejudiced Respondent. Victims 1, 2, and 3 testified that Respondent began abusing them at ages four, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Respondent did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case. Accordingly, Counsel would have had no strategic reason to move to strike it, and his failure to do so did not prejudice Respondent. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d

at 625.

Because Respondent failed to prove either deficiency or prejudice as to this allegation, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

4. The PCR court erred in finding Counsel was deficient for failing to move to sequester witnesses, when the witnesses had already testified at Respondent's previous trial and there was no substantial difference in the witnesses' testimony between the two trials.

The PCR court found Counsel was deficient for failing to move to sequester the witnesses because sequestration was necessary to ensure that the witnesses did not have the ability to hear one another's testimony. *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ."); *see also State v. Huckabee*, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010) (holding the purpose of Rule 615, SCRE, is to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at trial). However, the PCR court acknowledges that "[a]ll the witnesses had participated in the prior trial."

A party is not entitled to the sequestration of witnesses as a matter of right. *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). The trial court, therefore, had no obligation to order sequestration even if Counsel had requested it.

In addition, "[a] person must not be sequestered from a proceeding adjudicating an offense of which he was a victim." S.C. Code Ann. § 16-3-1550. Therefore, Counsel would not have been able to sequester the three victims even if he had made a motion to sequester the witnesses. Since those victims were the State's chief witnesses, there is no "reasonable probability" that the result of Respondent's trial would have been different but for Counsel's alleged error.

Furthermore, Respondent was unable to point to any specific testimony that was

purportedly "shaped . . . to match that given by other witnesses at trial." *Huckabee*, 388 S.C. at 241, 694 S.E.2d at 785. If any of the witnesses had abused the lack of sequestration at the second trial to match the testimony of other witnesses, there would be a noticeable discrepancy between that witness's statements at the first trial and his or her statements at the second trial. Respondent has not shown that any such discrepancy exists.

Finally, Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with each others' testimony from the previous trial, he believed sequestration would achieve nothing. (App.p.1652, lines 1–7). As Counsel has articulated a valid reason for not moving to sequester the witnesses, and as sequestration would not have prevented the witnesses from knowing each other's testimony anyway, Respondent has failed to prove his counsel was deficient or that the result of his trial would likely have been different if the witnesses had been sequestered. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Because Respondent failed to prove either deficiency or prejudice as to this allegation, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

5. The PCR court erred in finding Counsel was deficient for not moving to individually *voir dire* jurors who informed the trial court they had experienced sexual misconduct or abuse or to put those jurors' information on the record.

The PCR court found Counsel was deficient for failing to move to individually *voir dire* jurors whom the trial court noted had approached him about "similar types of behavior" or to preserve the issue by putting those jurors' numbers and their conversations with the trial court on the record. The PCR court's order does not explain how Respondent was prejudiced by Counsel's alleged omission.

Prior to jury selection, the trial court asked if any member of the jury panel "has been a victim or subjected to similar types of behavior, i.e. sexual misconduct or abuse." (App.p.237, lines 5–7). The court went on to state, "Now, I've had several jurors who have come forward expressing to me some of their past and how it affected them. I don't need you to come back forward, but do I have anyone else who has not come forward that has been a victim or experienced this type of behavior in your family? . . . Anyone else other than the ladies who have come forward?" (App.p.237, lines 9–15). Later, during jury selection, Counsel moved to strike Juror No. 94 for cause, arguing that "[s]he has a relative that was a victim, as the court knows." (App.p.244, lines 4–7). The trial court stated, "And she did advise us of that and I asked her could she be fair and impartial and try the case based solely on what she heard in the courtroom. She adequately said she could, respectfully denied." (App.p.244, lines 8–11). Counsel then used a peremptory strike to have Juror No. 94 excused. (App.p.244, lines 12–14).

Although the trial transcript indicates that some jurors had informed the trial court, outside the record, about "their past and how it affected them," it also shows that Counsel was aware of those jurors and took appropriate action to have them removed from the jury pool. In addition, it shows that the trial court had examined the jurors to ensure they could try the case "fairly and impartially." The mere fact that those jurors' interactions with the court and Counsel were not included in the record is not sufficient to establish prejudice; the jury is presumed to act according to law. *See Strickland*, 466 U.S. at 694–95 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). Respondent still bears the burden to show that, but for Counsel's failure to record

those interactions, the result of his trial would likely have been different. Absent such a showing, it should not be presumed that the interactions were harmful to Respondent's case or that the jury acted improperly. Respondent presented no evidence to overcome the presumption that the jury was fair and impartial; therefore, he has failed to meet his burden. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP

Because Respondent failed to prove either deficiency or prejudice as to this allegation, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

6. The PCR court erred in finding Counsel was deficient for not putting on the record Juror No. 94's revelation that she had "a relative that was a victim," when Counsel successfully struck the juror using a peremptory challenge and still had a strike left over at the end of jury selection.

The PCR court found Counsel failed to properly argue and preserve his request that Juror No. 94's conversation with the trial court be placed on the record after that juror revealed she had "a relative that was a victim, as the court knows." However, the PCR court acknowledges that Juror No. 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. The PCR court also acknowledges that Counsel did not even use up all of his peremptory strikes; only nine jurors were struck in total, and Counsel had ten strikes. Nevertheless, the PCR court found Counsel was deficient for failing to put Juror No. 94's conversation on the record because Counsel "had to strategically use one of his peremptory strikes on this juror."

Respondent could not possibly have been prejudiced by Counsel's alleged error because Counsel still had peremptory strikes left over after all the jurors were selected. In other words, Counsel struck every juror he wanted to strike, including Juror No. 94. Since the use of a peremptory strike on Juror No. 94 manifestly did not prevent Counsel from striking any other juror, there is no possibility that the ultimate composition of the jury would have been different

had Counsel more vigorously argued for Juror No. 94 to be struck for cause. Therefore, Respondent was not prejudiced. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Because Respondent failed to prove either deficiency or prejudice as to this allegation, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

7. The PCR court erred in finding Counsel was deficient for not moving to sever Respondent's charges, when Counsel testified he strategically chose not to sever the charges in order to avoid a potential life without parole sentence, and there was substantial similarity and overlapping evidence between all the charges.

The PCR court found Counsel should have moved to sever his charges into three separate trials because the charges involved three separate victims and conduct occurring over three distinct periods of time, did not arise out of a single chain of circumstances, and were not proved by the same evidence.

Where counsel articulates a valid strategic reason for his conduct, that conduct will not be deemed ineffective. *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. In the words of the *Strickland* court:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689. Counsel's performance is not deficient unless it falls "outside the wide range of professionally competent assistance." *Id.* at 690. Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."

Id.

The PCR court found Counsel was deficient for failing to sever the charges because the State's case was strengthened by the number of victims presented to the jury. However, the court's order acknowledges that Counsel articulated a strategic reason for not moving to sever the charges: at the evidentiary hearing, Counsel testified that he was afraid multiple trials could result in a life without parole sentence. (App.p.1838, lines 17–22). Counsel faced a serious dilemma: if he allowed Respondent to be tried in a single proceeding, the State's case might be strengthened by the number of victims; on the other hand, if he tried to sever the charges into three trials, he increased the risk that his client might be sentenced to life in prison. Counsel made the difficult choice to go forward in a single trial. This was not an objectively unreasonable decision; Respondent's first trial—which covered the same charges and victims—had ended in a hung jury, so Counsel had reason to believe Respondent might be acquitted in the second trial, notwithstanding the strength of the State's case. "This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion." *Yarborough*, 540 U.S. at 9. Though it may be tempting to second-guess Counsel's performance with the benefit of hindsight, *Strickland* requires a more deferential review.

Moreover, if Counsel had moved to sever the charges, the motion would likely not have succeeded. Even where the charges do not arise out of a single, isolated incident, joinder will be allowed when the crimes involve connected transactions closely related in kind, place, and character. *State v. Beekman*, 415 S.C. 632, 637, 785 S.E.2d 202, 205 (2016) (providing examples). In this case, the charged offenses were closely related in numerous ways: the victims were all Respondent's daughters or stepdaughters; the abuse almost always occurred in Respondent's home, typically in the victims' bedrooms before school; Respondent performed the same kinds of

acts on multiple victims (oral sex on Victims 1 and 2, "humping" on Victims 2 and 3); Respondent would abuse each victim for years, then move on to the next victim after the previous victim moved away; and Respondent coerced each victim with threats of murder and suicide. Therefore, despite the number of different victims and large time period during which the abuse occurred, for the purposes of joinder, it was all one "chain of circumstances." In addition, overlapping evidence was used to prove multiple charges; for example, Buffy Brown testified regarding Respondent's abuse of Victims 2 and 3, the testimony of Dr. Benedetto was used to explain the delayed disclosure and recantation of Victims 1 and 2, and the evidence of Respondent's suicide attempt in prison was used to prove his guilt regarding all three victims. *See, e.g.*, *State v. McGaha*, 404 S.C. 289, 297, 744 S.E.2d 602, 606 (Ct. App. 2013) (holding severance was not required where "a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other"); *State v. Caldwell*, 378 S.C. 268, 278, 662 S.E.2d 474, 479–80 (Ct. App. 2008) (holding separate trials were not warranted, for crimes committed at different times against multiple different victims, because some evidence pertained to multiple charges). Therefore, the joinder requirements were met in this case, and Counsel had no ground to seek severance of the charges.

Because Counsel articulated a valid reason for not moving to sever the charges and because he would not have succeeded if he did so move, Respondent has not proved Counsel was ineffective. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Therefore, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

8. The PCR court erred in finding Counsel was deficient for not objecting to "truth-seeking" language in the trial court's preliminary jury instruction on witness credibility, when at the time of the trial that language was expressly permitted by this Court's precedent and approved by the general sessions benchbook.

The PCR court found Counsel deficient for failing to object to a portion of the trial court's preliminary jury instruction in which the trial court told the jury to "decide what the true facts are," to "render a true and just verdict, a verdict that speaks to the truth of the case," and to "pay close attention and decide whose [*sic*] telling the truth." (App.p.255, line 22–p.256, line 13). The order cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), for the proposition that "any references to the word 'true' must be removed from the Court's comments to the jury."

However, that proposition does not appear anywhere in *State v. Daniels*, even in paraphrase. The trial court's "truth-seeking" language was not held improper until *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). In that decision, this Court held "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." *Id.* at 34, 813 S.E.2d at 506. However, the Court acknowledged that the general sessions benchbook promulgated by the Court to all circuit judges contained language virtually identical to the disapproved language used in the lower court. *Id.* at 34 n.2, 813 S.E.2d at 506 n.2.

The trial in this case occurred in 2013, many years before *Beaty* was decided. Counsel would not have known that, years afterward, a change in the law would render the trial court's instructions objectionable. PCR courts may not find counsel ineffective for failing to object to a jury instruction in the absence of any case law rendering the instruction improper. *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016); *see Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614

(1999).[10]

In addition, the trial court's comments were all made in the context of the jury's role in evaluating witness credibility—the court explained that, if witnesses give conflicting testimony, the jury must judge "their believability or their credibility. . . . [Y]ou determine whose [*sic*] telling the truth, the believability of the witnesses, the credibility; . . . [I]t's your civic duty to pay close attention and decide whose [*sic*] telling the truth." (App.p.255, line 12–p.256, line 13). At the time of Respondent's trial, references to "truth" were permitted by the Supreme Court in the context of instructions on witness credibility. *See State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000).

In addition, the fact that the challenged language appeared in the credibility context, and *not* in the context of the presumption of innocence or the State's burden of proof, defeats any claim that Respondent may have been prejudiced by Counsel's failure to object. *See id.* at 28–29, 538 S.E.2d at 252 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses."). Furthermore, if the jury instructions, considered as a whole, are correct, isolated portions that may be misleading do not constitute reversible error. *Id.* at 27, 538 S.E.2d at 251. The trial transcript reflects that the trial court repeatedly and emphatically instructed the jury that the State bears the burden of proof beyond a reasonable doubt and that Respondent

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[10] Bizarrely, the PCR court denied and dismissed Respondent's Allegation 47, which raised an almost identical issue of failure to object to "truth-seeking" language in the trial court's *closing* instruction. Responding to that allegation, the PCR court acknowledged that the trial court was employing "the language that was provided at the time" and that Counsel "cannot be expected to predict all possible changes in the law." The PCR court's disposition of Allegation 47 is totally inconsistent with its disposition of this virtually identical claim.

must be presumed innocent and need not offer any proof of his innocence. The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice.

For these reasons, Respondent has not met his burden of proving that Counsel's failure to object to the trial court's "truth" language during its preliminary jury instruction was deficient, nor has he proved that the result of his trial would likely have been different if Counsel had objected. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

9. The PCR court erred in finding Counsel was deficient for arguing that, if the victims were telling the truth, Respondent could not be innocent.

The PCR court found Counsel was deficient for arguing, in his opening statement, that Respondent could not be innocent if the victims were telling the truth. The court's order points out that the State used that quote against the defense in its closing argument, stating, "As Mr. Routzong said in his opening statement, if you believe the victims, the defendant's guilty." The order does not explain specifically why Counsel's argument was deficient or how Respondent was prejudiced by it.

Counsel began his opening argument by emphasizing the presumption of innocence. He stated "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 . . . ." (App.p.264, lines 19–25). He concluded by attacking the credibility of the victims, claiming they had "axes to grind" and were "either mistaken or telling untruths." (App.p.265, lines 9–13). In context, it is clear that Counsel was urging the jury *not* to believe the victims, but to start from the presumption that the victims

were either mistaken or lying in order to get revenge on Respondent.

Clearly, if the jury believed the victims—who testified in detail about the crimes perpetrated by Respondent—it would also have to believe Respondent was guilty of those crimes. The heart of the case, for both sides, was the credibility battle between the victims and Respondent. Focusing the jury's attention on the fact that the State's case depended on the credibility of the victims was an integral part of Counsel's defense strategy.

The mere fact that the solicitor was able to use Counsel's words in his own closing argument does not mean Counsel was deficient for making the argument in the first place. The solicitor would have been able to argue that the victims' testimony implied Respondent's guilt even if Counsel had never brought it up; the victims' testimony was the crux of the State's case. Therefore, there is no reasonable probability that the result of the trial would have been more favorable to Respondent if Counsel had not made the challenged statement. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Furthermore, the fact that the victims' testimony was inconsistent with Respondent's innocence was so obvious that no prejudice could have resulted from either Counsel or the State pointing it out to the jury. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

10. The PCR court erred in finding Counsel was ineffective for failing to object to testimony that DSS only becomes involved in a case if it "meets the legal statute."

The PCR court found Counsel should have objected when Michelle Price, a caseworker for the South Carolina Department of Social Services (DSS), testified that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina." (App.p.334, lines 15–16). The court stated 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.

At the evidentiary hearing, Counsel testified he did not believe Price's statement lowered the State's burden of proof. (App.pp.1686–87). Although he acknowledged that "there could have been questions asked in hindsight," he maintained he found nothing objectionable in Price's phrasing, and he did not believe the jury would have incorrectly inferred that DSS possessed some evidence of Respondent's guilt just because they opened a case. (App.p.1804–1806). The PCR court's order does not explain why Counsel's explanation for not objecting was unreasonable.

However, even if Counsel's stated reason for failing to object was deficient, Respondent suffered no prejudice. The test for prejudice is whether an error "undermines the reliability of the result of the proceeding," not whether it "conceivably could have influenced the outcome." *Strickland*, 466 U.S. at 693. Respondent must show a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome"—that the result of his trial would have been different but for Counsel's alleged error. *Id.* at 694.

Even if it were "conceivable" that the jury misinterpreted Price's statement, it is more likely that the jury correctly interpreted her statement to mean that DSS is required to initiate investigations based only on statutory parameters—*not* based on some belief in the strength of the evidence against the accused or the credibility of the accuser. Price also clarified that the next step would be to "interview the family," which would have alerted the jury that DSS had not yet investigated the report or made any determination of guilt. Far from being prejudicial to Respondent, therefore, Price's statement would likely have conveyed to the jury that the mere fact DSS opened an investigation did not mean DSS believed Respondent was guilty.

In addition, Price's statement was brief and was not specifically related to Respondent's case, and the solicitor did not dwell on it. Even an unusually attentive jury would be unlikely to

assign any importance to such a statement. Finally, the trial court's thorough instruction on the State's burden of proof, the presumption of innocence, and the reasonable doubt standard would have cured any possible confusion before the jury began its deliberations. Accordingly, Respondent has failed to show a probability "sufficient to undermine confidence in the outcome" that, but for the alleged error of Counsel in failing to object to Price's statement, the result of his trial would likely have been different. *See id.*; *see also Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Therefore, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

11. The PCR court erred in finding Counsel was deficient for failing to cross-examine the State's witnesses about alleged discrepancies regarding whose bedroom the semen-stained bedsheets were taken from.

The PCR court found Counsel should have cross-examined the State's witnesses about whose bedroom the bedsheets were taken from that had Respondent's DNA on them. Respondent alleged that the State claimed the sheets were taken from Victim 3's room at the first trial but claimed they were taken from Hoss's room at the second trial. The court found Counsel deficient for failing to expose this discrepancy because the location of the sheets was critical to the State's case. However, the court's order does not explain why this evidence was "critical."

Courts give great deference to counsel's decisions concerning the cross-examination of witnesses. *See, e.g.*, *Brown v. Uttecht*, 530 F.3d 1031, 1036–37 (9th Cir. 2008) (holding counsel was not ineffective for failing to cross-examine an expert witness); *Skeen v. State*, 325 S.C. 210, 216–17, 481 S.E.2d 129, 132–33 (1997) ("We see no ineffectiveness in counsel's failure to cross-examine [the State's witness] about the supposed discrepancy in her testimony and her statement to the police. . . . [O]ne could only speculate whether a 'better' cross examination would have helped Skeen.").

The heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Respondent's semen on the bedsheets (for which Respondent was able to offer an innocent explanation). In addition, Victim 3 testified Respondent continued abusing her after she had started sleeping in Hoss's bedroom when Hoss moved out, so the presence of Respondent's semen on the sheets of Hoss's bed was not inconsistent with Victim 3's testimony. (App.p.354, line 6–p.355, line 13). Since both Hoss and Victim 3 used the bedroom at different times, whether that room is characterized as "Hoss's bedroom" or "Victim 3's bedroom" is a semantic quibble, not a material factual discrepancy. *See Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding counsel was not ineffective for failing to cross-examine witnesses based on "meaningless inconsistencies," such as whether a particular incident of sexual abuse occurred in the living room or the bathroom), *abrogated on other grounds by State v. Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).[11]

In addition, Respondent bases this allegation on alleged differences in the photographs introduced in his two trials, claiming the State introduced photographs of Victim 3's bedroom in the first trial but then introduced a photograph of Hoss's bedroom in the second trial. (App.pp.538–40). However, Respondent did not present either photograph to this Court at the evidentiary hearing to substantiate this claim. *See Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (holding, in a case where a PCR applicant received a second trial after his first

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[11] In fact, attempting to refute the State's claim that the bedsheets were found in Hoss's room could easily have backfired against the defense: Respondent offered a potentially innocent explanation for how his semen ended up on Hoss's bedsheets but did not offer any explanation for how it might have ended up in Victim 3's room. Counsel cannot be found ineffective for failing to conduct a cross-examination that might have negated an aspect of Respondent's defense. *See, e.g.*, *Brown*, 530 F.3d at 1036–37 (holding counsel was not ineffective for failing to cross-examine the State's expert because doing so could have "backfired" and hurt the defendant's mitigation case).

trial ended in a mistrial, the applicant was required to present a copy of the first trial transcript to substantiate his allegation that trial counsel was ineffective for failing to point out discrepancies in the testimony given at the two trials), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Respondent has failed to prove, by a preponderance of the evidence, that Counsel was ineffective for failing to further develop this line of inquiry. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

12. The PCR court erred in finding Counsel was ineffective for failing to object when the trial court admonished Respondent to give responsive answers to Counsel's questions and to refrain from testifying as to what other people said.

The PCR court found Counsel was deficient for failing to object when the trial judge repeatedly interrupted Respondent's testimony, admonished Respondent for giving hearsay testimony, and instructed the prosecutor to object more often to Respondent's improper statements. The PCR court found that the trial judge's comments were unfairly prejudicial and that Counsel's failure to object was not a valid trial strategy.

During direct examination by Counsel, Respondent's testimony often deteriorated into irrelevant tangents. (App.p.551, line 21–p.552, line 10; p.553, line 8–p.554, line 11; p.554, line 25–p.555, line 8; p.555, lines 14–16; p.560, line 24–p.561, line 7; p.567, line 14–p.568, line 3). He also frequently attempted to testify to statements made by third parties. (App.p.558, lines 1–2, 14; p.560, lines 1–2; p.563, lines 15–16; p.566, lines 3–4; p.567, line 25–p.568, line 3; p.572, lines 9–12). The trial court admonished him multiple times to give responsive answers to Counsel's questions and to refrain from testifying as to what other people said. (App.p.552, lines 11–15; p.555, lines 17–18; p.558, lines 16–18; p.561, lines 10–21; p.563, lines 14–24; p.564, lines

8–9; p.565, line 7; p.566, line 5; p.568, lines 4–19; p.572, line 19–p.573, line 5). At one point, the court admonished Counsel for asking speculative questions and told the solicitor to "object to those speculation type of questions and answers." (App.p.558, lines 10–11).

A trial judge's inherent power to maintain order and decorum in the courtroom includes the authority to admonish, rebuke, or warn a witness because of the witness's language or conduct. *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999), *abrogated on other grounds by State v. Wright*, 391 S.C. 436, 706 S.E.2d 324 (2011). Respondent's repeated failures to abide by the rules necessitated the court's remonstrances. At the PCR hearing, Counsel testified that he did not believe the trial judge crossed a line in his attempts to maintain order. (App.p.1817, lines 16–19). He also testified that, in his experience, jurors base their decisions on the evidence presented and the demeanor of the witnesses, not on the actions of the court. (App.p.1820, line 19–p.1821, line 2). Therefore, Respondent failed to establish, by a preponderance of the evidence, either Counsel's deficiency or any resulting prejudice from the alleged error. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. This Court, therefore, should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

13. The PCR court erred in finding Counsel was deficient for not objecting to the trial court's instruction that the testimony of the victim need not be corroborated, when that instruction was expressly permitted at the time of Respondent's trial.

The PCR court found Counsel was deficient for failing to object to the trial court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." (App.p.632, lines 23–24). Although that proposition is correct as a statement of law, its use as a jury instruction has since been condemned by this Court. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (holding jury instructions that victims' testimony need not

be corroborated in prosecutions for criminal sexual conduct should no longer be given). However, at the time of Respondent's trial in 2013, that instruction was expressly permitted by Supreme Court precedent. *See, e.g.*, *State v. Rayfield*, 369 S.C. 106, 115–18, 631 S.E.2d 244, 249–50 (2006) (holding the trial court did not err in charging that a victim's testimony need not be corroborated), *abrogated by Stukes*, 416 S.C. 493, 787 S.E.2d 480. Counsel is not required to be clairvoyant and was not deficient for failing to anticipate a change in the law. *See Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (holding trial counsel cannot be found ineffective for failing to object to a jury instruction at a time when no case law rendered the instruction improper per se); *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456 ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765)), *overruled on other grounds by Brightman*, 336 S.C. 348, 520 S.E.2d 614. In addition, the *Stukes* opinion expressly states that its holding does not apply to PCR cases. *Stukes*, 416 S.C. at 500 n.5, 787 S.E.2d at 483 n.5. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

CONCLUSION

For the foregoing reasons, the State asks this Court to grant the Petition for a Writ of Certiorari and to reverse the decision of the PCR court.

Respectfully submitted,

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