

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No: 2022-001088

HAROLD CARTWRIGHT,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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ATTORNEYS FOR PETITIONER

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

HAROLD CARTWRIGHT, #355084,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2019-CP-02-01582

AFFIDAVIT OF SERVICE BY MAIL

FILED 10-3 2019 0:48
SP
Robert J. White
C.C.P. & G.S.
Shadell Parks
Deputy Clerk

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by hand delivery and depositing same in the United States mail, postage prepaid:

Dayne C. Phillips, Esquire
Price Benowitz, LLP.
1614 Taylor Street, Suite D
Columbia, South Carolina 29201

DATED this the 3rd day of October, 2019.

Brianna L. Schill
Brianna L. Schill, AAG
Attorney For Respondent

THE STATE OF SOUTH CAROLINA)
)
COUNTY OF **AIKEN**)
)
Harold Cartwright,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF **COMMON PLEAS**

SECOND JUDICIAL CIRCUIT

Case No.: **2019CP0201582**

ORDER AUTHORIZING DISCOVERY

This matter comes before the Court on the Applicant's motion for leave to obtain discovery in post-conviction relief action. See S.C. Code § 17-27-150(A) (Discovery in post-conviction relief proceeding). Specifically, Applicant and his lawyer, Dayne Phillips, appeared before Court on October 2, 2019, requesting subpoena power to obtain an independent review of the electronic evidence (i.e., computer) seized by law enforcement based on the testimony and arguments presented at trial. Assistant Attorney General Brianna Schill appeared on behalf of the State at the hearing.

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight counts of criminal sexual conduct with a minor, first degree; sixteen counts of lewd act with a minor; two counts criminal sexual conduct with a minor, second degree; one count of criminal sexual conduct, first degree; and one count of criminal sexual conduct, third degree.

On April 15, 2013, Applicant proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Michael Routzong and David Hayes represented Applicant, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts on all charges on April 18, 2013. The Trial Court sentenced

FILED 12119 2019

Robert J. ... C.C.P. & ...
Charles Griffen Plaut
Deputy Clerk

Applicant to *concurrent* sentences of thirty (30) years imprisonment for criminal sexual conduct in the first degree conviction and criminal sexual conduct with a minor in the first degree conviction; twenty (20) years imprisonment for the criminal sexual conduct with a minor in the second degree conviction; and fifteen (15) years imprisonment for the lewd act upon a child convictions. The Trial Court did, however, impose a *consecutive* sentence of ten (10) years for the criminal sexual conduct in the third degree conviction.

On September 30, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App. filed September 30, 2015). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Applicant, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, Op. No. 27842 (S.C. Sup. Ct. filed September 26, 2018).

On June 26, 2019, Applicant filed an application requesting post-conviction relief, alleging ineffective assistance of counsel.

FINDINGS OF FACT

It appears PCR Counsel has met with Applicant, reviewed the trial transcript, and has identified additional investigation that is reasonable and necessary in preparation of challenging Applicant's convictions in a PCR action. It also appears Applicant is unable to prove the second prong of seeking PCR (i.e., prejudice) for allegations related to this digital forensic evidence without conducting an independent expert review. It further appears Applicant has retained an expert in digital forensic examinations, Christopher

Watkins, to assist in obtaining and reviewing this evidence.

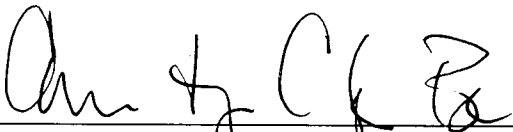
This Court finds Applicant has good cause to invoke discovery because he desires to have an expert conduct an independent review of specific digital forensic evidence in preparation for the evidentiary hearing. This Court also finds that a physical inspection of this evidence is reasonable and necessary to conduct an independent review of the evidence based on the allegations of ineffective assistance of counsel.

CONCLUSIONS OF LAW

For good cause shown, this Court grants Applicant's request allowing formal discovery in this case. It is therefore Ordered that the Applicant has subpoena power to inspect digital forensic evidence in preparation for Applicant's evidentiary hearing. See S.C. Code § 17-27-150(A); *see also Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14.

It is also Ordered that the South Carolina Office of the Attorney General shall be provided all discovery received by Applicant pursuant to this Order and shall be given the opportunity to inspect the requested digital forensic evidence in preparation for Applicant's evidentiary hearing.

IT IS SO ORDERED.


The Honorable Courtney Clyburn Pope
Presiding Judge, Second Judicial Circuit

December 9, 2019

Aiken, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Order Authorizing Discovery by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Robert J. Harte
Aiken County Clerk of Court
P.O. Box 583
Aiken, SC 29802

Brianna Schill, Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

The Honorable Courtney Clyburn Pope
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By: Courtney Powers
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December 16, 2019

FILED 12119 20 19

Robert J. Harte CMP
C.C.P. & G.S.

Charles Griffioen
Deputy Clerk

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Harold Cartwright,

Plaintiff(s)

vs.

State of South Carolina.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2019-CP-02-01582

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF
(REDACTED)

Submitted By: Dayne C. Phillips, Esq.
 Address: 1614 Taylor Street, Ste. D.,
Columbia, SC 29201

SC Bar #: 77712
 Telephone #: (803) 807-0234
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 E-mail: dayne@pricebenowitz.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____ -NI- ____ - ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature:


Date: July 1, 2020

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
	)	
Harold Cartwright,	)	Case No. 2019-CP-02-01582
	)	
Applicant,	)	
	)	
v.	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
	)	(REDACTED)
State of South Carolina.	)	
	)	

As required by Rule 71.1(b), SCRCP, this application is in conformity with Form 5 of the SCRCP Appendix of Forms.

1. **Place of Detention:** Applicant is detained in the South Carolina Department of Corrections at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899.
2. **Name and location of Court which imposed sentence:** Aiken County Court of General Sessions, 109 Park Ave SE, Aiken, SC 29801.
3. **Name(s) of co-defendant(s) (if any):** None.
4. **The indictment number(s) upon which and the offenses for which sentence was imposed:**
 - (a) 2012-GS-02-00304 (Criminal Sexual Conduct, First Degree).
 - (b) 2012-GS-02-00306 (Criminal Sexual Conduct with a Minor, First Degree).
 - (c) 2012-GS-02-00307 (Lewd Act Upon a Child).
 - (d) 2012-GS-02-00308 (Lewd Act Upon a Child).
 - (e) 2012-GS-02-00309 (Lewd Act Upon a Child).
 - (f) 2012-GS-02-00310 (Lewd Act Upon a Child).
 - (g) 2012-GS-02-00311 (Lewd Act Upon a Child).
 - (h) 2012-GS-02-00312 (Lewd Act Upon a Child).
 - (i) 2012-GS-02-00313 (Lewd Act Upon a Child).

- (j) 2012-GS-02-00314 (Lewd Act Upon a Child).
- (k) 2012-GS-02-00315 (Lewd Act Upon a Child).
- (l) 2012-GS-02-00316 (Lewd Act Upon a Child).
- (m) 2012-GS-02-00317 (Lewd Act Upon a Child).
- (n) 2012-GS-02-00318 (Lewd Act Upon a Child).
- (o) 2012-GS-02-00319 (Criminal Sexual Conduct with a Minor, First Degree).
- (p) 2012-GS-02-00320 (Lewd Act Upon a Child).
- (q) 2012-GS-02-00321 (Criminal Sexual Conduct with a Minor, First Degree).
- (r) 2012-GS-02-00322 (Lewd Act Upon a Child).
- (s) 2012-GS-02-00323 (Criminal Sexual Conduct with a Minor, First Degree).
- (t) 2012-GS-02-00324 (Lewd Act Upon a Child).
- (u) 2012-GS-02-00325 (Criminal Sexual Conduct with a Minor, First Degree).
- (v) 2012-GS-02-00326 (Lewd Act Upon a Child).
- (w) 2012-GS-02-00327 (Criminal Sexual Conduct with a Minor, First Degree).
- (x) 2012-GS-02-00328 (Lewd Act Upon a Child).
- (y) 2012-GS-02-00329 (Criminal Sexual Conduct with a Minor, First Degree).
- (z) 2012-GS-02-00330 (Lewd Act Upon a Child).
- (aa) 2012-GS-02-00331 (Criminal Sexual Conduct with a Minor, First Degree).
- (bb) 2012-GS-02-00332 (Lewd Act Upon a Child).

5. The date upon which the sentence was imposed and the terms of the sentence:

- (a) April 18, 2013.
- (b) Thirty (30) years imprisonment for the Criminal Sexual Conduct, First Degree, conviction (2012-GS-02-00304).

- (c) Thirty (30) years imprisonment for the Criminal Sexual Conduct with a Minor, First Degree, convictions (2012-GS-02-00306; 019; 021; 023; 025; 027; 029; 031).
 - (d) Twenty (20) years imprisonment for the Criminal Sexual Conduct with a Minor, Second Degree, conviction (2012-GS-02-00315).
 - (e) Fifteen (15) years imprisonment for the Lewd Act Upon a Child convictions (2012-GS-02-00307–318; 320; 322; 324; 326; 328; 330; 332).
 - (f) Ten (10) years imprisonment for the Criminal Sexual Conduct, Third Degree, conviction (2012-GS-02-1682).
 - (g) Concurrent sentences for the following convictions: Criminal Sexual Conduct, First Degree; Criminal Sexual Conduct with a Minor, First Degree; Criminal Sexual Conduct Second Degree; and Lewd Act Upon a Child.
 - (h) Consecutive sentence for the Criminal Sexual Conduct, Third Degree, conviction.
6. **A finding of guilty was made after:**
- (a) A jury trial before the Honorable Doyet A. Early, III.
7. **Did you appeal from the judgment of conviction and/or the imposition of the sentence?**
- (a) Yes.
8. **If you answered “yes” to number (7), list:**
- (a) **The name of each Court to which you appealed:**
 - i. South Carolina Court of Appeals.
 - ii. South Carolina Supreme Court.
 - (b) **The result in each Court to which you appealed:**
 - i. Affirmed convictions and sentences (S.C. Court of Appeals).
 - ii. Affirmed convictions and sentences (S.C. Supreme Court).

(c) The date of each result:

- i. December 4, 2015 (S.C. Court of Appeals; Unpublished Opinion).
- ii. September 26, 2018 (S.C. Supreme Court; Published Opinion).

(d) If known, citations of any written opinions or ordered entered pursuant to such result:

- i. State v. Cartwright, Op. No. 2015-UP-466 (S.C. Ct. App. filed on December 4, 2015).
- ii. State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018);
State v. Cartwright, Op. No. 27842 (S.C. Sup. Ct. filed on September 26, 2018).

9. If you answered “no” to number (7), state your reasons for not appealing:

- (a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Trial Counsel denied Applicant’s right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel’s unreasonably deficient performance fell below an objective standard of reasonableness “under prevailing professional norms” and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel’s errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, “counsel’s conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

- (b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

11. State concisely and in the same order the facts which support each of the grounds set out in number (10):

- (a) Trial Counsel's acts or omissions of ineffective assistance of counsel include but not are not limited to the following allegations:
- (i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*,

415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

- (ii) Trial Counsel failed to hire expert witnesses to conduct an independent review of the forensic evidence presented by the State and to testify in rebuttal of the State's evidence and arguments when it was reasonable and necessary to do so in preparation for Applicant's second trial. See *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Specifically, the electronic evidence seized by the police and DNA evidence.
- (iii) Trial Counsel failed to adequately investigate Victim 1's involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State.
- (iv) Trial Counsel failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations.
- (v) Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.
- (vi) Trial Counsel failed to properly cross-examine and impeach the State's witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses' prior inconsistent statements to the police.
- (vii) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See *State v. Harrison*, 343 S.C. 165,

539 S.E.2d 71 (Ct. App. 2000); Cf. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009).

- (viii) Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.
- (ix) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and misstated the law.
- (x) Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial.
- (xi) Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.
- (b) The additional acts or omissions of ineffective assistance of counsel include but not are not limited to the following allegations:

 - i. Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. See State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015).
 - ii. Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 field

itself—after the witness was deemed “expert” by the Court and the State’s direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012); State v. White, 398 S.C. 376, 728 S.E.2d 468 (2009); and Watson v. Ford, 389 S.C. 434, 699 S.E.2d 169 (2010).

- iii. Trial Counsel failed to object and move to strike the expert witness’s testimony that went beyond the scope of her expertise. Specifically, the witness’s admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological “profiler” of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCRE; State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).
- iv. Trial Counsel erroneously stipulated to a witness’s medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel’s stipulation provided the foundation needed by the State to even seek admission of her prior testimony. See Rule 804, SCRE; Dodd v. Berlinsky, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).
- v. Trial Counsel failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an

independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), Lounds v. State, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008); Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

- vi. Trial Counsel failed to move for the Trial Court to conduct follow-up voir dire questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror’s number.
- vii. Trial Counsel failed to move to quash the jury panel pursuant to Baston where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Schuler, 344 S.C. 604, 545 S.E.2d 805 (2001); State v. Rogers, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).
- viii. Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. See Rule 615, SCRE.

- ix. Trial Counsel by failed to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him regarding “similar types of behavior.” Notably, Trial Counsel failed to preserve for appellate review the issue and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror’s numbers were placed on the record with whom the judge spoke. See U.S. Const. amends. V, VI, XIV.
- x. Trial Counsel failed to properly argue and preserve for appellate review that juror number 94’s conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim “as the court knows.” Notably, Counsel sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. See U.S. Const. amends. V, VI, XIV.
- xi. Trial Counsel failed to move to sever Applicant’s charges where the three (3) primary complaining witnesses alleged conduct over three (3) distinct and large periods of time, did not arise out of a single chain of circumstances, and are not proved by the same evidence. See *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996).
- xii. Trial Counsel failed to object and preserve for appellate review the Trial Court’s initial instructions to the jury that were tantamount to instructions to search for the truth, violative of Due Process, and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, “you twelve collectively act as one, decide what the true facts are...”, and “you will be in a position then to render a true and

just verdict, an verdict that speaks the truth of the case”, and “It’s your civic responsibility to pay close attention and decide whose telling the truth.” See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

- xiii.** Trial Counsel failed to object and preserve for appellate review the State’s improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, “These are the dates when all this is said and done”, and “It’s important to see how we grouped these indictments together.”
- xiv.** Trial Counsel improperly argued in his open statement that “[i]f they’re telling the truth, [the Applicant] can’t be innocent...,” and where the State used that same quote against the defense in its close, saying, “As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant’s guilty,” and where use of such a statement could not be considered a reasonable trial strategy.
- xv.** Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), “Now, sitting here today, telling these events to these 13 strangers, how are you doing?” to which the witness responded, “I would rather be at home with my children, but it’s something that needs to be done; I’m glad I finally get to tell what happened.” See *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).
- xvi.** Trial Counsel failed to object and preserve for appellate review the Prosecutor’s

improper bolstering when Melinda Lively (mother of Victim 2) answered in the affirmative to the State's question, "Did you just hear Victim 2 testify?" and later indicated that she did not contact police because of threats from the Applicant "as [Victim 2] stated."

- xvii. Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by the Defendant?" to which the witness replied, Yes, when she was four." See State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989); Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- xviii. Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, "My mom told me to lie then..." and Counsel's hearsay objection was sustained by the Trial Court. See State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943).
- xix. Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel's objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. See State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943).
- xx. Trial Counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up.

- xxi.** Trial Counsel provided ineffective assistance by reaffirming the complaining witness's version of events regarding her initial recantation of the allegations by asking her, "[Y]ou're saying it was your mom, Buffy Cartwright that ultimately convinced you to recant?", and Victim 1 responded, "Yes." This highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- xxii.** Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.
- xxiii.** Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. See *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.
- xxiv.** Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule

801(d)(1)(D).

- xxv. Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be, the issues will be what they're asking you to look for to keep tuned into *what they intend to prove*, what the case is about." See U.S. Const. amends. V, VI, XIV.
- xxvi. Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- xxvii. Trial Counsel failed to object and preserve for appellate review the admission of Buffy Brown's prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than

as it actually occurred at the previous trial.

- xxviii.** Trial Counsel failed to object during the “acting-out” of Buffy [REDACTED] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- xxix.** Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant’s consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant’s waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).
- xxx.** Trial Counsel failed to object and move to strike the State’s redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed, what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.
- xxxi.** Trial Counsel failed to object and move to strike the State’s redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope

of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant's identification on cross-examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was hanging in his cell present in the courtroom.

xxxii. Trial Counsel provided ineffective assistance where Applicant stated *in camera* at the end of the State's case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3's actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom (victim's brother's old bedroom), where Counsel failed to cross-examine the State's witnesses regarding this discrepancy (the location of evidence critical to the State's case, and it is unknown whether Trial Counsel obtained a complete copy of the prior trial transcript before the second trial. However, if true, then failing to examine this area cannot be a valid trial strategy).

xxxiii. Trial Counsel provided ineffective assistance where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly said so, where State witnesses repeatedly indicated Victim 3 was not in any such pictures, and where Counsel failed to proffer any such photographs into evidence to support his theory.

xxxiv. Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of

the prosecutor and giving the improper appearance partiality before the jury. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. See U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal).

- xxxv. Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses."
- xxxvi. Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...." and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- xxxvii. Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).
- xxxviii. Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched

and bolstered the credibility of the State's witnesses. See State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted); State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted); Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.") (quotation omitted); Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) (finding trial counsel's decision not to object to prosecutor's improper vouching for the credibility of the State's witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.).

xxxix. Trial Counsel failed to subject the prosecution's case to meaningful adversarial

testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 466 U.S. 648 (1984); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness”); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that “labeling counsel's actions as “trial strategy” does not automatically immunize an attorney's performance from sixth amendment challenges.”).

(c) Appellate Counsel’s acts or omissions of ineffective assistance of counsel include but not are not limited to the following allegations:

- (i) Appellate Counsel failed to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt.
- (ii) In the event Trial Counsel properly preserved the issue in his pre-trial motions and objections to the Trial Court immediately prior to the witness’s testimony, then Appellate Counsel failed to raise and argue the issue of the Trial Court’s application of an incorrect legal standard for qualifying the State’s expert witness in the field of child sexual abuse dynamics where the 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 about the reliability and validity of field itself after the witness was deemed “expert” by the court and after the State’s direct examination—all of which was held in the presence of the jury rather than *in camera*? See Rule 702, SCRE; *State v. Council*, 335 S.C. 1, 515

S.E.2d 508 (1999); State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012); State v. White, 398 S.C. 376, 728 S.E.2d 468 (2009); and Watson v. Ford, 389 S.C. 434, 699 S.E.2d 169 (2010). See also Staubes v. Folly Beach, 339 S.C. 406, 529 S.E.2d 543(2000); and State v. James, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004).

- (iii) In the event Trial Counsel properly preserved the issue in his contemporaneous objection (“leading”) to the Trial Court, then Appellate Counsel provided failed to raise and argue the issue of whether the expert witness’s testimony went beyond the scope of her expertise. Specifically, the witness’s admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological “profiler” of the accused when the Prosecutor asked whether it was typical for *an abuser* to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCRE; State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).
- (iv) Appellate Counsel failed to raise and argue Trial Counsel’s objection where the Trial Court refused to ask Defense Questions 1 and 3 during *voir dire*, where Question 1: “Have you, any member of your family, or friend been impacted in anyway by Sexual Crime or Sexual Assault or Child Molestation?” and Question 3: “Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?” Notably, the questions sought by Counsel would have elicited the prejudicial bias to disqualify jurors who answer in the affirmative, and thus, depriving Applicant of a fair trial if allowed on the jury panel.
- (v) Appellate Counsel failed to raise and argue Applicant’s motion for directed verdict

of acquittal where the motion was timely raised and ruled upon by the Trial Court.

See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Brown*, 360 S.C.

581, 602 S.E.2d 392 (2004).

12. Prior to this application, have you filed with respect to this conviction:

(a) Any petition in a State Court under South Carolina Law?

Applicant filed a Direct Appeal: Petition for Rehearing in the S.C. Court of Appeals
and Petition for Writ of Certiorari to the Court of Appeals in the S.C. Supreme Court.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief?

No. Applicant has not previously filed an application for Post-Conviction Relief or
Petition for Writ of Habeas Corpus in either state or federal court.

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (8)? No.

(d) Any other petitions motions or applications in this or any other Court? No.

13. If you answered “yes” to any part of number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof:

i. Petition for Rehearing in the S.C. Court of Appeals.

ii. Petition for Writ of Certiorari to the Court of Appeals in the S.C. Supreme Court.

(b) The name and location of the Court in which each was filed:

i. South Carolina Court of Appeals.

ii. South Carolina Supreme Court.

(c) The disposition thereof:

i. Denied.

- ii. Granted; Affirmed.
- (d) The date of each such disposition:
 - i. December 4, 2015.
 - ii. September 26, 2018
- 14. Has any ground set forth in number (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.
- 15. If you answered “yes” to number (14), identify:
 - (a) The grounds which have been presented:
 - i. Not applicable.
 - (b) The proceedings in which each ground was raised:
 - i. Not applicable.
- 16. If any ground set forth in number (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
 - (a) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, issues not preserved for appellate review, and/or were not appropriate to raise or were not properly raised on Direct Appeal.
- 17. Were you represented by an attorney at any time during the course of:
 - (a) Your plea hearing? Not applicable.
 - (b) Your trial? Yes.
 - (c) Your sentencing? Yes.
 - (d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence? Yes.
 - (e) Preparation, presentation or consideration of any petitions, motions, or

application with respect to this conviction, which you filed? Yes.

18. If you answered “yes” to one or more parts of number (17), list:

(a) The name and address of each attorney who represented you:

(i) Michael Routzong, Jr., Esq., 215 N. Harvin, Sumter, SC 29150.

(ii) David Hayes, Esq., PO Drawer 2247, Aiken, SC 29802.

(iii) Robert Dudek, Esq., PO Box 11589, Columbia, SC 29211.

(iv) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Michael Routzong represented Applicant at trial.

(ii) David Hayes represented Applicant at trial.

(iii) Robert Dudek represented Applicant on direct appeal.

(iv) Dayne C. Phillips is currently representing Applicant on this application for Post-Conviction Relief.

19. State clearly the relief you seek in filing this application:

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and remanding the indictments for a new trial based on ineffective assistance of counsel.

20. Are you now under sentence from any other court that you have not challenged?

No. Applicant is not under sentence from any other court.

July 1, 2020

[Verification to Follow]

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Harold Cartwright, #355084)

Applicant,)

v.)

State of South Carolina.)

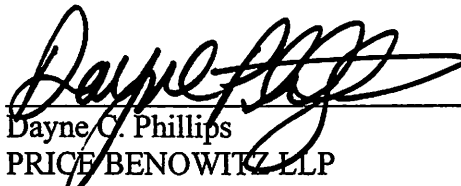
IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

Case No. 2019-CP-02-01582

VERIFICATION

I, Dayne C. Phillips, Esq., on behalf of my client, Harold Cartwright, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attached in this application; and that the matters and allegations therein set forth are true.

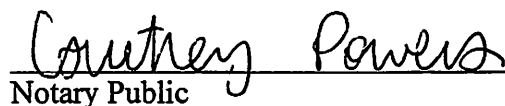


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July 1, 2020

SWORN to and subscribed before me this 1st

day of July, 2020.

 (L.S.)
Notary Public

My Commission Expires: May 2, 2027

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Amended Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Brianna Schill, Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

The Honorable Robert J. Harte
Aiken County Clerk of Court
P.O. Box 5833
Aiken, SC 29802

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

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courtney@pricebenowitz.com

July 1, 2020

1 State of South Carolina) Court of Common Pleas
 2 County of Aiken) Second Judicial Circuit
 3
 4 Harold Cartwright,) Transcript of Record
 5)
 6 Petitioner/Applicant,)
 7)
 8 vs.) 2019-CP-02-01582
 9)
 10 State of South Carolina,)
 11)
 12 Respondent.)
 13
 14 February 3rd & 4th, 2022
 15
 16 Aiken, South Carolina
 17 Via WebEx Videoconferencing
 18
 19 B E F O R E:
 20
 21 The Honorable Robert J. Bonds, Judge
 22
 23
 24 A P P E A R A N C E S:
 25
 Dayne C. Phillips, Esquire
 On behalf of the Petitioner/Applicant
 Michael J. Neubauer, Assistant Attorney General
 On behalf of the State of South Carolina/Respondent
 Reported by: Stacy S. Johnson,
 Circuit Court Reporter

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E X H I B I T SID. EVD.

*****NO EXHIBITS WERE MARKED*****

COURT REPORTER LEGEND

Dashes --	intentional or purposeful interruption or change in thought
ellipses . . .	Trailing off
(ph.)	Phonetically written
[sic]	written as said
(inaudible)	unable to be understood due to low volume or quality of audio provided

1 (The following proceedings were held April 3, 2022,
2 via WebEx Videoconferencing, beginning at 11:31 AM.)

3 THE COURT: All right. Let's go ahead and start.
4 I'm happy -- go ahead and call the case, Attorney General
5 Neubauer.

6 MR. NEUBAUER: Yes, Your Honor. May it please the
7 Court? We are here today for the matter of Herald
8 Cartwright versus State of South Carolina. Case Number
9 2019-CP-02-01582.

10 In February of 2012, the Aiken County grand jury
11 indicted Applicant for one count of criminal sexual
12 conduct first degree, eight counts of criminal sexual
13 conduct with a minor first degree, nineteen counts of
14 lewd acts upon a child, and one count of criminal sexual
15 conduct third degree.

16 Applicant -- Applicant was originally tried on
17 November 13th and 14th of 2012 before the Honorable
18 Thomas A. Russo and a jury. Assistant Solicitor John
19 Weeks and Kevin Molony of the Second Circuit Solicitor's
20 Office prosecuted the case and Applicant was represented
21 by Robert Hardy of the Second Circuit Public Defender's
22 Office. However, following a hung jury Judge Russo
23 declared a mistrial.

24 Applicant was subsequently retried on April 15th
25 through 18th of 2013 before the Honorable -- Honorable

1 Doyet A. Early and a jury. Applicant was then represented
2 by Michael Routzong and David Hayes of the Second Circuit
3 Public Defender's Office. Kevin Molony and Ashley Agnew
4 of the Second Circuit Solicitor's Office prosecuted the
5 case.

6 At the conclusion of the trial, the jury found
7 Applicant guilty as indicted and Judge Early sentence --
8 Judge Early sentenced Applicant to concurrent sentences
9 of 30 years for criminal sexual conduct first degree
10 and criminal sexual conduct with a minor first degree.
11 Additionally, Applicant was sentenced to a concurrent
12 term of 15 years for each count of lewd act upon a child
13 and a consecutive 10-year sentence for criminal sexual
14 conduct third degree.

15 Applicant filed a notice of appeal and Applicant's
16 appeal was perfected by Chief Appellate Defender Robert
17 Dudek of the South Carolina Commission on Indigent
18 Defense, Appellate Division.

19 In his appeal, Applicant raised the following
20 issues: That the trial court erred by admitting
21 evidence of Appellant's attempted suicide when the
22 incarcer -- or when incarcerated on the charges in
23 the case since the evidence wasn't irrelevant and given
24 no relevance the probative value was substantially
25 outweighed by the prejudicial effect under Rule 403 of

1 the South Carolina Rules of Evidence; whether the Court
2 erred by admitting photographs of Appellant's prison
3 cell to corroborate the fact that he attempted to commit
4 suicide since the evidence was similarly not relevant
5 and unduly prejudicial if relevant; whether the Court
6 erred by allowing Dr. Alicia Benedetto to be qualified
7 as an expert in child sexual abuse dynamics when she,
8 frankly, acknowledged her job was to conduct interviews
9 and not conduct research or studies, and the judge thus
10 abused his discretion by qualifying her as an expert to
11 render opinion testimony under Rule 702 of the South
12 Carolina rules of evidence; whether the Court additionally
13 erred by qualifying Dr. Benedetto as an expert allowing
14 her to bolster the testimony of the alleged victims where
15 the jury would draw the impermissible inference that the
16 alleged victims were conducting themselves consistently
17 with other victims of child sexual abuse.

18 Following briefing and oral arguments, the
19 South Carolina Court of Appeals affirmed Applicant's
20 conviction and sentence in an unpublished opinion filed
21 on September 30, 2015. Applicant filed a petition for
22 re-hearing in the South Carolina Court of Appeals on
23 October 15th of 2015, and the Court of Appeals denied
24 Applicant's petition on December 4, 2015.

25 Applicant petitioned the South Carolina Court -- or

1 the South Carolina Supreme Court for a Writ of Certiorari
2 on January 25, 2016, raising the same issues that were
3 submitted to the South Carolina Court of Appeals. The
4 South Carolina Supreme Court granted Applicant's petition
5 on November 6, 2016. Following briefing, the South
6 Carolina Supreme Court affirmed Applicant's conviction
7 and sentence in a published opinion filed on September 26,
8 2018.

9 On June 26, 2019, Applicant filed an application
10 for post-conviction relief alleging he was being held
11 in custody unlawfully for the following reasons:
12 Ineffective assistant of counsel due to a failure to
13 adequately investigate victim AR's involvement in a
14 drug investigation by law enforcement, which prompted
15 the unrelated statement implicating Applicant of sexual
16 abuse; failure to adequately investigate and compare
17 the timeline of when Applicant lived in the home and the
18 timing of the allegations; failure to obtain or review
19 discovery; failure to cross-examine and impeach the
20 State's witnesses based on their inconsistent testimony
21 from the first trial to the second trial and the
22 witness's prior statements to law enforcement; failure
23 to interview witnesses who could have testified regarding
24 Applicant's good character and reputation when it was
25 reasonable and necessary to present this evidence at

1 trial; and failure to request a jury instruction on good
2 character and reputation; trial counsel provided erroneous
3 legal advice regarding Applicant's testimony that was not
4 within the range of competence of mandatory attorneys in
5 criminal cases; counsel failed to object and preserve
6 for appellate review the Court's jury instruction that
7 improperly shifted the burden of proof and misstated the
8 law; counsel failed to object and preserve for appellate
9 review inadmissible and unduly prejudicial evidence
10 during Applicant's trial; counsel -- and counsel failed
11 to object and preserve for appellate review the State's
12 improper closing argument that was a misstatement of
13 evidence and unduly prejudicial.

14 Applicant also alleges ineffective assistance of
15 appellate counsel for failing to file a petition for
16 Writ of Certiorari to the United States Supreme Court
17 on the novel issue in South Carolina of whether evidence
18 of an attempted suicide is an admission of guilt.

19 The State filed its return and a motion for more
20 definite statement on October 3, 2019, requesting
21 Applicant provide specific facts giving rise to the
22 allegations of ineffective assistance of counsel. On
23 June 24, 2020, Applicant through his counsel filed an
24 amended application for post-conviction relief clarifying
25 Applicant's original allegations while adding thirty-nine

1 allegations of ineffective assistance of counsel and
2 four additional allegations of ineffective assistance of
3 appellate counsel.

4 Prior to this hearing, the State has submitted a
5 court packet to Your Honor containing Applicant's trial
6 transcripts, his SCDC records, the clerk's record from
7 the Aiken County Clerk of Court, a copy of Applicant's
8 appellate records and the records of this application for
9 post-conviction relief.

10 At this time Applicant {sic} would request coun --
11 opposing counsel clarify which allegations they intend
12 to go forward on.

13 THE COURT: All right.

14 And it's Mr. Phillips?

15 MR. PHILLIPS: Yes, Your Honor.

16 THE COURT: You represent the Applicant,
17 Mr. Cartwright?

18 MR. PHILLIPS: I do, Your Honor.

19 THE COURT: Okay. And so the -- Attorney General,
20 you're asking him to clarify what he's moving forward on
21 today; is that correct, sir?

22 MR. NEUBAUER: Yes, Your Honor.

23 THE COURT: Okay. Do you want to go ahead and sort
24 of, I guess, state -- or let's go ahead and list out
25 those grounds, sir.

1 MR. PHILLIPS: I can be specific, Your Honor. So
2 the amended application requesting post-conviction
3 relief was filed on June 29th of 2019 and then we filed
4 a redacted version just to be safe given -- although the
5 victims, I believe some of them were adults at the time
6 of the trial, we just wanted to be safe and filed a
7 redacted amended application on July 9th of 2019.

8 THE COURT: Right.

9 MR. PHILLIPS: So we would be going forward with
10 the allegations listed in the amended application.
11 Specifically as to the ineffective assistance of
12 appellate counsel, we would not be going forward on the
13 directed verdict motion issue. We would removing that
14 and -- but as far as the ineffective assistance of
15 appellate counsel, we would be raising on all of the
16 issues that are contained and raised in the amended
17 application. As for the ineffective assistance of trial
18 counsel, we would -- as far as the clarification part
19 of it, we would be raising all of the issues as far as
20 ineffective assistance of trial counsel that were in the
21 amended application.

22 THE COURT: Okay.

23 MR. NEUBAUER: Thank you.

24 THE COURT: Yes, sir.

25 All right. Mr. Phillips, you've got the burden of

1 proof, this is your case now, and so we're happy to hear
2 from you, sir.

3 MR. PHILLIPS: Thank you, Your Honor.

4 THE COURT: Call your first witness.

5 MR. PHILLIPS: Thank you, Your Honor.

6 There was some discussion the other day that we
7 would have Bob Dudek be called the first witness, I
8 believe, out of scheduling, and I have no issue with
9 that, and -- in terms of helping out Mr. Dudek with the
10 -- the timing issue.

11 We'd call Robert Dudek as the first witness.

12 THE COURT: All right. Mr. Dudek, can you raise
13 your right hand for me.

14 (Whereupon, Robert Dudek was duly sworn by the
15 Court.)

16 THE COURT: All right. Thank you, sir.

17 Your witness, Mr. Phillips.

18 Thank you, Your Honor.

19 ROBERT DUDEK,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. PHILLIPS:

23 Q. Now, Mr. Dudek, is it fine if I call you Bob?

24 A. Of course.

25 Q. Okay. Bob --

1 THE COURT: Spell your last name, sir. I'm sorry.

2 THE WITNESS: Sure. Yes, Your Honor. It's
3 D-U-D-E-K.

4 THE COURT: Okay. Thank you.

5 THE WITNESS: Yes, sir.

6 THE COURT: Go ahead.

7 BY MR. PHILLIPS:

8 Q. All right. So, Mr. Dudek, you've raised four issues
9 before the South Carolina Supreme Court in this matter; is
10 that right?

11 A. Are you taking about on the certiorari petition?

12 Q. That's correct.

13 A. Yes, that's correct.

14 Q. And in the opinion of our South Carolina Supreme
15 Court, they basically kind of pushed them into two major
16 issues; is that fair to say?

17 A. Yes, sir.

18 Q. All right. One of those being the attempted suicide
19 as evidence of guilt and the second one being expertise and
20 bolstering of the expert witness?

21 A. Correct.

22 Q. Now with the attempted suicide as evidence of guilt,
23 that was a novel issue in South Carolina at the time?

24 A. The challenge to it I think it's fair to say was
25 novel. I had a prior case that -- my memory was the

1 Supreme Court had granted cert -- certiorari on it or I
2 was seeking certiorari on it and then my client dropped
3 before that appeal ever went through, but I think it's safe
4 to say at the time of Mr. Cartwright's appeal the issue I
5 raised was a novel issue and the issue raised by trial
6 counsel.

7 Q. Now in the opinion, our South Carolina Supreme Court
8 notes that there's a -- they looked to other jurisdictions
9 because of it being a novel issue, but only referenced New
10 Jersey. Did you do any specific research as far as other
11 jurisdictions outside of New Jersey?

12 A. I'm sure I did. Let me look at my (inaudible) the
13 petitioner here. I beg the Court's indulgence for this
14 moment.

15 THE COURT: Yes, sir.

16 A. I see that I had cited, I guess, Commonwealth versus
17 Jones from Pennsylvania. I think to answer your question,
18 I researched this issue pretty thoroughly.

19 Q. And what did you find as far as the jurisdictional
20 split as far as where different jurisdictions handled this
21 issue?

22 A. Well, there were different -- as I recall, there were
23 different ways other jurisdictions had handled it. Some of
24 them were there to be absolutely no jury instruction on it
25 one way or another. There were, you know, jurisdictions

1 that said there had to be a substantial nexus between the
2 suicide attempt and the arrest; meaning, that if they were
3 gonna introduce evidence of a suicide attempt that some
4 other jurisdictions wanted it pretty clearly established
5 that the suicide attempt was the result of the underlying
6 conviction or accusation, which was my underlying problem
7 with the issue, I guess, as a legal and kind of as a moral
8 matter, frankly, because, I mean, suicide attempts are --
9 you know, people commit suicide for a variety of reasons.
10 It can be the mere accusation itself could make them feel
11 hopeless or there are a lot of things going on in people's
12 lives that might -- might challenge --

13 THE COURT: Mr. --

14 THE WITNESS: I'm sorry.

15 THE COURT: Hold on one second.

16 Mr. Phillips, can you give me a little background?
17 I mean, I'm sorry, but it escapes me as to Mr. Dudek,
18 his qualifications, for what purposes his testimony is
19 being offered because at this point, you know, it seems
20 like we're getting into, well, lots of purposes for
21 suicide and so I don't know anything about Mr. Dudek.

22 MR. PHILLIPS: So generally Mr. Dudek would be a
23 State's witness, but I was helping the State out by
24 calling him first. I can go into all the background
25 information. I apologize.

1 THE COURT: Okay. Just briefly because I -- okay.
2 Well, see I -- because I just don't -- I don't know
3 anything about it.

4 MR. PHILLIPS: Understood. Thank you, Your Honor.

5 BY MR. PHILLIPS:

6 Q. Mr. Dudek, if you could, could you explain your title
7 and position at appellate defense and your history?

8 A. Okay. Right. I'm the chief appellate defender for
9 the Office of Appellate Defense, which is a division of
10 the Commission on Indigent Defense. I head an office of
11 twelve appellate defenders. We do appeals from the courts
12 of General Sessions to the Court of Appeals and the Supreme
13 Court. We do post-conviction appeals from the courts of
14 Common Pleas. We do SVP, sexually violent predator,
15 first-time appeals from jury trials that they've become a
16 sexually violent predator. I have done this for
17 thirty-one years. I started as an assistant appellate
18 defender in late 1989, early 1990. I then was promoted to
19 chief for capital appeals and in 19 -- '09 and then 2010 I
20 became the chief appellate defender.

21 THE COURT: All right. And thank you. That helps
22 me tremendously. And I'm -- I'm sorry. I just didn't
23 put one and one together.

24 Go ahead. Go ahead, Mr. Phillips.

25 MR. PHILLIPS: Yes, Your Honor. I apologize with

1 not doing the appropriate intros and since it was a
2 State witness, I went right into my issues, so I
3 apologize.

4 THE COURT: Yes, sir.

5 BY MR. PHILLIPS:

6 Q. So going specifically into the issue as we were
7 discussing regarding it being -- using an attempted
8 suicide as evidence of guilt being a novel issue in South
9 Carolina and the fact that there is a jurisdictional split
10 on how this issue is handled, you ultimately did not file
11 a petition for Writ of Certiorari in the United States
12 Supreme Court on this issue?

13 A. No, I did not.

14 Q. Okay. And with that issue being novel and a
15 jurisdictional split, was there any specific reason why you
16 didn't raise it?

17 A. Yes. I mean, I did not do a petition to the United
18 States Supreme Court, I guess, for a couple of reasons.
19 One is they're not an error correction court and, second
20 of all, I viewed this as a matter of state law really, not
21 Federal constitutional law. So although states went about
22 it in a different manner, I wasn't looking at it as a split
23 in states on an important question of constitutional law, I
24 just viewed it as a difference in states coming about this
25 issue as a matter of state law, how they handled this

1 matter as state law, so I -- so, Mr. Phillips, I didn't
2 look at it as a split on an important constitutional law
3 issue among the Federal circuits or among the states if
4 that answers your question. So that -- that's why I never
5 entertained and did not file a petition for certiorari in
6 the United States Supreme Court.

7 Q. Well, do you believe that Federal law is implicated
8 with this issue at all?

9 A. Well, I mean, I suppose it could be to answer your
10 question. On -- you know, as a matter of due process, I
11 suppose you could say well, you can never have a fair trial
12 if evidence that the person committed suicide after they
13 were arrested on a particular crime, if that comes in as
14 evidence of consciousness of guilt, but I guess as the
15 cliché goes, I would just think of that as a bridge too far
16 and never seriously entertained that idea. And if I'm
17 wrong, I'm wrong, and I certainly don't want Mr. Cartwright
18 to suffer, but I never thought of it about going -- about
19 making it a -- making it a matter of Federal constitutional
20 law in the United States Supreme Court.

21 Q. And specifically you didn't raise it as a Federal
22 issue in your petition or in your original cert --

23 A. Yeah.

24 Q. -- before the Supreme Court and then as in your
25 briefing petition?

1 A. Right. I mean, as a mat -- as a matter of state law,
2 we -- this evidence had been allowed I would say somewhat
3 routinely, which, again, was very bothersome to me that
4 the person was arrested for this crime and the defendant
5 subsequently attempted to commit suicide, the same as in
6 Mr. Cartwright's case, that he attempted to commit suicide
7 and they introduced photographs, as I recall, from the
8 prison or the county jail that showed that he attempted
9 suicide. So my attack was on that, that evidence coming in
10 as consciousness of guilt evidence, similar -- my motion
11 direct analogy, as you might recall, Mr. Phillips, was to
12 evidence of flight, that that evidence could come in if it
13 -- a sufficient nexus was drawn to show that the person
14 fled the jurisdiction or fled the area as consciousness of
15 his guilt, and I had a real problem with that, and my
16 attack on it was that, again, people commit suicide --
17 attempt to commit suicide or commit suicide for many, many
18 different reasons other than the fact that they've been
19 arrested for the crime and one of them could be just the
20 mere accusation itself of a horrible crime, particularly
21 in today's society, you know, a sex crime or a sex crime
22 involving a minor, but, again, my attack was on what was
23 happening in the State of South Carolina as far as that
24 evidence being admitted and I did not think of it,
25 correctly or incorrectly, as a much broader question of

1 Federal constitutional law.

2 Q. Okay. Is it your opinion that trial counsel had
3 preserved the Federal issue to be raised before our Supreme
4 Court?

5 A. That I -- that, again, I don't recall off the top of
6 my head, but suffice it to say -- I mean, that -- that's
7 not the way I went about it mainly.

8 Q. And, well, I guess -- and since you couldn't recall, I
9 know you're probably trying to look for it at this point,
10 let's assume that it was preserved, you made the -- the
11 specific decision not to raise the Federal issue?

12 A. I think that's fair to say. Again, I cited on
13 page 12 of my final brief in the Court of Appeals and then
14 on page 11 as far as how it was brought up in the lower
15 court and I -- what -- the judge then cited this Court's
16 opinion in State versus Orozco, 392 S.C. 212,
17 708 S.E.2d 227, Court of Appeals 2011, as support for the
18 suicide evidence being admitted. The judge ruled the
19 evidence was admissible and I dropped the footnote saying
20 certiorari was granted by the Supreme Court on October 17,
21 2012. This Court can take judicial notice of the fact that
22 the petitioner Orozco voluntarily dismissed his appeal
23 after certiorari was granted by the Supreme Court on the
24 issue of whether this Court erred by holding evidence of
25 his suicide attempt was admissible.

1 So I think it's -- and that's the gentleman I was
2 telling you about, Mr. Orozco, who I had cert granted on,
3 so this was my second go around in the state Supreme Court
4 on this issue of this evidence of suicide, but, again, my
5 attack was on this evidence being allowed mainly as a
6 matter of state law and I didn't see it as a broader
7 question to say like a due process question of Federal
8 constitutional law. That's not the way that it was
9 attacked.

10 Q. Thank you. And just to clarify, so my position is
11 if the Federal issue was preserved at the trial level, you
12 could have raised it before our Supreme Court and then
13 could have raised -- or could have filed a petition for
14 Writ of Certiorari to the United States Supreme Court to
15 challenge that issue. Is that --

16 A. If both -- if both of those if's are correct, then I
17 could have. I -- I chose not to raise it that way. That's
18 correct.

19 Q. Now the second part that the Court really addressed
20 was the expertise and bolstering of the expert witness.
21 Specifically you -- you raised -- or challenged the
22 qualification of Dr. Benedetto being qualified as an expert
23 in child abuse dynamics and then the second part was that
24 the admission of the testimony was highly prejudicial and
25 essentially amounts to bolstering. Our Supreme Court

1 disagreed.

2 Now going off that same lane as far as that specific
3 expert, the trial court itself -- do you believe the trial
4 court used the correct legal standard in qualifying the
5 State's expert witness? In other words, specifically where
6 the Court limited trial counsel's ability to voir dire the
7 witness regarding qualifications. The second part -- I
8 mean, I can break this up for you, but --

9 A. Yeah.

10 Q. -- let me kind of give you the overview and then I'll
11 break it up. That way you can easily digest it so I'm not
12 giving you so much of a compound question.

13 A. Okay.

14 Q. But essentially the trial court's application was an
15 incorrect legal standing in the sense that it was
16 qualifying the expert witness in the field of child abuse
17 dynamics, but limited the voir dire of the witness
18 regarding qualifications, qualified the witness in the
19 given field and only permitted questioning of the witness
20 about the reliability and validity of the field itself
21 after it was deemed an expert during the State's direct
22 examination while in the presence of the jury, not a -- not
23 a separate in-camera hearing.

24 So I know I gave you a lot there. To kind of break
25 it down, under the Council standard, and, again, State v.

1 White for non-scientific evidence, the standard that we're
2 supposed to use, do you believe that the Court used an
3 incorrect legal standard in qualifying the expert witness?

4 A. Well, again, the answer would be yes because, I mean,
5 as far as the gatekeeping functioning, again, and to give a
6 little background here, you know, my overall problem with
7 Dr. Benedetto, one, is she was, you know, being qualified
8 as an expert in, quote, child abuse dynamics, unquote, and
9 really there was the evolution of this law -- I mean, the
10 evolution of this area of the law starting -- well, before
11 that we had Douglas, which was my case in the South
12 Carolina Supreme Court, Kromah, which was also my case in
13 the South Carolina Supreme Court, and on this -- these
14 people or persons such as her being recognized as -- as an
15 expert in an area and then just giving testimony under the
16 guise of being an expert, which simply mirrored in large
17 part the testimony of the child so that it impermissibly
18 signalled to the jury that as an expert she believed that
19 the child was telling the truth.

20 So, no, I mean, I think the attack was on she should
21 not have been qualified as an expert and that by allowing
22 her to be an expert and to give expert opinion that
23 bolstered the credibility of the alleged victim.

24 Q. Well, and I -- I guess, my -- getting more specific,
25 my clarification question would be if the trial court --

1 if you believed the trial court used the incorrect legal
2 standard, there wasn't a specific issue raised as to State
3 v. White or Council and how the Court applied that standard
4 to qualify the expert witness and so did you not raise the
5 issue because it wasn't preserved or because you made a
6 decision to do so -- not to do so?

7 A. I -- off the top of my head, I don't remember
8 preservation or preservation problems. I simply -- I'm
9 certainly not trying to be flippant, but I would not have
10 raised the issue if I did not think it was preserved for
11 appellate review, and as you can see the way I raised the
12 issue was that the Court -- trial court erred by allowing
13 Dr. Benedetto to be qualified as an expert in child abuse
14 dynamics where she, frankly, acknowledged her job was to
15 conduct interviews and not conduct research or studies and
16 the judge thus abused her -- his discretion by qualifying
17 her as an expert to render opinion testimony under Rule 702
18 and it allowed her to give bolstering opinions. So, I
19 mean, you know, I -- that's -- that's what I did right or
20 wrong. That's the way I attacked it.

21 Q. So you would have essentially made an additional
22 argument under the legal standard as far as challenging how
23 it was qualified under White if it was properly preserved
24 and argued by trial counsel?

25 A. Again, I don't -- and, Mr. Phillips, I'm not trying

1 to avoid your question. It's been a long time. I don't
2 remember on the -- on error preservation. The record will
3 have to speak for itself. I don't want to guess. I hope
4 you respect that. I just don't want to guess.

5 Q. No, that's fair. That's quite -- quite fair.

6 Now moving onto -- and, again, I know you don't want
7 to guess, but if it wasn't preserved you said you wouldn't
8 have raised it bottom line?

9 A. Yes. If I thought -- I think I can safely say that.
10 If I thought something was not -- an issue was not
11 preserved for appellate review, I would not have raised it
12 unless it was a strategic matter where I was just positive
13 it wasn't -- something was not preserved for appellate
14 review and I just raised it just to get the appellate court
15 to clearly say it wasn't preserved for appellate review so
16 that would help my client at a later date in PCR, but I
17 have no memory of thinking of that in this case, that I
18 was trying to raise it in any -- for any PCR advantage
19 at a later date. So I think I was trying to keep myself
20 within the trial record as to what I raised on appeal.

21 Q. So as far as specific testimony of the expert
22 witness, the expert testifies at trial that a typical --
23 quote unquote, typical abuser has a favorite -- you know,
24 quote unquote, favorite age to sexually abuse, and -- and
25 answered in the affirmative to that question, trial counsel

1 objected contemporaneously to a leading -- arguing leading
2 and was overruled, but didn't make any objections regarding
3 going beyond the scope of the expertise regarding the
4 favorite age in the specific kind of argument of being,
5 say, like a psychological profiler of the accused or not
6 testifying as a blind expert, but more related to the exact
7 facts presented in this case.

8 MR. PHILLIPS: And I can -- Your Honor, I've got a
9 page for that I can -- if you want to share the screen
10 so I can show it to him. I'm not trying to hide the ball
11 and make it more confusing than it needs to be.

12 THE COURT: That's all right. I don't know that we
13 need to do that.

14 MR. PHILLIPS: All right.

15 BY MR. PHILLIPS:

16 Q. And, Mr. Dudek, it's on page 59 of the trial
17 transcript. I apologize.

18 A. Oh, that's okay. I have it -- I have it right here.
19 Just give me a second to find that page.

20 Q. Page 59 of Alicia Benevetto -- Benedetto's direct
21 examination.

22 A. Now, Mr. Phillips, is that a record on appeal cite or
23 a transcript cite?

24 Q. I apologize. It's a transcript cite.

25 A. Okay. I have -- give me a second. I have the

1 record on appeal, so I'm gonna have to do a little
2 cross-referencing.

3 Okay. I have Dr. Dena -- Benedetto's, okay, on
4 page 59. I'm with you now. Okay. I'm right with you and
5 I guess you said Line --

6 Q. Line 15. Yeah, Line 15 is the question from --

7 A. It is typical for an abuser to have like a favorite
8 age. Mr. Hayes: Objection, leading. Court overruled.
9 That's what you're talking about?

10 Q. That's -- that section right there, yes.

11 Now if trial counsel would have objected and also
12 -- or would have included in his objection that the
13 testimony went beyond the scope of expertise to go into
14 that testimony of a favorite age, would that have been
15 something that you would have raised on appeal?

16 A. I don't know -- you know, again, I don't know if I
17 would have raised it as a freestanding issue. I think
18 it's all part and parcel of my overall problem with
19 Dr. Benedetto's testimony. I mean, again, on the evolution
20 of this matter, you know, we objected to the -- the same
21 type experts, and this has changed -- this has changed the
22 title from like forensic interviewer to child abuse
23 assessment person and, again, it just -- it brought
24 together people who were advocates for the child, which
25 was what Dr. Benedetto was, and gave them this aura, which

1 I was complaining about incessantly in Kromah of being an
2 expert witness in this kind of pseudoscience or essentially
3 this junk science to put it bluntly, and so this would
4 have been part and parcel of my overall problem with her
5 testimony not being admissible because it did nothing but
6 bolster -- bolster the child's testimony or -- or signal to
7 the jury that Dr. Beno -- that Dr. Benedetto was an expert
8 in this subject matter and that she believed the child.

9 So to answer your question directly, I don't think I
10 would have raised it as a freestanding issue as a profiler
11 issue as you said it, but I think it just goes back to the
12 -- to the whole problem with this, is that whatever --
13 whatever evidence there is in the case, that the abuser
14 supposedly was grooming the child or buying her gifts or
15 showing her attention or -- or those kind of things, and it
16 -- it always goes along this same parallel of matching --
17 that the supposed expert's testimony mirroring or matching
18 what the child said happened in this case. So I don't
19 think I would have raised that as a freestanding issue --
20 legal issue. It would have just been part and parcel of my
21 overall complaint about Dr. Benedetto.

22 Q. So as far as -- and we'll -- we'll move on. I think
23 you -- you certainly clarified your position on it.

24 Now as far as the voir dire that was presented, the
25 defendant's proposed voir dire, the trial court decided

1 not to allow questions 1 and 3 that was presented.
2 Specifically, question 1 was have you, any of your family
3 or friends been impacted in any way by a sexual crime or
4 sexual assault or child molestation, and question number 3
5 was does any member of the jury panel believe that anyone
6 charged with crimes involving sexual molestation of a child
7 is more likely guilty than not, and you can kind of -- the
8 page I'm gonna reference is page 43 of the transcript.
9 Specifically, that issue wasn't raised on direct appeal.
10 Was -- was there a specific reason why that issue was not
11 presented to the appellate court?
12 A. I, frankly, don't recall. I -- you know, I think
13 the simple answer -- and, again, I don't specifically
14 remember -- would have been I would not have thought that
15 would have been a legal issue or the Court would have
16 said that -- that the refusal to ask those questions on
17 voir dire, you know, denied the defendant -- denied the
18 defendant a fair trial. Again, suffice it to say I didn't
19 -- I didn't raise it. If it was a winning issue, I
20 certainly had no strategic reason not to raise a winning
21 issue. So I think the safe answer and the correct and
22 honest answer would have been I did not think it was a
23 winning issue, and if I'm wrong, I'm wrong, and certainly
24 wouldn't want Mr. Cartwright to suffer if I was wrong.
25 Q. Now in your review of the case, there are a lot of

1 other issues that we -- that we've kind of raised, and I
2 know you don't know the record by heart, and a lot of
3 them there's some specific questions regarding error
4 preservation that I would have for you and I don't want to
5 go through every specific one, but the issue -- kind of
6 going back to what we discussed before, issues related to
7 -- if -- if there was an issue that was preserved for
8 appellate review that you felt was a winning issue, you
9 would have raised it in the brief?

10 A. Certainly. I mean, I -- you know, I'm trying to win
11 these -- trying to win these cases, so if I thought
12 something was a preserved winning issue, I would have
13 raised it or I wouldn't be doing my job and there would be
14 no excuse for not raising a winning issue.

15 Q. And -- and if there's an issue there that's not
16 preserved for appellate review, it would be for one of,
17 say, the four reasons that -- or four elements that trial
18 counsel would have needed to do to preserve those issues
19 so you would -- to give you the opportunity to raise it.
20 Is that fair to say?

21 A. I guess -- and the four you're talking, I mean, would
22 have been raised to the judge in a timely, specific manner,
23 it would have had to have been ruled upon by the trial
24 judge, you know, I would have had thought the trial judge
25 was wrong in his or her ruling, here his ruling, and, you

1 know, that it was prejudicial to my client.

2 Q. Now -- sorry about that. Now if he would have raised
3 any issues challenging the indictment as being overbroad,
4 specifically the case from State v. Baker, would that be an
5 issue that you would have raised on appeal?

6 A. I mean, the same answer. If I -- if I thought
7 something was a winning issue, I certainly would have
8 raised it.

9 Q. Well, I guess that's my -- that's my point. Because
10 that issue potentially is available in this case, but it
11 wasn't raised, had he raised that issue would you have
12 raised it on appeal?

13 A. I guess can we get more -- I mean, if I thought
14 something was a winning issue, I would have raised it.
15 What -- what indictment, if I may ask, are you talking
16 about?

17 Q. The point is it wasn't raised. What I'm --

18 A. Oh.

19 Q. -- asking is based on the evidence that was presented
20 at trial, what we have, the indictments themselves --

21 A. Yes.

22 Q. -- trial counsel didn't raise the Baker issues stating
23 that the indictments were overbroad. Had he done so, would
24 you have raised that in your brief?

25 A. If -- if I thought it was a meritorious winning issue,

1 I certainly would have raised it. I mean, if what you're
2 telling me is there was no challenge to the indictment,
3 then, again, you know, I don't have any reason to think I,
4 you know, scoured the indictments and lost a lot of sleep
5 over them if there was -- you know, if it wasn't even
6 raised to the trial judge, I wouldn't have, frankly, given
7 it a -- you know, again, not being flippant, but I doubt I
8 would have gave it a second thought because under Gentry,
9 you know, and those lines of cases it has to be brought up
10 prior to trial and if you're telling me it was not, then I
11 have no reason -- you know, I obviously wouldn't have
12 raised it.

13 Q. Right. And less -- less specific as to whether you
14 would have raised it in the sense of the record as it
15 stands, but had that issue been brought, would that have
16 been an issue you would have wanted to raise on appeal had
17 it been preserved?

18 A. If it -- if an issue as to the indictment had been
19 preserved, I would have taken a hard look at it.

20 Does that help or answer the question?

21 Q. It does. Same with a motion for severance of the
22 indictments? And I don't know if you remember the facts of
23 this particular case.

24 A. You know, I have a list of -- of objections, motions
25 and everything, and if -- you know, there -- there are

1 always many, many objections for the most part, a lot of
2 motions during a criminal trial, particularly a long one
3 like this, and if something is properly raised and
4 preserved, I would take -- you know, I would take a look
5 at it.

6 You know, in most criminal cases as you know,
7 Mr. Phillips, from having worked here yourself, you know,
8 there -- there are all kinds of objections and motions and
9 you narrow them down to sometimes, you know, one issue on
10 appeal, sometimes two, sometimes three, sometimes four.
11 I think Justice Toal in her book said there should never
12 be more than four issues. So, you know, it's just a
13 narrowing process, but if something's not raised at all
14 before the trial court, certainly then it's not there for
15 me to consider raising it at all.

16 Q. Understood. Now -- and I guess that would apply to
17 any other motions that would not have been preserved as you
18 stated.

19 MR. PHILLIPS: At this time I have no further
20 questions of the witness.

21 Thank you, Mr. Dudek.

22 THE COURT: All right.

23 THE WITNESS: Yes, sir. Thank you.

24 THE COURT: Attorney General Neubauer, do you have
25 any questions of this witness, sir?

1 MR. NEUBAUER: Yes, Your Honor.

2 THE COURT: Go ahead, sir. Your witness.

3 MR. NEUBAUER: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. NEUBAUER:

6 Q. Good afternoon, Mr. Dudek.

7 A. Good afternoon sir.

8 Q. So regarding issues with the attempted suicide, you
9 raised this issue as an issue of state law in your petition
10 to the Court of Appeals and to the South Carolina Supreme
11 Court, correct?

12 A. That is certainly my memory, yes, sir.

13 Q. And you testified that you didn't feel that this was
14 an issue of Federal constitutional law, correct?

15 A. No, I didn't. In response to Mr. Phillips's question
16 also, I mean, I did not think of this as, say, a due
17 process or however else it could be raised as a matter of
18 Federal constitutional law, and I did not look at it that
19 way as far as any, you know, divisions in the circuits or
20 between, you know, lower state courts of last resort. I
21 was looking at it, as I said, like evidence of flight, it
22 had been allowed in this state as suicide attempts being
23 raised as consciousness of guilt evidence, and that always
24 bothered me, and that is the way that I raised it on
25 appeal. And I guess to further answer your question, I

1 mean, I remember during oral argument -- and you can go
2 back and check behind me, but I remember arguing this
3 issue and I think it was Chief Justice Beatty said, you
4 know, Mr. Dudek, every member of this court agrees with
5 you that it's wrong and the evidence that has come in in
6 this trial, you know, should not be allowed and it needs
7 to be a stricter foundation, but what's the prejudice?

8 So, you know, I think overall on the issue I kind of
9 got in a way, strangely enough, what I was after, it just
10 didn't do my client, Mr. Cartwright, any good, ironically
11 enough, from his conviction.

12 Q. And kind of in line with that, in the Supreme Court's
13 opinion they held that the facts here survive the strict
14 test for admissibility, but they did establish a guideline
15 to proceed with possible evidence of attempted suicides.
16 Do you remember that?

17 A. Well, I do, and I think there was a line in the
18 opinion that said that from here on this evidence of
19 suicide attempts would rarely be admitted. The State had
20 to prove that, you know, a jury can reasonably find a
21 suicide attempt occurred, the defendant was aware of the
22 occurrence of the alleged crime at the time of this suicide
23 and, most importantly, an unmistakable nexus exists by
24 clear and convincing evidence linking the suicide attempt
25 to a conscious -- to a guilty conscious derivative of the

1 offense for which the defendant is on trial. The only --
2 suicide attempt evidence may only be admitted when all
3 three factors have been met and the evidence survives a
4 Rule 403 analysis. And here's what I was looking for. We
5 recognize in view of our vigorous framework suicide attempt
6 evidence will rarely be admitted.

7 So I think, again, you know, a helpful overall
8 analysis, it just didn't do my client, who I was
9 representing on appeal, any good.

10 Q. And regarding your -- your failure to petition the
11 United States Supreme Court, do defendants have a right to
12 assistance of counsel while seeking a petition for a Writ
13 of Certiorari in the United States Supreme Court?

14 A. No, sir, they don't. They certainly do not. You
15 know, for that matter, now that you're asking the question,
16 you also do not have a right to the assistance of counsel
17 from a discretionary appeal between our State Court of
18 Appeals and our State Supreme Court, but I did that for
19 Mr. Cartwright because I felt strongly about it and thought
20 I had a chance to win in the South Carolina Supreme Court
21 and, you know, if I thought it was a matter of Federal
22 constitutional law, I could have won in the United States
23 Supreme Court. Even though he didn't have the right to
24 counsel, I would have done that for Mr. Cartwright also. I
25 just never thought of the issue that -- in that manner, and

1 if I was wrong, I was wrong.

2 Q. Yes, sir. And just for a little background, about how
3 many cases do you think that you've handled in the Court of
4 Appeals and the Supreme Court in South Carolina?

5 A. Thousands.

6 Q. And --

7 A. In over thirty years -- I mean, let's just say a
8 hundred a year, which I've certainly handled more than
9 that, you know, that would be, you know, I guess over
10 3,000 cases.

11 Q. And for any of those cases have you petitioned to the
12 United States Supreme Court in the past?

13 A. Yes, I have. I'm trying to -- yes. I mean, and not
14 all of them have been death penalty cases. I think every
15 death penalty case I've -- I've handled, I did petition the
16 United States Supreme Court and I've done it in a couple of
17 capital cases. So, yes, I have done that in the past.

18 Q. And that was going to be a follow-up question. Do
19 you know how many have not been a death penalty case or
20 non-death penalty cases?

21 A. I'm thinking only -- only a couple. It could be
22 more than that, two or three, that I -- and that's a
23 guess -- that I felt strongly about. One I'm remembering
24 in particular, which was a case which I think we were the
25 only state in the union which tried someone in their

1 absence and without them being represented by counsel, and
2 I think that, for what it's worth, was conferenced like
3 seven times in the United States Supreme Court before cert
4 was denied. So, anyway, I have done it in non-capital
5 cases also for whatever that's worth, if anything.

6 Q. Yes, sir. And do you have any idea how many times
7 that you -- or that your petition for Writ of Certiorari
8 to the United States Supreme Court has been granted?

9 A. Yeah, that's real easy. One. State versus William
10 Arthur Kelly, a death penalty case, was granted. My former
11 boss, David Bruck, came on and did the certiorari petition
12 and argued it in the U.S. Supreme Court and won five to
13 four, so I remember very well that was the only one I ever
14 was on the brief as, but I wasn't the -- I was on the
15 opinion, but I was not the final counsel of record.

16 Q. But just to clarify --

17 A. I was one of the counsel of record -- one of the
18 counsel of record, but not the counsel of record.

19 Q. Yes, sir. Just for clarification, in no non-death
20 penalty case that you'd petitioned to the United States
21 Supreme Court you had certiorari granted in, correct?

22 A. That is correct.

23 Q. And if you thought that this was an issue that you
24 could have won or that you would have, I guess, ultimately
25 been successful by petitioning the United States Supreme

1 Court, would you have pursued that?

2 A. If I thought I could have won this case in the
3 U.S. Supreme Court, I guarantee you I would have sought
4 certiorari from the United States Supreme Court. I never
5 thought of this court that way, so I was either right or
6 horrible mistaken, and if I was mistaken, I would not want
7 Mr. Cartwright to suffer because I was mistaken.

8 Q. Yes, sir. And regarding Ms. Benedetto -- first, you
9 did raise an issue of Ms. Benedetto being qualified as an
10 expert witness, correct?

11 A. Right. Again, I had a lot of problems with
12 Dr. Benedetto in cases preceding this one. Again, I
13 thought her -- she should not have been -- she should not
14 have been an expert and that, you know, once she's allowed
15 to testify, you know, with the aura of being an expert,
16 all her testimony did was mirror that of the allegations
17 of the child and thereby impermissibly bolstered the
18 testimony of the child, and that was some cases that
19 preceded this one and cases that subsequently came out
20 after Mr. Cartwright's cases. But, again, I tend to think
21 of these all as a continu -- continuum because I've been
22 involved in that whole issue of expertise in child abuse
23 cases going all the way back to State versus Douglas.

24 Q. And you didn't particularly raise an issue with the
25 court limiting voir dire to just their qualifications. Did

1 you see that as an issue?

2 A. Again, I do not -- I do not recall any problem or
3 issue that I -- that I would have raised as far as limiting
4 the scope of the voir dire of trial counsel regarding
5 Dr. Benedetto by Judge Early. I don't recall that being
6 an issue I seriously considered raising. Again, either
7 right or wrong the record is the record on what I raised
8 and what I didn't raise.

9 Q. And equally did you see there were any issues worth
10 appealing regarding Judge Early limiting questioning to
11 the reliability of the field after she was considered an
12 expert?

13 A. Can you -- can you ask that again? I'm sorry for
14 being dense.

15 Q. One of Mr. Cartwright's allegations is a failure to
16 raise and argue the issue that Judge Early only permitted
17 questioning of Ms. Benedetto about the reliability of the
18 field of child sexual abuse dynamics. Did you see that
19 as an issue or as one of the, I guess, prevailing issues
20 or more meritorious issues in this case?

21 A. I -- I raised the issues that I thought were the most
22 meritorious to give Mr. Cartwright the best chance to win
23 and, I mean, I -- I don't recall -- I know I didn't raise
24 it in the way you're articulating. So, I mean, the only
25 way I can think of to answer the question would be I didn't

1 raise it that way because I didn't consider it better than
2 the issues I raised that I hoped would get Mr. Cartwright a
3 fair trial -- I mean, a new trial.

4 Q. And despite your -- despite raising the issue of her
5 qualification as an expert, the Supreme Court ultimately
6 ruled against you, finding that based on her education and
7 understanding of the field she was qualified as an expert,
8 correct?

9 A. Right. The Court -- Court ruled against me on that
10 issue as well. That is correct.

11 Q. And then --

12 A. They found -- I'm looking at the opinion. We find
13 Dr. Beno's -- Benedetto's testimony did not improperly
14 bolster the victim's credibility, so the Court disagreed
15 with me on that. And, you know, so the Court, again, has
16 found -- bottom line was the Court disagreed that
17 Dr. Benedetto's testimony impermissibly bolstered the
18 credibility of the alleged victim.

19 Q. And you did raise the issue of her testimony as
20 bolstering a witness, correct?

21 A. Yes, the alleged victim.

22 Q. And regarding your -- or Mr. Cartwright's allegation
23 that you failed to raise the issue that her testimony was
24 beyond the scope of her expertise when she commented on an
25 abuser having a favorite age, you previously testified that

1 you would not have -- or you did not consider raising that
2 as an independent issue, correct?

3 A. That's correct. I mean, again, I -- I don't think I
4 would have raised an independent issue. It would have
5 been just another part of my overall complaint about
6 Dr. Benedetto's testimony and just another component --
7 just another component of my argument that as an -- as a,
8 quote, expert, unquote, she is impermissibly bolstering
9 the credibility of the witness by giving opinions on
10 matters she's not qualified to give opinions on thereby
11 bolstering the credibility of the alleged victim because
12 her opinions mirrored the testimony of the alleged victim
13 in the eyes of the jury.

14 In other words, I guess, to make it real clear, the
15 child testified here's what happened to me, me, me in this
16 case and then a supposed expert comes along and says, in
17 general, A happens, B happens, C happens and D happens and,
18 lo and behold, A through D all happened in this -- in this
19 case also.

20 Q. Okay. And you highlighted particular instances
21 throughout your argument where her testimony mirrored what
22 these victims stated, but you -- did you feel that it was
23 necessary to highlight that particular question or that
24 issue while raising your issues with her testimony?

25 A. No. And, I mean, I didn't. And if I remember

1 Mr. Phillips's question correctly, I think his complaint
2 was with trial counsel's objection only being to leading
3 and not to being a -- a broader objection as to it ought
4 -- requesting an improper opinion, if I'm paraphrasing
5 Mr. Phillips correctly. And if I'm wrong, I apologize to
6 him, but that's my memory of the question.

7 Q. And ultimately though you raised the issue of her
8 testimony bolstering the witnesses, the Supreme Court
9 ruled against you finding that her testimony served the
10 purpose of explaining the behavior common to sexually
11 abused victims and that Ms. Benedetto testified she didn't
12 interview any of these victims and she never stated that
13 she believed these victims; is that correct?

14 A. I think that's fair, yeah. Yes, sir.

15 Q. And now regarding the issue with the trial court
16 refusing to ask the defense's questions 1 and 3 during
17 voir dire, you ultimately chose not to raise these issues
18 in your brief, correct?

19 A. Right, I did not raise those.

20 Q. And you indicated that you did not think that it
21 would be a legal issue that would have merited appellate
22 review?

23 A. If I did not raise them, I would not have thought
24 that they were a meritorious issue or a winning issue;
25 otherwise, I would have raised them. I don't know how else

1 to answer that question otherwise other than, you know, I
2 did not have a strategic opinion -- I mean, a strategic
3 reason not to raise a winning issue, so I must not have
4 thought that was a -- a winning issue, and sit -- sitting
5 here today respectfully I still don't see that as being a
6 winning issue, and if I'm wrong, I'm wrong, and if I'm
7 wrong, I certainly apologize to Mr. Cartwright.

8 Q. And just to clarify, you don't have a duty to raise
9 all possible issues on appeal, correct?

10 A. Correct. Yes, sir.

11 Q. And you raised the issues that you thought were best
12 and that you could have raised, correct?

13 A. Yes, sir. That is correct also.

14 Q. And have you in the past raised -- regarding possible
15 issues that were not preserved, have you previously raised
16 issues that were not preserved for appellate review?

17 A. I mean, I certainly think that there have been
18 instances where I raised something. I might have been in
19 doubt whether it preserved, but suspected the Court -- the
20 Appellate Court was gonna think it was not preserved, and I
21 may have done that, so the Court explicitly in the opinion
22 says this is not preserved for appellate review because
23 then I kind of view it as, you know, your client in PCR on
24 that matter can almost be over the deficiency prong of
25 Strickland and then you're only arguing prejudice. So, I

1 mean, I know on occasions I've done that in the past, but
2 certainly don't think I did that on anything in this
3 particular case.

4 Q. And that kind of ties into the last question I was
5 going to ask you. If you thought that there were any
6 issues in this case that weren't preserved that would have
7 been beneficial to show deficiency in a PCR action, would
8 you have raised those to the Court of Appeals even though
9 they weren't preserved?

10 A. No. I mean, I don't remember ever in this appeal
11 going about the appeal as being -- you know, in other
12 words, I would not have -- the way my boss, Dan Stacey,
13 used to put this is, you know, you don't want to have a
14 steak sandwich and put baloney in it because it ruins the
15 steak sandwich. I wanted to win Mr. Cartwright's case and
16 I thought always of the suicide attempt issue as being my
17 best chance to win. Dr. Benedetto's testimony I certainly
18 had problems with and I raised that as a secondary issue.
19 Though I still hoped I could win on it, I was not gonna
20 throw in lesser issues that I did not think I was gonna win
21 on because that would detract from the attractiveness of
22 issues that I thought were rock solid, if that makes sense.
23 It hope does.

24 Q. It does.

25 MR. NEUBAUER: Thank you so much, sir. I have no

1 further questions at this time.

2 THE COURT: Any redirect, Mr. Phillips?

3 MR. PHILLIPS: Yes, Your Honor. I'll be brief.

4 REDIRECT EXAMINATION

5 BY MR. PHILLIPS:

6 Q. And, Mr. Dudek, you weren't able to raise a Federal
7 issue to the -- or file a petition for Writ of Certiorari
8 in the United States Supreme Court even if it -- even if
9 you wanted to because at the Court of Appeals you didn't
10 raise a Federal issue and you wouldn't have been -- and
11 then you didn't raise a Federal issue in your brief of
12 petitioner before our Supreme Court, so you didn't have the
13 ability to raise a Federal issue regardless; is that fair
14 to say?

15 A. I guess your -- I guess your question may be I did not
16 have a chance to raise a meritorious Federal issue to the
17 United States Supreme Court. Again, Mr. Phillips, I never
18 -- I never went into this case as a -- before the appellate
19 courts, which it would have to have been developed either
20 way that way in the trial court and the appellate court,
21 setting it up as matter of Federal constitutional law
22 because as you know, you know, there's no playing games in
23 the United States Supreme Court. It's either raised all
24 the way throughout as a matter of Federal constitutional
25 law or it's not and I -- and I never went about it as a

1 matter of Federal constitutional law. I went about it as
2 a matter of state law allowing this type of evidence of
3 suicide attempt, this consciousness of guilt evidence,
4 almost reflexively was wrong. That's what I was attacking
5 as a matter of state law and I think, again, I got most of
6 what I wanted on that. Unfortunately, it did not do my
7 client, Mr. Cartwright, here any good.

8 MR. PHILLIPS: No further questions of this witness,
9 Your Honor.

10 Thank you, Mr. Dudek.

11 THE WITNESS: Thank you, sir.

12 THE COURT: All right. Anything further,
13 Attorney General Nusbau -- Neubauer, concerning -- for
14 this witness?

15 MR. NEUBAUER: No, Your Honor.

16 THE COURT: All right. Thank you so much.

17 THE WITNESS: May I be excused, Your Honor?

18 THE COURT: Yes, sir, you can. Have a great day.

19 THE WITNESS: Yes, sir, Your Honor. Thank you
20 much.

21 (Witness excused.)

22 THE COURT: All right. Mr. Phillips, who do you
23 want to call next?

24 MR. PHILLIPS: We call Herald Cartwright.

25 THE COURT: All right. Do you want -- how long is

1 this gonna take?

2 MR. PHILLIPS: Being that it's 12:44, if -- if
3 Your Honor's kind of wanting to break for lunch around
4 1:00 -- I mean, I would say it might be best to break
5 for lunch and us do it straight through in the afternoon.

6 THE COURT: What I was doing is -- basically what
7 I was saying is, let's take ten minutes' break and then
8 we'll come back and let you call Mr. Cartwright, okay?

9 MR. PHILLIPS: Perfect.

10 THE COURT: So it's 12:44. Let's be back at 12:55,
11 okay?

12 MR. PHILLIPS: Yes, Your Honor.

13 THE COURT: Is that all right for everybody?

14 MR. NEUBAUER: That works for me.

15 THE COURT: Madam Court Reporter, is that okay for
16 you?

17 THE COURT REPORTER: That's fine.

18 THE COURT: Thank you.

19 All right. We'll see everybody back in ten minutes.

20 MR. PHILLIPS: Thank you.

21 (Recess taken at 12:44 PM.)

22 (Back on the record at 12:58 PM.)

23 THE COURT: Have we got everybody we need to start?

24 MR. PHILLIPS: I believe so, Your Honor.

25 THE COURT: Okay. Mr. Phillips, in that case why

1 don't you call your next witness, sir.

2 MR. PHILLIPS: Yes, Your Honor.

3 (Pause in proceedings.)

4 THE COURT: All right. Are we ready, Mr. Phillips?

5 MR. PHILLIPS: Yes, Your Honor.

6 THE COURT: Okay. Mr. Phillips, you're calling --
7 you're calling your client, Mr. Cartwright?

8 MR. PHILLIPS: That's correct.

9 THE COURT: Okay. Mr. Cartwright, how about raise
10 your right hand for me, sir.

11 (Whereupon, Harold Cartwright was court sworn by
12 the Court.)

13 THE COURT: All right. You can put your hand down.
14 Go ahead.

15 HAROLD CARTWRIGHT,

16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. PHILLIPS:

19 Q. Good afternoon, Mr. Cartwright. Can you hear me okay?

20 A. Yes, sir.

21 Q. Do we have a microphone for him? Obviously --
22 Mr. Cartwright, you're not hearing how we're hearing it,
23 but it appears to be a little bit -- if you could, state
24 your full name and I just -- we're not hearing -- it's not
25 coming through to us in a -- in a good way.

1 A. (Unintelligible.)

2 THE COURT: Earlier he was perfect.

3 MR. PHILLIPS: Do you think maybe if they log out
4 and log back in? One of those issues. I just know we
5 can't take the testimony from Madam -- Madam Court
6 Reporter can't take down the testimony, so.

7 THE COURT: No.

8 THE WITNESS: Can you hear me better now?

9 THE COURT: Perfect.

10 MR. PHILLIPS: That's it.

11 BY MR. PHILLIPS:

12 Q. All right. Mr. Cartwright?

13 A. Yes, sir.

14 Q. Tell us about how this started as far as your
15 representation. You've had two trials in this case; is
16 that right?

17 A. Yes, sir.

18 Q. All right. And the attorneys that you had in the
19 first trial are different than the attorneys you had in
20 your second trial?

21 A. Yes, sir.

22 Q. Your first trial ended in a hung jury and mistrial?

23 A. Yes, sir.

24 Q. Do you know why your lawyers changed from the first
25 trial to the second trial?

1 A. Yes, sir. I was taken to the county. Mr. Rout --
2 Mr. Harte was attempting to because of funds resign as my
3 attorney and I had went to Aiken County, I -- I wasn't
4 gonna let him because he had represented me in the first
5 trial, and I -- we had made arrangements that, you know,
6 I could get payment to him if I had -- (transmission
7 interruption).

8 THE COURT: All right. You've got to repeat that,
9 sir. You broke up.

10 A. Yes, sir. I -- we went back to Aiken county.
11 Mr. Harte was gonna stop representing me because of funds
12 and --

13 Q. That's after the first trial he said he wasn't gonna
14 continue. He moved to be relieved, is that specific
15 enough?

16 A. Yes, sir.

17 Q. And did you have a hearing on that matter?

18 A. We went to Aiken County for a hearing and they brought
19 me some papers to sign to see if I was eligible for an
20 attorney was my belief. I did not have my glasses at that
21 time in the county where I could actually, you know, read
22 everything without being strained and I never did show up
23 in front of the Court. They said that I had relieved
24 Mr. Harte of his duties and opted for a public defender.

25 Q. Did you relieve him?

1 A. Well, yes, sir. According to the paperwork I did.

2 Q. Well, I'm asking you specific. Not the paperwork.

3 A. Oh, no, sir. I had intended upon going before the
4 judge and -- and letting the judge know that I -- I
5 couldn't afford at that point in the trial to have new
6 representation because the court date came within --
7 within not even two months I was back in trial with the
8 new representation.

9 Q. Okay. And that's what I wanted to get to. And so
10 you never went in front of a judge on the motion to be
11 relieved because you would have asked that your same
12 attorney from the first trial, Mr. Harte, would have been
13 appointed to represent you to continue representation; is
14 that fair to say?

15 A. Yes, sir.

16 Q. And you were never given that opportunity?

17 A. No, sir. Not before the judge.

18 Q. Now once you found out that the public defender's
19 office had been appointed to represent you, how much time
20 before you went to trial once you learned that? How much
21 time passed before you went to trial?

22 A. I would say it was not even two -- two months.

23 Q. And so when was the first time that you met your
24 lawyer, Mr. Routzong?

25 A. At Aiken County I would say sometime in December or

1 first of -- around January of 2013 -- 2012 and January of
2 2013.

3 Q. So you had the trial in November with Mr. Harte and
4 about January or February is the first time you met with
5 Mr. Routzong?

6 A. Yes, sir.

7 Q. How many times did you meet with Mr. Routzong prior
8 to trial?

9 A. Three or four.

10 Q. Could you repeat that?

11 A. Three or four times at the most and one time on the --
12 on the phone we talked, which I didn't want to talk on the
13 phone, but he insisted that they weren't listening, and we
14 did.

15 Q. And what all did you discuss during those three to
16 four meetings?

17 A. We discussed basically strategy and of how to defend.
18 He wanted to know, you know, how I felt on the subject of
19 calling in my ex-wife. I didn't want to call her. I did
20 want to call in some hostile witnesses, which he objected
21 to. There was a big discussion though of the -- the
22 bedroom picture, Exhibit 5, and the sheets that were
23 presented in the trial. I actually had obtained a set of
24 sheets for Mr. Routzong to use in trial to show that they
25 were off of my son's bed and not my daughter's bed

1 according to the picture they would have used in trial.

2 Q. So, I guess, being specific, you talked about hostile
3 witnesses. Who were they that you said you wanted him to
4 call a hostile witness? Who did you tell him you wanted
5 him to interview and investigate?

6 A. Barbara, the grandmother, and Regan (ph.) Jackson.

7 Q. You said Barbara, the grandmother?

8 A. Yes, sir.

9 Q. And Regan Jackson?

10 A. Yes, sir.

11 Q. Why did you want him to call those witnesses at trial?

12 A. Because all through the first trial, I -- they said
13 that -- that they had talked to nobody, they hadn't told
14 their mother, they hadn't told anybody, and in my reading
15 of all of this it was real obvious to me that knowing
16 [REDACTED] and her background that she and her boyfriend, and I
17 had put them out of the house, that there was something
18 going on because she had called her grandmother and -- and
19 according to her grandmother's statements saying that
20 things had happened between me and [REDACTED] which [REDACTED]
21 denied during that time, but then they went back again
22 before the trial and during their statements to say that
23 she had told her uncle and her aunt and her grandmother,
24 which she denied during the trial and at various times, but
25 then it was to me to show the jury that it's completely

1 unacceptable that five adults -- grown adults supposedly
2 spoke and had been told according to this testimony that
3 this man has been molesting this child and not go to the
4 police, but yet while [REDACTED] (transmission interruption)
5 interrogating for drugs all of a sudden she's gonna tell
6 them that these things are going on.

7 Q. And let me stop you right there.

8 A. Yes, sir.

9 Q. So you had a discussion with him about -- the
10 allegation came up when she was under investigation related
11 to drug -- to drug charges?

12 A. Yes, sir.

13 THE COURT: Who was?

14 THE WITNESS: [REDACTED]

15 THE COURT: [REDACTED]?

16 THE WITNESS: (Nods head.)

17 THE COURT: All right. Go ahead.

18 BY MR. PHILLIPS:

19 Q. And so she was under investigation for potential drug
20 charges when this came up. Did you ask him to investigate
21 further? Did you-all have any discussions about trying to
22 do any additional investigation related to the fact that
23 she had this potential bias?

24 A. Yes, sir. I had requested to be able to obtain the
25 files of this investigation.

1 Q. And what was his response to that? So he was aware of
2 it?

3 A. Yes, sir. He was aware and nothing ever happened on
4 it.

5 Q. Now he -- you know, your trial counsel advanced the
6 theory at trial regarding [REDACTED] of the fact that you were
7 the person who had her boyfriend at the time arrested and
8 ultimately convicted and where he was on a -- for a sex
9 offense. Is that accurate?

10 A. Yes, sir. As a matter of fact, on the 10th day of
11 December, 1999, I -- on the 2nd, it was supposed to be in
12 court, but I filed charges on December 2, 1999, against
13 him and -- and filed for emergency custody of my children
14 to get them out of Melinda's protection or custody so that
15 they could come live with me.

16 Q. Now for [REDACTED], the issue -- your trial counsel
17 raised essentially three issues regarding her as far as the
18 fact that after her biological father passed there was a
19 Social Security deposit of \$20,000; is that right?

20 A. Yes, sir.

21 Q. And that money was given to you?

22 A. Yes, sir.

23 Q. And --

24 A. It went into my account.

25 Q. And what did you do with the money?

1 A. Her father had never done anything for her throughout
2 her life and when I found out he died I took her to the
3 funeral and took her to the Social Security office to file
4 for Social Security on his behalf benefits.

5 Q. And what did you do with the money?

6 A. Well, in 2008 I had lost my job and I had -- we had
7 ended up living in my mother's yard in a shed temporarily,
8 and I used that money to get us the funds to (transmission
9 interruption). After --

10 THE COURT: (Inaudible.)

11 MR. PHILLIPS: Could you repeat that?

12 Yes, sir. Yes, Your Honor.

13 BY MR. PHILLIPS:

14 Q. Could you repeat that, please?

15 A. Yes, sir. I used it to get us a place to live.

16 Q. And it was your contention that she was angry about
17 that?

18 A. Not at first, but she became angry about it after my
19 -- my step -- my -- my son had moved in and I caught him
20 and her -- or K-Mart caught them stealing condoms and I
21 realized that there may be something more going on between
22 the two of them. My son, I caught him using drugs. I ran
23 [REDACTED] and her boyfriend off because they were bringing
24 drugs around the house and decided (transmission
25 interruption) my son left and --

1 THE COURT: You have to repeat -- when it breaks up
2 like that, I'm gonna need to ask you to repeat each time
3 just so we can try to make sure we've got a better record
4 and I understand.

5 Go ahead.

6 MR. PHILLIPS: Absolutely, Your Honor.

7 BY MR. PHILLIPS:

8 Q. Mr. Cartwright, could you repeat the last sentence
9 that you just said?

10 A. Yes, sir. She became very angry and wanted her money
11 after I found out about the pictures of her on the Internet
12 and (transmission interruption) --

13 Q. And you said -- if you could repeat that. I think
14 you said -- talking about the pictures on the Internet. Be
15 specific to that. That broke up.

16 A. Yes, sir. When I found the pictures of her on the
17 porn site and started interrogating her about those things,
18 she became increasingly angry and wanted her money so that
19 she could leave.

20 Q. Now talking about these specific issues as far as
21 cross-examination, was there discussions with Mr. Routzong
22 about what defenses would be raised at trial, specifically
23 as to these -- what discussions did you have with him
24 regarding the defenses -- potential defenses?

25 A. Yes, sir. It all started at -- back with my first

1 wife as far as the -- I filed for custody of my children
2 when I found out that Melinda was allowing [REDACTED] to have a
3 relationship with a 24-year-old man on the 2nd of December.
4 On the 7th of December, she goes to Floyd County and files
5 for contempt of court charges and then states that I had
6 been -- reportedly [REDACTED] said that I had been molesting
7 her. Then within a year of -- in 2000, she started calling
8 Bran -- my wife, Buffy, and making accusations that I was
9 messing with [REDACTED] -- [REDACTED] and she even called the
10 school, and that's when all the charges took place in 2001
11 and eventually [REDACTED] goes and recants her story after
12 breaking -- after Sandra Parsons had went to DSS with her
13 during her interview because she had told the woman that it
14 didn't happen, but that's -- you know, that was the start
15 of -- all of these accusations to start with was back in
16 that period of my divorce.

17 Q. Did you have discussions with him about potential
18 expert witnesses?

19 A. Yes, sir, I did on the fact of -- most specifically on
20 the fact that Buffy had -- as I had stated in court in the
21 first trial -- had ejaculated me on the 24th in my son's
22 bedroom with panties and I was wondering why come no DNA
23 was found on any of the panties that they had confiscated
24 even if they had even the right ones at that time and also
25 the fact that my brother had the computers of the girls

1 that he needed to get and put into evidence, which ended up
2 getting gone. They -- the girls said they never had any
3 computer, but at any rate (transmission interruption).

4 Q. Mr. Cartwright, I'm gonna need you to repeat that last
5 part. We missed you.

6 A. On the computers that my sister had bought for my
7 children, [REDACTED] and [REDACTED], there was evidence on those
8 computers of their activities on the Internet that were
9 never brought into play.

10 Q. So, I mean -- and to be more specific, you discussed
11 about potentially having an expert review DNA records with
12 him. Did you-all ever go that deep into the discussion or
13 more broad?

14 A. Yes, sir. I felt that we needed to have those items
15 retested because, you know, like I had testified, I -- my
16 DNA was on those sheets, I know that, and I told them how
17 my DNA got there, offered through the first trial with the
18 -- he had the sheets up there and asked me, he said well, I
19 guess you can remember -- the prosecutor asked me I guess
20 you can remember what the sheets looked like and I said
21 yes, sir, I can, and he brought them up there and threwed
22 them on the table and I said those are my son's sheets off
23 of my son's bed, and then in the second trial there's a
24 picture of my son's bedroom instead of my daughter's
25 bedroom for Exhibit 5, which I stated in the trial. I even

1 told my attorney right as soon as it happened that that --
2 that's not the same picture, you know, they changed the
3 evidence. Even their testimony around the picture changed,
4 it was a -- a total switch up, and he didn't do anything
5 about it or say anything, and then when I asked the judge,
6 he told me that was a problem between me and my attorney.

7 Q. Well, going in the same process, you talked about how
8 there was evidence that the prosecution presented and
9 arguments that was different from the first trial to the
10 second and you alluded that there's inconsistencies between
11 the first trial and the second trial. Did you ever discuss
12 with Mr. Routzong about obtaining the transcript from the
13 first trial so he could use it for impeachment?

14 A. Yes, sir, I did. I told him that in the first trial
15 that there was -- [REDACTED] in her testimony mentioned nothing
16 about -- I told him about the sheets that had the bedroom
17 in the picture, I told him about [REDACTED] testimony which
18 had changed, and I did get a transcript from him that came
19 from the solicitor's office and when I read it I noticed
20 that the -- it was a partial transcript and I noticed that
21 [REDACTED] had said things in this transcript that were not
22 said in the trial and the things that were said in the
23 transcript, well, she didn't mention anything about
24 somebody holding a gun and a knife to her while they were
25 sexually abusing her, and I told that to my attorney. And

1 so I bought another transcript, ordered it from the court
2 reporter and paid for it, and I told my attorney, I said
3 well -- when we were talking, I said well, it's okay
4 because I've ordered another transcript. Mr. Hayes said
5 well, I wish you wouldn't have done that, and it struck me
6 odd when he said that, but I did. When my transcript got
7 to the jailhouse, it was late in the afternoon before I got
8 it and I had to sign off because it had been opened, and
9 I've tried repeatedly to buy the CD's of the trial and have
10 not been able to get the CD's to the trial because it was
11 recorded and, of course, it was -- the whole trial was on
12 Channel 12 News. I was speaking into a microphone and
13 looking into a camera. Everybody was that was in that
14 trial.

15 Q. And you're referencing the first trial?

16 A. Yes, sir.

17 Q. Now as specific advice that he gave you during that
18 three to four visits, what all did you cover as far as your
19 right to a jury trial, the right to present a defense,
20 potential defenses, cross-examination, your ability to
21 testify? Did he review all of those rights with you?

22 A. (Transmission interruption).

23 Q. Mr. Cartwright, we lost -- we lost you for a second.
24 You -- again, it's just cutting out, so bear with us here.
25 If you could repeat it.

1 A. No, sir. Not that I recall. I don't remember going
2 over any of those things. Now at one time he did tell me
3 that -- he said something about (transmission interruption)
4 being a witness on the stand.

5 Q. Mr. Cartwright, we'll have to get you to start over.
6 I'm sorry.

7 A. Yes, sir. He did speak one time on me being a witness
8 on the stand and I told him, you know, that I was in the
9 last trial and that I didn't have any reason to change my
10 testimony because the truth is the truth and he told me
11 that every chance I got to speak if I was gonna testify to
12 talk about myself personally so that the jury would know
13 what kind of person I am and kind of get to know me.

14 Q. Did he ever discuss specifically the State wanting
15 to use the evidence of suicide -- or, excuse me, the
16 allegation of suicide as evidence of guilt?

17 A. He said that they were gonna put that on the trial and
18 that they would use that for that matter and, like I told
19 him, I -- you know, I don't understand that, I -- I came
20 and I turned myself in when I found out about these charges
21 against me. I was in the jail. I'd been through a lot in
22 the last four, five, six years. I'd lost my house, I lost
23 my wife's car, we lived in a shed for a year, I was having
24 problems with my -- my children, which, I mean, it's all on
25 the record. My first -- me and my wife had fallen out of

1 love seemingly. We weren't having no sexual relations
2 (transmission interruption) --

3 THE COURT: Again, Mr. Cartwright. Back it up a
4 little bit.

5 MR. PHILLIPS: It -- it just started to get worse
6 and so, if you could, just kind of start that process
7 over, walk me through that again, your response.

8 A. Yes, sir. And like I told him, that the -- you know,
9 the record pretty much speaks for itself as to why -- what
10 reasons caused me to commit suicide. It weren't the
11 charges that were brought against me, although when [REDACTED]
12 joined in on the charge it was the tip of the iceberg. I
13 had lost my house, lost my wife's car. I had -- we lived
14 in a shed for almost a year with my family. I took \$20,000
15 and used -- of my youngest stepdaughter's money to put us
16 in a house, which me and her were fighting about. I hadn't
17 been able to see my kids or grandchildren in almost seven
18 or eight years and now my son came to live with me and
19 moved out, I'm fighting with everybody in my family, and me
20 and my wife were falling out of love, hadn't made love in
21 almost five years. So, yeah, I -- at that point in time I
22 -- I did, I made a decision that I didn't want to live any
23 longer, but it wasn't because I was in jail. I just had a
24 real hard time for the last -- I don't know. It seemed to
25 be forever.

1 Q. Now going to, again, your prep -- or your attorney's
2 preparation, meeting with you those three to four times,
3 what all -- I mean, to make sure, what else did you discuss
4 that you haven't presented that -- or did discuss with him
5 or things that you told him to do during those meetings
6 that -- that weren't -- that didn't come to fruition at the
7 trial?

8 A. Yes, sir. On -- on the fact of the pictures of my
9 stepdaughter and -- the pornographic pictures, I gave him
10 a list of people that he could talk to and call for a
11 witness that could identify them easily. I told him -- I
12 gave him a list of -- I've got it right here. Yes, sir.
13 I -- I gave him a list of witnesses that he could call that
14 could identify [REDACTED] and her friends in that picture
15 to show that they were lying about that. Her and every
16 witness that testified against me knew that that was her in
17 those pictures. I told him to talk to Bradshaw McKenzie,
18 Zoey Engelbert, Joe Eminaker (ph.), (transmission
19 interruption), Alex Joiner and to -- and all of them could
20 have identified [REDACTED] or [REDACTED] in the picture and the --
21 and of -- and Desiree, Martha, and Ashley Townsend.

22 Q. So take -- take a step back. Take it slow because it
23 broke up a little bit. Name the people that you said could
24 have identified them.

25 A. Bradshaw McKenzie, Zoey Engelbert, Joe Eminaker,

1 Britany Cartier (ph.), Marie Tyler, Kathy Weiner (ph.),
2 Alex Joiner. All of them could identify the girls in the
3 pictures. They were all friends that went to school
4 together.

5 Q. Now one of the things that has come up was the -- a
6 timeline. Did you and your lawyer have a discussion
7 regarding the timeline of when you lived in the home? So
8 these allegations are over an expansive amount of time, you
9 know, years, and with that expansive amount of time that
10 the allegations are there, did you have a discussion with
11 your lawyer as far as the timelines of when you lived in
12 the home, when you weren't in the home, as potential alibi?

13 A. Yes, sir, I did.

14 Q. Could you be specific as to that?

15 A. Yes, sir. Give me just a second. I've got the notes
16 here that I've had for -- yes, sir. On -- on 7-17-2001,
17 the accusations against [REDACTED] were reported. I moved
18 out of the house. I was arrested in 9-12-2001. I was out
19 of the house. I got bonded. They dismissed the charges in
20 12-3-2002. I was working out of town when they dismissed
21 them at Cyclone Development and did not return home until
22 -- I was in Atlanta and I did not return home until maybe
23 (transmission interruption).

24 Q. Mr. Cartwright, we've got to start over. Just the
25 last part -- just last part right there.

1 A. Okay. I did not move back into the house until two
2 days before [REDACTED] 12th birthday --

3 Q. So what's the date range you lived --

4 A. -- in 2003.

5 Q. So what's the date range that you lived in Atlanta?

6 A. Sir?

7 Q. The dates you said you lived in Atlanta outside the
8 home, what's the date range for that?

9 A. That was from 2000 and then ten -- about the 10th
10 month of 2002 all the way until the 10th month 15th day of
11 2003.

12 Q. Now when you moved back into the home, how long did
13 you live there?

14 A. Less than two months. Our house caught fire before
15 Christmas and we was -- it was to then and we had to move
16 out for a little over -- or right at a year. We moved in
17 with my brother-in-law and moved back in 12-3-2004.

18 Q. You said 12-3?

19 A. Yes, sir. December 3, 2004.

20 Q. You lived with your brother-in-law during that period
21 of time in between after the house burned down?

22 A. Yes, sir. My insurance company was paying them for us
23 to stay there.

24 Q. Now did you discuss this specific timeline with your
25 lawyer?

1 A. Yes, sir. I had told him of these -- about this, that
2 he check with the -- you know, the fire commissioner and
3 whatnot and get the exact dates. I wasn't sure of the
4 exact day, but I was, you know, pretty close as far as the
5 fire, when the fire happened.

6 Q. Did he have the arrest warrants or indictments and
7 sit down and go through the timeline with you to see how it
8 could be used in your defense?

9 A. No, sir.

10 Q. I'm sorry. If you could repeat that. You broke up.

11 A. No, sir.

12 Q. Now is there anything else that you want to present
13 or testify to specifically regarding allegations of
14 ineffective assistance of counsel? I'll have plenty of
15 questions for him, but as to his representation of you, is
16 there anything else that you want to present to the Court
17 while you're -- while you have the opportunity to testify?

18 A. No, sir, not that I can think of. I mean, I believe
19 that's it.

20 MR. PHILLIPS: No further questions, Your Honor.

21 THE COURT: All right, Mr. Phillips. Thank you.
22 Attorney General Neubauer, yes, sir.

23 MR. NEUBAUER: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. NEUBAUER:

1 Q. Good afternoon, Mr. Cartwright.

2 A. Good afternoon.

3 Q. So the first trial in this case was in November of
4 2012, correct?

5 A. Yes, sir.

6 Q. And the second trial was April of 2013, correct?

7 A. Yes, sir.

8 Q. So that would have been about five months in between
9 the two trials, correct?

10 A. Yes, sir.

11 Q. And you said shortly into 2013 Mr. Routzong and
12 Mr. Hayes began representing you, correct?

13 A. It was -- it was shortly into '13. I'd say a good --
14 it was almost two and a half, three months before I was
15 dismissed by Mr. Harte. The dates are somewhere. I mean,
16 we've got them. I've got them somewhere. I don't know the
17 exact date, but if I could -- it would take me a while to
18 dig through and find them, but, yes, sir essentially.

19 Q. And you indicated that you met with Mr. Routzong about
20 three to four times in that period of time?

21 A. Three or four, four or five maybe. It wasn't very
22 often.

23 Q. Okay. And do you recall ever reviewing discovery or
24 discussing the State's evidence with Mr. Routzong?

25 A. As far as discovery or evidence?

1 Q. Right.

2 A. Yes, sir. I -- I -- I did discuss discovery with
3 him as far as all the inconsistent testimony and the fact
4 that I wanted to bring out the fact that -- that nobody --
5 that how unbelievable the story was when you try to tell
6 somebody that six people or five grown adults know about
7 something and the only time it comes to light is when one
8 of them's getting ready to get charged with drug charges.
9 It makes no sense. When I found out my wife had allowed
10 my daughter to be in the room with a 24-year-old man, the
11 very next day I drove all the way to Floyd county to file
12 charges (transmission interruption).

13 Q. Pardon me, but -- I'm sorry, sir. I'm sorry, sir. I
14 don't mean to cut you off. We just need -- your audio kind
15 of cut out right there. Could you repeat the last thing
16 that you said, that last sentence?

17 A. Yes, sir. I was telling him that a responsible adult
18 does not sit around and say oh, Lord, he's molesting that
19 child and not gonna tell somebody (transmission
20 interruption.)

21 Q. I'm sorry, sir. We're still -- it's still a little
22 muffled.

23 A. Yes, sir.

24 Q. Okay.

25 A. Like I said, I -- I had told him that I wanted to

1 present them as hostile witnesses (transmission
2 Interruption) Regan and Barbara because it does not make
3 any sense in a -- in my mind or anybody else that's
4 reasonable I don't believe that five grown adults would
5 know or have been told that a man is molesting a child and
6 not go forward and say something about it to the officials,
7 that they sit back and wait until one of them is getting
8 ready to be charged with drugs or being investigated for
9 drugs, whatever, I don't know because I don't have any
10 paperwork on that, but that's when it comes out. It just
11 -- it don't make sense. Just like my first wife, I tried
12 to take my children away from her and having my step -- or
13 my (transmission interruption) boyfriend locked
14 (transmission interruption) I did that immediately. I
15 didn't sit around and know about it and --

16 MR. PHILLIPS: Mr. Cartwright, we need you to --
17 we need you to go back and repeat that. I'm sorry.

18 THE WITNESS: Yes, sir. Just like whenever my
19 first wife was allowing my 14-year-old daughter to be
20 molested by a 23 or 24-year-old baby-sitter, I did not
21 sit around and know about it. I went the very next day,
22 drove 400 and something miles to Floyd county and filed
23 charges on that like any reasonable adult would do, but
24 funnily -- funny she goes and, you know, puts charges
25 against me that -- within a week after that. All of a

1 sudden I become the bad guy. It's just -- but that's
2 why I wanted Mr. Hayes to call them as hostile witnesses
3 because it don't make sense. Five people don't know
4 something like that and not go to the police.

5 BY MR. NEUBAUER:

6 Q. Yes, sir.

7 A. That's --

8 Q. Now just briefly for clarity, you don't know for
9 certain that [REDACTED] was ever charged for anything related
10 to drugs in the incident you're referring to, correct?

11 A. I know for a fact that her and her first boyfriend
12 were dealing drugs, so --

13 Q. But he was not -- sorry. Do you know whether she was
14 charged?

15 A. No, sir.

16 Q. Okay. Now regarding trial strategy, do you remember
17 what Mr. Routzong and you discussed as far as a strategy
18 for trial?

19 A. Yes, sir. We discussed that he was gonna call in
20 Melinda as a witness and I argued that I wanted Regan
21 Jackson and Barbara called in as hostile witnesses that
22 he didn't want to do and me and him had a big fallout
23 about that in the dressing room, that I -- I didn't care
24 for them to (transmission interruption) into the courtroom
25 because I didn't feel that it was anything other than just

1 blusterous. I had also wanted to separate the witnesses
2 being able to just listen to each other's testimony and
3 then back each other up during the trial, which didn't
4 happen. For whatever reason I don't know.

5 Q. Okay. But -- and you brought up something about
6 discussing issues of photographs and which bedroom the
7 sheets came from with Mr. Routzong. Do you remember what
8 he said about that when you guys talked about it?

9 A. Yeah, he said that he didn't want to bring that
10 picture in because I wanted her picture to be put in there
11 because it looked just like her and that he --

12 Q. Sir, that's not the photograph I was talking about.
13 You addressed an issue with the State using a photograph
14 of a bedroom and saying that's the bedroom the sheets came
15 from. Did you not discuss -- did you discuss that with
16 Mr. Routzong prior to trial?

17 A. Yes, sir. I even brought a set of -- I bought a set
18 of bedsheets that matched the ones that was on my son's bed
19 for him to use as an exhibit that he never did.

20 Q. And do you remember did he give you any explanation
21 about what he thought you guys should do regarding that
22 issue?

23 A. He said that he would bring it out by cross-examining
24 them on these things, which never happened.

25 Q. Okay. And just regarding the DNA that was found on

1 the sheets, did you ever deny that your DNA or your semen
2 was found on that sheet?

3 A. No, sir.

4 Q. Okay. And as far as possible defenses, did -- did
5 you guys have any discussions about defenses that you could
6 bring up during a trial?

7 A. Yes, sir.

8 Q. Do you remember what you guys discussed?

9 A. It was what I had just told you earlier. One of the
10 biggest parts that I felt like that a jury -- that what the
11 motive was for them going into that was the fact that all
12 those people were told, she just got through sitting there
13 and denying ever telling these people. Regan Jackson was
14 never mentioned as being told anything and he was the main
15 one in all of their depositions that they gave to the
16 police that she was able to open up to and talk to and he's
17 an Army Ranger in the military and had been for many years
18 and had done many tours in Afghanistan and I doubt for a
19 minute that she -- he or anyone else in his position or
20 Regan for that matter, Army intelligence, would sit back
21 and say oh, well, she don't want her mom to know, so we're
22 not gonna say that. That ain't happening in the real
23 world. I'm sorry. And all those people found out and she
24 told them supposedly that this was happening. Unless it
25 was all a ploy just to keep [REDACTED] from going to jail, I

1 don't see them keeping their mouths shut that I was
2 supposedly molesting these children. I know if I would
3 have been told something like that, I would have drove all
4 the way to Floyd county the very next day just like I did
5 in the case with my daughter to let it be known; hey,
6 there's something going on here with this child, you-all
7 need to look into this. You don't sit around and wait.
8 And then she said that she wasn't planning on saying
9 nothing. Unh-unh. It -- none of it makes sense. If you
10 look at the record as a whole and sit down and read all the
11 testimony back and forth that who all supposedly knew, it
12 don't none of it make sense. It's -- just a reasonable
13 adult when you tell them hey, I'm being molested by this
14 man, if it's your aunt, your grandmother, your mother, your
15 sister, your uncle, they're going -- they're going to
16 authorities if not -- not right then, fast, quick and in a
17 hurry. I know I would and I believe anybody sitting before
18 me would.

19 Q. And when you guys were talking about defenses, did
20 Mr. Routzong give you any advice about the defenses,
21 whether or not he thought they would be successful or any
22 issues of, I guess, raising a certain defense?

23 A. He told me when we got into our argument basically
24 right there before the trial that the strategy was up to
25 him, that I was not gonna dictate strategy to him, that

1 ultimately that was his decision, and I accepted that and
2 went to trial because we were already in the proceedings.
3 The jury had already been selected. We were (transmission
4 interruption).

5 Q. I'm sorry. Can you -- I'm sorry. Can you stop for
6 a second and go back to that last sentence? You cut out
7 again. And I apologize for interrupting.

8 A. Yes, sir. I -- I was told that he was in charge of
9 the -- the strategy and I wasn't, I was his client, and he
10 listened to me, but he was gonna make the decision, and we
11 went to trial. We were already in trial, had already
12 selected a jury, and I was in the dressing room at that
13 time getting dressed.

14 Q. And as far as witnesses, you named a list of
15 witnesses that you wanted Mr. Routzong to speak to. Do
16 you remember having any follow-up conversation with
17 Mr. Routzong about those witnesses or whether he talked to
18 them or what they might have said?

19 A. As far as I know, nobody was talked to. I don't -- I
20 don't recollect any -- any conversation about the witnesses
21 as far as been spoke to or as to what they would have said.
22 I just trusted that they was gonna speak the truth of the
23 matter whether they liked me or didn't like me. I trusted
24 that they would speak the truth (transmission interruption)
25 and that's how I felt about it.

1 Q. Yes, sir. And did you ever provide Mr. Routzong with
2 any character witnesses that he could call that would
3 testify, I guess, about your character?

4 A. Yes, sir. I had -- I had mentioned some people. I
5 don't know if he took note of them or not, but I had told
6 him that Sandy Morton was a coworker of mine. My uncle,
7 Larry Brent (ph.). There was a city inspector that I
8 worked with a lot, Bruce Myers. A friend of mine, Sonny
9 Vandiver (ph.), an ex-boss, Ted Mavins (ph.). Martin
10 Speedy, an ex-boss. Neeley Page and Reggie Mavins were
11 ex-bosses and people that he could speak to that -- that
12 could.

13 Q. And ultimately I don't think these witnesses were
14 called. Did you guys discuss why they wouldn't have --
15 you wouldn't have called character witnesses?

16 A. No, sir.

17 Q. Okay. And you talked to him about the drug
18 investigation involving [REDACTED] Do you remember what he
19 said about that investigation or whether he looked further
20 into it?

21 A. As far as he told me was that he couldn't find
22 anything on it. Even -- even Robert Harte in the first
23 trial tried to find out something about it and he couldn't
24 get anything on it either.

25 Q. Okay. And you testified at your trial and did you

1 want to testify or did Mr. Routzong talk you into
2 testifying?

3 A. He felt that it would be good that I testify because
4 I had testified at the first trial and then -- and then I
5 was advised to -- to tell -- every chance I got to tell
6 about myself, which made me look like a fool, and in
7 closing the prosecutor even charged -- cashed in on it and
8 said and I could keep on going with his ridiculous stories,
9 including the youngest American (transmission interruption)
10 shrimper in Cuba.

11 So, I mean, his advice on my testifying just made me
12 look like a complete fool and the prosecutor used that in
13 his closing testimony to -- to convince the jury that I was
14 untrustworthy, they couldn't believe nothing I was saying.

15 Q. And do you remember the judge telling you that you
16 had the right to remain silent and that you didn't have to
17 testify if you didn't want to?

18 A. Yeah, I believe they read me those rights when I was
19 put in jail or when they arrested me when I turned myself
20 in.

21 Q. And --

22 MR. NEUBAUER: I beg the Court's indulgence for
23 just one second.

24 THE COURT: Yes, sir.

25 BY MR. NEUBAUER:

1 Q. Do you remember telling the judge I wish to testify,
2 Your Honor. I want to tell the truth of what's been going
3 -- or what's went on here. There's only been a little bit
4 of it disclosed.

5 A. Yes, sir. I remember saying that.

6 Q. So you did, in fact, want to testify?

7 A. Yes, sir. I -- I wanted to testify to tell the jury
8 I felt in my mind to (transmission interruption) tell my
9 side of things as far as what had went on and I wanted to
10 testify and bring out the fact of these other things, but
11 my attorney didn't do these things with me. And I -- and I
12 even asked the judge and when the jury was un-present about
13 certain things because me and my lawyer were having a hard
14 time during that trial getting on the same page.

15 Q. And do you remember what you said to the judge during
16 sentencing?

17 A. Yes, sir. I remember even before sentencing I told
18 him that it -- that I know at one time I told him that it
19 would be simple for me to prove. If I could just call all
20 the jurors, I could prove that the pictures had been
21 changed from one trial to the next because one set of
22 jurors is gonna point at one bedroom and the other set of
23 jurors is gonna point at another bedroom. I remember
24 telling him that.

25 Q. Do you remember ultimately just reaffirming that you

1 felt you weren't guilty despite the jury's finding?

2 A. Oh, yes, sir. Yes, sir. I did tell him, you know,
3 that he's -- they locked up a man that's not guilty of what
4 he's been charged with.

5 MR. NEUBAUER: I beg the Court's indulgence.

6 THE COURT: Yes, sir.

7 MR. NEUBAUER: I have no further questions at this
8 point.

9 THE COURT: Any redirect, Mr. Phillips?

10 MR. PHILLIPS: Yes, Your Honor. I'll be brief.

11 REDIRECT EXAMINATION

12 BY MR. PHILLIPS:

13 Q. Specific as to the question regarding the review of
14 the discovery, was there any discovery that he did not
15 review with you that you were surprised that the evidence
16 was presented at trial? In other words, there was evidence
17 that was presented at trial that you had not been -- had
18 not been made aware of or discussed with your lawyer?

19 A. Yes, sir. The -- the biggest thing was the -- the
20 exhibits, the pictures of the exhibits, and the fact that
21 the pictures of the exhibits weren't locked in from the
22 first trial to the second trial and the numbering of the
23 exhibits didn't make sense to me because I've always -- I
24 mean, I don't -- I'm not a law officer or -- or an attorney
25 or any of that myself, but I've always thought that when

1 you take evidence there's supposed to be a little number in
2 the picture, not wrote on the picture, but in the actual
3 picture so that the pictures can't be shuffled around and
4 changed as exhibits as happened to me. Had that been done
5 and had I had those exhibits in my possession during the
6 first trial and numbered as to what those exhibits are,
7 they're switching the pictures of the bedrooms would not
8 have taken place period.

9 Q. Well, outside of the -- the exhibit numbers, did he
10 review all of the photographs with you? Had you seen the
11 photographs that were presented at trial prior to trial?

12 A. No, sir.

13 Q. Okay. So that was my question. He didn't review
14 those photographs with you. He reviewed basically the
15 evidence packet, the paperwork, but he never reviewed the
16 photographs with you prior to trial?

17 A. No, sir. I still to this day (transmission
18 interruption) that I've seen any of those pictures.

19 Q. You're gonna have to -- you're gonna have to repeat
20 it.

21 A. I still to this day other than at trial have never
22 seen any of those pictures that they have in their
23 collection except for the one that (transmission
24 interruption) that I --

25 Q. You've got to repeat the last -- the last little bit.

1 The last four or five words. I apologize.

2 A. I said except for the one that they sent to you saying
3 that it was Exhibit 5 and it was used in both trials, which
4 is not true.

5 Q. And he never looked into or investigated that issue?

6 A. No, sir.

7 Q. You stated before that -- as far as given -- with
8 the timeline. Did you ever discuss you working out of town
9 and provide any relevant dates to your attorney regarding
10 that?

11 A. Yes, sir, I -- I did. I told him that I didn't come
12 back to the house as soon as the charges were dismissed,
13 that I was working in Atlanta for Cyclone.

14 Q. Did he ever get any of those records?

15 A. Sir?

16 Q. Do you know whether he ever obtained any of those
17 records?

18 A. No, sir. I don't know whether he did or not. I've
19 never seen any of them.

20 MR. PHILLIPS: No further questions, Your Honor.

21 THE COURT: All right. Any -- any additional
22 questions, Attorney General?

23 MR. NEUBAUER: No, Your Honor.

24 THE COURT: All right.

25 Thank you, Mr. Cartwright.

1 (Witness excused.)

2 THE COURT: Mr. Phillips, you can call your next
3 witness.

4 MR. PHILLIPS: We have no further wit -- witnesses.
5 It'd just be the State -- should be just the State
6 witness left, Your Honor.

7 THE COURT: All right. Mr. Neubauer, are you ready
8 to proceed?

9 MR. NEUBAUER: Yes, Your Honor.

10 (Pause in proceedings.)

11 THE COURT: The State's witness.

12 MR. NEUBAUER: Yes, Your Honor.

13 Briefly the State would first call Mr. David Hayes.

14 THE COURT: All right. Mr. Hayes, where are you?

15 MR. HAYES: Right here, Your Honor.

16 THE COURT: Can you raise your right hand, sir.

17 (Whereupon, David Hayes was duly sworn by the
18 Court.)

19 THE COURT: Thank you, sir.

20 Your witness.

21 MR. NEUBAUER: Thank you, Your Honor.

22 DAVID HAYES,

23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. NEUBAUER:

1 Q. Good afternoon, Mr. Hayes.

2 A. Good afternoon.

3 Q. And we've spoken briefly, but how long have you been
4 practicing law, sir?

5 A. Since 2009.

6 Q. And how much of that has been in criminal law?

7 A. All of it.

8 Q. And you were appointed to represent Mr. Cartwright
9 after his prior counsel was relieved, correct?

10 A. No. Michael Routzong was appointed and at the time
11 our office would split into teams and I would sit second
12 chair with Mr. Routzong on trials.

13 Q. Yes, sir. So Mr. Routzong was the primary attorney
14 in this case and handled most of the trial?

15 A. That's correct.

16 Q. And your -- or I guess your involvement in this trial
17 was really limited to arguing the issue revol -- or
18 involving Dr. Benedetto, correct?

19 A. That's correct.

20 Q. And as far as the actual trial itself, beyond your
21 pre-trial motion to prevent Ms. Benedetto being qualified
22 and then the cross-examination of Ms. Benedetto, what were
23 your roles throughout the course of the trial?

24 A. I would sit between Mr. Routzong and Mr. Cartwright
25 and I would buffer so that Mr. Routzong could to pay

1 attention to what was going on and we could take notes and
2 I can answer his questions while we were in trial.

3 Q. And do you remember him ever raising an issue with a
4 different photo or the bedsheet being from a different bed
5 throughout the course of the trial?

6 A. Quite honestly, I don't remember a whole lot about
7 the trial. This was nine years ago and, unfortunately, I
8 -- I don't recall a whole lot about it.

9 Q. And Mr. Cartwright has alleged that you failed to
10 object to the Court applying an incorrect legal standard as
11 far as qualifying Ms. Benedetto as an expert. If we could
12 just kind of break that down piece by piece. Did you see
13 any issue -- well, first, you addressed her qualification
14 as an expert both pre-trial and during the trial, correct?

15 A. Yes. I -- I did a motion pre-trial and then I was
16 the one that was gonna cross-examine (transmission
17 interruption).

18 Q. I'm sorry. You cut out at the very end of that last
19 sentence, sir.

20 A. I was gonna be the one -- I did a motion pre-trial and
21 then I was also the one that was gonna cross-examine her on
22 the issue during the trial.

23 Q. Yes, sir. And do you remember exactly what your
24 argument was against her being qualified as an expert?

25 A. First, it was under 702. That the science wasn't

1 needed, that this was a he said/she said issue and that
2 there was nothing that Dr. Benedetto could come forward and
3 tell the jury that wasn't common sense already and that it
4 was an improper bolstering move by the solicitor's office.

5 Q. And that pre-trial motion was denied by Judge Early,
6 correct?

7 A. That's correct.

8 Q. And then you, again, during her qualification in trial
9 -- or in the course of the trial objected to her being
10 qualified for the same reason, correct?

11 A. I did.

12 Q. And you attempted to get into the validity of the
13 science while voir diring her about her qualifications,
14 correct?

15 A. I don't remember, but after reading the transcript,
16 yes, that's what it appears.

17 Q. And ultimately Judge Early determined that you could
18 only question her about her qualifications, not so much the
19 validity of the field?

20 A. That's correct.

21 Q. And did you feel that there was a need to object at
22 that point to his determination?

23 A. He instructed me and I did as I was instructed at that
24 point. You --

25 Q. And do you feel that you -- I'm sorry. I didn't mean

1 to cut you off there.

2 A. You were only gonna push back so much and I had
3 already made my objection and he gave me an instruction to
4 move on.

5 Q. Yes, sir. And do you feel if you had objected to
6 him limiting your voir dire that it would have made a
7 difference or you would have been able to proceed with that
8 line of questioning?

9 A. I have no idea.

10 Q. And you did specifically raise the issue with her
11 being qualified as a witness in -- or an expert witness in
12 the field of child sexual abuse dynamics?

13 A. Yes.

14 Q. And that was ultimately denied. He decided to qualify
15 her as an expert in that field despite the case law that
16 you cited?

17 A. Yes, sir.

18 Q. And you then proceeded to challenge in your
19 cross-examination not only her qualifications, but the
20 validity of the field itself and why did you feel that that
21 was necessary at that time?

22 A. Well, he -- he stopped me from doing it in -- in --
23 when I first made the motion. When I went to ask her the
24 questions about qualification and about the science, he
25 limited me so the only way to get it in was to do it

1 through cross-examination in front of the jury.

2 Q. And do you remember what your issue was with the field
3 at that time -- or the field that she was qualified as an
4 expert in?

5 A. I was aware of the issues that Bob Dudek was going
6 after in the Court of Appeals, was having an expert come in
7 and testify as a bolstering witness as to the credibility
8 of the victim, which is what it essentially ends up being.
9 So when this case -- I watched some of the original trial
10 and when we were appointed I knew it -- it was gonna be a
11 trial a second time. I contacted Bob Dudek and talked to
12 him and I believe it was January of that year Kromah came
13 out and Mr. Dudek had sent me information and gave me the
14 information about Kromah and I proceeded to attack it that
15 way so that he could continue to try to argue this and --
16 and narrow down the issues in the Court of Appeals.

17 Q. And ultimately despite that challenge, despite the
18 case law that you reviewed, did Mr. Early -- or not Mister,
19 did Judge Early agree with you or disagree?

20 A. No, he -- he -- he allowed it.

21 Q. And did you feel that there were any additional
22 objections you could have made during her qualification as
23 an expert at that time?

24 A. I -- I don't recall. I mean, I made the -- I made
25 objections as I saw them at the time.

1 Q. Yes, sir. And we'll go specifically to testimony from
2 Ms. Benedetto. This is in the second portion of the trial
3 transcript, page 61. She's asked --

4 MR. NEUBAUER: I apologize, Your Honor. I thought
5 I had the correct page.

6 BY MR. NEUBAUER:

7 Q. Is it typical for an abuser to have like a favorite
8 age and you objected to that question, correct?

9 A. I did.

10 Q. And do you remember what your objection was for?

11 A. I believe it was hearsay.

12 Q. And do you know why you --

13 A. No, I'm sorry. Leading.

14 Q. Leading.

15 A. Yes, sir.

16 Q. And do you know why you -- or you objected as a
17 leading question?

18 A. At the time in the middle of the trial, I heard that
19 there was something wrong and the question did appear to
20 me to be leading, going down a different path, and that was
21 the objection that came to mind.

22 Q. Did it ever occur to you at that time that it would
23 -- or you could have also objected as the -- or testimony
24 beyond the scope of her expertise?

25 A. I don't recall. Obviously I didn't according to the

1 record and I don't -- I don't recall.

2 Q. And your objection was ultimately overruled by the
3 Court, correct?

4 A. It was.

5 Q. Do you think if you'd made a -- this is, I guess,
6 asking your opinion, but do you think that expanding on
7 your objection and claiming it was beyond the scope, that
8 would have brought the Court to sustain your objection as
9 opposed to overruling it?

10 A. I -- I have no way of knowing that.

11 Q. Yes, sir.

12 MR. NEUBAUER: I beg the Court's indulgence
13 briefly, Your Honor.

14 THE COURT: Sure.

15 MR. NEUBAUER: At this point I have no further
16 questions.

17 THE COURT: All right. Mr. Phillips, any
18 cross-examination, sir?

19 MR. PHILLIPS: Yes, Your Honor.

20 THE COURT: Your witness.

21 MR. PHILLIPS: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. PHILLIPS:

24 Q. Good afternoon, Mr. Hayes. How are you?

25 A. Doing good.

1 Q. So in -- talking about your objection to Ms. Benedetto
2 that -- that was the State's expert witness and, of course,
3 was raised on appeal by Bob Dudek, I know you heard some
4 of the questions I was asking regarding that. Specifically
5 as to limiting your ability to voir dire in the presence of
6 the jury, you never made the objection that this needed to
7 occur in-camera, outside the presence of the jury, did you?

8 A. I don't recall if we had a sidebar and argument prior
9 or a meeting in chambers about the issue. I know that
10 when I did the motion and then when I was trying to voir
11 dire her, he limited me on what I could do. And if you've
12 ever been in front of Judge Early, you know there's a point
13 where you stop pushing back and the only way I could see to
14 get it in and to do it was to do it in cross-examination.

15 Q. Now as far as the qualification is concerned, are
16 you aware of State v. White, the -- basically the case
17 -- the opinion that walks through the analysis for
18 admitting nonscientific evidence or qualifying an expert
19 as in nonscientific -- from a nonscientific point of view?

20 A. I -- I don't recall if -- if I was aware of it at the
21 time or not.

22 Q. All right. And then the --

23 A. I'm sure --

24 Q. Go ahead.

25 A. The case that I recall, and I can't remember the name,

1 we've had multiple trials in South Carolina, but it was
2 about the foot impressions inside the tennis shoe and the
3 court laid out the -- the process.

4 Q. Understood. So between State versus Council, State
5 versus Taft, and State versus White, you couldn't --

6 A. Council.

7 Q. -- and so you didn't take into consideration to make
8 that argument of State versus White, admitting basically
9 expert testimony of a nonscientific nature? That wasn't
10 something that -- it wasn't a strategic decision not to
11 make that argument?

12 A. No. I -- I think I was actually trying to make that
13 argument in whole, but the way he limited me I wasn't able
14 to go down the second prong in my argument. One, that it
15 was a junk science and then, two, that it wasn't needed to
16 be presented to the jury because it wasn't an issue of
17 complexity that was needed to be explained.

18 Q. Right. So as far as the legal standard is concerned
19 -- remember he was qualified -- or she was qualified in
20 child sex abuse dynamics, you know, the legal standard for
21 the qualification, you said Judge Early limited you and
22 didn't allow you to put it on the record. Did you request
23 to proffer that argument?

24 A. I don't remember.

25 Q. Okay.

1 A. And it could -- and it could have been that he just
2 completely threw me off my game when he did that to me
3 and I was trying to figure out how I was gonna get these
4 questions out for the record. I just don't recall and --
5 and to be brutally honest, when the AG called me the other
6 day, I forgot I even did the motion. I just thought I sat
7 in the middle between the two. I didn't recall any of this
8 until I went and looked at the file yesterday.

9 Q. Did you have anything in your notes regarding State
10 verses White?

11 A. I don't recall State versus White, so I don't know. I
12 remember seeing Kromah and one more that was in that line
13 and then my notes and my drafted motion, the copies for it,
14 and then all my notes while we were in trial because there
15 was a question as to why we didn't Batson.

16 Q. Understood. So there -- there wasn't any specific
17 strategic decision on your part not to try to make those
18 arguments as far as, you know, the judge's improper legal
19 -- using an improper legal standard for qualification?

20 A. No.

21 Q. It wasn't a strategic decision to make that argument?

22 A. No. You know, I was -- my goal in doing this motion
23 was, one, to try to win it and keep her from getting on the
24 stand because I believe that was completely improper and
25 then, two, if I wasn't successful at the trial level to

1 give Mr. Dudek enough to be able to make an argument in the
2 Court of Appeals to continue his battle there.

3 Q. Now there was the discussion, I believe it was on
4 page 59, or the colloquy back and forth where the
5 prosecutor elicits basically -- basically a lead -- a
6 leading question that's overruled regarding for a, quote
7 unquote, typic -- typical abuser to have a favorite age.
8 Again, in retrospect, having -- you know, having time to
9 look at it in hindsight, would it be an argument that you
10 would have made that it was beyond the scope of her
11 expertise to make that determination even though it's a
12 leading question? Well, I guess it was overruled, but.

13 A. Well, I -- I still say it's a leading question and
14 Monday morning quarterbacking, looking back at it knowing
15 more about where she was going, may -- maybe I would have
16 made that objection. I -- I can't tell you. At the time
17 the leading is the one that came to mind and I wasn't -- at
18 this time I think this was the first case we tried with
19 this kind of expert, seeing that she was getting ready to
20 step outside of the scope, I -- I would have maybe made a
21 motion or an objection, but I can't tell you that I would
22 or wouldn't have. I don't know at that time.

23 Q. But now outside having -- you know, outside the heat
24 of the battle, having time to reflect on it and look at it,
25 would -- would you have made the objection that it was

1 outside the scope that she was qualified to --

2 A. Possibly. Yeah.

3 Q. Thank you. Was there any other pre-trial motions that
4 you were directly involved in or any other testimony in the
5 trial?

6 A. I don't recall actually taking the front and center on
7 any other issues.

8 MR. PHILLIPS: No further questions, Your Honor.

9 THE COURT: All right. Thank you.

10 Any redirect?

11 MR. NEUBAUER: Yes, Your Honor. Just very briefly.

12 REDIRECT EXAMINATION

13 BY MR. NEUBAUER:

14 Q. You stated your argument was centered on the new case
15 law that you received from Bob Dudek, State verse Kromah,
16 and just for clarity's sake for the Court, that is
17 401 S.C. 340 and 737 S.E.2d 490. Did you feel that this
18 was, I guess, the best case law that you could have cited
19 in support of your motion?

20 A. Yes, it -- it was the newest in the line. It -- like
21 I said, it came out in January, if I'm not mistaken, and
22 we were trying this, I believe, in April of the same year.

23 Q. And do you recall what the case of Kromah was in
24 regards to, kind of the --

25 A. What the gist of it is?

1 Q. Yes, sir.

2 A. They were having an expert, I can't remember which one
3 it was at the time, it might have been the Child Advocacy
4 Center person, come forward and testify and basically
5 saying yes, we believe that the kid's telling the truth,
6 which was bolstering the testimony.

7 Q. And did you feel that the argument was in line with
8 the argument that you were making to prevent Ms. Benedetto
9 from testifying as an expert?

10 A. Yes. Now -- now in Kromah, if I'm not mistaken, they
11 specifically said it, and when I made the motion here, I
12 believe Judge Early limited it and said as long as she
13 ain't saying that she believes them, then I'm gonna allow
14 it. It's been done in the past and we're gonna do it
15 today.

16 Q. And so you still feel that that was the best argument
17 that you could have made regarding her qualification as an
18 expert?

19 A. Yes.

20 Q. And as far as objections with Judge Early, you made a
21 comment, you only push so far with Judge Early. Could you
22 elaborate further on that?

23 A. He was very strict on how he ran the courtroom. Not
24 -- not a bad thing, not a good thing. It's you know at a
25 certain point where to stop and after being in front of him

1 for a while, I knew if I went another step I was gonna get
2 abolished in front of the -- the jury, and that was the bad
3 thing, too.

4 Q. So would you say that it was a strategic decision on
5 your part to stop pushing -- that you felt you preserved
6 your general issue and you knew that if you continued to
7 push this that you might get sandblasted in front of the
8 jury by Judge Early?

9 A. Yes. And I knew that if I waited until I got to
10 cross-examination I could still get the information that I
11 was seeking out and I had already been ruled against.

12 Q. And did you ultimately on cross-examination get out
13 the information that you were seeking?

14 A. I believe so.

15 MR. NEUBAUER: No further questions about this
16 issue.

17 THE COURT: All right. Anything further,
18 Mr. Phillips?

19 MR. PHILLIPS: Yes, Your Honor. Just briefly.

20 RECROSS-EXAMINATION

21 BY MR. PHILLIPS:

22 Q. And, again, I know there was the discussion of Kromah,
23 but with the specific issues that are addressed in Kromah,
24 it didn't go directly to the issue of qualification of a
25 nonscientific expert; is that right?

1 A. I haven't -- it's been a while since I've read Kromah
2 and I don't remember if that was a discussion in there or
3 not.

4 Q. And was that --

5 A. That, too, was another -- a whole other issue.

6 Q. And just to -- and, again, to make sure the record's
7 clear, the references to State versus White is -- the
8 398 S.C. 376, is the 2009 case of our Supreme Court;
9 reference to Council, the seminal case, is 335 S.C. 1,
10 1999, and, again, in arguing specifically as the correct
11 legal standard for the qualification of a nonscientific
12 expert.

13 And so, again, with Kromah, I know you haven't had
14 a chance necessarily -- or you can't necessarily recall
15 whether that addresses that specific issue, but that wasn't
16 part of your -- you didn't make a strategic decision not
17 to object on that basis, on an incorrect legal standard for
18 the qualification?

19 A. I don't recall. I just remember I was making the
20 motion and he cut me off and said you're not gonna go down
21 this path.

22 MR. PHILLIPS: No further questions, Your Honor.

23 THE COURT: All right. Thank you.

24 Thank you very much, sir. I appreciate your
25 testimony.

1 THE WITNESS: Thank you, Your Honor.

2 MR. PHILLIPS: Thank you.

3 (Witness excused.)

4 THE COURT: I tell you what. Let's take a -- let's
5 take a ten-minute break and we'll come back and you can
6 call your next witness then.

7 Is that all right with everybody?

8 MR. NEUBAUER: Yes, Your Honor. And I believe the
9 testimony of Michael Routzong will be rather lengthy. I
10 discussed with him the issues last night and it took a
11 few hours for us to go through. I just wanted to give
12 the Court kind of a heads-up.

13 THE COURT: Well, that's why we're gonna take a
14 little break before we start it. I kind of figured
15 that might be the case.

16 (Recess taken at 2:23 PM.)

17 (Back on the record at 2:36 PM.)

18 THE COURT: All right. Is Mr. Neubauer there?

19 MR. NEUBAUER: Yes, Your Honor.

20 THE COURT: Okay. Mr. Neubauer, are you ready
21 to proceed with your next witness, sir?

22 MR. NEUBAUER: Yes, Your Honor.

23 The State would call Mr. Routzong.

24 THE COURT: All right. Mr. Routzong, would you
25 please raise your right hand?

1 (Computer feedback.)

2 THE COURT: I'm getting some bad feedback from
3 somebody.

4 All right. Mr. -- Mr. Rout --

5 MR. NEUBAUER: I believe that Mr. Routzong is
6 logged in on his phone, as well as his computer, and
7 that may be causing a feedback loop.

8 THE COURT: All right. Hold on a second.

9 All right. Let me know if my IT specialist, also
10 known as my law clerk, can fix this.

11 (Pause in proceedings.)

12 THE COURT: Can you hear me, sir?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: Okay. Great. Can you raise your right
15 hand for me, sir?

16 THE WITNESS: Yes, sir.

17 (Whereupon, Michael Routzong was duly sworn by the
18 Court.)

19 THE COURT: All right. And would you please say
20 and spell your last name for me, sir.

21 THE WITNESS: Michael Routzong, R-O-U-T-Z-O-N-G.

22 THE COURT: Thank you, sir.

23 All right, Mr. Routzong.

24 Your witness, Attorney General.

25 MR. NEUBAUER: Yes, Your Honor. Thank you.

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MICHAEL ROUTZONG,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NEUBAUER:

Q. Good afternoon, Mr. Routzong. How are you doing
today?

A. Good afternoon, sir.

Q. Just briefly to start with, how long have you been
practicing law, sir?

A. Since 2004, 2005.

Q. And what percentage of that practice is criminal law?

A. All of it.

Q. Yes, sir. And you were ultimately appointed to
represent Mr. Cartwright, correct?

A. Yes, sir.

Q. Do you remember when you were appointed?

A. It would have been -- it would have been shortly after
Mr. Harte was relieved. I'm not sure when. Normally, if
-- I do not work in this office anymore, I work in Sumter,
and I have printed off my notes, but that's one of the
things I didn't go seek out, but I probably should have.
I should have anticipated that, but it would have been
shortly after Mr. Harte was relieved.

Q. Yes, sir. And do you recall how the charges against
Mr. Cartwright arose or how he came to be arrested for

1 this?

2 A. I think they disclosed something to DS -- one of the
3 -- one of the children disclosed something to DSS and I
4 think it -- it kind of started from there, but that was
5 early on. I think that charge probably was dismissed and
6 then there was other disclosures.

7 Q. And ultimately he had one child and two stepchildren
8 accused him of criminal sexual conduct, correct?

9 A. Yes, sir.

10 Q. And did you meet with Mr. Cartwright to discuss the
11 charges against him?

12 A. Yes, sir. I agree with Mr. Cartwright, and that's
13 what my notes reflect, about three to four times, then
14 there was a phone call. That's all I have in my notes,
15 including the computer, and what I can find in my
16 handwritten notes. It says that I met with him on a
17 couple of occasions for several hours is what my notes say.

18 Q. And did you -- during your conversations with him,
19 would you guys have gone over discovery in this case?

20 A. I believe we did, yes, sir.

21 Q. Do you remember really all that -- what was in the
22 discovery file or what the State's evidence was in this
23 case?

24 A. Well, the -- the State's evidence would be the
25 testimony of the children. There was the suicide. They

1 alleged that was -- that was evidence of guilt. There
2 was DNA evidence and there were some pictures that were
3 entered into evidence, but the problem in the case against
4 Mr. Cartwright would have been the testimony of his
5 children.

6 Q. Yes, sir. And briefly regarding those photos, do
7 you remember having an opportunity to review those with
8 Mr. Cartwright prior to the trial?

9 A. I do not. It would have come on a disk and I don't --
10 I don't specifically remember. I'm a little bit surprised
11 that he testified that I didn't because that would be
12 unusual. The evidence, I think, came on a disk. I -- I
13 had the ability to bring my computer and show him all the
14 evidence, that's what I normally would do, but I don't see
15 anything reflected in my notes one way or the other and
16 would be unusual for me not to do that.

17 Q. And in your normal course of practice, you would
18 review the entire discovery file with a client prior to
19 pleaing or going to trial?

20 A. That would be normal, yes, sir.

21 Q. And ultimately he'd been tried prior to your
22 representation and that was a -- declared a mistrial. Was
23 there any talk of a plea negotiation at that point or did
24 you guys focus on a trial strategy for a retrial?

25 A. The only plea offer I -- I saw would have been one

1 given to Barry Thompson, who's another attorney in our --
2 in this office, and I think that was probably prior to
3 Mr. -- Mr. Cartwright's trial with Mr. Cartwright -- I'm
4 sorry, with Mr. Harte. That's the only thing I -- I saw
5 and I don't recall any -- I don't recall -- I don't recall
6 Mr. Cartwright ever wanting to have a plea offer or enter
7 into plea negotiations. I don't think that -- my
8 recollection is that was never -- never in -- in his
9 desires.

10 Q. So during your meetings with Mr. Cartwright, did he --
11 or did you discuss his version of the facts of this case
12 and his theory as to how these charges came about?

13 A. Yes, sir. We discussed, you know, these kinds of
14 cases really come down to a simple question. I think
15 everybody that defends this would agree that if it didn't
16 happen, why are they lying, and that is probably always the
17 theory. If somebody says it happened, there's seldom or
18 frequently not very much evidence forensically, physical
19 evidence, that kind of thing. I mean, there's not usually
20 witnesses, so it always come down to who's lying. Why
21 would they lie.

22 Q. And did Mr. Cartwright develop an opinion of why these
23 witnesses may have been lying?

24 A. Yes, sir. I think that's reflected in the trial
25 strategy. There were a lot of reasons. Yeah, I would have

1 only learned from Mr. Cartwright as to why his children
2 were upset with him, one of which, arguably, was money;
3 one of which was the reporting to the police about a -- a
4 photograph that Mr. Cartwright uncovered on the Internet.
5 He reported to police and subsequently I think he did an
6 interview with a television station if I'm not -- in
7 Augusta, Georgia, I think is what -- where that was at.
8 And then there was an -- an issue of one of the children --
9 I think Mr. Cartwright testified to this a few moments ago,
10 there was an issue of an older man who subsequently --
11 subsequently became his -- his -- his child's husband, but
12 he has to register as a sex offender, I think he went to
13 prison, so there's a host of reasons potentially why his
14 children might be fibbing on Mr. Carter -- Cartwright.
15 Excuse me.

16 Q. And did Mr. Cartwright ever provide you with names of
17 any witnesses who might have been beneficial to him in this
18 case?

19 A. I don't specifically remember that and there's a
20 couple of things I can say about that. I was a little bit
21 surprised to hear the number of names. I don't -- I think
22 I counted maybe six people. I didn't write the names down,
23 but there were probably six people he referenced. I do not
24 recall him saying any of those, and I don't have any notes
25 that I see on any of those people, so I -- I hesitate to

1 agree with him that he told me the names of those people.
2 On the other hand, there may be -- were he to have told me,
3 it looks like if you put his reputation into evidence or
4 you tell people to talk about his reputation, and it looks
5 to me like he probably has some prior criminal convictions
6 that would have been in front of a jury, and I noticed that
7 -- I think one of them, a grand larceny, might have been
8 able to come in any way. I -- I looked at the transcript
9 again. I think the information -- the grand larceny, that
10 definitely would have come in and would have been a good
11 reason to not put his reputation in as evidence and call
12 those kind of witnesses.

13 Q. So the fact that there was that criminal record that
14 could have been brought in, I guess, to oppose a good
15 reputation or good character evidence or witnesses, would
16 that have been a reason for you not to pursue character
17 witnesses?

18 A. To be exact, my testimony is I don't recall
19 specifically, but the fact that he had those in there, only
20 one of which would have been -- I think the other one was
21 a -- I want to be exact. I'll look it up. I think I wrote
22 it down actually. A burglary and a grand larceny and they
23 were in the eighties. The -- the grand larceny probably
24 could have come in at any time, but certainly the burglary
25 was well outside the timeframe permitted by the rule. We

1 may have been asking for trouble and I would -- I would
2 probably tell Mr. Cartwright today if I represented him
3 and we were going to trial, that that would definitely be
4 a danger in calling reputation evidence witnesses.

5 Q. And if Mr. Cartwright had provided you with the names
6 of witnesses, be it character witnesses or other witnesses
7 he wanted you to call, would you have pursued those or at
8 least spoken with those witnesses to see what they would
9 have said or how they could have been useful in this case?

10 A. I certainly would today. I can't really -- it would
11 be -- it would not be accurate for me to testify what I had
12 done nine years ago if I had talked to them. I certainly
13 would -- I would talk to people. I really have my doubts
14 whether I would have put -- I would have put people like
15 that in there. I think Mr. Cartwright did a pretty good
16 job in his -- in his direct examination of explaining to
17 him his commit -- explaining to the jury his commitment to
18 his children, for example, and -- and I think he testified
19 today that he would -- he drove a great distance when he
20 found that one of his children could be in danger of an
21 unfortunate relationship. He drove a great deal of time.
22 I think that came out in his direct examination, if I
23 recall correctly. I just don't -- I think I would probably
24 encourage him not to call any reputation witnesses today,
25 but it would be speculation for me to -- or would not be

1 accurate for me to testify what I would have done nine
2 years ago.

3 Q. And in your normal practice, if you're provided with
4 the names of witnesses, would you speak with them to see
5 what information they have or how they could be beneficial
6 to a case that you're handling?

7 A. I would like -- I'd like to think today I'm very good
8 at investigating cases. I have the benefit of having very
9 good investigators that work with me as I did here in the
10 office in Aiken and if I had anything that needed to be
11 investigated by professional investigators, I certainly had
12 that ability.

13 Q. Now did you and Mr. Cartwright discuss any possible
14 legal defenses that could have been raised at trial?

15 A. Well, as I said, Mr. Cartwright's case, as it is
16 frequently true in a lot of these cases, the defense is
17 trying to -- trying to persuade or entice the jury not to
18 believe the people that are saying these very bad things
19 about Mr. Cartwright. So the answer to the question is the
20 -- the defense is trying to explain to people -- to the
21 jury why these accusers might be lying.

22 Q. And was that ultimately your strategy during this
23 trial?

24 A. Yes, sir.

25 Q. Did you convey that to Mr. Cartwright while you guys

1 were preparing for this trial?

2 A. I dare say I -- I did because I wouldn't have known
3 what the -- what to ask or -- or have a theory as to why
4 they're lying without Mr. Cartwright's help.

5 Q. And you briefly discussed the State's evidence.
6 There's an allegation raised by Mr. Cartwright that you
7 failed to request a Jackson versus Denno hearing to
8 determine whether he voluntarily consented to have a -- a
9 buccal swab performed to obtain his DNA. Did you feel that
10 you needed a Denno hearing for that issue?

11 A. As best as I can recall, sir, that -- that is kind of
12 falling in the -- in the -- in some ways. I know it's kind
13 of a normal course, but -- and I have argued this many
14 times in the -- in the courtroom, that I think anybody --
15 any time the State seeks to get a -- a DNA sample from the
16 defendant that it's appropriate for a Schmerber hearing to
17 be held, and the reason I think that is, it's -- you know,
18 for one thing, it's the law, and -- at least that's the
19 case law, and I think it prevents tampering with evidence.
20 That -- that really is the -- the gravamen of the issue.
21 Could they take somebody's DNA and put it on something
22 because they really believe that they're not -- that that
23 person's guilty and they want to make sure there's DNA on
24 the appropriate objects. I haven't persuaded any -- any
25 court yet to agree with me on that it seems --

1 Q. And --

2 A. -- but in this particular case I don't think that
3 Mr. Cartwright, as he testified earlier, had any -- any
4 qualms about whose DNA was on that and he offered an
5 explanation. He said he --

6 Q. At any point did Mr. Cartwright deny to you that his
7 DNA was on the bedsheet that was obtained?

8 A. I don't recall him ever denying that.

9 Q. Did he ever argue that his semen wasn't on the
10 bedsheets?

11 A. I don't recall him ever arguing that. I think he's
12 been very forthcoming that it was his and he offered us an
13 explanation.

14 Q. So would you have felt a need to request or hire a DNA
15 expert to analyze the bedsheet or the semen for any DNA
16 that was found on the bedsheets?

17 A. At that time I did not, no, sir.

18 Q. And, additionally, if he denied that he -- or he
19 admitted that his DNA was on the sheets, did you feel
20 a need to further investigate SLED and obtain all
21 procedural documents from SLED such as policy, procedure,
22 qualifications, lab bench notes and the overall testing
23 of the semen stain from the bedsheets?

24 A. No, sir, I didn't see any need for that.

25 Q. And, additionally, did you feel there was any need for

1 any expert witnesses to be hired for Mr. Cartwright in this
2 case?

3 A. I'm not aware of any expert that I would have needed.
4 The defense in this case was really based on the things
5 that Mr. Cartwright told me, the -- the theories about why
6 they would be lying.

7 Q. And Mr. Cartwright has alleged you failed to hire
8 an expert witness to conduct an independent review of
9 forensic evidence presented by the State and testify in
10 rebuttal the State's evidence, specifically regarding
11 electronic evidence seized by the police. Do you have any
12 memory of electronic evidence seized by the police and why
13 an expert would have been needed?

14 A. Excuse me. No, that's kind of surprising. I don't --
15 I don't recall -- I don't recall -- I don't recall whether
16 electronic devices were seized.

17 Q. And Mr. Cartwright in his testimony made reference to
18 [REDACTED] and [REDACTED], I guess, conduct and behavior on the
19 Internet. I believe it's in regard to a -- a photograph
20 that he believed he found of [REDACTED]. Did you feel any need
21 for an expert witness to analyze the photograph that he's
22 referenced?

23 A. Okay. Now there's a couple of things I can say about
24 that. The first thing probably that's worth noting is
25 whether or not it is, in fact, the people that he thought

1 it was. He went to the police and he went to -- and he
2 spoke to a television station I think it was in Augusta.
3 He caused a -- and I'm not -- I'm not saying that
4 Mr. Cartwright -- I think -- I'm not saying that he did
5 wrong by doing these things. I'm not alleging that at all.
6 I think that it -- it actually goes towards something good
7 to be said about Mr. Cartwright, that he was very careful
8 and very proactive about protecting his kids arguably, but
9 whether it was them on the picture or it's not on the
10 picture, the -- the point would be that was a source of
11 immense embarrassment arguably to the persons that were
12 involved and I dare say it can be said that if it wasn't
13 them on there, then they should be even more irritated,
14 and they -- the testimony was, I believe, that there was --
15 it was not them. It's one thing to be accused correctly.
16 That's sometimes irritating because you got caught. If
17 you get -- if you get accused falsely, I dare say that
18 engenders more -- or could engender even more anger. So I
19 don't really feel like it was necessary to have somebody
20 come and say yes, I know this person and that's them right
21 there.

22 Q. So you didn't feel any need to further pursue the
23 photograph and make a determination of where it came from
24 to use in his defense?

25 A. No, sir. The -- the -- the point is he -- he caused

1 quite a sensation that arguably was embarrassing to the
2 person that he said that was on that photograph.

3 Q. And did you bring this issue up in front of the jury
4 as a possible reason for his child to be upset with him?

5 A. I believe I did. I think I -- I think I addressed
6 that with him and I addressed that in the closing argument,
7 I believe.

8 Q. And he -- Mr. Cartwright has raised issues with
9 one victim, [REDACTED] being involved in a possible drug
10 investigation. Do you remember speaking with
11 Mr. Cartwright about this?

12 A. I'm pretty sure I would have. I don't have any notes
13 that reflect it. You know, my notes really say some things
14 like I discussed this with the defendant for several hours
15 and, you know -- you know, I have reviewed the transcript
16 and I noticed that -- that Mr. Harte asked about that and I
17 think I addressed it as well. I think that -- I think that
18 could be interesting maybe in the sense of -- of impeaching
19 the witness a little bit because of the drugs, but to
20 actually -- to actually -- I probably did not believe that
21 the State would have made a deal with that person in
22 exchange for her testimony. I don't think she was ever
23 actually charged with anything, one, so I doubt that --
24 that's not how the narcotics folks work. They're not gonna
25 really be interested in Mr. Cartwright's issues, they're

1 gonna be interested more in people that deal with drugs and
2 I know it -- it would not necessarily be confined to the
3 narcotics department, but I -- I just don't think it -- I
4 would find it hard to believe that any deal was struck with
5 any of the police departments in a -- in an effort to -- to
6 -- to ensnare Mr. Cartwright. I just don't think that
7 happened.

8 So I -- I did not investigate that, whether or not
9 there was a deal, I think that's true, but I don't think
10 I would have. I just don't believe that's -- I think it's
11 -- I think it's -- the issue was he actually made the
12 allegation that that person was on drugs and I think she
13 subsequently denied it.

14 Q. And you raised that allegation by Mr. Cartwright to
15 [REDACTED] as far as a possible reason why she could be
16 fabricating a story, correct?

17 A. I think I would have. I should have read my closing
18 arguments a little bit. That would probably have been the
19 way to do that, but I'm pretty sure that's -- that would
20 have been the -- I don't know. That might have been -- I'm
21 not sure. I'd have to look back at the transcript to tell
22 you the truth because that might have been so tenuous I may
23 -- may not have addressed that in the argument. Like I
24 said, if I didn't, I should have no doubt because that
25 would have been a reason certainly to -- or that would have

1 fit our theory that those folks were upset because he was
2 contacting law enforcement at least twice about two
3 different issues.

4 Q. Yes, sir. And you just made reference to a --
5 attempting to impeach witnesses. Do you remember trying
6 to impeach witnesses based on prior testimony?

7 A. I don't recall that at all. That -- I -- I don't
8 recall any issues as far as that goes. I would dare say
9 I did not. To answer your question directly, no, I don't
10 think I did, but I don't recall any issues.

11 In my closing argument, I -- I -- I told the -- the
12 jury that [REDACTED] testified that she was called into the
13 sheriff's office because her ex-boyfriend was involved with
14 drugs. She says it wasn't me, they just wanted to know
15 what I thought, and I went on to say that wasn't reasonable
16 and made an argument to the jury. That's probably the
17 extent of my presentation to the jury.

18 MR. NEUBAUER: I beg the Court's indulgence, Your
19 Honor.

20 BY MR. NEUBAUER:

21 Q. In the trial transcript, the first portion from
22 April 15th and 16th, I draw your attention to page 130 and
23 131. If you could review that to yourself and tell me if
24 that helps refresh your memory regarding --

25 A. This is Mr. -- this is Mr. Cartwright's examination?

1 Q. This is your examination of Ms. [REDACTED], [REDACTED].

2 A. It looks like I asked her, You don't recall that you
3 testified in your prior hearing that you were involved with
4 drugs? I was talking to them about drugs and the things
5 that I knew that was going on with my ex-boyfriend. But
6 you actually testified in the other proceeding that you
7 were involved -- and then the Court -- the Court advises me
8 to follow the rule and -- and refresh her memory with the
9 -- the transcript I think is where we were with that.

10 Q. Yes, sir. And Mr. Cartwright's raised an allegation
11 of failure to prepare by failing to have a copy of the
12 transcript available. Do you remember whether or not you
13 had a copy of the transcript available to impeach
14 witnesses?

15 A. Well, I noticed in my file -- I don't specifically
16 remember now, but I looked in my file and under different
17 people's name, I had a -- for example, I think if I pull
18 out -- if I pull out [REDACTED] -- [REDACTED] file, among other
19 things that I have in there is a copy -- a partial copy of
20 a transcript from the prior trial. So I dare say based on
21 my -- what I have in the box here and in the various files,
22 I did have a copy of the transcript.

23 Q. So -- so you ultimately did not succeed in impeaching
24 the witnesses -- or may not have succeeded in impeaching
25 the witnesses' testimony with the transcript of the prior

1 trial, you had obtained at a minimum portions of the
2 transcript to use to show contradictory statements,
3 correct?

4 A. It looks like I -- it looks like I at least began to
5 do that. I don't know how successful I was, but at least I
6 -- I began to do that when I cross-examined [REDACTED].
7 And I think -- and I looked through the file earlier and I
8 did find a whole transcript from the -- the Harte trial,
9 so probably what I did is I -- when I came to the various
10 people, I made copies of their testimony and put it in the
11 various files and -- and wrote that person's name on it.
12 That appears to be what I did.

13 Q. Yes, sir. And you briefly discussed -- did you have
14 an overall theory or strategy for this case?

15 A. Yes, sir. As succinctly as I could put it, the -- the
16 people that are saying that Mr. Cartwright did these things
17 and why.

18 Q. And you and Mr. Cartwright discussed this prior to
19 trial, correct?

20 A. I -- I don't -- I -- I -- I very much believe we -- we
21 discussed everything. I wouldn't have known what to say
22 but for the fact that I -- I spoke with him.

23 Q. And you ultimately proceeded in trial to use this
24 strategy of knowing why he thought the victim may have a
25 reason to lie or fabricate a story?

1 A. That was the strategy, yes, sir.

2 Q. Now regarding the indictment, Mr. Cartwright's raised
3 issue with failing to move to quash the indictments due to
4 them being vague or overbroad. Did you see an issue with
5 the indictments?

6 A. No, sir. Frankly, if I had been prosecuting this
7 case, I probably would have done it exactly like the State
8 did. Once again, we have a -- a situation here where
9 probably young children are saying that events happened
10 and my experience thus far, and I'm sure the Court and
11 everybody here has experienced it, children don't tend to
12 -- to write things down in a diary, especially young
13 children, so you're dealing with -- with relatively broad
14 timeframes. So she said -- I think a lot of the testimony
15 is this happened when I was five years old, six years old,
16 seven years old, so the State I think wisely based their
17 indictments on various ages. So it would be the birthday
18 -- I think it was the birthday of a child starting, let's
19 say, the fifth year, so -- so now you're five years old, up
20 until your sixth birthday because that's how the children
21 remembered things. They didn't have specific dates, they
22 didn't have -- I don't really think they even had -- a lot
23 of times you can expect children to say things like it
24 happened at Christmas or it happened when I was in school,
25 so you can narrow it down a bit, but in this case they --

1 they said it happened when they were a certain age and I
2 think if I had prosecuted it, I would have done exactly
3 what the State did.

4 Q. And do you remember if the witnesses indicated that
5 it happened only on -- like it was limited to one time
6 throughout a certain age?

7 A. My recollection after reviewing the -- this a little
8 bit, they were -- that was another thing that's probably
9 not plausible, but they said it happened many times,
10 sometimes in the same day, so to address the alibi issue
11 was just one of the -- the problems. I don't -- I don't
12 think -- it is my recollection that Mr. Cartwright never
13 gave me an alibi, an alibi being I was with this person,
14 they had my eyes on -- their eyes on me and I couldn't have
15 done this. I don't recall Mr. Cartwright ever giving me
16 an alibi, nor did I expect him to be able to because they
17 were alleging rather nonspecific dates just that -- that
18 had just occurred during the time period when they were a
19 certain age, so I don't think an alibi would have been
20 possible based on what I -- I recall in this case.

21 Q. And just briefly going back to the indictments, do
22 you remember if each indictment was -- or do you remember
23 the amount of time that each indictment was limited to?

24 A. Some of them -- they're different -- they're
25 different dates, I believe, based on different birthdays,

1 but it's October 17, 2000, to October 16, 2001, so you're
2 encompassing a specific discrete age.

3 Q. So would it be accurate in saying that each in --
4 each indictment was limited to only one year, not a -- not
5 multiple years?

6 A. That's correct. One year.

7 Q. And -- and so based on that and the case law at the
8 time, you did not feel a need to object for the indictments
9 being overbroad or vague?

10 A. Well, the answer to your question is no. You never --
11 one never likes them to be that broad if you're a defense
12 attorney, but I don't think there was an argument to be
13 made that it was overly broad.

14 Q. Yes, sir. And regarding the possible pretrial
15 issues, do you remember stipulating that a witness, Buffy
16 Cartwright, was unavailable to testify at the second trial?

17 A. I do.

18 Q. Do you remember Ms. Cartwright's condition at the time
19 of the second trial?

20 A. I believe she -- she testified at the earlier trial
21 and I think there was a letter that was subsequently
22 stipulated to that she had Stage 4 cancer and she was not
23 doing well at all. Lung cancer.

24 Q. And -- and ultimately you agreed that her prior
25 testimony could be introduced instead of her testifying

1 again. Do you remember why you would have agreed to that?

2 A. I think there were things in there -- there's two --
3 probably two reasons. I don't think it would have done any
4 good to object to it because I think she literally was not
5 available under 804(a)(4). I mean, she was -- the evidence
6 showed that she was seriously ill. She would not have been
7 able to be there and so the judge would have let in her
8 testimony any way. She was cross-examined, so they were
9 under oath, so there's pretty good guarantees that her
10 testimony was -- that -- that the rules of evidence and
11 that -- those issues had been complied with and I didn't
12 have no reason to believe that she would have testified to
13 anything else. I think she would have been consistent with
14 her prior testimony and I think there were some things in
15 there that were helpful. I think there were a lot of
16 things in there that were not helpful, but certainly there
17 were things in there that were helpful.

18 Q. Would that have played into why you chose to not
19 require her to testify again?

20 A. Yes, sir. I think that pretty much sums it up.

21 Q. And you did not move to sequester the witnesses in
22 this case, correct?

23 A. No, sir. I don't recall doing that. I -- I dare say
24 I did not. I think that's in the transcript. I did not do
25 that.

1 Q. And why would you not have moved to sequester the
2 witnesses in this case?

3 A. I don't -- I can tell you probably why. I don't know
4 that I can answer that question specifically, but I think
5 they were -- they'd already been through a trial. I'm
6 pretty sure everybody knew what everybody was gonna testify
7 to. They're -- they're really all discrete testimonies.
8 They're not really testimonies that are connected, I don't
9 think, one to the other. There -- there is a -- kind of
10 a pattern perhaps of some of the allegations. I don't
11 know that I would say they were unique. They might be
12 somewhat unique, but I don't think there was any reason to
13 sequester the -- the witnesses and -- and, frankly, the
14 main witnesses were all victims and I dare say the Court
15 probably would not have sequestered the -- the victims.
16 They have a right to be at the trial.

17 Q. Yes, sir. Now you also did not move to sever the
18 charges from different victims; is that correct?

19 A. That's correct.

20 Q. Do you feel that you could have moved to sequester the
21 victims -- or sequester -- I apologize -- move to sever the
22 charges relating to each victim?

23 A. I absolutely believe I could have moved to do that.

24 Q. Do you know why you chose not to?

25 A. I don't know that I ever -- I, frankly, don't know

1 that I ever considered doing it. If I look back now on why
2 I wouldn't have done it, there are reasons based on the
3 somewhat unique nature of some of these instances to -- to
4 explain to the Court there were -- one can only commit
5 certain kinds of -- I mean, there's only a discrete number
6 of possibilities that a person can commit sexual crimes
7 against somebody else, I guess, there's just a few ways
8 of doing it, but some of them involved specifically issues
9 of maybe laying on the back and -- and just humping the
10 person. I -- I believe that was the word they used.
11 Humping. If somebody commits an -- or if somebody coerces
12 or forces somebody to do oral sex, that's not particularly
13 unique. It is what it is. There's not that many
14 possibilities. I guess the issue I'm -- or the issue I'm
15 getting to, would they have been able to Lyle in some of
16 these as bad acts? I don't know the answer to that.
17 That's a possibility. I don't -- frankly, I do not
18 remember actually considering severing these -- these
19 cases.

20 Q. Yes, sir. And there's a few allegations regarding
21 the selection of the jury in this case and we can start --
22 initially you -- Applicant alleges that you failed to move
23 to quash the jury panel through a Batson motion where the
24 State imposed a statutory -- or only used two statutory
25 strikes and both were used on white females. Do you feel

1 that you wanted or needed to make a Batson charge in this
2 case?

3 A. I did not feel any charge was necessary. I think
4 the -- based on the -- the jury pool, I think it was -- it
5 was a good jury. It's unfortunate they -- that they came
6 back with a guilty verdict. I think Mr. Hayes actually
7 refreshed my memory to a certain degree yesterday. He
8 said one of them -- one of those people had a criminal
9 record I believe he said and he said it would have been
10 likely that we would have struck the other one and I -- I
11 think it was because that person had a connection to law
12 enforcement in -- in I want to say Wagener, South Carolina.
13 So, you know, if that's the case, it's not unreasonable
14 for the State to strike somebody that had even a minor
15 criminal record because they might have a bad impression
16 of the State and I don't see how Mr. Cartwright was harmed
17 if we would have struck the other person anyway because
18 they had a connection to law enforcement.

19 Q. Yes, sir. And there were questions that were asked
20 during voir dire and at multiple times witnesses -- or not
21 witnesses, but potential jurors came and spoke with Judge
22 Early about why, one, the question related to them or how
23 it may affect their ability to proceed on this jury. Do
24 you remember those instances happening?

25 A. Not specifically, no, sir.

1 Q. And --

2 MR. NEUBAUER: I beg the Court's indulgence, Your
3 Honor.

4 BY MR. NEUBAUER:

5 Q. We can look at the first half the trial transcript,
6 page 30, lines 1 through -- actually begins on page 29,
7 line 22 through page 30, line 13. If you could review
8 that to yourself. This is one of the instances that
9 Mr. Cartwright has raised issue with.

10 A. Is this in regard to the fact that the -- the sidebar
11 occurred and there's no record of it?

12 Q. Not this one, sir. This is regarding a juror who knew
13 a member of the public defender's office.

14 A. Oh. Yeah, that -- that was our circuit public
15 defender, Mr. Gibbons, that she knew. I recall that now.

16 Q. And Mr. Cartwright has alleged that you failed to move
17 the Court to conduct follow-up voir dire for -- to find out
18 if the juror could be fair and impartial. Do you recall
19 whether the juror -- potential juror indicated they could
20 be fair and impartial?

21 A. The Court said, Okay. The fact that you know
22 Mr. Gibbons, who happens to work in the public defender's
23 office right now, would that in any way preclude or keep
24 you from being fair and impartial in the trial of the case?
25 The juror said no, sir.

1 Q. And were -- from reading that, do you recall if you
2 were satisfied with that answer?

3 A. I -- frankly, I -- I most likely thought it would be
4 a good thing. It's rare that we get to see people on
5 the jury that -- that actually know folks in the public
6 defender's office and certainly it wouldn't be usually a
7 defendant. So, no, I -- I don't think I would have been
8 shocked at the answer that she gave. I would have -- I
9 think it was perfectly reasonable to accept what she said.

10 Q. Yes, sir. Additionally --

11 MR. NEUBAUER: I beg the Court's indulgence.

12 BY MR. NEUBAUER:

13 Q. One of the allegations is failed -- counsel failed to
14 conduct individual voir dire when the trial court indicated
15 that several jurors approached him regarding similar types
16 of behavior and --

17 MR. NEUBAUER: I beg the Court's indulgence.

18 BY MR. NEUBAUER:

19 Q. This would be, I believe, the first portion of the
20 transcript, page 41.

21 A. I'm looking at it now.

22 Q. Line 9 through 15.

23 A. Yes, sir.

24 Q. Do you remember any of these conversations regarding
25 jurors telling Judge Early that they had -- the previous

1 question was, Do I have any members of the jury panel who
2 have been a victim or subject to similar types of behavior,
3 sexual misconduct or abuse from the hands of someone? Do
4 you remember discussions with potential jurors where they
5 indicated they had been the victim of or were familiar with
6 someone who was the victim of sexual misconduct?

7 THE COURT: Let's hold off one second.

8 Mr. Phillips, is your client still there?

9 MR. PHILLIPS: I'm checking. It says that he's got
10 low bandwidth, and he's on mute, so.

11 Mr. Cartwright?

12 THE COURT: Here, I can -- let's see. Let me see.

13 MR. PHILLIPS: I thought it was gonna pop back up,
14 but it -- it did not.

15 THE COURT: All right. Well, I'm trying to --
16 Monica?

17 All right. I -- I tried to un -- unmute him and my
18 assistant tells me that he's not processing.

19 MR. PHILLIPS: The --

20 THE COURT: It's not us.

21 MR. PHILLIPS: -- low bandwidth symbol is gone.

22 You know, I don't know if it's an issue where they need
23 to log out and log back in or whether they can even hear
24 us. And I believe they're out of the room now.

25 THE COURT: Well, all we can do is wait and see if

1 he pops back up and re-add him to the meeting, but -- I
2 mean, we don't have any numbers to the jail or anything
3 like that, so.

4 MR. NEUBAUER: Yes, Your Honor. And I've spoken
5 with Ms. Jameson. She's indicated that she will reach
6 out to SCDC to see if we can determine what the issue
7 is at this point.

8 THE COURT: All right. Well, then -- then I'm --
9 we'll just be at ease for a minute and see if we can get
10 him back on there, okay, folks?

11 MR. NEUBAUER: Thank you.

12 MR. PHILLIPS: Yes, Your Honor.

13 (Pause in proceedings.)

14 THE COURT: All right. I'm informed that they're
15 on, but there's no video or audio capabilities so we
16 cannot make them a panelist.

17 MS. JAMESON: I will call the institution yet again.
18 I'll update everyone after I get off the phone with them.
19 Thanks. Sorry.

20 THE COURT: Thank you.

21 (Pause in proceedings.)

22 THE COURT: Mr. Cartwright, are you there?

23 Mr. Cartwright?

24 All right. For whatever reason, folks, it won't
25 allow me to make him a panelist. Wait a second though.

1 All right. For some reason -- explain the dynamics
2 here.

3 LAW CLERK: It will not allow me to make them a
4 panelist. Our AA's still trying. I see there's three
5 people. If that doesn't work, a private WebEx link will
6 allow me to just have them come in and out without the
7 making a panelist issue. Sometimes that is easier.

8 (Pause in proceedings.)

9 THE COURT: Yes, sir. Because I want to make sure
10 that you're present, that you can be heard, sir, and that
11 you can hear everything that has transpired, all right,
12 sir?

13 THE APPLICANT: Yes, sir. And I surely appreciate
14 it.

15 THE COURT: Yes, sir.

16 All right. And so, Mr. Attorney General, are you
17 ready to proceed? This -- you were still examining
18 Mr. Rout -- Routzong.

19 MR. NEUBAUER: Yes, Your Honor. And I believe we
20 were discussing issues with voir dire during the jury
21 selection process.

22 THE COURT: Right.

23 BY MR. NEUBAUER:

24 Q. Now I referenced page 41 of the trial transcript,
25 line 9 through 15. Do you recall jurors coming up to

1 speak to Judge Early regarding members -- or being a victim
2 of sexual misconduct or abuse at the hands of someone else?

3 A. I -- I reviewed the transcript and I -- I know exactly
4 what you're referring to, yes, sir.

5 Q. Yes, sir. And did you feel that there was a need to
6 have these conversations conducted on the record?

7 A. I am surprised that it's -- that it's not on the
8 record because normally all of these are conducted right
9 beside the court reporter and I was not aware that she
10 wasn't putting all of this into the record. It's always
11 conducted -- here in Aiken it's always conducted when the
12 judge steps down from the bench, he stands beside the court
13 reporter, the attorneys gather around and we listen to what
14 the person is telling the judge.

15 Q. And do you recall that happening in this case?

16 A. It is a sidebar. Obviously I can't recall
17 specifically every -- each instance, but they always have
18 the same pattern. I am surprised it wasn't on the record.
19 I would have -- I would have thought it was on -- it would
20 have been on the record, but I do know that every time
21 somebody comes up for a sidebar, I leave my seat as the --
22 as the solicitor does, and we go up there and we listen to
23 the conversation with the judge.

24 Q. So you would have been a party to these conversations
25 between potential jurors and Judge Early?

1 A. Yes, sir.

2 Q. And if you knew that these conversations were not a
3 part of the record at that time, would you have requested
4 that they be part of the record?

5 A. Probably not unless I heard something. These
6 conversations are normally things that the -- the -- every
7 -- every judge I've ever been -- done a trial in front of
8 does the same thing. They will ask the jury if there's
9 anything they -- that they don't want to discuss openly,
10 they'll ask them to come forward and the judge will hear
11 them. Normally it will be things like -- it can be
12 anything from I was a victim of a -- of a criminal sexual
13 conduct case, my -- my Uncle Joe did this to me. Of
14 course, we would not probably want somebody like that on
15 the jury and we listen in on that. And it could be things
16 like I was ill, I have a doctor's appointment, and people
17 don't want to discuss their medical situation in public, so
18 they will come up and -- so most of the time I would not
19 see any need to put that, you know -- but I am surprised.
20 I just thought as a matter of course since where we were
21 standing that the -- the court reporter would have placed
22 it in the record. I am surprised about that. I can't
23 really think of any reason that it shouldn't be, but would
24 I have -- would I have objected had I known? Probably not.
25 Q. And if anything that was said was troubling or

1 something you thought was relevant to this case or that
2 you, I guess, felt strongly needed to be on the record,
3 would you have made that request at the time?

4 A. It has not happened to me yet, but I can -- I can
5 imagine there would be situations where I would -- I would
6 -- you know, if you really had a situation where you were
7 worried about the judge excusing somebody -- this has not
8 happened, but if you were worried about the judge excusing
9 somebody because they were a certain color, you know, if
10 everybody that came up there was whatever color it is and
11 the judge kept excusing those people, but kept other people
12 that had a similar problem, then you would have a -- you
13 might have concerns. That has never happened to me yet. I
14 don't anticipate it happening.

15 Q. Yes, sir. And now I'd like to draw your attention
16 to page 48. We're still in the jury selection process.
17 Juror Number 94, Susanna Hopkins (ph.) was called -- the
18 State requested she be presented and you moved to strike
19 her stating there would be a strike for cause, she has a
20 relative that was a victim as the court knows. Do you
21 recall this incident?

22 A. I don't recall, but I've reviewed the transcript. I
23 know Mr. Hayes and I talked about this. I -- I think we
24 had not exhausted all of our strikes. We were hoping -- I
25 suppose the -- the issue is why would you ask to be struck

1 for cause if you haven't exhausted your strikes yet, so I
2 guess we were trying to save the strike in case we needed
3 it. I think we -- I think we struck nine people. We would
4 have had one more strike.

5 Q. So you ultimately didn't use all your strikes in this
6 case?

7 A. That's correct.

8 Q. And did you feel that there was a need -- you
9 indicated she had a relative that was a victim. Did you
10 feel that there was a need to have her conversation about
11 her relative's abuse be put on the record?

12 A. As I said, I didn't know that it wasn't being put in
13 the record. If it happened to me today, I probably --
14 unless there was something very unusual, I probably would
15 not -- I would probably not ask the Court to put it in the
16 record. I -- I have the opportunity to listen to what's
17 going on and I've never -- in the trials that I've done, I
18 haven't had reason to -- to worry or -- or object to or ask
19 the Court to make a record of something. Most of them I --
20 I would believe are already on the record.

21 Q. And now we'll move to Judge Early's opening
22 instructions to the jury. One of Mr. Cartwright's
23 allegations is you failed to object to the instruction to
24 the jury that -- words tantamount to a search for the
25 truth, and that occurred on page 57 from line 12 through

1 line -- I believe that's the correct spot. I apologize.

2 I believe that to be the wrong location.

3 MR. NEUBAUER: I beg the Court's indulgence, Your
4 Honor.

5 THE COURT: Sure.

6 BY MR. NEUBAUER:

7 Q. All right. This would be page 59, line 6 through
8 page 60, line 1. Specifically they drew issue with lines
9 18 on page 59 through line 1 on page 6 {sic}. Do you
10 recall what the context of this instruction was?

11 A. The context would have been just the judge's opening
12 remarks to the jury. I don't see specifically where it
13 says he's instructing them to search for the truth. I said
14 -- I see where he says a verdict that speaks the truth.

15 Q. And in regard to references to the truth, do you see
16 exactly what Judge Early was stating?

17 A. It's -- I'm gonna put -- to answer your question, I
18 would answer it like this. I think it's pretty clear in
19 all of his remarks that he says he -- for example, I'm the
20 -- the judge of the law. He tells them that they're the
21 judge of the facts. He tells them that the burden of proof
22 is on the State. I think he's probably -- I am not a Latin
23 scholar, but I think he's kind of incapsulating the meaning
24 of a verdict, it means true saying or true statement. I
25 think there's nothing objectionable that -- I -- I don't

1 think there's anything I can see there that I would have
2 objected to or should I have objected to.

3 Q. Did you feel at any point that those references to
4 the truth or you determine who's telling the truth or the
5 believability of witnesses, did you feel that that shifted
6 the State's burden or in any way led the jury to believe
7 that they did not have to find that the State prove their
8 case beyond a reasonable doubt?

9 A. That's a dangerous -- that's dangerous territory, but
10 I don't think the line was crossed here. I mean, you can
11 only ask people to find and determine -- to determine the
12 facts; that the English language requires us, if we're
13 gonna speak English, to use certain words if we're trying
14 to convey a certain meaning. The search for the truth is
15 one of those that possibly could invite somebody to fill in
16 the gaps. I -- I certainly think the most appropriate way
17 of conveying it is determine whether or not the State has
18 proven their case beyond a reasonable doubt. I don't know
19 -- if it is objectionable, I -- I -- I would be surprised
20 if it swayed anybody, if that -- if that fact swayed
21 anybody.

22 Q. And just to reiterate, you didn't feel that shifted
23 the State's burden of proof, that particular language?

24 A. I really don't see how -- how it -- as I said, you
25 know, you can only try to express it in certain ways, and

1 there's probably a preferred way, but that doesn't mean
2 everything's -- knowing it's the totality sways the jury
3 one way or the other. So I would have to say no, I don't
4 -- I don't think this by itself swayed the jury.

5 Q. And similarly I'll draw your attention to page 57,
6 lines 2 through 11. At that point did Judge Early inform
7 the jury that the State had the burden of proof -- proving
8 this case beyond a reasonable doubt?

9 A. Yes, it does.

10 Q. And then further, he goes on in the next paragraph
11 from line 12 through line 23, and what exactly do you
12 believe Judge Early is getting at with that paragraph?

13 A. It appears that he -- he reiterated that the State
14 has the burden of proof and that he's getting ready to
15 talk about how -- he's giving them a roadmap basically of
16 how the trial's gonna go. He talks about his opening
17 statements, he talks about the solicitor's opening
18 statements. I think we go in there and he -- somewhere
19 in there he'll say that their opening statements are not
20 evidence, they're the lawyers trying to explain to the jury
21 the things that they believe are relevant and what to look
22 for.

23 Q. And one of Mr. Cartwright's allegations directly deals
24 with line 18 through line 22, specifically 21 and 22. When
25 Judge Early indicated what they intend to prove, do you

1 feel that this portrayed to the jury that the defendant had
2 to prove anything or was trying to prove anything in this
3 case?

4 A. I understand -- I understand -- I understand what's
5 being alleged, but the answer to your question is no. What
6 we have here -- as I said, you're constrained by language
7 to -- to explain to -- to people that are not familiar
8 with it or even if they are familiar with how court goes,
9 you're telling them basically the -- the solicitor hopes to
10 prove that the allegations are true and the defense hopes
11 to prove not only that they're not true, but that in our --
12 in this particular case that the -- the evidence that
13 Mr. Cartwright put forward is true. So, of course, we're
14 both trying to say -- we're both saying that -- I am saying
15 that Mr. Cartwright is saying true things, the State is
16 saying their -- their witnesses are saying true things, so
17 we're both trying to prove to the jury that -- that each
18 side is saying true things. I mean, I understand that the
19 defense doesn't have to -- we constantly or frequently say
20 to each other that the defense doesn't have to prove
21 anything, but I doubt that that's really true. If you have
22 allegations on one side that -- that stand alone, you --
23 you want to certainly disprove those by proving that the
24 witnesses or the evidence that you're putting on is true as
25 opposed to the State's case, which is untrue.

1 Q. Okay. And you, again, did not feel that any of those
2 comments from Judge Early gave any indication to the jury
3 that the State did not have to prove Mr. Cartwright's guilt
4 beyond a reasonable doubt?

5 A. I do not.

6 Q. If you felt that way, would you have objected?

7 A. If I felt that way and I -- that would mean I
8 recognized it as being objectionable. I certainly am
9 capable and would have objected.

10 Q. Have you -- throughout your legal practice, have you
11 ever had to object to a judge's instruction to the jury
12 either during opening or closing?

13 A. The answer is yes, I have had reasons to object. I
14 don't recall so much about -- I can't really recall
15 anything about opening statements, but sometimes in closing
16 statements, yes.

17 Q. And you have objected to those instances in the past,
18 correct?

19 A. That's correct.

20 Q. So it -- would it be safe to say that it did not occur
21 to you that this was an objectionable statement from Judge
22 Early?

23 A. I don't think it's objectionable.

24 Q. All right. Now next, one of Mr. Cartwright's
25 allegations regards your opening when you state, and I'm

1 paraphrasing, I will find the exact thought, if these
2 witnesses are telling the truth, then Mr. Cartwright can't
3 be innocent, but if -- if these witnesses aren't telling
4 the truth, then Mr. Cartwright is innocent. Do you
5 remember this argument?

6 A. I reviewed it in the -- in the transcript, so I am
7 familiar with it.

8 Q. And I would draw your attention to page 68, para --
9 line 19 through page 69, line 8, specifically the language
10 occurs on 22 through 25. Do you remember exactly what you
11 were attempting to convey with that remark?

12 A. Yes, sir. When -- when somebody thinks about -- when
13 you're -- when someone thinks about what it means to
14 presume somebody's innocent and they have to stay that way
15 during the whole trial, how do you convey that to the jury,
16 and the way I chose to do it and have done it many times is
17 explain to the jury that that really means that you have to
18 presume that the witnesses and in this case that are saying
19 Mr. Cartwright committed criminal sexual conduct against
20 his children, those witnesses that the State presents are
21 either mistaken or they're lying because if you presume
22 somebody's in -- innocent and you -- and the -- and the
23 postulation or the hypothesis is Mr. Cartwright is guilty
24 of criminal sexual conduct because three people say he is,
25 so that's -- so they're saying that that's the case, well,

1 if you presume that somebody's innocent of those, you have
2 to presume that that's not the case, and I tried to say --
3 the way I tried to explain that to the jury is A, these
4 witnesses are either lying or they're -- they're mistaken
5 and that's a presumption that you have to carry all the way
6 back to the jury room until you begin deliberations. And,
7 of course, you know, obviously the logical result is well,
8 if they're telling the truth, then -- then Mr. Cartwright
9 is guilty, but, you know, if he -- this is just a logical
10 discussion. I mean, this is -- if he's not guilty -- if
11 you don't believe those people after deliberating about it,
12 then he's not guilty.

13 Q. And --

14 A. Sometimes attorneys will -- to establish credibility
15 with the jury will say things like hey, you know, if you --
16 if you find that he's -- you believe the witnesses and the
17 State's proven their case beyond a reasonable doubt, you
18 should find him guilty. I've heard that in trials before.
19 I don't normally do that, that was not my intention here,
20 but sometimes it's a strategy adopted by defense attorneys
21 to establish credibility with the jury.

22 Q. And ultimately the State turned and used that
23 comment in their closing -- I apologize -- indicating as
24 Mr. Routzong said in his opening, if you believe the
25 victims, then the Applicant --

1 THE COURT: What page is that?

2 MR. NEUBAUER: I apologize. I beg the Court's
3 indulgence.

4 Your Honor, that would be the second portion of the
5 trial transcript on page 197.

6 THE COURT: Thank you.

7 MR. NEUBAUER: Line 19 through 23.

8 THE COURT: All right. Thank you.

9 MR. NEUBAUER: Sorry. 19 and 20.

10 BY MR. NEUBAUER:

11 Q. First, despite the State using the same logic in
12 their closing, did you feel the -- or do you still feel
13 that your comments in opening, the point that you were
14 trying to convey, was proper for this case?

15 A. Yes. The answer to your question is yes. And as I
16 keep saying -- as I keep saying or trying to indicate,
17 that is simply true. That's always going to be true.
18 it's -- that's not what shifted any -- that didn't shift
19 the burden, it did not -- my remarks -- I -- I don't
20 think my remarks that were used by the State swayed the
21 jury. The jury understands -- that's why we picked them.
22 They understand that if somebody -- if you believe these
23 witnesses, then you should find them guilty, that is not a
24 revelation to anybody, and it certainly wouldn't be -- it
25 wouldn't be a revelation commun -- communicated by me for

1 the first time to the -- the State or the solicitors. If
2 you believe their witnesses, they'll be found guilty.

3 Q. And did you see any issue with Solicitor Molony using
4 that same logic or argument or even your quote in his
5 closing?

6 A. No, sir. Frankly, I always do that myself,
7 particularly in opening statements. I rarely get to close
8 last, but usually in opening statements, I will seize on
9 something the State says that -- that I can use in my
10 opening. I look for it and I do that myself. They're
11 simply doing the same thing, I guess, in this case to me.
12 I -- I don't -- I think it's a -- I don't see any problem
13 with it.

14 Q. Now jumping to Solicitor Molony's opening statement,
15 one of the allegations was failure to object to the
16 State's opening where they invited the jury to utilize
17 the indi -- the indictments in their deliberations.
18 That's specifically on page 64, line 8 through 20. More
19 specifically, line 13 through 20. I'll give you an
20 opportunity to review that.

21 Do you -- did you feel that it was objectionable for
22 Solicitor Molony to reference the indictments in the way
23 that he did?

24 A. That is not good. I -- I -- I don't believe that is
25 good. And the indictments are not evidence, they shouldn't

1 be considered as evidence by the jury. I don't think
2 that's good in any way, so I think I could have objected
3 to that, yes, sir.

4 Q. Have you in the past objected to opening statements
5 by a solicitor?

6 A. I can't recall opening statements. Closing
7 statements, frequently, but -- well, not frequently, but
8 it's happened. But I can't recall anything in terms of
9 opening statements.

10 Q. And at the time if you thought that was objectionable,
11 would you have objected?

12 A. Probably. If I thought it was objectionable, I would
13 have objected to it.

14 MR. NEUBAUER: I beg the Court's indulgence, Your
15 Honor.

16 BY MR. NEUBAUER:

17 Q. And if you'll look at page 25 of the first part of
18 the trial transcripts, lines 19 through 22, Judge Early
19 indicates that the indictments are not evidence in this
20 case. Did you feel that Solicitor Molony's reference to
21 the indictments and the dates that are listed on them led
22 the jury to believe that they could use those as evidence?

23 A. I don't have any reason to believe that at all.

24 Q. Okay. Now we have a handful of allegations regarding
25 your cross-examination and failure to object during the

1 State's case in chief. First, we've previously discussed
2 you attempting to impeach the State's witnesses based on
3 their prior inconsistent statements. Do you have an oppor
4 -- did you have an opportunity to review the transcript of
5 the first trial before this trial began?

6 A. I evidently did because I separated it out in the --
7 in the files. I have one for [REDACTED], one for [REDACTED]. There
8 should be another one in there. And I -- I had -- I stuck
9 in [REDACTED], I guess it is. I stuck in there -- at least in
10 [REDACTED], I stuck in there partial copies, and in [REDACTED]
11 I stuck it in there as well. I stuck in partial portions
12 that referred to those particular witnesses from the prior
13 trial.

14 Q. And you ultimately attempted to impeach [REDACTED]
15 [REDACTED] testimony based on her prior statements, correct?

16 A. I think there was a brief -- there was a brief attempt
17 where she said something slightly different, I think. I
18 don't know how successful I was, but I think there was an
19 attempt. I think I said something like you previously
20 testified.

21 Q. Yes. And that's on page 130 of the transcript,
22 line 24 through page 131, line 15. Do you recall a
23 discussion you had with Judge Early about your attempt to
24 use the prior testimony?

25 A. I don't recall that.

1 Q. And I'd have you draw your attention to page 131,
2 line 1 through 15.

3 A. Oh, yes. Okay. Now I do recall, yes. I attempted
4 to impeach her with a prior statement. I did not follow
5 the rule by showing her -- allowing her to review and
6 Judge Early correctly told me to follow the rules.

7 Q. So it wouldn't be a misstatement to say that you did
8 not have specific pages and lines marked to impeach her
9 testimony with, correct?

10 A. That's what I told the Court. I evidently picked up
11 the -- I -- I noticed in one of them I had marked in yellow
12 lines things I wanted to -- so I would -- apparently I told
13 the Court that I evidently picked up the wrong one because
14 it wasn't marked the way I thought it was or else -- else I
15 didn't mark it at all. It looks like I -- I said I might
16 have marked it on the other transcript, that -- that's what
17 I told the Court, and Judge Early says well, we need to
18 move along now, and I said yes, sir.

19 Q. And then looking on that same page, line 17 through
20 the following page, 132, line 13, you -- despite not using
21 the transcript, you did -- or did you attempt to get the
22 same testimony out of Ms. [REDACTED] during the course of the
23 trial?

24 A. It looks like I kind of went there. I don't know how
25 successful I was in actually impeaching her with that. I

1 -- I want to say -- really I wonder -- it does make a
2 difference, I think, perhaps in terms of, you know,
3 another instance of when -- another instance maybe that
4 we could show that somebody was being inconsistent, but
5 the more important, I think, issue was that Mr. Cartwright
6 was the genesis of her contact with law enforcement giving
7 her a reason to be upset with him.

8 Q. And do you feel that you were still able to convey
9 the -- that point, that -- the allegations about
10 Mr. Cartwright only came about because she had that
11 involvement with law enforcement?

12 A. My recollection is that was -- that part of it was
13 successful, yes, sir.

14 Q. And do you think that using the prior transcript to
15 impeach her would have helped convey that message more
16 thoroughly?

17 A. It doesn't look to me like I -- I utilized it very
18 well, frankly, but, like I said, my testimony here today,
19 I've been asked many questions and I -- some things I don't
20 recall. Of course, this is nine years ago or eight years
21 ago. Almost nine. I don't recall some things. It
22 wouldn't -- it wouldn't be particularly surprising if
23 somebody was unable to recall what they said in a prior
24 trial. Now I -- I realize and I will concede that if you
25 -- if you got your story straight, it shouldn't change too

1 much, so a lot of times it's just the -- the details. I
2 will point out in addition that I think the important
3 issue was getting across to the jury, as I said, that
4 Mr. Cartwright was concerned about his daughter being on
5 drugs or being involved with somebody that had -- that had
6 drugs, called the police, and that was the genesis of --
7 of that young lady's problems and her encounter with the
8 police.

9 Q. Okay. And something -- another allegation,
10 Mr. Cartwright alleges you failed to object under Rule 401
11 and 403 to the testimony of Kathy [REDACTED] That's on
12 page 81, line 17 through 22. Do you recall this
13 interaction between Solicitor Molony and Ms. [REDACTED]?

14 A. Can you repeat the lines, please, sir?

15 Q. Yes, sir. It will be lines 17 through 21.

16 A. I do recall this.

17 Q. And did you feel that that line of questioning was
18 objectionable as prejudicial or not relevant?

19 A. No, I -- frankly, if I had been Mr. -- Mr. Molony --
20 I think if I had been Mr. Molony and I was prosecuting this
21 case, I would be -- I would be pleased to present testimony
22 to the jury that the person would rather be doing something
23 else than testifying as they said, but it's something that
24 needs to be done. That -- from the State's point of view,
25 I wouldn't want to get something like that in. It was --

1 you know, it's always a little bit suspect if somebody
2 really, really, really, really wants to testify about
3 something. That -- that sounds like they have an ax to
4 grind. Mr. Molony, I think, elicited -- was trying to
5 elicit testimony that's not really particularly
6 comfortable, telling all this stuff to this -- these --
7 these juries -- this jury -- the jury, the petit jury, and
8 -- and her response simply is I know I'd rather be doing
9 something else at home with the children specifically is
10 what she said. I don't find that to be objectionable. I
11 think -- I think that's a good trial technique. You're
12 just -- you're telling the jury this person doesn't have
13 an ax to grind, they're -- now from my point of view at
14 that time -- this is easy for me to diagnose right now. I
15 think at that time I -- I -- it just didn't occur to me to
16 object to it. I just -- it doesn't strike me as anything
17 objectionable.

18 Q. Yes, sir. And if you'd seen it as objectionable, if
19 you thought that it wasn't relevant at all to her -- well,
20 first, do you feel that it was relevant to her testimony to
21 indicate that she would rather not be there, but she was
22 doing what she felt needed to be done?

23 A. As I said, it was -- from the State's point of view
24 and the jury's point of view -- from the defense point of
25 view, it's probably not helpful because it shows that she

1 doesn't have an ax to grind, but I would -- I would argue
2 it's probably relevant to their point of view to show that
3 I'm not -- I'm not here trying to -- to grind -- or bury a
4 hatchet in Mr. Cartwright, it's -- I'd rather be doing
5 something else, but I had to be here because it was the
6 right thing to do. That's a message I would think that's
7 hurtful to the defense. It's not objectionable. It's
8 relevant to the State's case.

9 Q. Did you think that it was unduly prejudicial?

10 A. The answer is no. It's prejudicial, but it's not
11 unfairly prejudicial.

12 Q. So you think that if you'd objected under 403 it would
13 have passed based on the balancing test?

14 A. I think it would. Yes, sir.

15 Q. Now we'll jump -- next there's an allegation you
16 failed to object to bolstering testimony from Melinda
17 Lively. This would be first on page 94, lines 21 and 22,
18 and then next on page 95, line 20 through page 96, line 3.
19 Do you recall the first comments from Solicitor Molony on
20 page 94?

21 A. That -- did you hear Kathy [REDACTED] testify is probably
22 the relevant portion.

23 Q. And then on the following page, line 23 specifically
24 through line 24, Ms. Lively testified I was scared for our
25 lives, I was threatened by their father as Kathy stated.

1 The following lines, line 25 and then line 1 of page 96,
2 did you feel a need to object after Solicitor Molony
3 informed Ms. Lively I need you to testify, don't tell me
4 what Kathy said, you tell me why you didn't call the
5 police?

6 A. No, sir. That -- that seems to have fixed it I would
7 think.

8 Q. So before you had an opportunity to object, Solicitor
9 Molony corrected the, I guess, supposed bolstering
10 testimony?

11 A. Yes, sir. That's probably -- as he corrected it, it
12 probably -- if there -- I doubt that there was much impact
13 on the jury one way or the other if I'm -- if I'm -- from
14 the testimony as Kathy stated. It probably wasn't much
15 impact on the jury one way or the other, but if there was
16 Mr. Molony correcting it would be more powerful than my
17 objection arguably.

18 Q. Well, Mr. Cartwright's raised another allegation of
19 failure to object to Mr. Molony's redirect of Melinda
20 Lively. It's on page 103, line 16 through 19. First,
21 let me draw your attention to your cross-examination on
22 page 101, lines 1 to 21. If you could review that and, I
23 guess, inform the Court what exactly you were getting at
24 with that line of questioning?

25 A. Evidently what I was getting at there was I was asking

1 Ms. Lively about a delay apparently -- an apparent delay in
2 alleging that the 14-year-old -- their 14-year-old daughter
3 had been a victim of sexual abuse until I think they had --
4 or, no, Mr. -- Mr. Cartwright had filed a -- in the -- in
5 the Superior Court of Floyd County, Georgia -- I may have
6 to go back a little bit farther for the context. Oh, this
7 is when Mr. Cartwright -- reading from the transcript, you
8 learned -- Mr. Cartwright learned that you had been
9 permitting his oldest daughter, 14 years old, to engage in
10 a sexual relationship with a 23-year-old man. Do you
11 remember that allegation in this complaint? And the
12 answer, I remember him making allegations, but we never
13 went in front of a judge in a court. And you don't deny
14 that was filed December 1st of '99 in Aiken County, South
15 Carolina? She did not deny, the answer was no. Six days
16 later, the Superior Court of Floyd County, Georgia, you
17 don't deny that you filed a civil action or a citation for
18 contempt? I don't remember. The answer is, I don't
19 remember. I don't deny.

20 And this is six days after he filed his complaint, so
21 apparently she never made an allegation against him until
22 he filed the complaint. So it sounds like where I was
23 going with that is her actions were out of revenge.

24 Q. And, specifically, one question is, And she first told
25 you regarding the sexual abuse by Mr. Cartwright in '99?

1 That's line 18 and 19. Do you feel that -- do you feel
2 that Solicitor's Molony's question on page 103, line 16
3 through 18, in '99 -- well, previous to '99, had you
4 learned that your daughter had been abused by the
5 defendant, did you feel that was outside the scope of your
6 cross-examination?

7 A. Probably not. If I look back on my cross-examination,
8 I -- I -- I asked her specifically -- that was the context
9 around -- I certainly was talking about 1999 when she
10 filed a complaint and that apparently was the first time
11 officially that Kathy -- [REDACTED] -- Kathy and Michelle
12 Cartwright, your 14-year-old daughter, had been the victim
13 of abuse, so I -- I pretty clearly talked about that in my
14 -- in my cross, so I don't think it was outside of the
15 scope of my cross-examination.

16 Q. Okay. Next we are jumping to the testimony of [REDACTED]
17 [REDACTED], an allegation of failure to move to strike hearsay
18 testimony from Ms. [REDACTED]

19 MR. NEUBAUER: I beg the Court's indulgence. I'm
20 attempting to find the specific remark.

21 THE COURT: Yes, sir.

22 BY MR. NEUBAUER:

23 Q. This would be on page 110, line -- just for context
24 starts talking about her recanting to the solicitor,
25 specifically going for a meeting at the courthouse with

1 the solicitor. That would be on line 19. On line 23 of
2 page 110, Solicitor Molony asked what happened on the way
3 to the meeting. Ms. [REDACTED] responded on the way there my
4 mom told me to lie. You objected as leading, the Court
5 sustained this objection. Did you feel a need at that
6 point to move to strike the statement by Ms. [REDACTED]?

7 A. I actually did not consider that although I think it
8 has to be said that at that point it's already in front of
9 the jury, but I -- the answer to your question is no, I did
10 not feel the need.

11 Q. And you could have moved to strike that, but you chose
12 not to. Again, why did you feel the reason to not -- or
13 feel the -- why did you not feel the need to move to strike
14 that testimony?

15 A. It's hard to say why I didn't feel the need. I can
16 say as -- as I'm reviewing it now, it's already in front
17 of the jury. I think -- you know, those are one of those
18 things that you can tell people -- I mean, the judge can
19 tell -- order that that be stricken from the record, but
20 it's not stricken from the minds of the people that heard
21 it. That would be the jury.

22 Q. And a similar allegation is raised regarding [REDACTED]
23 [REDACTED] testimony. This would be on page 115. Solicitor
24 Molony asked a line of questioning. This humping
25 (inaudible) act that you referred to earlier in the morning

1 time, did that continue when you were 13, 14? At any
2 point, 13 or 14, did he have you perform oral sex on him?
3 And you object as they're all leading questions and that
4 objection was sustained. Again, you did not move to strike
5 the testimony. Why, again, did you feel -- not feel the
6 need to strike?

7 A. I think I should have. I think that's certainly a
8 -- the appropriate thing to do. It would have been
9 appropriate in this instance. On the other hand, the
10 jury's already heard it. I have my doubts whether it's
11 stricken from their minds, so I -- I doubt very much that
12 it had any -- asking the Court to strike that would have
13 had any positive impact on the jury.

14 Q. And if you'd moved to strike that testimony, do you
15 feel that that would have made a difference as far as the
16 jury was concerned regarding that testimony?

17 A. I can't know for sure, but I doubt it.

18 Q. Thank you.

19 A. Yes, sir.

20 Q. In addition -- we'll jump few pages forward. We're
21 still in the testimony of Ms. [REDACTED] She's testifying
22 about an incident where Mr. Cartwright, I guess, coerced or
23 threatened her to perform oral sex on him. On page 119,
24 line 8 and 9, you interject during her testimony and say
25 Your Honor, I'm having a real hard time hearing her

1 testimony. Did you feel that there was an issue with you
2 requesting her to speak up or that you may have been
3 bolstering or any way benefiting her while testifying?

4 A. I fail to see how I can listen to what's -- the
5 testimony is if I -- and I -- if I can't hear it, I fail to
6 see how I could possibly do anything else. It's much more
7 important that I hear the testimony and certainly for all I
8 know the jury may have heard the testimony and if they hear
9 it twice, so be it, but I've got to hear it. I know that
10 for sure.

11 Q. And --

12 A. So the answer to your question is no, I don't think
13 there's anything wrong with asking the jury -- the witness
14 to speak up.

15 Q. Do you feel it's reasonable to have made that request
16 or at least make the Court aware of your inability to hear
17 the testimony?

18 A. Absolutely reasonable.

19 Q. Okay. Now the next allegation regards the testimony
20 of -- I apologize for getting around to the page here.

21 This would be the testimony of the DSS agent, Ms. --

22 MR. NEUBAUER: I apologize, Your Honor. I beg the
23 Court's indulgence.

24 THE COURT: Yes, sir.

25 BY MR. NEUBAUER:

1 Q. This would be Michelle Prince. So in the testimony
2 of Michelle Prince, DSA -- or DSS agent, this is on
3 page 138, line 12 and 13, Solicitor Molony asked explain
4 how DSS becomes involved in these cases and her response,
5 lines 15 through 17, indicates somebody calls to report
6 and makes a complaint and if it meets the legal statute
7 in South Carolina, we take a report and go interview. Did
8 you feel that you should have objected to this comment as
9 it's lowering the State's burden of establishing that
10 Mr. Cartwright had committed these crimes?

11 A. No, sir. I think it's pretty clear this is not a
12 question specifically about Mr. Cartwright's case, it's a
13 -- it's a question directed to how does DSS become involved
14 in any case. So I don't see how that could be bolstering
15 or supporting anything regarding Mr. Cartwright. I think
16 it's simply a person trying to answer the question how
17 does DSS get involved in the case. Well, somebody makes
18 a complaint. So one could imagine that somebody could
19 complain to DSS that their neighbor's children eat too much
20 pizza. Well, if -- if DSS -- you know, for all we know the
21 -- the neighbor is against high a carbohydrate diet, so the
22 DSS agent would receive the complaint and then probably say
23 well, is this anything that I'm required to worry about and
24 they would probably conclude no. That's simply a -- a --
25 she's simply trying to answer the question and communicate

1 to the jury that DSS gets complaints, they -- they look and
2 see if it's anything they should be worried about and then
3 if it is, they -- they investigate.

4 Q. So would -- based on the fact that Ms. Prince stated
5 that -- and if it meets the legal statute, do you feel that
6 that particular language indicated that she had already
7 made the determination that Mr. Cartwright had committed a
8 crime?

9 A. No, sir. As I -- as I said, I think this was not in
10 reference only to Mr. Cartwright, it's just generally
11 speaking, so I -- I think that would be a very attenuated
12 connection to only Mr. Cartwright's case.

13 Q. And do you think that that language would have led the
14 jury to believe that Mr. Cartwright had committed a crime
15 just because DSS began investigating?

16 A. I doubt it. I -- I think -- I think anybody that when
17 you read it or when you listen to it, you know that that's
18 not what she's saying. She's simply saying we're -- we're
19 tasked to investigate, and there is. I think Title 63 is
20 chock full of statutes that refer to children and -- and
21 the things that DSS is supposed to look at and what they're
22 required to investigate and so on and so forth, and I think
23 that's simply what she was trying to say.

24 Q. Yes, sir. Further in the testimony of Ms. Prince,
25 on the same page, line 22 through 139, page -- page 139,

1 line 2, Ms. Prince is asked to explain to the jury how
2 she became involved in this case. She then indicates
3 that she received a call from her intake supervisor
4 saying that there was a report of sexual abuse concerning
5 [REDACTED] and Herald Cartwright. Mr. Cartwright has
6 alleged that this -- you should have objected as this
7 comment was hearsay beyond the scope of the time and place,
8 bolstering and double hearsay. What is your response to
9 that allegation for those grounds that you should have
10 objected on?

11 A. That's page 139?

12 Q. 138, line 22 through 139, line 2.

13 A. My first reaction is it's probably not hearsay
14 because it's not -- it's not -- it's not for the truth of
15 the matter asserted, it's -- it's actually for the reason
16 how the DSS folks got involved in this case. So I don't
17 think it's hearsay. It's -- it's really just trying to
18 answer the question how they got involved. And anyway
19 they're not really citing what the intake supervisor said.
20 I guess in a way they are, but it's not -- certainly I
21 doubt it's for the truth of the matter asserted.

22 Q. Do you feel that that comment was bolstering the
23 allegations of the -- of [REDACTED] in this case?

24 A. I -- I don't really see how it is. It's -- I mean,
25 if -- if you -- if it's okay to ask the question, you --

1 if it's a -- if the question is how did you get involved,
2 I think you have to answer it, but I think it's
3 satisfactory to say I got a call. It wouldn't be -- it
4 wouldn't be satisfactory to say I just came to the
5 realization somehow. You have to say well, we received a
6 -- a complaint about criminal sexual conduct. That falls
7 within our purview.

8 THE COURT: How much more do you got?

9 MR. NEUBAUER: Your Honor, we're just going through
10 the allegations. I have 1, 2, 3, 4, 5, 6 --

11 THE COURT: All right. We're breaking for the day.

12 MR. NEUBAUER: Yes, sir. I apologize.

13 THE COURT: No, that's all right. Listen. This
14 is a very important case. It's a case that Mr. Phillips
15 has a -- a lot of different matters for you to respond
16 to and he's gonna have I'm sure a very -- quite frankly,
17 I -- I would anticipate a lengthy cross-examination of
18 your witness and what I want to do is I want to give
19 everybody time to present their case and we're just not
20 gonna be able to continue. It's 5:11 and we've been
21 going strong except for a few technical breaks since
22 11:30 this morning.

23 MR. NEUBAUER: Yes, Your Honor.

24 THE COURT: So what I'm gonna do is I'm gonna have
25 you, sir, get together with Mr. Phillips, with the

1 witness, and you-all are gonna have to come to a time
2 where we can reconvene this matter because we can't
3 go for another hour and a half tonight doing this and
4 I suspect it will take at least that long and I want
5 everybody to be -- to have an opportunity to eat and
6 take a break. And, like I said, we've been going at it.

7 So I just -- I just think we've got to -- we've
8 got to break right now and I'm just gonna leave it upon
9 you-all to come up with a time working with my clerk
10 when we can complete this matter because it just can't
11 be done today. It's not fair to the court reporter,
12 it's not fair to the parties because it's too important
13 of a matter to just -- to just push through for lack of
14 better words. I don't want to do that.

15 I hope that meets with your approval, Mr. Neubauer.

16 MR. NEUBAUER: Yes, Your Honor.

17 THE COURT: Do you got any objection to that or
18 problem with that? If you do, I want you to tell me.

19 MR. NEUBAUER: No, Your Honor. I completely
20 understand. I anticipated that this would be a long
21 matter. I was speaking with Mr. Routzong yesterday
22 regarding this and we were on the phone for about five
23 hours going over all of this information.

24 THE COURT: All right. Let me ask you this,
25 Mr. Phillips. Any objection to go ahead -- and I hate

1 to cut off him mid answer, but I just started wondering
2 and I said let me -- let me interrupt right now while
3 I'm thinking about it and ask -- and you certainly if
4 you need to get the court reporter to give you whatever
5 you need for him to -- for the witness to finish his
6 question or probably just pick up with that question
7 again when we start back.

8 But, Mr. Phillips, any problems, sir, with working
9 with Mr. Neubauer and my clerk and trying to find a time
10 when we can reconvene, sir?

11 MR. PHILLIPS: No, Your Honor.

12 THE COURT: Is that a problem?

13 MR. PHILLIPS: No. As long as we have the
14 opportunity -- I know logistically we run into problems.
15 We've got to stay in front of Your Honor since you've
16 already had the ability to weigh credibility of the
17 witnesses.

18 THE COURT: Certainly.

19 MR. PHILLIPS: As long as I have the opportunity
20 to have the cross-examination. Like you said, it will
21 -- it will be lengthy, but that's -- we're just here
22 for, like you said, to have a fair process and that
23 opportunity to have it done in a manner that --

24 THE COURT: Certainly.

25 MR. PHILLIPS: Like you said, we've been going

1 strong. We have no objection to that.

2 THE COURT: And, Mr. Routzong, you've -- you've
3 been giving very complete, thorough and thoughtful
4 answers, okay, and so, again, I appreciate that.

5 And so what I'd like to do is to go ahead and
6 break. So let me just ask you this. I -- I see that
7 Attorney General Jameson's on the line.

8 Attorney General Jameson, do you have any problems
9 or anything to add as it relates to this matter and
10 taking a break and reconvening at some time that's
11 agreeable?

12 MS. JAMESON: No, not at all, Your Honor.

13 Tomorrow we were able to move Ashley Prior to
14 9:00 AM and then we have an 11:30. Nothing is in
15 the afternoon, if that's a possibility for anyone. We
16 would just have to make sure we are able to coordinate
17 with the Department of Corrections to make sure that
18 Mr. Cartwright can.

19 THE COURT: Well, let me tell you what. I'm --
20 well, I'm generally very flexible, but I find out that
21 sometimes this job requires you-all to not be flexible
22 because I never know where I'm going or how long
23 something's gonna last.

24 Tomorrow afternoon, I mean, if folks can make it,
25 fine. If they can't, then I understand. And you can

1 coordinate with my clerk and we can try to do something.
2 I've got -- I've got Colleton court next week, but --
3 and the roster looks soft as pluff mud, so I could end
4 up having a whole bunch of time next week on my hands,
5 but I -- I don't know. I'll have a better idea tomorrow
6 afternoon, but if tomorrow afternoon's good, fine. If
7 not, you-all can just work together with my clerk, she's
8 great, and we can reschedule then.

9 Madam Court Reporter, that doesn't oppose -- you
10 don't oppose breaking for the day, do you?

11 THE COURT REPORTER: Not at all.

12 THE COURT: You don't want to go another hour and
13 a half, do you?

14 THE COURT REPORTER: No, sir.

15 THE COURT: All right. I -- I'm with you. I can
16 tell. I thank you for your patience today --

17 THE COURT REPORTER: Un-huh.

18 THE COURT: And thank you for pushing through with
19 this.

20 THE COURT REPORTER: You're welcome.

21 THE COURT: And, again, it's an important case for
22 Mr. Cartwright, it's an important case to the State, and
23 so we'll do that.

24 So I'm gonna go ahead and sign off and I'll look
25 forward if tomorrow -- you-all talk and caucus. If

1 tomorrow works, tomorrow afternoon, I'm available.

2 Let's not -- let's start -- if we're gonna start
3 tomorrow, let's give enough time to finish the first
4 one and get a sandwich so I don't have to eat in front
5 of you.

6 My clerk walked in here and said Judge, do you
7 realize they can see you eating? I said yes, I do.

8 So, in any event, just let me know, folks.

9 Have a great evening, okay?

10 MS. JAMESON: Thank you. We'll see you in the
11 morning.

12 THE COURT: Thank you very much.

13 (Whereupon, the proceedings were adjourned at
14 5:14 PM on February 3, 2022.)

15 (The following proceedings were held February 4,
16 2022, via WebEx Videoconferencing, beginning at 2:15 PM.)

17 THE COURT: All right, Mr. Neubauer.

18 MR. NEUBAUER: I apologize for the delay, Your
19 Honor.

20 THE COURT: All right. Mr. Neubauer, I think you
21 were, I guess, direct examining Mr. Routsong -- or
22 Routzong and I interrupted you because we were gonna
23 just go ahead and break for the evening, and so I'm
24 happy to have you resume your examination, sir.

25 MR. NEUBAUER: Yes, Your Honor. I beg the Court's

1 indulgence for one second. After finishing yes -- or
2 our afternoon's hearing, I have to pull everything back
3 up for Mr. Cartwright.

4 CONTINUED DIRECT EXAMINATION

5 BY MR. NEUBAUER:

6 Q. I believe the last issue we were addressing was
7 the testimony of the DSS agent where Mr. Cartwright has
8 alleged Mr. Routzong failed to object as beyond the
9 scope of time and place, bolstering and double hearsay,
10 and this would be on page 138, line 24 through page 139,
11 line 2.

12 Again, Mr. Routzong, do you recall this question from
13 Solicitor Molony to Ms. Pri -- or Ms. Prince?

14 A. Only insofar as it's reflected in the transcript.

15 Q. Okay. And having reviewed that question, do you feel
16 that it was objectionable?

17 A. The answer to that question is no. She's simply --
18 she's responding to how she became involved in the
19 question. She's simply saying that she received a call
20 from the intake supervisor and she does say that we had
21 received a report of sexual abuse concerning [REDACTED], but
22 it's -- I don't -- I'd argue it's probably not hearsay,
23 it's not for the matter -- the truth of the matter
24 asserted --

25 Q. Yes, sir.

1 A. -- because it's for the purpose of -- of simply saying
2 this is how DSS became involved.

3 Q. Yes, sir. And -- all right. The next allegation
4 raised by Mr. Cartwright is -- while you were attempting
5 to impeach the testimony of -- I believe it's [REDACTED]
6 and [REDACTED]. You questioned Ms. [REDACTED] about multiple
7 people whom she reported the alleged abuse to. Do you
8 recall this instance?

9 MR. NEUBAUER: And I beg the Court's indulgence,
10 Your Honor. I'm attempting to find the exact line to
11 help.

12 BY MR. NEUBAUER:

13 Q. That would be page 174, line 25. Well, I believe it
14 would be page 174 starting around line 1. There's a
15 conversation regarding you questioning Ms. [REDACTED] about the
16 story or testimony that she gave to investigators and then
17 specifically line 24 through page 175, line 17. If you
18 could review that.

19 A. Yes, sir.

20 Q. And then, again, Mr. Cartwright's drawn issue to --
21 well, first, what were you asking -- or what was the exact
22 line of questioning there or what were you trying to gather
23 from the witness with this questioning?

24 A. Trying to communicate to the jury that -- that --
25 what it looks to me like, I was trying to communicate to

1 the jury that she had not disclosed to certain people.

2 Q. Yes, sir. And then in Mr. Cartwright's allegation,
3 he draws attention to page 177, line 15 through 19, where
4 Solicitor Agnew states Mr. Routzong talked to you a whole
5 lot about you telling people about what happened, so let's
6 talk about that. Did you tell your sister what's going
7 on? Mr. Cartwright had alleged that this reaffirmed the
8 State's case and could not be deemed a valid trial
9 strategy. Do you remember what or how exactly did that
10 line of questioning play into your trial strategy?

11 A. Without -- when -- in these kinds of cases, without
12 going into the issue of when a person discloses and why
13 they didn't disclose, that's always an effort to try to
14 entice the jury to say well, if this happened, why didn't
15 they disclose to someone.

16 Q. And you testified yesterday that your trial strategy
17 was to show why these -- why the victim may be lying or
18 may be fabricating a story. Do you feel that this line of
19 questioning was in line with your overall trial strategy to
20 show how or why these witnesses may have lied throughout
21 this allegation?

22 A. This probably wouldn't be so much about a lie, but it
23 would be the lack of disclosure, but, you know, that's
24 often fruitless because everybody knows that sometimes
25 people disclose, sometimes they don't. So the only thing

1 -- the only thing you're left to do sometimes is try to
2 entice the jury to wonder about that and maybe cause
3 reasonable doubt.

4 Q. Yes, sir. And did you feel that -- in your own
5 opinion, do you feel that you were -- that your line of
6 questioning was, I guess, successful in an attempt to
7 raise reasonable doubt or that that line of questioning
8 was tailored to try to raise reasonable doubt?

9 A. Well, based on the result I'd have to say it was not
10 successful.

11 Q. Yes, sir. Now next Mr. Cartwright's alleged that you
12 failed to object to the solicitor -- or to -- well, the
13 testimony of Ms. Buffy [REDACTED] being acted out in front of
14 the jury. Do you recall how [REDACTED] -- or Ms. Buffy
15 [REDACTED] testimony was handled during this trial?

16 A. I had -- I did refresh my memory. I had forgotten
17 that I had participated in the reenactment, but after
18 looking at -- briefly looking at the transcript, I
19 remembered that. I think Ms. Agnew may have played
20 herself, I don't know, and then I was in the part of
21 Mr. Bob Harte who was representing him at that time, I
22 think, and then they had someone else, I don't -- I'm not
23 familiar with who that is anymore, I probably did at the
24 time, offering Buffy's responses.

25 Q. And do you recall why Ms. Buffy [REDACTED] was not at this

1 second trial?

2 A. She was not available the State alleged and I -- I
3 did not object. She had -- she was very seriously ill
4 apparently with Stage 4 cancer, I don't think that was in
5 dispute, and I think they received a letter saying she
6 probably shouldn't come or maybe that she ought not come at
7 all and some -- some caretaker and -- to probably get to
8 the heart of the question, it would probably have been a
9 lot more sympathetic to the jury to have somebody who was
10 obviously quite ill be forced to come and testify probably
11 substantially to what was already in the record, she had
12 already been cross-examined by Mr. Harte, she was under
13 oath, and that was why I -- I did not object.

14 Q. So she'd been cross-examined in this previous trial.
15 Mr. Harte since had an opportunity to question her
16 regarding the testimony that she gave during the initial
17 trial in November of 2012. Did you feel that there was any
18 issue with her testimony being presented?

19 A. Well, when I look at it -- when I look at it now, I
20 see some things that are helpful, some things that are not
21 helpful. I would -- I would have to say under the rule,
22 and this -- I'm sorry I can't be -- my memory is not more
23 exact, but I -- looking back on it now I would say it
24 would probably have been fruitless to object because I
25 think under the rule it's pretty clear that she was not

1 available and it would have come in. So there were things
2 -- there were things that -- that were helpful and things
3 that were not helpful in that prior testimony.

4 Q. And specifically regarding the decision to have her
5 testimony acted out, did you feel any issue -- well, let me
6 just start with kind of a general background. Have you
7 seen that sort of prior testimony be introduced in that
8 manner before?

9 A. I had not. That was the first time I'd seen it.

10 Q. You've not seen it since?

11 A. (Nonverbal response.)

12 Q. Did you think that it was unreasonable to have that
13 testimony restated to the jury verbally as opposed to just
14 publishing a copy -- a written copy of her prior testimony?

15 A. At the time I did not think it was unreasonable. I
16 don't know that I think it's unreasonable now. Either way
17 it gets in the hands of the jury.

18 Q. And part of Mr. Cartwright's allegation is the
19 inflections and mannerisms that were used throughout the
20 testimony of Buffy [REDACTED] were as the prosecutor saw fit
21 rather than how it actually occurred. Do you recall there
22 being any issues with how the testimony was recited?

23 A. I do -- I do not recall any issues with that and, on
24 the other hand, that would be true from, you know, if it
25 were just read into the record. Whoever reads it into the

1 record could also not had a very impactful way of repeating
2 what Mr. Harte said, so I -- I think that sort of cuts both
3 ways. If there were mannerisms or expressions on one side,
4 then I had the opportunity to do that on the other side.

5 Q. And --

6 A. I should say I don't specifically recall any -- any
7 problems with the people exaggerating or -- or excessive
8 mannerisms.

9 Q. And if you'd seen any of those throughout the course
10 of the trial, do you believe you would have objected?

11 A. I don't -- I don't know the answer to that,
12 Mr. Neubauer, because anything that -- anything that's --
13 I should object to anything that does not appear to be
14 appropriate, so that -- I -- I should -- that's true then
15 and it's true now. That's the best way I can answer, I
16 think.

17 Q. And you did not object at any point to mannerisms or
18 inflections that were, I guess, conveyed through the
19 rereading of Buffy [REDACTED] prior testimony?

20 A. I don't -- I don't remember that being a problem at
21 all.

22 Q. And have you had to have prior testimony of an
23 unavailable witness introduced in a trial before or after
24 Mr. Cartwright's?

25 A. That's been a very rare occurrence. I can't think

1 of any right off the top of my head where that's ever
2 happened after that.

3 Q. So it's not something that has happened often with you
4 or that you've had many experiences with?

5 A. That's correct.

6 Q. Okay. And specifically within the testimony of Buffy
7 [REDACTED] there is an allegation that you failed to object
8 during Buffy [REDACTED] testimony on the basis of hearsay,
9 beyond the scope of time and place and bolstering, and the
10 prosecutor asked Ms. [REDACTED] if she and police found out that
11 the Applicant had been molesting [REDACTED], to which
12 Buffy replied yes, and --

13 MR. NEUBAUER: I beg the Court's indulgence, Your
14 Honor. I'm trying to find the exact lines.

15 THE COURT: All right.

16 BY MR. NEUBAUER:

17 Q. This would be, I believe, page 184, line 3 through 6.
18 And having had an opportunity to review that, do you feel
19 that you should have objected as this hearsay being beyond
20 the scope -- or as this being hearsay beyond the scope of
21 time and place?

22 A. I don't know. That is a very good question that I --
23 I'd have to give some thought to. Since this had already
24 -- this was simply the transcript of the trial, it may be
25 that I should have asked the Court if that could be

1 redacted. I don't believe that would have been successful
2 and I don't know that I can object. I'm wondering -- I
3 wonder if I could object to the whole thing. It probably
4 would not have been as successful to object to part of it.
5 It would be -- it would always -- it would always be nice
6 to keep out everything that's prejudicial to a defendant.
7 And I will say this. There are unfairly prejudicial
8 things and there are things that are just prejudicial to a
9 person's case, and I'm not sure how I could have handled
10 that by an objection unless I had objected to the whole
11 thing.

12 Q. So you do not believe that you had the ability to
13 raise new objections to testimony that was being introduced
14 from a prior proceeding?

15 A. I don't see how. I -- I would have to -- the only way
16 I could think that I could have kept that out would have
17 been to object to the whole thing, which I think would come
18 under -- under -- what is it, 804? I think it would have
19 come in any way, she's not available, and I don't think I
20 would have been successful if I'd have asked them to redact
21 something that's prejudicial. You can't -- that doesn't
22 make any sense. Of course, the State's allowed to put on
23 their case.

24 Q. And I would -- and you stated that Ms. Buffy [REDACTED]
25 was unavailable. I would draw the Court's attention to

1 page 4 of the transcript, lines 5 through 17, where the
2 State addresses the unavailability of the witness, and
3 specifically line 15 through 17 -- well, we can go line 13
4 through 17. Mr. Molony indicates that she has Stage 4 lung
5 cancer. She will not be here all week. Her diagnosis is
6 palliative and the treatment at this point is only on pain
7 management. Do you recall or did you have an opportunity
8 to review the letter from the hospice facility that she was
9 at prior to this trial?

10 A. I do not specifically remember honestly and I -- and
11 I don't believe I have any notes on that. That would have
12 happened -- I feel that that would have been something that
13 would have been shared and that would have been the normal
14 thing. Before it gets passed up to the judge, they would
15 show it to me, I would have reviewed it and then it would
16 have gone to the judge. I don't -- I don't recall anything
17 out of the ordinary in that -- in that regard.

18 Q. And would the indication that her -- she has Stage 4
19 cancer, her treatment is palliative in nature and is
20 focussed on pain management, how did you interpret her
21 state at that time and you were unable to actually see her?

22 A. I relied on -- I relied on the -- the facts that we
23 had in front of us. There was some prior testimony where
24 she said she had Stage 4 cancer. That was a couple of
25 months before that, I think, and so I didn't have any doubt

1 that she had Stage 4 cancer.

2 Q. Did you feel that she would have been able to
3 appear for the entire four-day trial or to provide clear
4 testimony?

5 A. Based on what we knew -- based on what I knew at the
6 time and I -- I have to kind of -- how do I put this? It's
7 hard for me to specifically remember what I knew or what I
8 didn't knew -- or -- or know or what I think or what I
9 thought at that time. That's very difficult for me to
10 testify to now, but I can say I didn't have any doubt she
11 had cancer. I didn't have any reason to doubt that her
12 condition had worsened since she testified last time. We
13 had the testimony already. She would have testified, I
14 believe, substantially the same. That would have been a
15 reasonable conclusion, I think. And also I think it --
16 you're forcing somebody who's going to appear to be in very
17 poor health. If the State could have gotten her there, she
18 would have been in very poor health and probably pretty
19 sympathetic I would think to most people in the courtroom.

20 Q. And you indicated that your belief was that the only
21 way that you could have objected to specific lines of her
22 previous testimony would have been to object and attempt to
23 keep the entire testimony out, correct?

24 A. I think so because -- well, I didn't do it, so, you
25 know, I can't speculate what Judge Early would have done.

1 In fairness to -- to Mr. Cartwright and the Court, I can't
2 really speculate on what Judge Early would have done. He
3 never had a chance to consider that, but I would have my
4 doubts that any judge is gonna allow me to -- to redact
5 prejudicial things like that to the case on only one side.
6 That would -- he -- he would -- I feel confident most
7 judges would say you can object to the whole thing and we
8 can talk about that, but I don't know that he would let me
9 redact things that -- that were not objected to and that
10 they're in the record. Now if Mr. Harte had objected to
11 it and it was in the -- let's say he didn't ask it to be
12 stricken from the record, and I don't know if that would
13 have had an effect even on the transcript, but if it wasn't
14 objected to then, it's in -- it's part of the case.

15 Q. Yes, sir. And to go back to the testimony on
16 page 184, did you feel that that comment bolstered the
17 testimony of [REDACTED]? Or I apologize. It would have
18 been [REDACTED].

19 A. Can you tell me exactly what line you're referring to
20 so I'll know exactly?

21 Q. 184, line 3 through 5.

22 A. I would say the answer to that -- I'm not -- I
23 don't know that it unfairly bolsters it, but it -- it
24 probably does a pretty good job of corroborating the
25 State's position. I don't know if it was unfair or not.

1 Q. Yes, sir. Now next Mr. Cartwright has alleged you
2 failed to object to redirect of the DNA expert as beyond
3 the scope of cross when the State immediately asked if
4 DNA can be destroyed and the effects of washing and drying
5 sheets. That would be in the second portion of the
6 transcript, the -- that would be page 92 of the second
7 portion, line 1, and (transmission interruption) for
8 cross-examination on page 88, line 17 and page 91, line 24.
9 A. And your question was whether or not I should have --
10 Q. Do you feel that that -- or the question can DNA be
11 destroyed or the comment in a case like this, these sheets,
12 if you wash the sheets, would that have any effect on the
13 DNA, do you feel that that was testimony beyond the scope
14 of your cross-examination?
15 A. I don't think so because that was kind of where I was
16 going. I mean, I didn't ask that particular question, but
17 I was certainly asking questions about touch DNA and how
18 -- what that means, how does it get there and different
19 mixtures. I think where I was going with that was there
20 seems to be all these events and people are alleging that
21 they had clothes on during those events and yet there's
22 no touch DNA, there's no semen on the clothes, and -- and
23 I think we have to recall that they kept saying very
24 specific, unique -- probably not really unique, somewhat
25 unique, but it would begin with humping from behind, if I

1 -- if I recall correctly. I mean, there's a lot of
2 touching, there's a lot of touching of -- allegedly of
3 Mr. Cartwright's genitalia on -- on their clothes, so if I
4 were Mr. Molony based on that -- that line of questioning,
5 if there's an absence of it, then I -- since I bring it
6 up, if I was Mr. Molony prosecuting the case, I might want
7 to ask that question, well, maybe the absence of it can be
8 accounted for by the destruction of the DNA.

9 Q. And if you did object as beyond the scope of cross,
10 do you think that that objection would have been successful
11 ultimately?

12 A. If -- if -- if the Court reasoned as I just did, I
13 don't think it would have been.

14 Q. Yes, sir. Now Mr. Cartwright's next allegation
15 regards the testimony of James Hettich, who was the
16 jailer who saw Mr. Cartwright hanging in his cell.
17 Mr. Cartwright's alleged you failed to object on
18 redirect to the State requesting Mr. Hettich identify
19 Mr. Cartwright. The objection should have been that this
20 is beyond the scope of cross. Did you feel that it was
21 proper -- or that you could have or should have objected
22 in that moment? The redirect would be on page 104.

23 A. Yes, sir.

24 Q. I believe specifically lines 10 through 20.

25 A. It will take me a second to look at this now.

1 Mr. Molony did not appear to have asked the deputy to
2 identify Mr. Cartwright and -- probably I opened the door
3 to that question frankly. On page 104, line 1, I said
4 and the prob -- the thing is -- I think where I was going
5 with this, and I will read the line, it says any other
6 problems with Mr. Cartwright since that time, so I
7 definitely identified Mr. Cartwright as the person that
8 we were talking about there and Mr. Molony looks like he
9 chose to repeat that to make sure that that was the case.
10 Arguably it looks like I opened the door for that. And
11 the rea -- where I was going with that, I -- I believe, is
12 -- you know, if he was -- if he's so -- if this -- if this
13 is really about these events, these charges, rather than
14 just everything going to hell in a hand basket so to speak
15 and not out of guilt, why wouldn't they continue to have
16 problems with him I think is what I was trying to get the
17 jury to infer from that.

18 Q. Yes, sir. So you feel that you may have opened the
19 door for an identification through your cross?

20 A. Well, I don't think his question was -- I don't know
21 that his question was beyond the scope since I'm the one
22 that -- that was attempting to say hey, Mr. Cartwright's
23 not a -- you know, Mr. Cartwright's not trying to -- did
24 not try to kill himself anymore, so maybe it's not about
25 these charges, maybe it was just a momentary, very grave,

1 despondency.

2 Q. Yes, sir. And now Mr. Cartwright's next allegation
3 regards an in-camera conversation between Judge Early,
4 Solicitor Molony, yourself and Mr. Cartwright where
5 Mr. Cartwright asks the Court a question regarding photos
6 that were introduced during this trial and photos that
7 were introduced in the first trial, and I believe
8 Mr. Cartwright somewhat touched on this yesterday in his
9 testimony. I believe specifically this begins page 116,
10 line 18 going through line -- or page 119 line 3.

11 Now Mr. Cartwright -- and, again, he addressed this
12 issue yesterday in court stating that his belief is in the
13 first trial the State claimed that the sheets came from
14 [REDACTED] bedroom and provided a photo of [REDACTED] bedroom,
15 yet in the second trial the State indicated that it came
16 from Hoss's bedroom and that [REDACTED] was staying in there.
17 Do you recall Mr. Cartwright ever addressing this issue
18 prior to him addressing the Court?

19 A. I do not, but that doesn't mean -- at that point in
20 time since the testimony had already been put in there,
21 I believe, and I don't specifically remember him, but
22 Mr. Cartwright has a -- obviously has a very good memory
23 about this, so I -- I wouldn't deny at all that he
24 mentioned it, but it -- it probably was pretty close to --
25 to the time that he stood up and was asking the judge a

1 question when the jury was outside. I don't think it was
2 -- I don't think it would have been before that.

3 Q. And do you recall ever addressing this prior to the
4 trial?

5 A. I know -- I doubt if -- I doubt I would have addressed
6 it because we wouldn't have -- Mr. Cartwright would not
7 have discovered it until the testimony that there may be
8 some kind of a -- a problem with the -- the testimony as
9 to the -- where the photos came from, and if that's the
10 case truly, then I -- when that testimony was elicited
11 by the State that's when I should have -- I should have
12 recognized that and cross-examined the -- the person
13 testifying and I -- I don't -- it makes me wonder if --
14 if maybe Mr. Cartwright didn't recognize it until after
15 that because I -- I certainly come over to the table after
16 I finish questions to ask pe -- ask everybody at the table
17 have I missed anything. That would be the normal thing to
18 do. I do not specifically remember if I did this on this
19 issue, but that is what I normally do. I come over and I
20 say is there any -- any problem. It might be the case that
21 Mr. Cartwright --

22 (Internet transmission interruption.)

23 (Pause in proceedings.)

24 (Internet connection reestablished.)

25 THE COURT REPORTER: The Internet or my --

1 everything went down.

2 THE COURT: Let me ask you this. From the State,
3 what's your position on moving forward with the court
4 reporter not being able to see us and us not being
5 able to see her, but her being able to just record this
6 audio?

7 MR. NEUBAUER: This is the first time I've
8 personally experienced this issue. I am uncertain
9 that it would be a major issue as long as she is able
10 to determine what we are saying and who is speaking at
11 any given point. I'm not sure if others have dealt with
12 this in the past and -- or if we would have any issue.

13 THE COURT: Well --

14 MR. PHILLIPS: My --

15 THE COURT: Go ahead.

16 MR. PHILLIPS: Yes, your Honor. I apologize for
17 jumping in. I see the -- it doesn't appear that this
18 Zoom proceeding's being recorded. I would have some
19 -- some concern if we don't have the Zoom recording as
20 a backup. I just -- I don't want to -- I would hate
21 to have to do a motion to try to recreate --

22 (Internet transmission interruption.)

23 (Internet connection reestablished.)

24 THE COURT REPORTER: I'm sorry. It just keeps
25 circling. It's like the WebEx app is just circling.

1 I can try to reset the router.

2 THE COURT: No, I'll tell you we're gonna take a
3 break.

4 (Pause in proceedings.)

5 THE COURT: Mr. Cartwright?

6 THE APPLICANT: Yes, sir.

7 THE COURT: We are going to get this rescheduled as
8 soon as we can, okay, Mr. Cartwright?

9 THE APPLICANT: Yes, sir.

10 THE COURT: Mr. Cartwright, we want this to be
11 right. You understand that. It's important to you, it's
12 important to the State. Okay, sir?

13 THE APPLICANT: Yes, sir, Your Honor. Thank you.

14 THE COURT: Thank you.

15 All right, folks.

16 THE COURT REPORTER: Sorry about that.

17 THE COURT: That's all right. No problem.

18 THE COURT REPORTER: Yeah, I've just never had it
19 happen before.

20 THE COURT: That's quite all right, okay, Stacy?

21 THE COURT REPORTER: Okay. I'm sorry.

22 MR. NEUBAUER: Thank you, Your Honor.

23 (Whereupon, the proceedings were adjourned at
24 3:12 PM on February 4, 2022, to be continued at a later
25 date.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the February 3rd and 4th, 2022, recorded via WebEx Videoconferencing, and transcribed by me to the best of my ability.

This transcript may contain quoted material. Such material is reproduced as read by the speaker. This transcript may also contain transmission interruptions and/or technical difficulties and inaudible or unintelligible indications due to being conducted remotely via videoconferencing.

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

October 6, 2022

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

-----)

Harold B. Cartwright,)

III,)

Plaintiff,)

vs.)

State of South)

Carolina,)

-----) Defendant.

TRANSCRIPT OF HEARING
(VIA WEBEX)

February 25, 2022
Aiken, South Carolina

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The Honorable Robert Bonds, Judge Presiding

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P R O C E E D I N G S

* * * * *

THE COURT: All right, good morning, folks.
Good morning, Mr. Cartwright.

MR. CARTWRIGHT: Good morning, Your Honor, good morning.

THE COURT: All right, we've got everybody we need?

MR. NEUBAUER: Your Honor, we are waiting on Michael Routzong. I've reached out to him yesterday and this morning, and I have not heard back from him yet. If you don't mind, I'll call him real quick and find out where he's at, or how long it will take him.

THE COURT: Right. Mr. Routzong, he was the witness, correct?

MR. NEUBAUER: Yes, Your Honor.

THE COURT: Okay, no problem.

MR. NEUBAUER: Thank you.

THE COURT: Thank you.

MR. NEUBAUER: I apologize for the confusion, Your Honor. I reached out to Mr. Routzong, he'd attempted to join just your standard virtual courtroom, instead of the private link that we'd sent; so I just sent it back to him, and he should

1 be joining us here momentarily.

2 THE COURT: All right, great.

3 MR. NEUBAUER: And, Your Honor, I've just
4 received a call back from Michael Routzong,
5 apparently, his firewall is causing him some issues
6 with accessing the courtroom. He's in Aiken, and is
7 attempting to get one of the Aiken Public Defender's
8 computers to use to access the hearing. I apologize
9 for the delay.

10 THE COURT: All right, well, we'll just wait and
11 see, if we can get him on, all right?

12 MR. NEUBAUER: Yes, Your Honor.

13 (BRIEF RECESS)

14 THE COURT: All right, Attorney General, are we
15 ready to proceed?

16 MR. NEUBAUER: Yes, Your Honor.

17 THE COURT: Okay, and I think you're continuing
18 your direct examination of your witness?

19 MR. NEUBAUER: Yes, Your Honor, that's correct.

20 THE COURT: All right, go ahead, sir.

21 MR. NEUBAUER: Thank you, Your Honor.

22 DIRECT EXAMINATION CONTINUES:

23 BY MR. NEUBAUER: (Continuing)

24 Q. Good morning, Mr. Routzong.

25 A. Good morning, sir.

1 Q. I have a few more allegations to go through
2 with you. I believe we stopped on allegation, the
3 -- Mr. Cartwright stated in the in-camera
4 conversation with the Court that during his first
5 trial the State introduced evidence and pictures
6 showing the sheets were taken from one bedroom, but
7 at the second trial they claimed that they were from
8 the Applicant's son's bedroom, and you failed to
9 cross-examine the State's witnesses regarding this
10 discrepancy. Do you recall this exchange with the
11 Court?

12 A. I recall from the transcript record that
13 Mr. Carwright brought it to -- brought it to the
14 Court's attention. What I do not remember is if he
15 had mentioned it to me before that. I don't have
16 any recollection or notes, and I do not recall being
17 aware of that, prior to Mr. Cartwright bringing --
18 I would have -- I would think Mr. Cartwright
19 probably brought it to my attention at least before
20 he stood up and -- and made the Court aware of it,
21 but that -- it may have been after the State
22 rested though, at that point; but I don't recall --
23 and I don't recall catching that inconsistency at
24 all, personally.

25 Q. And you didn't handle the first trial,

1 correct?

2 A. Yes, sir, that's correct.

3 Q. And did you have a copy of the transcript
4 from the first trial?

5 A. I do somewhere here.

6 Q. Going through that transcript, do you
7 recall the State claiming that the sheets came from
8 [REDACTED] room?

9 A. I don't -- I don't specifically recall --
10 I don't specifically recall that, no.

11 Q. And you're saying you don't remember any
12 conversations with Mr. Cartwright before trial,
13 where -- or during the course of the trial where he
14 told you that there were any discrepancies with the
15 State's evidence, regarding where the bedsheet came
16 from?

17 A. No, sir, I don't -- I don't specifically
18 recall. A lot of times I will say -- as Mr. Hayes,
19 I think, pointed out in earlier testimony, what we
20 did was we worked in teams. We'd have two attorneys
21 sitting on one trial; one would be lead, one would
22 be second chair. And one of the purposes of a
23 person in the second chair would be, to field
24 questions from the Defendant, and if it -- if --
25 if you could answer that, or -- or make

1 corrections. And a lot of times Defendants catch
2 things that nobody else catches, obviously, so --
3 but I do not specifically remember him bringing it
4 up, but I would think, at least before he stood up
5 and talked to the Judge, that he would have tried to
6 get our -- drawn our attention to it. So I -- I
7 think it's probably fair to say that there was some
8 time before he told the Judge, he would have brought
9 it -- brought it to our attention, but I don't know
10 if the State had already rested. If they had
11 rested, then I guess the proper thing to have done
12 would have been to -- to recall a witness at that
13 point in time, but I do not recall recalling any
14 witnesses that the State provided.

15 Q. So your testimony is, that you don't
16 remember, for certain, whether or not Mr. Cartwright
17 brought that to your attention; that you think he
18 might have, but you can't specifically remember?

19 A. That's correct. I would think he would
20 have said something before he stood up to speak to
21 the Judge, that would make sense. That would be the
22 normal thing for a Defendant to do.

23 Q. And you said that if this is brought up
24 after the State rested, that you could have recalled
25 a witness to address this issue?

1 A. I would think -- yes, sir, I would think I
2 could have done that, that's correct.

3 Q. And do you know why you would not have done
4 that? I do not believe that you recalled any of the
5 State's witnesses.

6 A. I don't think I did either, and it's hard
7 to say right now. I don't know that the idea
8 actually appeared to me. I'm not so sure -- I'm
9 not real sure. It's hard for me to remember, but
10 I'm not real sure I considered it earthshaking; and
11 I think probably -- let's look at it like this, now
12 that is inconsistent -- an inconsistency,
13 apparently, in the State's case, but what would
14 account for that? They -- to me, the gravamen of
15 the issue was - it was found on somebody's bed. And
16 Mr. -- Mr. Cartwright's story, I believe, was that
17 when he came home from work, I think it was, that he
18 was -- his wife had masturbated him into the --
19 and he had ejaculated onto the sheet. And I don't
20 think -- I'm not sure whether that was in either of
21 the bedrooms or in the laundry room. I'm not sure
22 if I recall correctly. I guess the gravamen of the
23 question would be why would anybody not just put
24 that in the laundry room, and or do the laundry with
25 it? How would it ever have made it back to either

1 bedroom? That doesn't seem to make sense, and I
2 agree, if there was an inconsistency in the State's
3 case, it should have been brought forward; and I
4 don't recall other than his testimony, I think it
5 might have been listed the inconsistency. And
6 that's about all I can tell you about that. I think
7 every time an inconsistency appears in the State's
8 case, it should -- it should be brought forward
9 somehow to the Jury. And I think, if I recall
10 correctly, Mr. Cartwright testified to the Jury that
11 that's not how it happened. The Police, even though
12 it's an inconsistency, the question is, I would
13 think, how did it show up in the bedroom instead of
14 being just laundered?

15 MR. NEUGAUER: I beg the Court's indulgence.

16 WITNESS CONTINUES:

17 A. I apologize to everyone for being tardy. I
18 was here on time, but I could not get my computer
19 from Sumter to get past the firewall; but Mr. Bush
20 here at Sumter managed to do a work around for me,
21 but I do apologize to everybody. I should have paid
22 closer attention to the email yesterday. I just
23 thought it was the same old Webex link.

24 THE COURT: Sure.

25 BY MR. NEUBAUER: (Continuing)

1 Q. And just to go back to the point of where
2 the bedsheet came from, you indicated that you
3 believe Mr. Cartwright testified that the sheet did
4 come from Hoss's room, correct?

5 A. I think that's what he testified to. I'd
6 have to go back and look at the transcript, but I --
7 I'm pretty sure Mr. Cartwright would not have let
8 that fact escape.

9 Q. And I draw your attention to page 145 of
10 the second portion of the transcript, line 13
11 through 24.

12 A. Yes, sir.

13 Q. And if you just review that to yourself.

14 A. (Reviews document.) I have reviewed it,
15 yes, sir.

16 Q. Okay. And so Mr. Cartwright, during his
17 direct examination, addressed the issue of where, I
18 guess, which bedroom he was pulled into when he and
19 Buffy had a intimate moment, correct?

20 A. Yes, sir. Specifically, he says, "I pulled
21 back onto the door around the corner to Hoss's room.
22 She took me and pushed me back onto the bed and
23 masturbated me with some panties."

24 Q. So do you -- through testimony were able
25 to address where -- or which room the sheet came

1 from. Is there any reason why you would not have
2 dove into the prior trial, and the discrepancy
3 between testimony from the first trial and the
4 testimony from the second trial regarding which room
5 the sheet came from?

6 A. I can think of no reason why I would not
7 have drawn the Jury's attention to that. I think
8 that was an important fact. I think the gravamen of
9 the question though is how did sperm get on a sheet,
10 and Mr. Cartwright addressed that.

11 Q. Okay. Now, next allegation from Mr.
12 Cartwright is that you provided erroneous legal
13 advice regarding his decision to testify. Do you
14 remember the conversations you had with Mr.
15 Cartwright regarding his decision to testify at
16 trial?

17 A. I believe it's always important, if we're
18 -- if we're -- let me start out by saying it's a
19 very attractive thought to have the last licks, as
20 they say, or to have the closing argument last. If
21 you're going to present evidence, then I think you
22 should go to war with all your weapons, as they say.
23 I believe in Defendant's getting up, and telling the
24 Jury, "I didn't do it," because sometimes it's kind
25 of lopsided that way if you don't, particularly in

1 criminal sexual conduct cases. There are other
2 cases, where, you know, maybe the State just doesn't
3 have enough evidence. I think there was a problem
4 between the Court and -- and Mr. Cartwright's
5 responses. I probably didn't control Mr. Cartwright
6 as well as I should have, but my -- what I asked
7 him to do, and I know we're going to get to this, in
8 -- if we haven't already gotten to it; so what I
9 tried to get Mr. Cartwright to do was tell him about
10 himself a little bit to try to give the Jury a sense
11 of who he is. And I probably -- this would be a
12 normal thing for me to say in these -- in these
13 kind of cases, or any -- any case, when I'm asking
14 you a question, don't, you know, don't make me draw
15 it out of you question-by-question. There are some
16 things that -- that can just flow by themselves.
17 Biographical information, I believe, is one of those
18 things. However, I believe I failed miserably in --
19 in controlling Mr. Cartwright. And maybe not
20 anticipating what the Court found to be the
21 appropriate, and so that led to a problem. I don't
22 think it was overwhelming. I don't think he looked
23 like a fool. I think he looked -- I think he
24 pretty much appeared to the Jury as he is. He has
25 convictions on things, and I -- I think -- I think

1 as best he could, that's what was presented to the
2 Jury.

3 Q. And do you recall any conversation with Mr.
4 Cartwright regarding, like, the State's ability to
5 cross-examine him, and any potential criminal record
6 that he may have that could be used to impeach him
7 prior to him testifying?

8 A. I don't specifically remember, but that's
9 what I normally always do. You have to let
10 Defendant's know that, hey, they can talk to you
11 about this, or that, or the other thing, yes, sir.

12 Q. And do you remember the Court informing Mr.
13 Cartwright of his right to remain silent, and the
14 implications of him testifying, that he could be
15 cross-examined, or the State could try to use a
16 prior record, if he had any, to impeach his
17 testimony?

18 A. I don't specifically recall. I'd have to
19 look -- look back at the transcript, but that's
20 what the Court, particularly, Judge Early, I've
21 never seen him waiver from that. He always -- he
22 always did what was about to happen, the right to
23 remain silent, the right to testify in their own
24 defense. I don't know that he ever goes into, "Hey,
25 you can be cross-examined." That's probably self-

1 explanatory, since you've watched half the trial.
2 He normally would, you know, give the Defendant the
3 opportunity to tell the Court whether they wanted to
4 remain silent, usually, after the State rests
5 itself. I -- and Mr. Cartwright's a very bright
6 man, so I don't think -- I don't think there would
7 be any issue about being -- understanding that he
8 would be cross-examined.

9 Q. And I draw your attention to page 114 of
10 the transcript, line 22 through 116, line 17, and,
11 specifically, page 114, line 24 through page 115,
12 line 10.

13 A. (Reviews document.) Yes, sir, he
14 specifically, on line 115 -- page 115, line six, he
15 specifically tells him that they can be cross-
16 examined on any relevant subjects of the case or
17 facts on the record.

18 Q. And --

19 A. I'm sorry, subjects of the case, and facts
20 on the case, excuse me.

21 Q. And do you recall Solicitor Maloney inform
22 the Court that there was no prior convictions that
23 could have been used to impeach Mr. Cartwright's
24 testimony? To be used to impeach him?

25 A. Mr. Maloney says, when asked, "Does he have

1 a record?" Mr. Maloney said, "Nothing, nothing, we
2 will be," and then the Court interrupted Mr.
3 Maloney, and said, "No impeachable."

4 Q. So did you feel that there was anything
5 that would have prevented Mr. Cartwright from
6 testifying at this trial?

7 A. I don't -- I don't have -- I don't have
8 any recollection that Mr. Cartwright ever wanted to
9 do anything else other than tell his side of the
10 story. And some of it I think it was -- I -- and
11 like I said, I always believe it's important,
12 particularly, in CS -- CSC cases, where frequently
13 there's not a lot of evidence, there's just somebody
14 saying this happened. Well, you're kind of lopsided
15 if you don't encourage the Defendant to tell his
16 side of the story, and that's what I think about
17 that.

18 Q. And you stated Mr. Cartwright wanted to
19 testify at the trial?

20 A. My recollection is I didn't have to fight
21 him about it. I think he was ready, willing and
22 able to tell his side of the story.

23 Q. And, again, you feel that it was in his
24 best interest to testify at this trial?

25 A. Yes, sir.

1 Q. All right. The next allegation is that
2 your theory throughout the trial was that [REDACTED]
3 (phonetic) lied after Mr. Cart -- or [REDACTED] lied and
4 made up these allegations after Mr. Cartwright
5 discovered pornographic photos of her online; and
6 Mr. Cartwright is claiming that you failed to
7 proffer any photographs into evidence to support
8 this theory. Do you recall the photograph in
9 question, that Mr. Cartwright alleged was [REDACTED]

10 A. I do.

11 Q. And during -- you guys spoke about this
12 photograph during your preparations for this trial?

13 A. We did.

14 Q. And was there anything that made you
15 believe that this was -- or that the photograph was
16 of [REDACTED]

17 A. No, sir, other than Mr. Cartwright saying
18 it was.

19 Q. And you still pursued the theory that
20 after Mr. Cartwright saw this photo, that he
21 believed was her, Mr. Cartwright took actions that
22 irritated or infuriated [REDACTED]

23 A. Well, I think -- it's hard for me to
24 speculate about [REDACTED], but -- and I understand what
25 you're -- you're getting at, and I'm not trying to

1 be flippant or anything, but it's hard to speculate
2 about [REDACTED], but at least the argument I think could
3 be made, that anybody whose father would go to a --
4 to the lengths of calling a -- calling Law
5 Enforcement, and speaking to a -- I think it was a
6 television station in Augusta, Georgia, if I'm not
7 mistaken, I think anybody would understand that that
8 would embarrass a young person half to death, and so
9 they might be upset about that.

10 Q. And that was the theory that you proceeded
11 with, correct?

12 A. Yes, sir. I think in -- I think everyone
13 agrees that one of the questions in criminal sexual
14 conduct cases is always, why would the accuser lie?
15 Why would anybody make an allegation, and you have
16 to answer that question.

17 Q. And do you feel that you were able to
18 convey that theory without introducing the
19 photograph?

20 A. I don't think the photograph was relevant
21 at all. And -- and I mean other than -- it was
22 relevant, the actual physical photograph was not
23 relevant. Why -- if -- it would be different if -
24 - it would be different, I suppose, if he hadn't
25 already taken actions. In other words, if he hadn't

1 gone to Law Enforcement, if he hadn't gone and
2 spoken to a television station. As I testified
3 before, I think it even makes it worse if it's not
4 her. So it -- it's -- it's a little bit wrong --
5 it's -- it's bad enough to be accused of doing what
6 you did successfully, it's even worse, arguably, to
7 be accused of something you didn't do. So I don't
8 think physically entering the photograph into
9 evidence is a problem. Everybody -- every --
10 anyone that -- everyone that I'm aware of, except
11 Mr. Cartwright, said that it wasn't her.

12 Q. And so based on that you felt no need to
13 further pursue the issue of the photograph, and
14 whether or not she was the one in it, you -- or --
15 or your theory was that Mr. Cartwright's insistence
16 that it was her, and Mr. Cartwright's actions after
17 finding the photograph, were enough to embarrass
18 [REDACTED], that that could have caused her to make this
19 accusation, correct?

20 A. Yes, sir.

21 Q. The next, Mr. Cartwright's alleged that you
22 failed to object to the Court repeatedly stopping
23 Applicant's testimony before the Jury and
24 admonishing him for continuing to recite hearsay.
25 Do you recall those exchanges?

1 A. Yes, sir, that is one of the things that
2 actually does pop up into memory, because I think --
3 I don't know what more to say about that then I've
4 already said. I probably failed to -- I certainly
5 failed in the Court's view, in -- in asking a
6 question, and waiting for an answer. And that's
7 what the Court had anticipated and expected, but
8 that is not what I asked Mr. Cartwright to do. I'd
9 -- I believe I -- and this is something I would
10 normally say to Defendants, "Don't make -- there
11 are some -- some questions that -- that can be
12 answered more extensively." Like if I asked Mr.
13 Cartwright to please let the Jury know who he is,
14 that's biographical, I don't necessarily -- if I
15 tell him, "Look, these are the kind of things, let
16 the Jury know what kind of person you are, the
17 things that you'd done," which I specifically
18 remember telling him to do, and he -- and I think
19 he attempted to do that. That, evidently, wasn't
20 what the Court expected, and I -- I disagree with
21 the Court, but I did not object. I think, like I
22 said, biographical information is one of those
23 things that can kind of just flow, and it doesn't
24 require a succession of questions, necessarily.

25 Q. And I've reviewed the testimony of Mr.

1 Cartwright, and I believe there were eight instances
2 where the Court interrupted him. Just as a general
3 matter, have you practiced before Judge Early prior
4 to this trial?

5 A. Yes, sir.

6 Q. And --

7 A. Probably -- probably six years or so, five
8 or six years.

9 Q. And throughout his prior -- or throughout
10 your prior interaction with him, have you seen him,
11 I guess, interrupt or object to -- personally object
12 to the testimony of a witness?

13 A. I don't recall -- I -- I can't specifically
14 recall any incident. What you frequently noticed
15 about Judge Early was -- would be that he would many
16 times frown. Some of the times he would make facial
17 expressions, but -- and I know that the Court -- Mr.
18 -- or Judge Early was aware of that because he would
19 always tell the -- the -- a Jury at the end of the
20 evidence, when he's instructing the Jury, "If I've
21 done anything to make you think I have an opinion,"
22 is usually how he -- he would express it, "you
23 should disregard that," but everybody, I think, if
24 we're all honest, everybody knows that Judge Early
25 would make facial expressions during testimony that

1 sometimes you would wish he would not. I never
2 objected to any of those, and I didn't object this
3 time.

4 Q. And do you recall if Mr. Earl -- or Judge
5 Early made those same remarks during his Jury
6 instruction in this case?

7 A. I feel pretty confident that he would have,
8 since he always did.

9 Q. And I would draw your attention to page 202
10 of the second portion of the transcript, line 13
11 through page 203, line two.

12 A. Please tell me the lines again?

13 Q. Page 202, line 13 through page 203, line
14 two.

15 A. (Reviews document.) In part, he says, "So
16 if there's been any time during the trial of this
17 case that I've rolled my eyes, or yawned, or
18 whatever, picked up my glasses and chewed on them,
19 or stretched, or whatever, and you think I'm
20 commenting on the facts, please don't -- don't take
21 anything that I've done in the trial to think that I
22 have an opinion about the facts." That would pretty
23 much be a similar remark by Judge Early, a normal
24 remark.

25 Q. And going through Judge Early's

1 interactions with Mr. Cartwright, the majority of
2 them concerned him either not answering a specific
3 question or proceeding to give hearsay testimony.
4 Have you ever seen Judge Early independently stop or
5 admonish a witness for giving hearsay testimony
6 outside of this trial, or outside of Mr.
7 Cartwright's testimony?

8 A. Normally, Judge Early, I think -- I've
9 practiced in front of him many years, and I don't
10 specifically remember any -- I can't cite any
11 particular case, my recollection is, he would -- I
12 -- I don't think he would normally interfere in the
13 -- in the testimony, but once the State or the
14 Defense objected to something, and he sustained the
15 objection, after that point, I think it would be
16 normal for him to admonish a witness, who he already
17 told, for example, he would -- he would say
18 something like, "I've already told you you can't
19 tell what somebody else says." And I don't know
20 that it happened or not. I mean it's almost always
21 contingent upon somebody objecting, I would think;
22 but I -- I think there have been times when he went
23 ahead without an objection, and just said, "Look, I
24 told you don't do that," just to kind of keep things
25 rolling along.

1 Q. In fact, that interaction occurred -- that
2 exact interaction occurred on page 136, line 12
3 through line 19; do you recall that?

4 A. (Reviews document.) It says so he -- I
5 guess this was me, "So you don't really -- then you
6 don't really know if Melinda asked him to babysit?"
7 "No, she stated that she felt more comfortable," and
8 Mr. Maloney objects at that point, "That's hearsay,
9 Your Honor." The Court, "Come on, you can't testify
10 -- testify about what somebody said. Please Mr.
11 Routzong. Disregard that, ladies and gentlemen."

12 Q. And, again, on - or, again, on page 138,
13 line three through line eight, saying, "Admonishment
14 comes after you asked Mr. Cartwright to not testify
15 about what someone told him," correct?

16 A. (Reviews document.) Yes, sir.

17 Q. And, similarly, on page 139, line eight
18 through line 12, Judge Early interjects after
19 Solicitor Maloney is objecting, correct?

20 A. (Reviews document.) Mr. Maloney says,
21 "Your Honor, he asked him how he met Sandra Carson,"
22 and then the Court says, "That's exactly right.
23 Please listen to the question and respond to the
24 question." And Mr. Cartwright said, "Yes, sir."

25 Q. Then, again, that next time Judge Early

1 interjects is page 141, line 13 through line 25.
2 Again, this is concerning potential hearsay
3 testimony, correct?

4 A. (Reviews document.) Yes, sir, it appears
5 from the transcript, and I will read this. I asked
6 a question, "What happened in 2001 between you and
7 [REDACTED]" And Mr. Cartwright answers, "In 2001,
8 Buffy had come to me. I was working in Charlotte."
9 And then Judge Early probably anticipates that he's
10 going to say what Buffy said to him after she came
11 to him, so he cuts that off, and said, "Don't
12 testify about what she said."

13 Q. And I believe that occurs two more times
14 before Mr. Cartwright's finished testifying on
15 direct. Would it be fair to say that most of Judge
16 Early's admonishments came after Mr. Cartwright gave
17 hearsay testimony?

18 A. It looks like one was in the anticipation
19 of him giving it, and then he, subsequently, did try
20 to give hearsay testimony; but it -- the answer to
21 your question is, with that exception, it appears to
22 be, yes.

23 Q. And did you, at the time, feel that there's
24 a need to object to, or at least have a sidebar
25 conversation with Judge Early concerning his

1 preemptive interruptions of Mr. Cartwright's
2 testimony?

3 A. No, sir, I don't think -- and -- and right
4 now I don't think there would be any - any good
5 reason. Is it -- is it exactly proper? No,
6 probably the Court should wait for somebody to
7 object, but I think -- I think in the flow of the
8 trial, it -- it's -- it's not really such a big
9 deal, in my opinion. He anticipated and he -- his
10 anticipation turned out to be correct in that Mr.
11 Cartwright did go on to start to testify about what
12 someone had told him. It's hard for Defendants not
13 to do that. That's not -- that is now how we
14 typically interact with each other. And then that's
15 -- and in that sense, I don't specifically recall
16 going over the requirements that you can't testify
17 as to what somebody else says in most instances. I
18 don't recall whether I went over that with Mr.
19 Cartwright or not. I normally would, but, usually,
20 it's not -- it's not something that witnesses tend
21 to be able to get right very often, so that's about
22 all I can tell you about that.

23 Q. And from your personal opinion, do you
24 think that Judge Early's comments throughout Mr.
25 Cartwright's testimony painted Mr. Cartwright in a

1 negative light in front of the Jury?

2 A. I don't think it was helpful. I don't
3 think the Court was out-of-bounds. I don't think it
4 was helpful for Mr. Cartwright. I have, for years,
5 when I've thought about this case, felt like it
6 didn't -- he didn't appear to be a likeable person,
7 as much as I kind of wanted him to appear. He
8 appears to be headstrong, but that is Mr.
9 Cartwright, he is headstrong. He has convictions,
10 he has beliefs, and he acts on them; and so in that
11 -- in that sense, I don't necessarily think it's a
12 bad thing. Mr. Cartwright is who he is, and I think
13 -- I don't think -- I don't think his testimony and
14 his interactions with the Court made him likeable,
15 necessarily. I don't think it's what -- I don't
16 think it's way the Jury (Webex glitch).

17 Q. And next, Mr. Cartwright's alleged you
18 failed to --

19 THE COURT: Hold on -- hold on a second. Hold
20 on a second. I'm looking at this, has -- has Trial
21 Court failed to object and preserve for appellate
22 review? The Trial Court repeatedly -- or Trial
23 Counsel, excuse me, failed to object and preserve
24 for appellate review the Trial Court repeatedly
25 stopping the Applicant's testimony before the Jury

1 sua sponte admonishing going on. So, you know, we
2 went on for 20 minutes on this. The only thing I
3 got out of that was he disagreed with the Court, but
4 not -- but did not object. And so before you move
5 on, why didn't he object? That's all -- that's all
6 I need to know. And the only thing I have written
7 down is at one point, not such a big deal. So let
8 me just ask, Mr. Routzong, why did you not object?
9 That's all I need to know.

10 BY WITNESS:

11 A. The answer, Your Honor, is that I did not
12 feel it -- it -- it -- it went to that level -- it
13 -- it rose to that level that I had to bring it to
14 the Court's attention.

15 THE COURT: All right, that's all I needed to
16 know, sir, thank you. All right you can proceed.

17 MR. NEUBAUER: Thank you, Your Honor, sorry.

18 BY MR. NEUBAUER:

19 Q. Next allegation, you failed to object to
20 the State's improper closing argument, there was a
21 misstatement of the evidence and prejudicial. And
22 do you recall Solicitor Maloney's closing argument
23 in this case?

24 A. Not specifically, your -- your -- Mr.
25 Neubauer, I don't specifically recall. I don't

1 recall there being any -- I don't recall anything --
2 I -- I may have missed it, but I don't recall
3 anything objectionable.

4 Q. And the close argument begins on page 186,
5 and continues through page -- I beg your pardon,
6 198. So I'm not going to ask you to read the whole
7 thing, but in summary, Solicitor Maloney addressed
8 Mr. Cartwright's belief that everybody was lying --
9 or summarized it as everyone's lying in this case.
10 That each of his daughters have fabricated
11 allegations against him, and the State has -- or
12 Investigator Gaskins has lied. Did -- now going
13 through this closing argument, at any point, did you
14 feel there was anything objectionable that Mr.
15 Malloy -- or Maloney said?

16 A. Evidently not, I did not object, so either
17 I missed it, if there was something objectionable,
18 or I didn't find it to be objectionable; it would
19 have to be one of those two.

20 Q. And through your practice as an attorney,
21 have you objected to closing arguments in the past?

22 A. Rarely, but it has happened.

23 Q. And in the past what has led you to object
24 to a prosecutor's closing argument?

25 A. Oh gosh, you're asking me for a specific --

1 THE COURT: We don't need to get into that.

2 MR. NEUBAUER: My apology.

3 THE COURT: Yeah, we -- we don't need to
4 pontificate about why he's objected in the past to
5 closing arguments. It would seem to me that he's
6 outlined the attorney (Webex broke up) the facts by
7 some witnesses in a complete different version of
8 the facts by other witnesses. And he asks, and he
9 quotes, "What I'm assuming that means is that he's
10 got specific concern about failing to object to that
11 comment that was made." And so what I'd like to do
12 is set -- Attorney General Neubauer, did he have --
13 did your witness have any -- did the lawyer have any
14 problems with this particular statement? I mean it
15 -- it seems like -- it seems like we need to be a
16 little more direct on trying to move this thing
17 along, sir.

18 MR. NEUBAUER: Yes, I apologize, Your Honor, I
19 was -- I've had to break these allegations down into
20 different phases throughout the trial, and I was
21 just trying to thoroughly cover each of them. I --

22 THE COURT: No --

23 MR. NEUBAUER: I --

24 THE COURT: I promise you, you -- you've been
25 thorough. I -- I promise you you've been thorough,

1 sir, but I mean, you know, I -- I really think that
2 -- and -- and also, if he gets into something else
3 that you need to respond to, then I think that would
4 be great for a re -- for -- for redirect. So, for
5 instance, if counsel in cross-examination, you know,
6 gets into something on number 35, point 35, that you
7 didn't -- weren't able to bring out, then,
8 certainly, on -- on redirect, sir, that would be
9 perfect, but why don't you ask him about what it
10 looks like counsel is -- is concerned with.

11 And, Counsel, I'm not putting any words in your
12 mouth, sir, I'm just reading this document, and I'm
13 going to be happy to hear from you and allow you to
14 fully cross-examine this witness, okay, sir?

15 MR. PHILLIPS: Yes, Your Honor, I don't -- I
16 understand.

17 THE COURT: All right. Go ahead -- go ahead,
18 Attorney General.

19 BY MR. NEUBAUER:

20 Q. And just going back specifically to the
21 closing argument from Solicitor Maloney, in point,
22 38, counsel -- or Mr. Cartwright's alleged you
23 failed to object to the Prosecutor's improper
24 closing, or improper comments during closing
25 arguments, and failed to move for a period of

1 instruction and mistrial, claiming that the
2 Prosecutor's comments were calculated to rise the
3 Jury's passions and prejudice, and bolster the
4 credibility of the witness. Now, regarding comments
5 that -- in summary, Mr. Malloy -- or Maloney
6 indicated that Mr. Cartwright didn't appear to be a
7 credible witness, or that he's attempting to create
8 a story that these witnesses fabricated this
9 testimony against him, and these allegations. Did
10 you feel that this was an objectionable comment?

11 A. No, sir.

12 Q. And did you feel, at any point, that Mr.
13 Maloney was attempting to arouse the Jury's passions
14 or prejudice?

15 A. The answer to that, sir, is, I think to a
16 certain extent that's what all of us do, we try to
17 do that, it's whether or not it crosses a -- a line,
18 or is unfair, and I did not find it objectionable.

19 Q. Okay. And next, as far as Judge Early's
20 jury instruction, Applicant's claimed you failed to
21 request a Jury instruction on good character and
22 reputation. Did you feel any need to raise -- or to
23 request that specific Jury instruction?

24 A. No, sir.

25 Q. Why did you not feel the need to raise

1 that, or to request that instruction?

2 A. I don't think -- I don't think we put any
3 evidence in as to his good character. I don't
4 recall doing that at least.

5 Q. So --

6 A. I don't know -- I don't know what's -- I
7 don't know what the Jury would -- I don't know what
8 the Jury would base -- make any decision based on
9 that instruction.

10 Q. And now there's a few allegations regarding
11 somewhat a search for the truth argument, or comment
12 during Judge Early's instruction, specifically, Mr.
13 Cartwright's raised issue with Judge Early
14 indicating you got a version of facts from some
15 witnesses, and a completely different version from
16 other witnesses. And he goes on to say, this is on
17 page 203, line 13, "Who do you believe who's telling
18 the truth? What are the true facts in this case?"
19 And then on the next page, page 204, line five
20 through eight, "You have the right, and it's your
21 duty to determine what the true facts are, and what
22 the truth is, and who is telling the truth." Did
23 you feel that this was akin to a search for the
24 truth argument to the Jury, or an in search for the
25 truth instruction to the Jury?

1 A. (Reviews document.) I would probably today
2 object to anything like that. I did not find it
3 objectionable at the time.

4 Q. And prior to those comments from Judge
5 Early on page 201, he states, line, 12 through line
6 24, "The State has the burden of proving the
7 Defendant's guilt beyond a reasonable doubt," and
8 further expounds upon the State's burden of proof.
9 Did you feel that the ref -- or do you feel that he
10 clearly stated to the Jury that the State has to
11 prove these allegations, beyond a reasonable doubt?

12 A. (Reviews document.) Yes, sir.

13 Q. And then regarding the comments to
14 determine who's telling the truth, I'll go back to
15 the specific complaint, line six through eight of
16 page 203, you got a version of facts by some
17 witnesses, and a completely different version of
18 facts by other witnesses, that it -- that leads into
19 Judge Early's instructions regarding who is telling
20 the truth. Did you feel that the way that those
21 comments were worded, and the order that they came
22 in, that it shifted the State's burden of proof, or
23 that they were designed to tell the Jury, the
24 fireman, whose testimony they believed?

25 A. I believe the latter is the case.

1 Q. And, again, you don't think that it had an
2 effect on the Jury -- or that it shifted the burden
3 of proof from the State to the Defendant, correct?

4 A. I don't think that shifted the burden of
5 proof from the State to the Defendant. I can't
6 speculate as to what -- what affect it had on the
7 Jury, I don't --

8 Q. Yes, sir. And, finally, that Mr.
9 Cartwright's alleged you failed to object to the
10 Court's Jury instruction, that pursuant to our State
11 law, the testimony of victims in these cases does
12 not need to be corroborated. Do you recall this
13 comment?

14 A. I do.

15 Q. And that's on page 210, line 18, through
16 page 211, line two. Did you feel -- he cites,
17 specifically, to Section 16-3-552 through 16-3-558.
18 I've -- I'm not sure if you've had an opportunity to
19 review those sections.

20 A. I'm familiar with those sections. I can --
21 I have a book right here, as a matter of fact, but I
22 am familiar with those sections.

23 Q. And I believe having reviewed it, or having
24 reviewed the South Carolina Code of Laws, Judge
25 Early misstated the section that he was referring

1 to, specifically, criminal sexual conduct is covered
2 through Section 16-3-652 through 658.

3 A. Yes, sir.

4 Q. Would you agree with that? And could you
5 re -- did you say you have a copy of the South
6 Carolina Code of Law with you?

7 A. I do.

8 Q. If you could review Section 16-3-657.

9 A. Yes, sir, I have it right in front of me.
10 It says, "The testimony of the victim need not be
11 corroborated in prosecutions under Section 16-3-652
12 through 658."

13 Q. Now, would you agree that Judge Early's
14 instructions to the Jury were correct regarding the
15 need for testimony to be corroborated in criminal
16 sexual conduct cases?

17 A. Yes, sir.

18 Q. And do you feel the fact that he misstated
19 the Code Sections, while giving this Jury
20 instruction, that by incorrectly stating the Code
21 Sections, he misinformed the Jury?

22 A. I do not.

23 Q. And if Section 657 indicates that testimony
24 does not need to be corroborated, do you feel that
25 it would have been proper for you to object to this

1 Jury instruction?

2 A. No, sir. I didn't -- I don't like it,
3 obviously. I think it can lend itself to a
4 misunderstanding by the Jury, so I don't like it,
5 but it's not a misstatement of law; and that's his
6 obligation is to give the Jury the law.

7 Q. And throughout the course of Judge Early's
8 Jury instruction, did you feel that there was
9 anything that he said that was objectionable, or
10 that you needed to correct?

11 A. I do not recall anything I would have
12 objected.

13 Q. And on page 214, line 22 through 25, Judge
14 Early asked if there's any objections, questions,
15 additions, or deletions to the charges given, or any
16 problem with the verdict forms; do you recall that?

17 A. I'm reading it right now, yes, sir, I do
18 recall.

19 Q. And on the following page you actually
20 requested he modify or add something to his Jury
21 instruction, correct?

22 A. Yes, sir.

23 Q. And, ultimately, did that lead to Judge
24 Early reinstructing the Jury?

25 A. It looks like -- it looks like I was

1 complaining about the fact that the minor was -- is
2 defined as being someone under the age of 18; and
3 then it looks like Judge Early said, "Well, I told
4 them," and I'll -- I'll read what Judge Early says,
5 "Well, I'm reading the statutes. The statute says,
6 'A minor under the age of 18 that report to be -- I
7 read that they have to prove that the minor was 16,
8 under 16, I read that."

9 Q. And he -- Judge Early charged the Jury
10 based off of the statute, correct?

11 A. Yes, sir.

12 Q. And he -- and at no point did you add any
13 objections or issues with his Jury instruction
14 regarding search for the truth language, or
15 regarding his comments about victim testimony not
16 needing to be corroborated, correct?

17 A. I don't think I made any other objection,
18 no, sir.

19 Q. All right, and it's because you did not
20 feel that those were objectionable?

21 A. That's correct. At the time I did not.

22 Q. Thank you.

23 MR. NEUBAUER: I have no further questions, at
24 this time.

25 THE COURT: All right, thank you. Let's take a

1 ten-minute break, and then we'll try to start and
2 see where we go with your cross-examination, all
3 right, folks?

4 MR. NEUBAUER: Yes, Your Honor.

5 THE COURT: I'll see everybody -- is that all
6 right, Ms. Young?

7 COURT REPORTER: Yes, Your Honor, that's great,
8 thank you.

9 THE COURT: Okay, great, so it's -- well, we'll
10 start back at 11 o'clock, okay?

11 COURT REPORTER: See you then.

12 MR. NEUBAUER: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (BRIEF RECESS)

15 THE COURT: All right, Counsel, are you ready
16 for -- let's see if we can get Mr. Routzong. There
17 he is. Counsel, are you ready for your cross-
18 examination of the witness?

19 MR. PHILLIPS: Yes, sir, give me one moment.

20 THE COURT: There -- there I am, now -- you look
21 a lot better now, I can see your smiling face on a
22 Friday.

23 MR. PHILLIPS: Yes, Your Honor.

24 THE COURT: All right, I'm happy --

25 MR. PHILLIPS: Give me just a --

1 THE COURT: I'm happy --

2 MR. PHILLIPS: Give me just a second, I just had
3 my packet of papers tip over, so --

4 THE COURT: Oh, oh.

5 MR. PHILLIPS: -- give me one second. I know.
6 All right. All right, Your Honor, I believe -- I
7 believe I'm ready to proceed.

8 THE COURT: Yes, sir.

9 BY MR. PHILLIPS:

10 Q. Mr. Routzong, can you hear me?

11 THE COURT: I can hear you fine. Mr. Routzong,
12 is your sound on?

13 MR. NEUBAUER: I think he may be --

14 MR. ROUTZONG: I'm on.

15 THE COURT: There we are. Mr. Routzong, can you
16 hear us?

17 MR. ROUTZONG: Yes, sir.

18 THE COURT: Okay, great, thank you, sir. All
19 right, counsel, you go right ahead.

20 MR. PHILLIPS: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. PHILLIPS:

23 Q. Mr. Routzong, what date did you get this
24 case where you were appointed?

25 A. I would have had it sometime before March

1 of 2013, because that's the earliest note I have,
2 that says I spoke to -- spoke to Mr. Cartwright for
3 30 minutes.

4 Q. Let's start there, what -- what date is
5 that, the first -- the first note you have?

6 A. March 5th of 2013.

7 Q. All right, and so he had his first trial
8 back in November of the previous year; is that
9 correct?

10 A. Yes, sir.

11 Q. All right, and then he had his trial, the
12 one that you represented him in, in April?

13 A. Yes, sir.

14 Q. All right, and, you know, specifically,
15 that was April 15?

16 A. Yes, sir.

17 Q. All right, is when it started. So your
18 first note with him is March 5th of 2013, just a
19 little over a -- a month before that second trial?

20 A. Yes, sir.

21 Q. Okay. Now, when did you get the transcript
22 of that first trial?

23 A. I don't know the answer to that question.
24 It doesn't have a date on it when it was received.
25 Oh, well, it was received by the Solicitor on 28th

1 of January, 2013, I would have gotten it sometime
2 after that. That's the only date stamped on the --
3 on the --

4 Q. So you don't have any notes of when you
5 first started to review that transcript? There's no
6 notes, as far as trial preparation?

7 A. No, sir.

8 Q. All right. As far as your investigation,
9 what witnesses did you speak with?

10 A. The only ones I can recall speaking with
11 are Mr. Cartwright, and I think there was another
12 gentleman, might have been a relative or a friend of
13 Mr. Cartwright. Other than that, I don't recall --
14 it would have been the gentleman that I got the
15 picture of the -- he took a picture of the camper
16 that was spraypainted.

17 Q. And -- and do you have it in your notes who
18 that was? Do you have any idea who that is?

19 A. Not off the top of my head, no, sir.

20 Q. Well, your notes, your -- your notes from
21 your case file.

22 A. No, sir, I don't think it's in there.

23 Q. All right. Now, with that, so your first
24 note in the case is March 5th, the trial starts on
25 April 15th, they've had this pretty contested hung

1 jury trial back in November. At -- at that point,
2 when you have this, say, 40 days from when you first
3 started working on the case, you believed you had a
4 sufficient amount of time to conduct a full and
5 complete investigation in this case in 40 days?

6 A. My recollection is that's true.

7 Q. Well, and as far as recollection, I mean,
8 specific, there wasn't anything else that you wanted
9 to do on the case, in other words; there was no
10 other things that Mr. Cartwright had specifically
11 asked you to conduct as far as interviews or
12 evidence to obtain?

13 A. No, sir, I don't recall any other person.

14 Q. And, again, as far as your notes are
15 concerned, is any of that contained in your notes as
16 far as your trial preparation?

17 A. No, sir.

18 Q. Now, was there anything that you -- okay.

19 A. I'm sorry, go ahead, sir, you're good.

20 Q. I -- I assume you're probably grabbing your
21 notes.

22 A. Yes, sir.

23 Q. So was there anything specific that you
24 tried to do to make sure you could challenge the
25 credibility of these witnesses?

1 A. I think the best answer I can give you on
2 that, Mr. Phillips, is, this was over an extended
3 period of time. These are all people that are
4 either related blood or marriage to Mr. Cartwright.
5 I didn't not try to interview any of those witnesses
6 against him. What I tried to do was, based on what
7 Mr. Cartwright told me, to try to figure out why
8 they were lying, and present evidence of that to the
9 Jury.

10 Q. Now, as far as -- and, again, let me -- I
11 have everything originally redacted, but I -- I know
12 we've been using the name, so I'll continue to do
13 that for this hearing. So for [REDACTED], specifically,
14 [REDACTED] [REDACTED], her involvement, or at least the
15 allegation that she was involved in a drug
16 investigation by Police, when did you become aware
17 of that?

18 A. It would had to have been either on the
19 10th of March, which I doubt, that was only a 30-
20 minute telephone conversation, or sometime around
21 the -- I have a note that says I met with Mr.
22 Cartwright at the -- our Detention Center on the 4th
23 of April, and that we spoke for several hours, and I
24 met with Mr. Cartwright on the 13th, and spoke to
25 him two hours, so I'd dare say it would probably

1 have been on the -- around April 5th -- April 4th.

2 Q. How many -- I guess I -- I can take a step
3 back, how many times did you meet with him in
4 preparation of trial from March 5th to the start of
5 the trial on April 15th? How many times did you
6 meet with him?

7 A. The only notes I have are two different
8 days and a telephone call.

9 Q. So you met with him twice, a phone call on
10 the 5th, and the dates for the meetings were when?
11 I apologize.

12 A. I have a note that says I spoke with him
13 several hours on the 4th of April, and then I have a
14 note that says I spoke to him a couple hours on the
15 13th of April.

16 Q. Okay, so you had the phone call on March
17 5th, a meeting or a phone call on April 4th, meeting
18 or phone call on April 13th. So as far as your
19 preparation with Mr. Cartwright, that -- that's
20 encompassed in what your -- your dealings with him
21 prior to this trial; is that fair to say?

22 A. That's the only thing I can say, because
23 that's the only thing I have notes on.

24 Q. And as far as the -- kind of jumping back
25 forward, with [REDACTED] [REDACTED] -- the allegations

1 that she was involved in a drug investigation that
2 ultimately prompted this, you know, kind of
3 unrelated statement, as you said, this was a
4 credibility case, that she's a key-witness, in the
5 sense that not only she's making these allegations,
6 she's the victim in the case, but her credibility is
7 at issue. It's -- I mean that -- as you said, it's
8 the gravamen, it's the linchpin of this case. What
9 investigation did you do into that allegation that
10 she had a pending drug case, that there might have
11 been possible deals or offers? Was there anything
12 done on your end to investigate that?

13 A. I did not ask Law Enforcement, or the
14 Solicitor's Office, if there were any investigation,
15 or whether or not any deals were made.

16 Q. Now, as far as expert witnesses, I
17 understand that Mr. Cartwright has, you know, he
18 testified, and you addressed the DNA issue, as
19 specifically with his defense, did you discuss any
20 other type of potential experts before he decided to
21 testify, about whether to have -- potentially, look
22 into obtaining the DNA records from SLED to see
23 whether there was any potential issues with
24 admissibility?

25 A. No, sir.

1 Q. Did you ever discuss that with him? I just
2 want to make that clear on my question, I apologize.

3 A. I have -- I have no specific recollection.
4 I -- I would think, at the time, I would have
5 probably not wanted to do that, since he never
6 denied that the DNA belonged to him.

7 Q. As -- as far as the electronic evidence
8 that was seized, did you ever discuss anything as
9 far as hiring someone to do any extractions or
10 examinations of that evidence?

11 A. Did not consider that, no, sir.

12 Q. Now, there was testimony, I believe you
13 were able to hear Mr. Cartwright, regarding his
14 timeline of when he lived in the home, there was
15 times when he didn't live in the home, essentially,
16 like an alibi; and so with that, did you ever
17 discuss that with him?

18 A. I have, yes. As a matter of fact I had
19 gone -- I have a note, I saw it the last time we
20 were doing this, that it was a timeline. I don't
21 know where I put that thing. It was on a yellow
22 pad, and it was a timeline. However, to
23 specifically answer your -- answer your question, I
24 don't think I probably would have considered that a
25 -- a fruitful avenue on this, because we're talking

1 about periods of time over a year. As you know, Mr.
2 Phillips, an alibi normally means somebody's got
3 their eyes on somebody, and they can say
4 specifically that they were not where the incident
5 took place. And so over a period of years, it would
6 be very difficult to allege an alibi, people could
7 come or -- and they could go.

8 Q. Well, I understand the exact defense of how
9 you present a specific date and time alibi, but as
10 the defense of trying to layout this timeline, one
11 that you could try to tie-up in closing argument,
12 what made -- what was your reason and your rationale
13 for not trying to present that as a defense?

14 A. Probably what I just said. To me, an alibi
15 is very specific, date, time. I know on this date,
16 at this time a -- a person is at this place, and I
17 can call a witness who will testify to that. When
18 you're talking about a period of years, that becomes
19 problematic.

20 Q. Did it ever occur as far as try it with you
21 and your cross-examination, these witnesses, trying
22 to get them to commit to some dates that,
23 ultimately, you then later could have used with the
24 timeline?

25 A. If it's not in the transcript, Mr.

1 Phillips, then I didn't do it.

2 Q. With Mr. Cartwright, when did you obtain
3 all the discovery in the case?

4 A. I would -- I honestly -- I don't know if
5 this is -- let me see, because I took all the
6 discovery. I did not make copies of it, I just -- I
7 just looked over several different -- several
8 different file folders, so let me see, if I go to
9 the main one, whether I can answer that question.
10 One -- one issue is, I think this case was in our
11 office assigned to another attorney first, and that
12 looks like it was prior to Mr. Hart, so we probably
13 would have had a copy of the discovery perhaps as
14 early as -- as --

15 Q. I'm not trying to be -- Mr. Routzong, I'm
16 not trying to be difficult, and certainly want to
17 show all respect, but I'm not asking about
18 probabilities or maybes, you know, what date did you
19 receive the discovery?

20 A. I don't have a specific date, or I don't --
21 I can't answer that. Our office -- our office had
22 it as early as May of 2011, so somewhere, as
23 specific as I can be, somewhere between 2011 and --
24 and March of 2013, we received the discovery on it.

25 Q. But there's no cover -- there's no cover --

1 so, obviously, a private counsel tried that first
2 case in November. There's no cover letter when they
3 sent you all the updated discovery? Because
4 anybody, like you said, that's tried a case in South
5 Carolina, I know the prosecutors had to turn over
6 every bit of evidence way before then, so I'm sure
7 the private counsel had discovery that wouldn't have
8 necessarily been potentially in that other file. So
9 there was nothing -- there wasn't a new packet of
10 discovery that came over to your office; is that
11 what you're saying? You only had what was
12 originally in the file from before private counsel
13 got involved?

14 A. I can't specifically answer your question.
15 I don't know.

16 Q. Okay.

17 A. I --

18 Q. I'm just trying to -- just trying to nail
19 down that time.

20 A. Yes, sir.

21 Q. So as far as not sure when you got the full
22 discovery file from the Prosecutor's office, whether
23 it was before private counsel, or after the first
24 trial, when -- at which of these meetings did you
25 sit down with him and go through that entire

1 discovery file for trial preparation?

2 A. I don't have a specific note on that, so I
3 can't answer specifically.

4 Q. Now, earlier there was testimony regarding
5 the good character part. Did Mr. Cartwright ever
6 tell you to get individuals to testify on his behalf
7 as far as good character?

8 A. I don't -- I -- I don't specifically
9 recall. And I would not say -- if he says that he
10 did, I -- I have no -- no way of replying to that, I
11 don't know. I don't have a note on it.

12 Q. Now, as far as his decision to testify, at
13 which meeting did you discuss that with him?

14 A. I don't have a specific note on that.

15 Q. Did you explain that process? In other
16 words, when you're explaining to him his decision to
17 testify, there -- there, you know, obviously,
18 there's a lot of risks involved with testifying.
19 Could you explain how your strategy was in
20 explaining that -- the risks, the cost benefit of
21 him testifying given the nature of this case?

22 A. As I'm trying to be as specific as you
23 requested, I don't have the specific notes. I can
24 -- I can tell you how I normally would handle it,
25 but I can't tell you, specifically, how I handled it

1 with Mr. Cartwright.

2 Q. That's -- that's fine, if you don't have
3 the notes, I don't need anything further.

4 A. Yes, sir.

5 Q. You never filed any supplemental motion
6 discovery to get SLED's entire forensic examination,
7 kind of a full case jacket, with the DNA evidence?

8 A. Did you ask me, have I ever, or in this
9 case?

10 Q. Well, I guess we could start, have you ever
11 done that before?

12 A. Yes, sir.

13 Q. All right, did you do it in this case?

14 A. No, sir.

15 Q. And why is it important? Why have you done
16 it in other cases?

17 A. The issue was in dispute.

18 Q. Now, as to voir dire's concerned, I
19 understand that we don't have attorney conducted
20 voir dire, but for individual voir dire, given the
21 sensitive nature of the criminal sexual conduct
22 case, did you ever ask, essentially, to have the
23 jurors questioned individually, so not to take the
24 entire veneer?

25 A. I believe I have a copy of the voir dire

1 somewhere. I may be able to answer that question.
2 In the voir dire file, the only thing I have are the
3 notes when we picked the jury, so I don't know
4 specifically the answer to your question. I don't
5 recall doing it, normally -- I don't want to say
6 normally, so -- the answer to your question is, I
7 don't have a copy of the voir dire, so I can't
8 answer that.

9 Q. And as far as -- you -- you have the trial
10 transcript for this one, correct?

11 A. I do, yes, sir.

12 Q. On page 41 there's the discussion, or at
13 least there is -- it shows were jurors approached
14 the Judge regarding similar types of behavior during
15 this voir dire process, and did you -- it appears
16 you did not make any additional points to put on the
17 record those conversations between the Trial Court
18 and those jurors; is that fair to say? I mean I
19 don't see it anywhere in the transcript. There
20 wasn't anything on your behalf to try to preserve
21 that for appellate review.

22 THE COURT: All right, hold on, Counsel, I --

23 MR. PHILLIPS: I apologize, Your Honor, let me
24 re --

25 THE COURT: Well, no, no, no, no, no, no, you --

1 you're fine, I'm just trying to follow. You've got
2 a pretty detailed application, and so I was
3 wondering, what -- where is -- where is this issue?
4 Does the issue concern a voir dire, or is that B2 on
5 seven?

6 MR. PHILLIPS: Let me get.

7 THE COURT: Or where are we?

8 MR. PHILLIPS: Let me get that pulled up,
9 because the way I do it is I break out each
10 individual issue for my little prep.

11 THE COURT: Okay, well, I'm -- I'm sorry about
12 that.

13 MR. PHILLIPS: No, no, no, that's -- let's see,
14 let me make sure I'm following in the same footsteps
15 so I can tell you exactly where to go. Because
16 that's the problem with the -- my application, I
17 think it's kind of all over the place. All right,
18 let me get to the exact. I'll actually pull it up.
19 Give me one second, Your Honor, it'd be easier to
20 search it.

21 THE COURT: Yes, sir.

22 MR. PHILLIPS: All right, Your Honor, that's
23 actually -- it appears to be on page ten of the
24 application, Subsection 9. Essentially, it's Trial
25 -- the issue is Trial Counsel failed to object and

1 moved for individual voir dire, when the Trial Court
2 indicated counsel during voir dire process, that
3 several jurors approached him, quote, "Similar types
4 of behavior," and specifically, or notably that
5 Trial Counsel failed to preserve for appellate
6 review the issue of any resulting prejudice, because
7 none of those conversations between the Trial Court
8 and those jurors were placed on the record, and none
9 of those juror numbers were placed on the record
10 with whom the Judge spoke.

11 THE COURT: Okay, hold -- hold on, page ten,
12 Section 9?

13 MR. PHILLIPS: Yes, Your Honor.

14 THE COURT: Okay, I've got you, all right, at
15 the top. Okay, go ahead, sir, I'm sorry. Thank
16 you.

17 MR. PHILLIPS: Yeah, my fault, I'll make sure to
18 -- I'll have this up for control, if we can make
19 sure we're always on the same page.

20 BY MR. PHILLIPS:

21 Q. So, specifically, Mr. Routzong, when you
22 had those specific jurors go and approach the Trial
23 Court regarding similar types of behavior during the
24 voir dire process, those conversations between the
25 Trial Court and those potential jurors, as well as

1 their juror numbers, that was not placed on the
2 record?

3 A. No.

4 Q. Was there any strategic reason for not
5 doing that?

6 A. No, sir, I was unaware that it wasn't in
7 the record, until I got a transcript from the AG's
8 office, and -- and we discussed it, Mr. Neubauer and
9 I.

10 Q. Are you --

11 A. It was the first time I was aware.

12 Q. And are you aware for the rules of error
13 preservation for the Appellate Court, that issues
14 that are not contained in the record then are not
15 specifically objected to or ruled upon, are not
16 preserved for Appellate review?

17 A. I am.

18 Q. So those conversations, had they contained
19 potential prejudicial things, obviously, there's no
20 way to know now, that we're, essentially, deprived
21 of -- of having that opportunity to have it reviewed
22 specifically for this action?

23 A. That's correct, but at the time I thought
24 it was being recorded by the court reporter, because
25 the meetings always take place next to the court

1 reporter. I was kind of shocked it wasn't in the
2 record.

3 Q. Now, for the follow-up voir dire questions
4 of a potential juror that indicated that one of the
5 investigating officers -- that he knew one of the
6 investigating officers, but was not asked how they
7 knew the officer, what strategic decision did you
8 have for not doing follow-up voir dire regarding
9 that potential juror?

10 A. At that --

11 Q. And -- and I apologize, page 28, I
12 apologize, or at least I think it is, let me pull it
13 up.

14 A. Page 28 of the transcript?

15 Q. I -- actually, I think I got that --
16 disregard that page, I think I wrote that one down
17 wrong. Let me actually -- well, I'll come back to
18 that specific page.

19 A. Yes, sir.

20 Q. But, specifically, in the voir dire -- in
21 -- during the voir dire questioning of a potential
22 juror, he indicated that he knew one of the
23 investigating officers. Was there any strategic
24 reason why you wouldn't have asked for follow-up
25 voir dire, to determine whether he could be fair and

1 impartial?

2 A. The answer to that question is that I would
3 have just not chosen that if that juror came up. I
4 don't know what number we're talking about. Do you
5 know what the Juror's number is?

6 Q. Well, and -- and I -- and I think that --
7 that -- I think that was the other part is the fact
8 that I don't believe we have the Juror's number as
9 well.

10 A. I have here notes of when we chose the
11 Jury. I can -- if you want me to try to find
12 someone? I don't know if you want me to do that or
13 not, but I can tell you that, if somebody knows
14 somebody in Law Enforcement, I would just simply --
15 if they come up, I strike that person, and so that
16 wouldn't be --

17 Q. If we could, your notes regarding Juror
18 Number 4, you -- you move to strike Juror Number 94,
19 and that's on page 48, I believe. And to be
20 specific, on page 48, you move to strike Juror
21 Number 94 for cause. The Trial Court denied that.
22 Ultimately, you were forced to use a strike on the
23 Juror. Was there any strategic reason why you
24 didn't ask to preserve for Appellate review,
25 specifically, why Juror Number 94 was called up, and

1 stated that she had a relative that was a victim,
2 quite, "As the Court knows?"

3 A. The answer to your question is, is, you
4 know, based on the transcript, it looks like we only
5 -- we did not use all of our strikes anyway. I
6 probably was worried about having to use all of our
7 strikes if it had become an issue, which it wasn't.
8 I think we only used nine strikes, so I don't think
9 that -- that's probably not too hurtful to Mr.
10 Cartwright. It might -- it's --

11 Q. So do you - do you have any notes,
12 regarding the conversation Jury Number 94 had with
13 the Trial Court, which prompted you to move to
14 strike?

15 A. I don't have any notes on that, no, sir.

16 Q. And you didn't provide any additional --
17 was there any strategic reason why you didn't
18 provide any additional argument on the Motion to
19 Strike, as to why it was prejudicial for that Juror
20 to be -- why -- to support the Motion to Strike for
21 cause? In other words, not to preserve it for
22 Appellate review?

23 A. I don't think I made any other motions, no,
24 sir, no strategic reason.

25 Q. As far as the Jury panel's concerned, was

1 there a strategic reason why you didn't move to
2 quash the panel pursuant to Batson, where the State
3 utilized statutory strikes, that it struck two white
4 females from the petit jury, and sat 11 white
5 jurors, six of whom were female?

6 A. I -- I don't think -- I do not believe --
7 at the time I thought there was a Batson issue.

8 Q. You haven't -- so in your notes there's
9 nothing listing out, as far as what were the reasons
10 given --- well, I guess you didn't -- we didn't make
11 the motion, so there'll -- specifically, there
12 wasn't a strategic reason for not making the Batson,
13 at the time, other than you didn't believe there was
14 a Batson issue available; is that your testimony?

15 A. Yes, sir. That's somewhat imprecise. I
16 didn't think there was a Batson issue.

17 Q. Now, as far as -- and I -- this probably
18 should have been asked earlier, as far as the
19 sequestration, you failed to move to sequester the
20 witnesses. As you said that, in -- in your words,
21 that the gravamen of this case was really about
22 credibility of these witnesses. What strategic
23 reason did you have for failing to move to sequester
24 the witnesses?

25 A. Well, I -- I would sequester witnesses if I

1 thought one testimony would -- would influence the
2 other. I think their testimony was already pretty
3 locked in from the prior trial, and so everybody
4 already knew what everybody was going to say. I
5 don't know if Mr. Hart sequestered witnesses, but in
6 the interim they certainly had time to talk to one
7 another. I don't think -- I don't think I could, at
8 the time, discern any reason to sequester the
9 witnesses, or I just didn't consider it, it's one of
10 those two. And the answer -- specific answer to
11 your question is, I don't think I had any strategic
12 reason.

13 Q. And given now, obviously, hindsight's
14 20/20, seeing how the testimony was presented, and
15 how the State referred to prior witness testimony
16 while questioning later witnesses, since this was a
17 re-trial, would -- and would you have moved to
18 sequester the witnesses? Was it prejudicial, as far
19 as the cross-examination, and -- and as far as the
20 direct examination that was presented with these
21 witnesses, had they been sequestered?

22 A. I don't know how to answer that question,
23 Mr. Phillips, truly. I -- I don't know what I -- I
24 would do now. It might be completely different than
25 I did then. As you said, whatever I did then,

1 obviously, did not persuade the Jury, so -

2 Q. And -- and now that you've had the
3 opportunity, you were there at trial, and now that
4 you've had an opportunity to review the transcript,
5 would it have been strategic for you to move to
6 sequester those witnesses?

7 A. Honestly, I don't know how to answer that
8 question. I guess the best thing I could do,
9 because I'm not aware of any -- any reason. I guess
10 that's the best answer I could give you.

11 Q. And -- and I guess in context of my
12 questions, where the State referred to prior witness
13 testimony of questioning witnesses in a re-trial, as
14 well as inconsistent testimony, that even you
15 elicited through cross-examination?

16 A. I -- I have to stay with my -- my answer,
17 Mr. Phillips. I -- I -- I don't know how to answer
18 your question any other way.

19 Q. Now, as far as the indictments are
20 concerned, was there a strategic reason on your part
21 for not moving to quash the 28 indictments as
22 unconstitutionally overbroad and vague,
23 specifically, since a later case that comes out,
24 State v. Baker in 2015?

25 A. No strategic reason.

1 Q. And since each of these indictments had
2 alleged offenses that occurred at unspecified times
3 over a period of years, and the combined indictments
4 covered a total of an 18-year span, with -- since
5 you didn't have a strategic reason to move to quash,
6 now, looking back, given the nature of having 28
7 indictments spanning over an 18-year period, each
8 individual unspecified times of a year in -- in
9 between for each, would you now move to quash those
10 indictments, as being unconstitutionally overbroad
11 and vague?

12 A. Based on the case law that has arisen, I --
13 I would agree with you, that's exactly what I would
14 do.

15 Q. Now, as far as the indictments are
16 concerned and the three key witnesses in here, the
17 -- the witnesses really contained in those
18 indictments, was there a strategic reason why you
19 failed to move to sever those charges, essentially,
20 from basically trying to have this as three separate
21 trials, where there were three distinct large
22 periods of time, that didn't arise out of a single
23 change of circumstances, and weren't proved by the
24 same evidence?

25 A. I don't think -- the answer to your

1 question is no, I don't -- I think probably now I
2 would have done that. I -- I think probably, at the
3 time --

4 Q. And I put a lot of -- that was a long
5 question, so let me kind of break it up.

6 A. Sure.

7 Q. Since we have these three -- these three
8 witnesses that had, obviously, allegations that
9 spanned the three distinct periods of time, and had
10 different evidence, do you think, strategically, it
11 would be appropriate to move to sever those cases,
12 so the Jury would only be hearing one single set of
13 period of time, a single set of -- say a proof of
14 evidence that's not related to the others? Because
15 it is -- because they weren't proved by the same
16 evidence. Do you think it's now appropriate to move
17 -- to make a motion to sever those indictments?

18 A. I -- I probably would now, but then I don't
19 -- I don't recall -- recall all of my thought
20 process. And as I said, I didn't write any of my
21 thought processes down. If I can -- if -- if you'll
22 permit me to go back onto the question of the
23 indictments, because I may have misunderstood your
24 question in part. I would say that any indictment
25 that encompasses a period of time, probably more

1 than a year, that motion needs to be made. On the
2 other hand, in this particular case, and I don't --
3 I'd have to review the indictments again, but I
4 recall from the last time we were altogether, it --
5 it occurred to me that if I were prosecuting the
6 case, that's probably what I would have done,
7 because the witnesses were alleging specific ages.
8 And so I think the State used birthdays, one, let's
9 say, March 5th of 2012 to March 5th of 2013, that
10 would have encompassed a certain age; but any
11 indictments that expanded -- that were more than a
12 year, I think that's probably objectionable. So if
13 there are any indictments there that -- that were
14 more than a year in length, I should have done
15 differently, but the ones that were just encompassed
16 a year, if I were prosecuting, that's what I would
17 do, it's -- it's logical. I -- I'm sorry, I had to
18 kind of think about it for a minute, but I thought
19 maybe I had misunderstood your question.

20 Q. No, understood. So with these 28
21 indictments that span over 18 years, had -- the --
22 there was no strategic reason that you had for
23 failing to move to sever those, based on the
24 witnesses, or excuse me, the -- the victims in the
25 case?

1 A. No strategic reason. I think that if -- I
2 think now I probably would want to sever them, yes,
3 sir. There's always a danger that, you know, when
4 you have an extensive amount of indictments like
5 that, that somebody could -- well, a juror might
6 conclude well something -- something had to happen,
7 you've got all these indictments, and so it become
8 -- I think what we were betting on, in part though,
9 was that we could demonstrate to the Jury that these
10 witnesses were not happy with their dad, or stepdad,
11 and that they had reasons to lie.

12 Q. And then the other part of that would be,
13 that there's just overwhelming evidence, where you
14 have three victims spanning, again, 28 indictments
15 over 18 years period of time, yet the -- the
16 evidence -- again, they were distinct and large
17 periods of time, as far as the allegations, they're
18 -- the proof didn't arise out of a single change of
19 circumstances that weren't proved by the same
20 evidence; is that -- I mean that's fair to say, as
21 far as the potential for the prejudice there, you
22 would agree?

23 A. I -- I do agree. I -- I don't specifically
24 remember what my thought processes at the time were.
25 Clearly, now in hindsight, I can easily look back

1 and say, "Gee, I wished I would have severed that."
2 So the answer to your question is that there is
3 danger there.

4 Q. So, specifically, in this case, the
5 Defendant had made a statement, what was your -- do
6 you have anything in your notes regarding discussing
7 a Jackson v. Denno hearing with Mr. Cartwright?

8 A. No, sir. I -- I don't know why I would
9 have done a Denno hearing, but I don't recall that
10 -- I'd have to look at the discovery again. I'm not
11 sure he made a statement to the police. I don't
12 recall that right now.

13 Q. And I guess, specifically, it's related to
14 -- and I -- let me clarify that for you, that there
15 was, specifically, a consent to search form, State's
16 Exhibit Number 9, the buccal swab obtained from the
17 State on State's Exhibit Number 10, and then the DNA
18 testing regarding that, having a Jackson v. Denno to
19 flush out those issues of where the State
20 specifically got that information from him directly.

21 A. I can say at the time I would not have
22 looked at that as a Denno issue.

23 Q. Now, you did address this on direct
24 examination regarding the initial instructions, the
25 Trial Court's initial instructions to the Jury,

1 specifically, that, quote, "You 12 collectively act
2 as one. You decide -- decide what the true facts
3 are," end quote, and then later quote, "You will be
4 in position then to render a true and just verdict
5 -- a verdict that speaks the truth of the case," end
6 quote, quote, "It's your civic responsibility to pay
7 close attention in deciding who's telling the
8 truth," end quote. I believe that's kind of citing
9 pages 33, 57, 59 through 62. And you said you did
10 not believe that that amounted to the search for the
11 truth language, in the sense of -- of violating of
12 due process and burden shifting?

13 A. I can tell you at the time, and even now, I
14 probably would not object to that. I mean that's
15 kind of what -- that's kind of what -- there's only
16 -- I think there's only so many ways in -- in any
17 language you can express a concept. You -- you want
18 people to listen, and make a determination as to
19 what is fact, and what's not. Of course, the State
20 has the burden of proof. The real question is, has
21 the State proven beyond a reasonable doubt their
22 case? But somewhere lodged in that logically is a
23 determination of a truth. And so that -- I think
24 that's somewhat different, because, if you tell them
25 to search for a truth, then you're asking them, or

1 inviting them maybe to fill in gaps with their own
2 experiences, or something that's not in evidence.
3 That's a little bit different than just asking them
4 to make conclusions of truth based on the evidence.

5 Q. Well -- and you do agree that with the
6 burden being on the State, it has to be addressing
7 the fact that use of the search for the truth
8 language as being burden shifting; you agree with
9 that?

10 A. Yeah, I do.

11 Q. Now, with the initial opening statements to
12 the Jury, using, you know, again, the word true, and
13 truth, variations of that numerous times, again,
14 specifically, when the burden is completely on the
15 State to present all the evidence, to meet all the
16 elements beyond a reasonable doubt that that is --
17 that is, essentially, what the Jury, as a -- the
18 finders of fact have to -- have to make. They have
19 to decide whether the State has presented the
20 evidence to satisfy all elements, beyond a
21 reasonable doubt. You -- you -- your position's
22 that, given these explanations about truth and just
23 verdict, that that is not burden shifting?

24 A. That is my position, yes.

25 Q. Now, specifically, was there any strategic

1 reason why you didn't object to the State's opening
2 statement of stating that when they were referencing
3 the indictments, essentially, stating "That -- that
4 these are the dates for when all this is said and
5 done, it's important to see how we've grouped these
6 indictments together, especially, in relation to my
7 questions regarding the motions to quash the
8 indictments and the motion to sever the
9 indictments?"

10 A. Can you tell me what line you're referring
11 to, so I can --

12 Q. Yes, sir.

13 A. 'Cause I'm not quite sure I understood that
14 question.

15 Q. Yes, sir, so I apologize. So I think go
16 back to -- it's page 65 through 67, during the
17 opening statement the Prosecutor references the
18 indictments, and basically said, "That these are the
19 dates. When all this is said and done, it's
20 important to see how we've grouped these indictments
21 together." And in context of the failure to move to
22 quash, or move to sever on kind of both of them,
23 specifically, in light of that -- in light of our
24 prior questions and your answers, do you believe,
25 you know, that now that would be an objectionable

1 statement?

2 A. That -- that -- so if Mr. Maloney -- when
3 Mr. Maloney said, "That it's important that you see
4 how we group these indictments together," was that
5 an objection?

6 Q. Correct, is that a prejudicial and
7 objectionable statement, given the light that you
8 didn't move to sever?

9 A. I have to answer that question by saying,
10 no, I don't think it's objectionable.

11 Q. And given that it wasn't -- there wasn't a
12 prior motion to sever, that leads into your quote or
13 your answer for that it's not objectionable,
14 correct? Is that why you believe that it's not
15 objectionable?

16 A. Well, I'm -- I'm trying to answer as
17 specifically and as succinctly as I can, but it's
18 hard for me right now to go back, because we were
19 not successful in this trial, and so anything that I
20 could go back to and say maybe I should have done
21 this differently is -- that's very enticing. I can
22 say that, as best as I can answer your question, at
23 the time, I did not consider severing these charges.
24 I think there was a danger in that that is not good,
25 but at the same time, basically, the entire case I

1 think that we tried to present is that all these
2 folks right here have a reason to be mad at Mr.
3 Cartwright. And I think maybe the Jury saw a little
4 bit of the -- how Mr. Cartwright, his personality,
5 and his interactions with the Judge. He's not
6 necessarily a likeable man, that doesn't mean he's
7 guilty of anything. And I think we tried to provide
8 reasons for the Jury to consider that maybe this
9 didn't happen, okay, and -- and here are the
10 reasons, but looking back on it now, would it have
11 been better to do three trials instead of -- instead
12 of one trial? I think there's good arguments, but
13 -- and is it objectionable for me -- I -- I'm not
14 really sure I see the argument that his statement to
15 the Jury in openings, that you pay attention to the
16 group -- how we group these indictments, it -- it's
17 objectionable to this extent, I think, and perhaps I
18 should have objected, indictments are not really
19 evidence. And so in a way it's possible that he's
20 -- he's saying, hey, as evidence, look how we, you
21 know, we grouped these indictments. Now that I
22 think would be objectionable.

23 Q. And -- and I apologize for being confusing,
24 that was my question, I apologize, thank you, that
25 was it. You -- you clarified that for me, 'cause

1 that -- that was my question, as far as his
2 reference to the indictments, since they're not
3 evidence in the way he presented them.

4 A. Yes, sir.

5 Q. Now, going onto the next -- next question,
6 now, is -- back in the trial transcript that there
7 was a specific witness that you, ultimately, decided
8 to stipulate to a witness' medical condition
9 regarding having stage four cancer, obviously,
10 before the second trial, and did not object to the
11 admission of her prior testimony at trial, where she
12 was, again, as far as you knew, still alive. Had
13 you been provided any documentation to prove she had
14 cancer?

15 A. I think there was a letter that was
16 presented to the Court, and I don't think Mr.
17 Cartwright disagreed with the fact that she had
18 cancer. I didn't really, at the time, have any
19 doubts that she was gravely ill, and I think -- I
20 think the State received a letter that they
21 presented to the Court, as well, and I got a chance
22 to look at it. I didn't really have any question
23 about it, no doubts.

24 Q. And as far as having her prior testimony
25 being admitted during the second trial, other than

1 the fact that her -- her illness was provided, was
2 there anything else that was provided, and, again,
3 you said -- well, I guess, specifically, you said
4 the letter that was provided to the Court, do you
5 have that in your case file?

6 A. I do not. I don't think I have a copy of
7 that, no, sir.

8 Q. Was she ever subpoenaed to be present at
9 the trial?

10 A. Not by me.

11 Q. And your -- what was the strategic reason
12 for just allowing that to be admitted?

13 A. The answer to that question is a couple
14 reasons probably. Reason one, I didn't have any
15 doubt that she was gravely ill. I -- I don't know
16 if she's since passed away or not, but that was the
17 impression I got at least from the letter, that they
18 said now they're just trying to -- I believe the
19 word they used was palliative. So I didn't have any
20 questions about that. I thought it was -- I thought
21 if I were to force the State to bring somebody who's
22 gravely ill, probably has oxygen tanks, and probably
23 looks incredibly unhealthy, that would make it more
24 sympathetic to the Jury, and I expected her to
25 testify substantially, the same as she did in the

1 prior trial. And so, true, I missed out on an
2 opportunity to cross-examine her, but I doubt -- I
3 didn't have any doubts in my mind that -- that the
4 testimony would be substantially the same.

5 Q. Now, regarding on direct examination with
6 [REDACTED] (phonetic), specifically, I believe
7 it's on page 81, during her direct examination, was
8 there any strategic reason why you -- you didn't
9 object or move to strike under Rules 401 and 403,
10 basically, the State's questioning, quote, "Now
11 sitting here today, telling these events to these
12 three strangers, how are you doing?" Like, going
13 into a state-of-mind at the current time.

14 And her response is, "Lord, I would rather be at
15 home with my children, but it's something that needs
16 to be done. I'm finally getting to tell what
17 happened." Does -- what, specifically, about that
18 do you find that it's not objectionable, or was
19 there any reason why you did not object?

20 A. I did not think it was objectionable at the
21 time, because that -- I think most of us, when we
22 call a witness to the stand, we attempt to ask them
23 easy questions to try to get them comfortable. Mr.
24 Maloney chose to frame it the way he did. I think
25 most people frame it in the sense of just brief

1 biographical information. I didn't really find that
2 objectionable. As I'm reading it today, I don't
3 really find it objectionable.

4 Q. Now, on page 94, 95, specifically, the
5 testimony of Melinda Lively, there was questioning
6 from the State, "Did you hear [REDACTED] testify?" And
7 then she later indicates that she didn't contact
8 police, because of threats from the Applicant, as,
9 quote -- as [REDACTED] stated, was there any strategic
10 reason for failing to object to that improper
11 bolstering?

12 A. It doesn't appear to me to be bolstering.
13 He -- I'm not sure why he asked it. I guess -- I
14 guess that was his way of introducing the
15 relationship between [REDACTED] and -- and the witness,
16 Melinda. I guess that was a way to introduce their
17 relationship. I didn't really find that to be
18 objectionable.

19 Q. Well, based on my prior question about the
20 failure to move to sequester, had they been
21 sequestered, that question would not have been
22 available to the witness; you would agree to that?

23 A. Yes, sir. It would be -- it wouldn't -- it
24 wouldn't have been a reasonable question, yes, sir.

25 Q. And -- and so, again, when the second part

1 of that is that she indicates, specifically, Ms.
2 Lively testifies that she didn't contact police
3 because of threats, and she says, "As they," you
4 know, excuse me, as [REDACTED] [REDACTED] stated that quote,
5 that's the improper bolstering that I was -- and I
6 just want to make sure I touch back on that, that
7 second part, where Melinda Lively references
8 [REDACTED] -- or [REDACTED] testimony is improper
9 bolstering? In other words, elicited by the
10 Prosecutor's question?

11 A. I think that could be objectionable, yes,
12 sir. I don't know -- I -- I would say -- I don't
13 know -- I guess it could be considered bolster.
14 That -- that's -- that's part of our problem, I
15 think. We've only got so many different ways in --
16 in any language we can express something. I think
17 -- I didn't take it to be bolstering what she said,
18 as much as just agreement. I guess maybe that's --
19 that's a distinction without a difference, but
20 that's pretty close. I -- I would have to say it's
21 -- I would have to say it's close to bolstering, if
22 it's not bolstering. So it -- it -- it is possible
23 that I could -- I should have objected. I don't
24 recall at the time, nor do I now, really find it --
25 that it's something I would have objected to, I

1 don't know. It's a -- it's a -- it's a close call.

2 Q. Thank you. So next question, and there is,
3 on page 103, still with Melinda Lively's testimony,
4 there is, specifically, the testimony where she
5 says, "In 1999," or excuse me, this is the question
6 that leads into her response. The Prosecutor asks,
7 "In 1999 or 2000," it says, "whenever this pace --
8 paperwork was showed from your divorce, is that the
9 first time you found out or allege that your
10 daughter had been abused, essentially, by the
11 Defendant?" And then her reply is, "Yes, when she
12 was four." Was there any strategic reason for not
13 objecting for the prejudicial hearsay that went
14 beyond the scope of time and place? And I'll also
15 constitute it improper bolstering.

16 A. I don't think there's any strategic reason.
17 That's -- that is something that I think she's
18 restricted to time and place.

19 Q. Well -- and you did object, but you didn't
20 provide any specific objection with it, in other
21 words, to preserve it for Appellate review, there's
22 no specific objection as -- stating that it went
23 beyond time and place, or bolstering.

24 A. It looks like the objection I made was --
25 had had something --

1 Q. Asked and answered.

2 A. -- completely different, yeah.

3 Q. Yeah.

4 A. So I don't think -- I don't think I
5 objected at all to that.

6 Q. Was there any specific reason why -- that
7 you didn't object to it regarding it being hearsay
8 or bolstering?

9 A. Not -- there's no strategic reason for
10 that, no, sir.

11 Q. Now, on page 111 of the trial transcript
12 for [REDACTED] [REDACTED] direct testimony, there is a
13 quote where she says, "My mom told me to lie," then
14 and you have the objection, essentially. Was there
15 any specific reason why you didn't move to strike
16 that testimony where is it sustained by the Trial
17 Court?

18 A. No reason. No -- no strategic reason. I
19 can give you a reason, perhaps at the time, I would
20 put it like this, I probably would move to strike
21 now. At the time, that being wrapped up in the
22 trial, I probably thought to myself, oh, this is
23 already in front of the Jury, and I probably already
24 moved on at that point. To answer your question,
25 there's no strategic reason. Do I think -- do I

1 think moving to strike would have made any
2 difference? Probably not, because it's already in
3 front of the jury.

4 Q. On page 115, still [REDACTED] [REDACTED] direct
5 testimony from the State, the direct examination,
6 was there any specific reason why you failed to move
7 to strike leading testimony there that was sustained
8 by the Trial Court? It's page 115.

9 A. And what line is it, sir?

10 Q. Specifically, the Prosecutor asks, "At any
11 point," 13 or 14, "did he have you perform oral sex
12 on him?" She says, "No, sir." You object, you --
13 under leading questions, and it's sustained. Is
14 there any specific reason why you didn't move to
15 strike that testimony or is it the same answer as
16 -- as -- yeah.

17 A. No, same.

18 Q. Now, from pages kind of -- pages 172
19 through 176, and page 180 there's discussion
20 regarding [REDACTED] [REDACTED] disclosures of abuse. Now,
21 your questioning of that on re -- on redirect
22 examination, the State basically -- or the
23 Prosecutor's quote says, "Mr. Routzong talked a
24 whole lot about you telling people about what
25 happened, so let's talk about that." And,

1 specifically in regards to your cross-examination,
2 through your, I guess, your attempt to impeach
3 [REDACTED] [REDACTED] testimony, regarding her disclosures
4 of abuse, where the State on redirect examination
5 was able to reinforce her disclosures, was there any
6 trial strategy? I guess now looking back, any
7 reasonable trial strategy to do that?

8 A. Okay, I'm -- can you -- can you ask me that
9 again? I'm --

10 Q. Yeah, so -- so, essentially, during your
11 cross-examination, you would attempt to impeach
12 [REDACTED] [REDACTED] testimony, or her disclosures of
13 abuse; yet then on direct, excuse me, redirect
14 examination, the Prosecutor, essentially,
15 capitalizes on that, and gets to reinforce, and go
16 through all those disclosures of abuse, and his
17 specific quote is, "Mr. Routzong talked a whole lot
18 about you telling people about what happened, so
19 let's talk about that." And goes back through the
20 disclosures of abuse with redirect examination.
21 Again, from a trial strategy standpoint, was that --
22 and, you know, your cross-examination which elicited
23 this redirect examination of the disclosures of
24 abuse, was there a strategic reason of what you
25 tried to attempt in going through the disclosures of

1 abuse of [REDACTED] [REDACTED] And I know that -- that's
2 kind of a convoluted way to -- to ask the question,
3 but what strategic reason, during that cross-
4 examination -- was there -- were you trying to
5 accomplish? And I guess there's a -- the sub
6 question comes after that, so --

7 A. Well, during the cross-examination, I was
8 probably -- and I hate to use the word "probably,"
9 but without reading the whole thing again, I no
10 doubt was trying to impeach the witness. I don't
11 know how successful I was. Apparently, not very,
12 you know, considering the outcome of the trial. And
13 there had been gendered the response by Mr. Maloney,
14 so I think I can answer your question like this. I
15 would con -- I would have considered, at the time,
16 that that would be the purpose of redirect. If I
17 had any success impeaching the witness, if I were
18 prosecuting the case like Mr. Maloney, I would -- I
19 would think that pro -- the purpose of redirect
20 would be to -- to ask the things, try to get some
21 clarity, try to spin it the way I wanted to, based
22 on the questions that the defense counsel was
23 asking. So I -- I -- I don't know that I see
24 anything objectionable now.

25 Q. Now, going through the next question, I

1 don't know if you remember this from prior
2 testimony, not this morning, but during when we were
3 doing your direct examination before, the discussion
4 about you acting out, as a person or the witness,
5 that, basically, there was a person that acted as a
6 witness on the stand as Buffy [REDACTED], the Applicant's
7 ex-wife and mother of [REDACTED] and [REDACTED] -- [REDACTED],
8 where the Prosecutor for direct and cross,
9 basically, the question was, there was inflections
10 and mannerisms that was portrayed, basically, the
11 acting out of this testimony, and you had your --
12 your position was that it was not objectionable or
13 prejudicial. So, specifically, having you, you
14 know, present that testimony, now looking back, was
15 it a strategic reason for you -- or would it have
16 been objection -- objectionable to have you have
17 someone else, a third party, not counsel for, you
18 know, the Defendant at the time, to read part of the
19 testimony, or part -- act as part of that?

20 A. I have given this a lot of thought. I can
21 tell you, at the time, I believe my -- my thought
22 process was, this is going to come in, and so as far
23 as I know, I don't know of anybody else -- I haven't
24 run across anybody else that the State ever asked to
25 participate in part of their case. I think, at the

1 time, I was worried about certain things being
2 emphasized that the State wanted to be emphasized,
3 and I would -- and I thought to myself, well, I will
4 emphasize the things that -- that the Defense needs
5 to emphasize in speech, so on, and so forth. Now,
6 in fairness to Mr. Cartwright, you, and the State, I
7 have given this a lot of thought, and so that would
8 have been my reasoning then, that would have been my
9 strategic reason. Now, you've asked me a separate
10 question, would I do it now? I've given it a lot of
11 thought, and I -- I daresay there's a couple
12 problems with doing it. The first problem is, if
13 you're -- you may be leading the Jury to wonder to
14 themselves, well, the State -- or the Defense is
15 participating in the State's case, and I'm not
16 saying that happened. I think there's a danger in
17 that. And I think the other thing, there's no way
18 of knowing, it would all depend, but if -- if
19 something's just being read into the record in a
20 very monotone way that's helpful to the State, or in
21 this case I think there was some helpful things on
22 both sides that, arguably, that were useful to both
23 sides. If somebody just reads it in as a monotone,
24 then it might -- at some point in time, the Jury
25 might just -- just blank all of it out, just tune

1 all of it out, that would be human nature. So I --
2 I would say, upon reflection, there's a couple
3 dangers in that -- in doing that, and I felt -- I
4 think I've confirmed in my own mind, I probably
5 wouldn't do that again, because -- and I've asked
6 other attorneys, and the -- and didn't tell the --
7 what my opinion of it was, and all of them seem to
8 indicate that they were worried about the -- the --
9 the testimony, and the inflections, the bias that
10 might be given by the State, so they -- they think a
11 lot like I do; but I think now -- I don't think I
12 would do that, because I'm worried about the danger
13 that maybe a Jury person would sit there and go,
14 "Well, that -- the Defense is participating in the
15 State's case, I think that's a problem perhaps." I
16 hope I've answered your question. I'm trying to be
17 as fair to everybody as I can. That's -- that's my
18 answer.

19 Q. You did, thanks, Mr. Routzong. You did,
20 thank you, and thank you for being candid. Now,
21 during Buffy [REDACTED] prior testimony that was,
22 essentially, presented, that was read into the
23 record, as far as a -- and, I guess, trying to be
24 specific as possible, that there was testimony on
25 page 184 in the trial transcript, that arguably

1 could have went beyond the scope of time and place,
2 and constituted improper bolstering, where the
3 Prosecutor asked, and the police found out about the
4 Defendant had been, you know, molesting, and -- and
5 she agreed, and she intentionally replied in the
6 affirmative. In other words, on page 184 the
7 Prosecutor starts to go through the 2001
8 investigation questioning about, "Did Law
9 Enforcement and yourself find out the Defendant had
10 been molesting [REDACTED]?" She answers in the
11 affirmative, "Yes." "After Law Enforcement became
12 involved, did [REDACTED], eventually, tell the
13 authorities that she had not been sexually abused?"
14 And -- and she goes into that, essentially, is there
15 any strategic reason for not objecting as
16 prejudicial hearsay that went beyond time and place
17 to constitute improper bolstering?

18 A. No, there is no strategic reason to not
19 object, and to confine the remarks to time and place
20 that I can think of. I'm not so sure it's
21 bolstering that much, but, certainly, that's the
22 rule, so they -- that should have been objected to,
23 and confine to time and place.

24 Q. Now, on page 119 of the -- the trial
25 transcript, [REDACTED] [REDACTED] direct testimony.

1 Specifically, you objected, "Your Honor, I'm having
2 a real hard time hearing her testimony," and she
3 ordered her to speak up. Was -- and this was
4 regarding testimony where she had -- she just
5 testified about alleged threats and demands for oral
6 sex. In hindsight, would that be one of the issues
7 as far as trying to preserve that for Appellate
8 review, in trying to, essentially, object
9 specifically to that testimony? I guess you'd have
10 to go back, if you have a chance to look at it.

11 A. Yes, sir.

12 Q. All right, do you find anything
13 objectionable regarding that testimony now when you
14 have an opportunity to review where, essentially,
15 she -- the Court orders her to speak up, regarding
16 that specific threats of -- or the alleged threats
17 and demands for oral sex?

18 A. No, Mr. Phillips, I -- I think that that
19 was the Court's response when I asked the Court to
20 ask her to speak up, because I couldn't hear her,
21 and, of course, I have to hear what she's saying, so
22 I -- I don't have a problem with that.

23 Q. Now, on page 128 during your cross-
24 examination of [REDACTED] you, essentially reaffirmed
25 her version of events, quote, "You're saying it was

1 your mom, Buffy Cartwright, that, ultimately,
2 convinced you to recant," end quote. And [REDACTED]
3 responds, "Yes." Now, as far as the kind of
4 refirming the -- reaffirming the State's,
5 essentially, position, as far as the -- their direct
6 testimony, was there any specific reason why you
7 asked that question to reaffirm, essentially, her --
8 her direct examination testimony?

9 A. Well, I -- it appears that I was going
10 somewhere, and I had the -- that would have been in
11 the context. That was to place her in the context
12 of my question, I think, so I don't find that
13 objectionable.

14 Q. Okay, so your testimony is, it was a lead-
15 in question to where your next cross was going?

16 A. That appears to be where I was going, yes,
17 sir.

18 Q. All right, and -- and, again, reviewing
19 your -- your cross-examination questions after that,
20 what strategic reason was it for the lead-in?

21 A. If I may briefly re-read this, and -- and
22 we're beginning on -- is it at the beginning on line
23 eight, I guess, on 128, or is it --

24 Q. Yes. Yeah, I think that's -- yes, you're
25 right.

1 A. (Reviews document.) It looks like I was
2 trying to draw attention to the paradoxical moving
3 back and recant -- or recanting, and then looking
4 back, and now she's saying these things happened
5 several times. It looks like -- it seemed like it
6 was almost -- it looks like I was trying to draw
7 attention that it would paradoxical for her to move
8 back, and into a situation where she was being
9 molested according to her several times a week. I
10 think that's where I was going with that. You know,
11 I had to -- to place it in context for the Jury to
12 understand, hey, how can it be that somebody's being
13 abused like this, would recant, and then move back
14 into the home of their abuser? I think that appears
15 to be where I was going.

16 Q. Now, you said you had a copy of the
17 original -- the first trial transcript; is that
18 right?

19 A. I do.

20 Q. And so -- well -- and you don't have to --
21 to grab it right this second. What I'm saying is,
22 during -- I believe on page 29 of the second trial
23 transcript, when you're cross-examining [REDACTED],
24 there's specific testimony where you're trying to
25 impeach her, and you are referencing, essentially,

1 her prior testimony, that she said it under oath.
2 Was there any strategic reason why you didn't use
3 the first trial transcript to impeach her?

4 A. Well, I don't think --

5 Q. Testimony from the first trial?

6 A. Yeah, that's probably because, if she
7 responds -- I don't recall, I'd have to look at the
8 other transcript. It's certainly the case that, if
9 there was a difference between the first transcript,
10 his trial testimony, and the second one, it's clear
11 that I didn't get it; but, apparently, from what I
12 can tell, everything I wanted to release I tried to
13 get in the second one, and there wasn't any need to
14 reference the -- the first trial, apparently, I was
15 satisfied. So I was either ignorant of some fact
16 that happened in the first trial, or I was just
17 satisfied with what I heard in this one as much as I
18 could be.

19 Q. Thank you. Now, was there any strategic
20 reason for failing to move to -- or failing to
21 object to move to strike the DSS case worker's
22 testimony? I believe it's page 138, of the trial
23 transcript, quote -- where DSS becomes involved in
24 the case, and says quote, "If it means the legal
25 statute in the South Caro -- in the State of South

1 Carolina, we take it as a report, and go interview
2 the family."

3 A. I don't find anything really objectionable.
4 I could see -- I mean there's an argument to be
5 made, but, frankly, I don't think that's
6 objectionable. I think it's just some -- we're
7 constrained by language to, you know, to communicate
8 something in just so many ways, and I know that's
9 why we get -- we go to law school to figure out the
10 ways that are proper; but in this particular case,
11 she's just -- she's just answering the question,
12 "Well, how does DSS become involved?" I think she
13 -- she went beyond a little bit maybe. Probably
14 not, actually. They have a statute, they have rules
15 they have to follow. When we get a report, here's
16 our rules, this is what we have to do. She's very
17 succinctly just telling him, this is how we got
18 involved. I don't -- I'm not really troubled by
19 that too much.

20 Q. And -- and now as far as your cross-
21 examination of the DSS case worker going --
22 specifically, going into that reference of the
23 complaint legal statute, was there any strategic
24 reason for not going directly into that with the DSS
25 case worker?

1 A. You might have to help me, specifically,
2 what you are referring to that maybe I should have
3 gone into it with her a little bit.

4 Q. Well, as far as the DSS case worker, as you
5 said, it's a -- a way for the DSS case worker to
6 explain how they become involved in the DSS
7 investigation, and this is a criminal matter that's
8 entirely separate. This is a 2001 DSS
9 investigation. She's talking about that there's a
10 complaint, there's -- it meets the legal statute.
11 Your cross-examination of the DSS case worker, one,
12 objecting speci -- or, excuse me, let me take it
13 back. But cross-examining that DSS case worker on
14 the -- basically -- specifically, it related to the
15 statute itself, basically clarifying for the Jury
16 that nothing was made, that it was just a complaint
17 that was filed that they said met the statutory
18 determination, not that the findings met the
19 statutory determination. I -- I think that's where
20 I was trying to go with that.

21 A. It seems to -- you know, it seems to me
22 what you're -- what you're asking me is, should I
23 have gone into a deep -- go more deeply in a sense
24 of saying, well, this is a -- you're not gaging any
25 burdens of proof, or anything like that. For

1 example, there's no burden of proof involved at all.
2 They get a complaint, they investigate it. It's
3 founded, or it's not founded. That's a completely
4 different thing than the proof that's required in
5 Court, and that the -- you're saying the Jury may
6 have inferred that the two things -- you know, if
7 they by getting a complaint and opening up a case,
8 that they've -- they think they've made a
9 determination of -- of -- by some burden of proof
10 that there was evidence. And so the answer to your
11 question is, I perhaps should have gone more deeply.
12 Like I say, I didn't think about it like that. At
13 the time, it was just a -- to me, it was just a --
14 the opening context for the Jury to understand why
15 DSS would become involved; but I don't disagree that
16 there could have been questions asked in hindsight.

17 THE COURT: All right, hold on one second.

18 MR. PHILLIPS: Yes, Your Honor.

19 (OFF RECORD)

20 THE COURT: All right, I'm back. I'm sorry
21 about that. Somebody was turning on some music, I
22 guess, getting an early start on the weekend.

23 MR. PHILLIPS: Yes, Your Honor, thank you.

24 BY MR. PHILLIPS:

25 Q. Specifically staying with the DSS agent's

1 testimony, there was -- I believe we're -- we're
2 staying on page 138, the DSS agent testified, quote,
3 "That she received a call from her supervisor saying
4 we've received a report of sexual abuse concerning
5 [REDACTED], and her stepfather, Harold
6 Cartwright." Now, as far as -- I -- I think you've
7 already touched on it, but there was no strategic
8 reason not that you failed to object or move to
9 strike, it's going beyond time and place, regarding
10 that specific allegation of abuse from 2001 with the
11 DSS agent?

12 A. No strategic reason.

13 Q. Now, during -- on page 92, with the DNA
14 expert's testimony, the State asked whether DNA
15 could be destroyed; it goes into the effect of
16 washing and drying sheets would have the effect that
17 washing and drying sheets would have on DNA. When
18 you didn't go into that during your cross-
19 examination, was there any strategic reason why you
20 didn't move -- or object and move to strike the
21 State's redirect examination into those issues? And
22 I guess to try to be a little bit more clear, I
23 apologize, on your cross-examination you didn't go
24 into whether DNA can be destroyed or have effect
25 based on washing and drying sheets, or the

1 destruction of DNA, specifically, in your cross-
2 examination of this DNA expert; however, when the
3 State went into that in their redirect examination,
4 was there any strategic reason why you didn't object
5 and move to strike that testimony?

6 A. May I ask you what page that's on, again?
7 I couldn't see it on 93.

8 Q. Or is it 92? I apologize.

9 A. Is that the - that's the second -- the
10 second trans -- or second book, or the first book?

11 Q. That should be second book, 92. Lily
12 Gulman (phonetic) redirect examination.

13 A. Okay, yes, sir, okay. May I have a second
14 to review? I'll be brief.

15 Q. Of course.

16 A. (Reviews document.) The reason -- what I'm
17 looking for is -- I think when I looked at this
18 before, I felt like I had opened the door a little
19 bit to that line of questioning. I had felt like
20 this -- 'cause I had looked at that -- that question
21 earlier a couple weeks ago, and I felt like there
22 was -- the door to that line of questioning.

23 Q. Now, having an opportunity to review your
24 cross-examination, do you see anything that you
25 would make that argument now?

1 A. No, sir, I don't see it now. I may have to
2 -- I don't see -- for some reason, I have the
3 impression that I kind of opened the door to that,
4 but I don't see it now. But on -- yeah. The
5 specific answer to your question is, there's not a
6 strategic reason for me not to have objected. I
7 don't think I found it objectionable. I mean
8 whether or not it could be destroyed or not, that
9 might have been important, let's suppose, for
10 example, if someone said, "Well, this event happened
11 on the sheet, and it's not there anymore." And if I
12 were on the -- bring out the deal of the fact that,
13 "Well, they said it happened on the sheet, and
14 there's no evidence of that." And then -- and let's
15 suppose on cro -- on a direct examination the person
16 said, "Well, I washed the sheet." In other words,
17 it might become important if -- if they're needed to
18 be an explanation why it's no longer there. I don't
19 know that it's particularly hurtful for Mr.
20 Cartwright's case, if the Jury is told that it can
21 be destroyed, it wasn't destroyed, and Mr.
22 Cartwright wasn't denying that the -- the DNA was
23 his, so I don't think it was particularly hurtful.
24 And I apologize for taking so longer to answer your
25 question, but I thought I had opened the door on

1 that, but perhaps I didn't. I don't see it now.

2 Q. No, I appreciate you being thorough with
3 that. Now, page 104 of the -- in -- in that second
4 book, the State, ultimately, failed to have the
5 jailer identify -- during the direct examination,
6 identify the Defendant, the Applicant in this case.
7 And on redirect examination, he asked the question
8 on page 104 to make the identification in Court.
9 Was there any specific reason why you didn't object
10 and move to strike that testimony?

11 A. (Reviews document.) I'm reviewing my -- my
12 cross, so just give me a second, please, sir. Well,
13 the only thing -- the only other -- the answer to
14 your question is, no, but I -- looking back at the
15 transcript, it must be said in fairness to everyone,
16 that I'm the one that mentioned Mr. Cartwright's
17 name, and -- and I direct your attention to page
18 104, line one. In my cross-examination, I said,
19 "Any other problems with Mr. Cartwright since that
20 time?" And I got a response, "Not that I'm aware
21 of." And so I'm the one that actually introduced
22 Mr. Cartwright as the person that the -- had
23 attempted to -- to hang himself. So at that point,
24 I -- I think it's probably not objectionable for
25 them to go ahead, and -- and ask that question. I

1 think I already opened the door by saying it's Mr.
2 Cartwright.

3 Q. And since he -- since the Prosecutor did
4 not iden -- have the jailer to the in Court
5 identification, had you not elicited that testimony,
6 again, strategically now looking back, would it have
7 been better not to open that door to have the in
8 Court identification that occurs on redirect
9 examination?

10 A. I think the answer to your question is,
11 yes, I probably shouldn't have opened the door. I
12 don't think -- and I have to say yes to both
13 questions. I would have to say it would have been
14 objectionable had I not opened the door; and I am
15 the one that opened the door, so there's no doubt
16 that that is just a fact.

17 Q. Now, bear with me, I just -- it's pretty
18 contested -- I know you attested to on direct
19 examination, regarding your discussions with Mr.
20 Cartwright. In the first trial the State presents
21 evidence of pictures of sheets that were tested for
22 DNA from [REDACTED] bedroom; and then in the
23 second trial the State elicits testimony based on
24 different pictures of the same sheets that were
25 taken from the older brother, Hoss's bed. Now,

1 could you walk us through -- I'm just trying to
2 build this out so I can -- I don't want to just
3 throw out a bunch of broad questions, I want to get
4 a little more specific. Was there any reason why
5 you didn't cross-examine those witnesses regarding
6 the discrepancy in presenting that -- that evidence
7 as far as from the first trial to the second trial,
8 why it changed?

9 A. I cannot give you the specific reason, no,
10 sir.

11 Q. And, now, and not only through cross-
12 examination, your closing argument, was there any
13 strategic reason why that wasn't pointed out and
14 presented?

15 A. In closing argument -- well, I don't have a
16 reason for doing that. I think Mr. -- I would have
17 been able to do that because Mr. Cartwright
18 testified that there was a difference, I believe, so
19 I could have talked about that, but I didn't. On
20 the other hand, as I pointed out before, really, I
21 -- I'm not so overwhelmed by where the picture was
22 taken, or -- or I think it's an inconsistency, and
23 it certainly wouldn't help, if the Jury had been
24 made aware of it. I think I was more focused on the
25 fact that we have an explanation as to why wherever

1 the sheet was kept, it wasn't laundered, it's very
2 odd, and Mr. Cartwright provided an explanation as
3 to how that got on there. And I think that was the
4 most important thing I wanted to stress to the Jury
5 as to that.

6 Q. Understood. Thank you. Now, as far as
7 your theory for why [REDACTED] [REDACTED] lied, essentially,
8 that the Defendant discovered pornographic pictures
9 of her on the Internet, and as you said publicly,
10 essentially, it -- I guess we would frame it as
11 embarrassing her, and her -- as her being the motive
12 for presenting these allegations. And they had
13 State witnesses that testified, like, kind of
14 repeatedly, that she was not in any such -- such
15 pictures. Was there any reason why you failed to
16 proffer those photographs into evidence to support
17 that theory of defense? In other words, did you try
18 to have that picture presented -- admitted into
19 evidence, to be more specific?

20 A. I don't know that I can tell you a reason
21 why I didn't. I -- I know -- I guess I would have
22 to ask myself what would be the reason I would? And
23 as I pointed out before -- I guess my point is, that
24 if somebody's guilty of something and they're called
25 out on it, that's bad. If they're not guilty of

1 something and they're accused of it, arguably,
2 that's worse, and makes the motive stronger. And so
3 I don't really -- I'm not really too troubled by the
4 fact that I didn't put that picture.

5 Q. And so I guess -- so the strategic reason
6 for not doing it, I -- and I'm not trying to -- I
7 think you've answered it, but I'm just trying to
8 make sure I -- I have a good holding of the reason
9 why you didn't, specifically, try to -- to have that
10 marked, since -- since it was such a contested issue
11 and part of your theory.

12 A. And I -- I -- I have to be -- I want to be
13 specific and exact. I'm not -- it's not my
14 testimony that that was the reason I didn't. I -- I
15 think it's probably more accurate to say that I
16 didn't really think it was that relevant. And I
17 don't doubt that I had these same arguments in my
18 mind, but I don't have any notes to -- to verify
19 that. I would say the most accurate thing I could
20 say is, I -- I'm just not troubled by not putting
21 that in there. It's not -- it's not helpful. I
22 don't think it's that -- that helpful to the case,
23 and it's not hurtful not to have it in for the
24 reasons I've said.

25 Q. Did you do any investigation prior to trial

1 to try to prove that the individuals in the picture
2 were the individuals that Mr. Cartwright said they
3 were? Obviously, we have testimony during the trial
4 where there was a denial of being in the picture,
5 but was there -- there any investigation done on --
6 on your end regarding that, to prove identity?

7 A. I recall no such investigation.

8 Q. And as far as the witnesses denying their
9 involvement in the picture, despite that the defense
10 there is essentially that [REDACTED] [REDACTED] had
11 essentially been embarrassed by this public
12 profession of -- on the news by the Applicant of
13 saying that he found these pictures, and what it
14 does to young people, that having that admitted is
15 trying to support that it was something that
16 actually occurred. You said you -- it's your
17 opinion that it was not relevant, and would not have
18 been helpful to the defense?

19 A. Not the picture. I don't -- I'm -- I don't
20 really think that anybody was disputing that he did
21 -- that he -- the -- the hurtful thing to the
22 children here would have been the thing that's not
23 in dispute, and that is, that he went to Law
24 Enforcement and he -- and he did an interview with a
25 television station, I believe. Those things weren't

1 in dispute, so I don't -- I'm not troubled by the
2 picture.

3 Q. So during direct examination you - you
4 addressed the Trial Court's admonishment of the
5 Applicant, and instructing the Pro -- Prosecutor to
6 object more, and you said you found this not
7 objectionable. Now, specifically, what was not
8 objectionable about it? The fact that the Trial
9 Court was interjecting himself sua sponte telling
10 the Prosecutor to object, and stop, and admonishing
11 the Applicant specifically. What's not
12 objectionable about it? Like what -- what's your
13 strategic standpoint?

14 A. Well, you raise a good -- you raise a good
15 question, and a good issue. Anyone who has
16 practiced in front of Judge Early -- I'm aware of
17 only one time that an attorney in this Circuit
18 objected to a comment by Judge Early, and I was not
19 present, I only heard afterwards. I think I'm being
20 as precise as -- as I can, I -- I am always
21 reluctant to -- I'm always reluctant when I know a
22 Judge, and I know that he's -- he's like that with
23 everybody. I'm always reluctant to try to find --
24 well, I should put it like this, I'm always
25 interested to find out where the line is that I'm

1 being disrespectful to the Court, and where
2 everybody knows that, you know, it -- it's not -- it
3 might not be what you would -- it would be -- it
4 might not be what you want him to do, him or her,
5 but you might not be happy about it, but it might
6 not be objectionable. I can tell you that with our
7 Judge Early, he was always the same during trial,
8 during Court. I think maybe to a certain extent, we
9 knew how he was, and -- and we expected him to be a
10 certain way, and he always was. And I think you
11 just have to look at it overall. Could -- could we
12 object to something like that? Maybe. Is it always
13 wise to do that? Our judges tend to be human beings
14 as well, and we don't want to put them in a bad
15 mood, we just want a smooth trial, but we have to
16 protect the defendants. So it's -- it's always a --
17 it's always a question where that line's at. I
18 didn't think that line had been crossed by Judge
19 Early.

20 Q. Understood. And -- and in this case the
21 Trial Court was already repeatedly stopping his
22 testimony, admonishing him, the Prosecutor, to
23 object more. As a zealous advocate, you have a duty
24 to object; you agree to that?

25 A. I do.

1 Q. If there's anything improper being done in
2 the Courtroom?

3 A. I do.

4 Q. And --

5 A. I do agree with you.

6 Q. And it's your testimony that what Judge
7 Early did, that's not -- it doesn't - I'm not -
8 you're saying that he made, you know, he's making
9 faces during trial, he's doing these things, and
10 that's just the way Judge Early was, was your
11 testimony; but you, as a zealous advocate, has a
12 duty to provide that defense -- zealous defense. If
13 something in -- is improper that's done in the
14 Courtroom, you have a duty to object to it?

15 A. I do.

16 Q. And it's your testimony that none of that
17 was improper?

18 A. As I sit here right now and recall this,
19 because when it -- this is something you would
20 recall, and, no, sir, I can't say that I felt like
21 the Court went to far; but and in fairness to Mr.
22 Cartwright, and the State, and the Court, I'd have
23 to say, you know, when you practice in front of
24 Judge Early for so many years, you've gotten used to
25 a lot of things. I don't -- it's hard for me to

1 answer that question, Mr. Phillips. I -- I can sit
2 here and say I did not feel like he crossed any
3 line, but I wasn't real happy about what was going
4 on, because you don't like to see any witness
5 struggle; and that Mr. Cartwright was kind of
6 struggling and -- and, in part, probably because of
7 the interjections by Judge Early. But Judge Early
8 expected his Court to be run a certain way, and to a
9 certain extent, I think maybe I gave the wrong
10 impression to Mr. Cartwright. Because I do,
11 specifically, remember an agreement with Mr.
12 Cartwright. I told him, "Please, you know, you let
13 the Jury know who you are." Well, he did. I think
14 he tried to do that. And I -- I think I probably
15 didn't control him quite as well as I could have, or
16 maybe prepared him for that as well as I could. I
17 don't want to blame this necessarily on the Court,
18 because everybody knew what Judge Early expected.
19 It's a real tough question, and it's --

20 Q. I guess let me be specific, again. So
21 where a Trial Court sua sponte tells a prosecutor to
22 object more, that's not improper?

23 A. I -- yeah, the answer to your question is I
24 do believe that's improper, yes, sir.

25 Q. And if a Judge makes faces during a trial,

1 in reaction to testimony; is that improper?

2 A. Yes, sir, but that -- may I say I don't
3 specifically remember -- I would -- I would be
4 amazed if Judge Early did not make faces during this
5 trial, but I don't specifically remember any
6 instances; and I know we -- we have to confine
7 ourselves to the specifics. That was me -- when I
8 was stating about the Judge really making faces, or
9 things that I observed over many trials and -- that
10 he conducted, so -- and he, himself, recognized
11 that, as I said.

12 Q. And -- and you've practiced law for a long
13 time. How many cases have you tried?

14 A. I don't know the answer to that, sir. I've
15 never kept track.

16 Q. But I mean you've tried a significant
17 number of cases?

18 A. I've tried several, yes, sir.

19 Q. The -- and have you found that the jurors
20 follow the Judges closely?

21 A. I honestly don't know the answer to that.
22 When I have had discussions with -- well, not me,
23 but I've asked people to have discussions with
24 jurors, they've almost always confined themselves to
25 the evidence that was presented, or the demeanor of

1 the witnesses. I've never had any J=jurors respond
2 to anything about the Court.

3 Q. All right. Now, as far as the State's --
4 again, the State's closing arguments, you know,
5 specifically as -- I'm trying to get your exact page
6 number for you here.

7 A. Yes, sir.

8 Q. Bear with me one moment. While I'm looking
9 this up, I'll go to my next question. So on page
10 203, during the Trial Court's final instructions to
11 the Jury, the Jury charge, specifically, the charge
12 that states, quote, "You've got a version of facts
13 by some of the witnesses, and a complete different
14 version of facts by other witnesses." Is there --
15 your position on that line, whether it crosses the
16 threshold of being an improper charge on the facts?
17 Basically, the comment on the facts by the Trial
18 Court, regarding witness testimony?

19 A. No, sir, I'm not troubled by that -- that
20 too much. I think that's a -- I think -- I would
21 think that would the Court's effort to tell the
22 Jurors what their job is. You've got to consider
23 all these witnesses. You have to consider -- of
24 course, we were saying different things than what
25 the State was saying, and it's their job to sift

1 through all that, and see if the State's proven
2 their case beyond a reasonable doubt. I'm taking a
3 lot out of that, but the answer to your question is,
4 no, I'm not too troubled by that.

5 Q. Now, on page 204 to 212, again, during the
6 Court's closing instructions to the Jury, quote, "It
7 is your duty to determine what the true facts are,
8 and what the truth is, and who is telling the
9 truth." Next quote is, "You are to make your
10 decision based solely on what you determine the true
11 facts are in this case," specifically, citing that
12 last, "You are to make your decision based on what
13 you determine the true facts are in this case."
14 With the question we had earlier, with the opening
15 instructions, regarding violation of -- a potential
16 violation of due process and burden shifting, with
17 this search for the truth language, again, reviewing
18 that now, is there a strategic reason why you didn't
19 object to those closing instructions?

20 A. I don't think their -- I don't really think
21 their objection, while I don't find those to be
22 burden shifting, and I will, again, say that it's
23 different to say that there's a truth, and, you
24 know, there may be a truth, you may -- this fact
25 happened, there's a truth that's concealed there.

1 It's a lot different to ask somebody to search for
2 that. If you ask for the -- if you ask for them to
3 search for a truth, you're inviting or enticing them
4 to provide their -- the -- or to fill in the gaps.
5 So I don't think this feels asking the -- the Jury
6 to fill in any gaps. I think it's just they're
7 constrained by the English language to say, hey,
8 there's a truth here, and -- now he's not -- he's
9 not putting it squarely on -- he's not saying it
10 like that, because -- at this point, that -- that --
11 the question is, has the State proven their case
12 beyond a reasonable doubt? He's not saying it like
13 that, but he's saying there's a truth here perhaps,
14 and you should try to, in your deliberations, find
15 that truth, or examine that truth rather. That's a
16 different -- and to me there's a difference between
17 that, and telling somebody to go search for it,
18 maybe enticing them to fill in the gaps with their
19 own experiences, so on and so forth.

20 Q. Thank you. Now, on page 210 and 211, if
21 you're aware of State v. Stukes, a 2016 case that,
22 essentially, found the jury instruction about our
23 State law, that the testimony of the victim in the
24 case need not be corroborated. In that -- in his --
25 in the Applicant's trial, that was presented in the

1 instructions. Was there any strategic reason why
2 you didn't object to that specific --

3 A. No strategic reason. I don't -- I don't
4 think I disagreed, at the time, that that was a
5 statement of the law.

6 Q. And while I'm still trying to pull the
7 exact page number, was there anything specific, as
8 far as your recollection, if you need a minute to
9 review the Prosecutor's closing arguments, regarding
10 comments that you believed was calculated to
11 unfairly or unduly arouse the Jurors' passions or
12 prejudice and bolster the credibility of the State's
13 witnesses?

14 A. I -- off the top of my head, Mr. Phillips,
15 I can't answer your question. If -- do you have
16 anything specific in mind?

17 Q. Yes, give me one second, I apologize to you
18 and the Court. Specifically, Mr. Routzong, looking
19 at page 187 in the closing argument, where
20 Prosecutor states that there was no motive to lie is
21 one -- one portion.

22 A. Well, if my argument was they had a motive
23 to lie, and I would not be surprised if the State
24 says that there was no motive to lie, that's what I
25 would do..

1 Q. Now, is -- I mean, specifically, regarding
2 that specific evidence that was presented at trial,
3 certainly, you don't believe that to be calculated,
4 as far as bolstering -- any credibility of any
5 states witnesses?

6 A. I think it -- I think they're bolstering,
7 but I don't -- I think that's not -- I think that's
8 permissible. I think he's just saying this is my
9 case. And just, briefly, while we were -- I had a
10 chance to look at it --

11 Q. Well, I get -- and let me be more specific.
12 Some of the other parts, specifically, is my
13 question regarding calculated to arouse the Jurors'
14 passions or prejudice. On page 189, the Prosecutor
15 goes into quote, line five, "...and ejaculates him on
16 her bed with the panties against her will." And
17 then he goes onto say, "Golly, I feel bad for him,
18 don't you? You've got to, the poor guy, the suicide
19 attempt. Did you hear him say this? They -- they
20 hate me, because I love them." Basically, him --
21 the way he attacked that part in his -- or the way
22 he presented that in his closing argument. Do you
23 find any of that objectionable?

24 A. No, sir, it's probably effective,
25 certainly, after -- I don't find it objectionable.

1 What -- basically, if I can sum up what the State
2 was doing, they were -- they were using what I would
3 call the what a bad day defense. Look at all the
4 things that had -- that happened to you as an
5 innocent person, you know, for -- for these facts to
6 make you appear to be guilty. I think throughout
7 his closing argument, that is, basically, what he
8 was trying to do. I think it was effective. I
9 don't think it was objectionable.

10 Q. Now, on page 192 of the transcript, the
11 Prosecutor states in his closing, "That's
12 corroboration, ladies and gentlemen, you don't even
13 need that." Was there any specific reason why you
14 didn't object? Again, obviously, at the time, that
15 statute -- or that State v. Stukes had not been
16 found yet, was there any other reason why you didn't
17 find that to be objectionable?

18 A. I have no strategic reason.

19 Q. Now, again, on the same page, the
20 Prosecutor goes into, "I told you to listen why he's
21 in jail, then he's out of jail, he's bonded out."
22 Essentially, walks through that process. "He's
23 bonded out of jail," focusing on his incarceration
24 in that time, was there anything specific that --
25 strategic reason why you didn't object to that?

1 A. Let me read that just a second, I'll be
2 real quick. (Reviews document.) Not really. It
3 sounds to me like what he's, apparently, doing is,
4 he's saying that the only time she's not molested
5 is, basically, when he was in jail during this
6 period of time. So I don't remember -- bonded out
7 of jail, that was the first -- that was the first
8 allegation.

9 Q. In reference of him with his incarceration,
10 you don't find any of that being objectionable,
11 having that go before the Jury of him being
12 incarcerated for a period of time?

13 A. To be as precise as I can, I think that
14 comes -- I think that perhaps comes close to being
15 objectionable, because it -- it -- it entices the
16 Jury to -- this is -- if I can digress for a minute.
17 The reason we don't have people appear in trial
18 during -- or during their trial in -- in orange
19 jumpsuits is, we don't want the -- the Jury to
20 conclude from that that they're bad or they're, you
21 know, that -- that the State has a case right, that
22 they're, it's -- it kind of makes them less human,
23 and that's why we always dress people out for trial,
24 obviously. And this other -- this other instance, I
25 would use that, the -- the part about dressing

1 people out at the trial to kind of help me explain
2 where you're going, I think. You're saying, well,
3 the fact that he's incarcerated, that was
4 prejudicial in the sense that he probably did
5 something. Just like if you have somebody in an
6 orange jumpsuit, then they probably did something.
7 But I think that the -- what the State's actually
8 trying to do, and probably why it's not
9 objectionable is, they're saying, look, these events
10 are continually happening, and -- and she said the
11 only time it stopped was when he wasn't around, one
12 of those times was when he was incarcerated. As I'm
13 reflecting on this, it probably is something that
14 could have been objected to. Do I think it was the
15 final nail in this case? I don't think so. I
16 think, if I heard it again, I might object to it.
17 At the time, it probably didn't occur to me to be
18 objectionable. And I don't have a strategic reason
19 for that, I probably just didn't think it was
20 objectionable. It -- it placed this -- these events
21 in a true context. He was incarcerated, and the --
22 she felt like that was a break for her.

23 Q. Now, the grandmother --

24 THE COURT: Gentlemen, let me tell you, we --
25 we're going to take a break for lunch, okay?

1 MR. PHILLIPS: Your Honor, I'm -- I'm right at
2 the end, it --

3 THE COURT: Well, let me ask you this.
4 Solicitor, are you going to have any cross-
5 examination or redirect?

6 MR. NEUBAUER: Yes, Your Honor, I have a few
7 questions.

8 THE COURT: Okay, well, we're going to break for
9 lunch, we'll back --

10 MR. NEUBAUER: Yes, Your Honor.

11 THE COURT: -- we'll be back at 2 o'clock. Is
12 that -- is that okay, Ms. Young?

13 COURT REPORTER: Yes, Your Honor, that's good.

14 THE COURT: All right, great, we'll have
15 everybody back at 2 o'clock. Thank you.

16 COURT REPORTER: Thank you.

17 THE COURT: Thank you.

18 COURT REPORTER: Thank you.

19 (LUNCH RECESS)

20 THE COURT: All right, folks, we ready?

21 MR. NEUBAUER: Yes, Your Honor.

22 MR. PHILLIPS: Yes, Your Honor.

23 THE COURT: Okay, great. And can you -- you can
24 -- you can hear us, Mr. Cartwright?

25 MR. CARTWRIGHT: Yes, sir.

1 THE COURT: Okay, thank you, sir. All right,
2 Counsel, you can proceed with your cross-
3 examination.

4 MR. PHILLIPS: Thank you, Your Honor. Can you
5 hear me okay?

6 THE COURT: Yes, sir.

7 MR. PHILLIPS: Thank you.

8 BY MR. PHILLIPS:

9 Q. Mr. Routzong, in your preparation for this
10 trial, did you attempt to get all the -- or review
11 the exhibits from the original trial?

12 A. No, sir.

13 Q. Did you -- as far as the photographs that
14 were admitted into evidence, those exhibits, and
15 what was contained in the discovery, do you have any
16 notes showing that you reviewed those photographs
17 with Mr. Cartwright in preparation for the second
18 trial?

19 A. No, sir.

20 Q. As far as the allegation that -- not the
21 allegation, the presentation of the State's case in
22 the first trial where what was presented as far as
23 pictures of the bedroom, it being different in the
24 second trial of -- in the first trial there was a
25 picture admitted in the daughter's bedroom, whereas,

1 in the second trial, the picture was admitted in the
2 son's bedroom, was there any preparation in regards
3 to that issue done on your behalf, and, in other
4 words, to be prepared for confrontation, as cross-
5 examination of that issue, or presentation of your
6 defense as far as how the State changed their theory
7 of the case?

8 A. I don't have any notes on that, so I can't
9 be more specific than to say I don't -- I don't
10 think I was aware of any problem with that prior to
11 Mr. Cartwright, at some point, mentioning it before
12 he stood up to talk to the Judge, so I wouldn't have
13 prepared for something I wasn't aware of the issue
14 until that point in time. That's probably as
15 accurate as I can be.

16 MR. PHILLIPS: No further questions, Your Honor.

17 THE COURT: All right, thank you. Attorney
18 General, do you have any redirect, sir?

19 MR. NEUBAUER: Yes, Your Honor, and I'll keep it
20 brief.

21 THE COURT: No problem.

22 MR. NEUBAUER: Thank you.

23 REDIRECT EXAMINATION

24 BY MR. NEUBAUER:

25 Q. Mr. Routzong, regarding the allegation of

1 failure to investigate a timeline for these
2 allegations, you stated that you, I guess, compiled
3 a general timeline of when you felt the -- or when
4 these events occurred, correct?

5 A. I -- well, the -- the last time we all met
6 together I -- I looked through the file, and I came
7 across what appeared to be a timeline. I haven't
8 looked for it since today, since I asked -- since I
9 was asked the question. I don't remember -- I don't
10 -- my recollection from looking at it a couple weeks
11 ago is, that there was a timeline, but it didn't --
12 it didn't appear to be very extensive, or anything.
13 I don't -- I don't have any recollection that -- I
14 understand Mr. Cartwright's point, in terms of -- of
15 making sure there's a presentation to the Jury about
16 times that he would not have been present. I think,
17 from my point of view, at that time, it's fair to
18 say that over such an expansive period of time, I
19 just don't think there's any reasonable way to -- to
20 kind of nail that down. People can be there one day
21 and gone the next. Like, I'm -- I'm pretty sure
22 there's no logbook of Mr. Cartwright's life over
23 that period of time. It just would not have
24 occurred to me, and does not occur to me to this
25 day, to be the most important thing to be presented

1 to the Jury. The -- the whole thing was these
2 people are changing their stories, they have reasons
3 to lie, that was the defense.

4 Q. And to be clear, the allegations weren't
5 that Mr. Cartwright on one specific -- one
6 particular day committed one particular act,
7 correct?

8 A. Yes, sir, that's correct.

9 Q. And throughout the timeline that you
10 compiled, or a timeline that you may have
11 investigated, was there anything suggesting that Mr.
12 Cartwright was out of the children's lives for an
13 entire calendar year?

14 A. Mr. Neubauer, I can't answer that question.
15 I don't have any note on that. It's my -- what I do
16 recall is there were just lengthy periods of time
17 when Mr. Cartwright had told me he might have been
18 in Atlanta. But the -- the problem with that is, I
19 -- I lived in -- at one time in Nashville,
20 Tennessee, for example. I can't tell you when I
21 went to South Carolina or Ohio, and I know I did, I
22 can't tell you when. It's that kind of a problem,
23 but you're -- I don't know how you credibly present
24 to a -- a Jury, other than to Mr. Cartwright, which
25 would be a self-serving statement. And he's just

1 like, "Well, I wasn't there during this whole period
2 of time." I mean you -- you can -- you can do that.
3 The Jury would have to make of that what they would,
4 I guess, but you have -- you have testimony to the
5 contrary, so it's really difficult to nail that
6 down. And that's why I don't mind the one-year part
7 of the -- in the indictments, but, you know, when
8 you talk about trying to nail down a timeline over
9 several years, that's very difficult.

10 Q. Yes, sir. And regarding discovery, you
11 said you were -- your office would have received
12 this sometime between May of 2011 and March of 2013,
13 you can't pinpoint the specific date, correct?

14 A. That's correct.

15 Q. And you would have -- or you said that you
16 reviewed discovery with Mr. Cartwright, prior to
17 proceeding to trial?

18 A. I don't -- it's -- I -- I am -- I am
19 confident that I did. I don't have any notes on
20 that, but I -- I certainly spoke to him, according
21 to my notes, for several hours. I can't imagine I
22 wouldn't have had discovery with him -- with me. He
23 certainly would have wanted to see it, so I can only
24 say that I spoke to him for a long period of time,
25 according to my notes. We had to talk about

1 something, so I'm sure --

2 Q. And in the discovery would there have been
3 photos from the house or photos from the crime
4 scene?

5 MR. PHILLIPS: And, Your Honor, I'm going to
6 have to object to speculation. He said he doesn't
7 know, it's not in his notes, and he doesn't have any
8 specific memory of it.

9 THE COURT: I'm going to overrule your
10 objection, he can answer the question.

11 A. But, sir, I don't specifically remember if
12 there were photos in there. I -- I don't -- I don't
13 -- I can say this, I don't think that those photos
14 were the foremost in my mind in his defense, and I
15 could be wrong. Clearly, we lost the trial, but I
16 just don't think those photos -- those photographs
17 were really the most important part of his defense.

18 Q. And disregarding the comments made during
19 Jury voir dire, do you -- or there were points where
20 there were conversations or a reference to potential
21 jurors telling the Judge that they either were
22 themselves a victim of abuse, or knew someone that
23 was a victim of abuse. Was it -- are you saying
24 that you were not aware, at the time, the -- those
25 comments were not a part of the record, and this

1 conversation is not part of the record?

2 A. That's correct. I was very surprised to
3 find that out.

4 Q. And at the time you were under the belief
5 they were part of the record. Would you have had
6 any reason to, specifically, request the court
7 reporter put them on the record?

8 A. No, sir.

9 Q. All right. And --

10 MR. NEUBAUER: I beg the Court's indulgence one
11 second.

12 BY MR. NEUBAUER:

13 Q. Regarding allegation number six, that you
14 failed to move the Court to conduct a follow-up voir
15 dire, regarding a potential Juror, who indicated she
16 knew an investigating officer. That's on the --
17 during the first trial transcript, page 30, line --
18 actually, it starts page 29, line 16 through page
19 30, line seven. Do you recall the juror stating her
20 name and her juror number prior to stating that she
21 knew someone with the Public Defender's Office?

22 A. According to the transcript she did, yes,
23 sir.

24 Q. And then the actual Jury selection begins
25 on page 44, and it appears that Jurors that were --

1 that went through the selection were Juror 4, 57,
2 123, 29, 99, 101, 75, 81, 10, 177, 61, 60, 94, 182,
3 169, 39, 171, 13, 141. I believe there is more from
4 there, but I think -- was this juror -- was the
5 juror whom indicated she knew someone in the
6 Solicitor's Office, was she selected for the Jury?

7 A. It doesn't appear -- the transcript doesn't
8 appear to me that she was.

9 Q. So do you feel that the lack of a follow-up
10 voir dire prejudiced Mr. Cartwright?

11 A. I'm -- I'm unable to see how it could
12 happen that he was prejudiced from that.

13 Q. Thank you. And regarding issues with
14 quashing the indictments for being constitutionally
15 vague or overbroad, Mr. Cartwright cited to the case
16 of State v. Baker, that was decided in February 11th
17 of 2015, that's two years, approximately, after this
18 trial occurred, correct?

19 A. Yes, sir.

20 Q. So would there have been any reason for
21 you, at that time, to anticipate that there would be
22 a potential issue with the indictments based on
23 State v. Baker?

24 A. Not based on the -- not based on case law
25 at the time, sir.

1 Q. And are you familiar with the case of State
2 v. Wade, 306 SC 79?

3 A. No, sir, not off the top of my head.

4 Q. And --

5 A. I can look it up if you want me to.

6 Q. I won't waste anymore of the Court's time
7 regarding that. I'll just draw the Court's
8 attention to the case, State v. Wade, 306 SC 79.
9 And regarding the issue of possibly severing these
10 charges for separate trials, you'd indicated that
11 there was a -- that you contemplated this, but there
12 was a possible danger with severing the charges.
13 Could you go into that further of what the danger
14 would have been if you'd severed these charges into
15 separate trials?

16 A. And I need to probably review the
17 indictments again. If he was charged with three
18 most serious -- I'm sorry, two most serious, or
19 three serious charges, you could, potentially, run
20 the risk of getting struck out under the life
21 without parole. If you get notice of life with
22 parole, that would be one danger I can think of.
23 I'm sorry, I didn't look at -- review the
24 indictments that -- to review what he was actually
25 charged with, but there's -- there's certainly a

1 danger to that, in that regard.

2 Q. And would you have contemplated that while
3 making a potential decision to sever or to not sever
4 the charges in this case?

5 A. I hope I would, but I -- I don't
6 specifically remember it, and I don't have any
7 notes, Mr. Neubauer, about that. I didn't write
8 that -- wouldn't normally write something like that
9 down probably.

10 Q. Yes, sir.

11 A. I'm learning that I should have, but --

12 Q. And regarding Buffy Cartwright's status as
13 being unavailable for trial, Mr. Phillips asked you,
14 specifically, if there was anything that was
15 presented to you and the Court indicating that she
16 was, in fact, severely ill, or unavailable. I'd
17 draw the Court's attention to page four of the first
18 portion of the transcript, specifically, line ten
19 through 17. And Solicitor Moore -- Solicitor
20 Maloney indicates that you've stipulated to the
21 authenticity of a letter from her Hospice Care Nurse
22 stating she is unavailable to be here. She has
23 stage four lung cancer. Her diagnosis is palliative
24 in nature, and the treatment at this point is only
25 pain management. Did you have any reason to believe

1 that Ms. Cartwright was in any condition to appear
2 to testify?

3 A. No, sir, I didn't have any reason to doubt
4 -- to doubt the -- the authenticity of that letter.

5 Q. And further, regarding the testimony from
6 Melinda Lively, page 95, Mr. Phillips questioned you
7 regarding, potentially, bolstering comment. He
8 referenced line 20 through 24 on that page where
9 Melinda Lively indicates, "I was scared for our
10 lives, I was threatened by their father, as [REDACTED]
11 stated." You thought that that was potentially
12 bolstering, correct?

13 A. I think there's an argument to be made that
14 it is.

15 Q. Would you -- I apologize, would you be
16 willing to read the following question and answer
17 from line 25 on page 95 through line three of page
18 96?

19 A. Starting with line 25, "Question, I need
20 you to testify, don't tell me what [REDACTED] said. You
21 tell me why didn't you call the police?" "Answer,
22 he basically held us at gunpoint, and threatened to
23 kill us if we told anybody about it."

24 Q. Would you feel that that testimony was
25 bolstering, or her own testimony, not reliant on the

1 prior testimony of [REDACTED] [REDACTED]?

2 A. The best answer and the fairest answer I
3 could give to everybody here is to say there's an
4 argument to be made that -- that it could be
5 bolstering, because she's -- she is corroborating --
6 well, it could be argued that she's corroborating
7 what the other person said, but I think it's, at the
8 same time, and in fairness to the State's case on
9 this, it's pretty clear that he got a very definite
10 answer from her as to what happened without relying
11 on the other witness.

12 Q. Yes, sir. And regarding issues with the
13 testimony from the DSS agent, Michelle Prince, on
14 page 138, line 22 through 139, line two, Ms. Prince
15 was asked how she first became involved in the case,
16 and she responded that she received a call from an
17 Intake supervisor saying they received a report of
18 sexual abuse concerning [REDACTED] [REDACTED]. Did you
19 feel that that constituted hearsay?

20 A. I think as the truth of the matter that
21 started it, it was, as I said, it's for the context
22 of -- or the beginning of the explanation as to how
23 DSS got involved. I don't think it's hearsay.

24 MR. NEUBAUER: I beg the Court's indulgence for
25 one second, Your Honor.

1 THE COURT: Uh-huh. Yes, sir.

2 BY MR. NEUBAUER:

3 Q. And did you feel that that was hearsay --
4 further, did you feel that that was bolstering
5 testimony to indicate how Ms. Prince had become
6 involved in the case?

7 A. I -- I don't think it's bolstering, no,
8 sir.

9 Q. All right.

10 A. It's not effective bolstering at least,
11 impermissible bolstering. I -- if I were on the
12 jury, I probably would not have noticed very much
13 about that, but it's -- that would be real
14 speculation on my part.

15 Q. And regarding issues with SLED, and not
16 receiving a full copy of the DNA, now, since they
17 got a full, I guess, workup of the case, did you
18 feel any need to do a deep dive into the SLED
19 analysis of the bedsheets?

20 A. No, sir, because that -- that part really
21 wasn't in dispute, so where our side it -- it wasn't
22 in dispute.

23 Q. And had Mr. Cartwright admitted that it was
24 his semen on the bedsheet?

25 A. Yes, sir, he gave an explanation, as to how

1 it got there, but he didn't --

2 Q. Yes, sir.

3 A. -- he didn't dispute that.

4 Q. Further, regarding the interruptions from
5 Judge Early during Mr. Cartwright's testimony, would
6 it be fair to say the majority of the comments from
7 Judge Early followed objections by the State?

8 A. On the part that refreshed my memory from
9 the transcript, that seemed to be the case, yes,
10 sir.

11 Q. And, finally, regarding the jury
12 instruction about victims' statements not needing to
13 be corroborate -- or corroborated for CSC cases like
14 -- like this, Mr. Cartwright has cited State v.
15 Stokes, and are you familiar with that case, sir?

16 A. Not off the top of my head.

17 Q. And that cite 416 SC 493, that was decided
18 in May -- on May 4th of 2016, that would have been
19 about three years after this trial, correct?

20 A. Yes, sir.

21 Q. Would there be any reason for you to have
22 anticipated the -- the jury instruction, regarding
23 victims' statements not needing to be corroborated,
24 would be found impermissible three years after this
25 trial occurred?

1 A. No, sir.

2 Q. And -- thank you.

3 MR. NEUBAUER: I have no further questions, at
4 this point.

5 THE COURT: All right, anything else on recross?

6 MR. PHILLIPS: Very brief, Your Honor.

7 THE COURT: Yes, sir.

8 RECROSS-EXAMINATION

9 BY MR. PHILLIPS:

10 Q. Mr. Routzong, in regards to the questioning
11 regarding the motion to quash the indictment in
12 State v. Baker, State v. Baker is not a seminal
13 case; in other words, the base case law, the black
14 letter law for, you know, having an indictment
15 that's unconscionably over vague and overbroad,
16 that's not a new concept that was a novel issue that
17 was addressed by the Court in Baker, is it? You're
18 on mute, if you could -- Mr. Routzong, we can't hear
19 you.

20 A. I'm sorry. I'd be fibbing if told you --
21 if I could tell you, I need to review the case, but
22 I don't disagree. I have no reason to disagree with
23 you.

24 Q. But I mean my point is, that you -- you
25 knew that although State v. Baker didn't exist, you

1 knew at the time you had the ability to move to
2 quash an indictment based on it being vague and
3 overbroad? At the time of the trial you knew that?

4 A. Yes, sir, I -- I think that's a fair thing
5 to say. I will say this, in my experience up until
6 that point in time, it was -- it was not unusual to
7 have indictments that went for longer than a year.
8 I don't think I recognized it at the time as being
9 overbroad; but, you know, getting the -- getting
10 back to the specifics here, as I've testified, I --
11 I think this -- I think the indictments, unless
12 there's one in there I can't remember, and you might
13 be able to cite it for me, but most of them, I
14 think, were a period of time of one year that
15 corresponded to the ages that the accuser said that
16 these -- that's happened. And I think when you're
17 dealing with children, that's not -- that would not
18 be considered an unusual thing.

19 Q. Understood.

20 MR. PHILLIPS: No further questions, Your Honor.

21 THE COURT: All right. Attorney General, do you
22 have any other witnesses?

23 MR. NEUBAUER: No, Your Honor, the State has no
24 further witnesses; however, if Your Honor would
25 allow, I would like a brief closing argument to try

1 and summarize the extensive testimony we've had in
2 this case.

3 THE COURT: I will be happy to hear from you,
4 and then I'm also happy to hear from counsel for Mr.
5 Cartwright. Go right ahead, sir.

6 MR. ROUTZONG: Your Honor?

7 THE COURT: Yeah.

8 MR. ROUTZONG: May I be excused?

9 THE COURT: Yes, sir. Any objection to Mr.
10 Routzong being excused?

11 MR. NEUBAUER: No, Your Honor.

12 THE COURT: Okay, hold -- hold on. Your client
13 has indicated he wants to say something, Counsel.

14 MR. PHILLIPS: Mr. Cartwright?

15 MR. CARTWRIGHT: I was just curious if -- if I
16 would be able to ask Mr. Routzong a question.

17 MR. PHILLIPS: It'd have to go through me. We
18 don't allow for the hybrid counsel. I'd have to ask
19 him the question.

20 MR. CARTWRIGHT: Okay, okay. Well --

21 MR. PHILLIPS: Your Honor, unfortunately, given
22 the virtual nature of this, I'm not -- it's not the
23 usual course, where I'm sitting beside him, and he
24 can -

25 THE COURT: Then ask the question. Does the

1 State care?

2 MR. NEUBAUER: Depending on the context of the
3 question, I may object, but I have no issue with at
4 least --

5 THE COURT: All right.

6 MR. NEUBAUER: -- seeing what the question may
7 be.

8 THE COURT: And I know -- all right. Sir, if --
9 if you want to ask a question, if it meets with your
10 lawyer's approval, I'll certain allow you to ask Mr.
11 Routzong a question, okay?

12 MR. CARTWRIGHT: Okay.

13 THE COURT: So go ahead and ask the question.
14 Is that okay, Counsel, for Mr. Cartwright?

15 MR. PHILLIPS: Yes, Your Honor, given the
16 virtual nature, I appreciate it.

17 THE PLAINTIFF: Mr. Routzong, I just wanted to
18 ask if you remember me having my brother bring you a
19 set of bedsheets before the trial that were brand
20 new, that were the same as what was in my son's
21 bedroom? And -- and wasn't it odd that my son's
22 bedroom was never mentioned throughout discovery,
23 nor throughout the whole first trial, until I used
24 that as my defense, that those sheets were not out
25 of her bedroom, they were out of my son's bedroom?

1 But I -- my brother still has the sheets that he
2 brought you, and they're still in the package they
3 were mailed from. I just wanted to know if you
4 remembered that conversation me and you had.

5 THE COURT: Thank you. Mr. Routzong?

6 MR. ROUTZONG: I -- I remember the bedsheets,
7 and I remember your brother bringing it, but I don't
8 have any notes on that, and I apologize, Mr.
9 Cartwright. I will say -- but you asked me two
10 questions, so that's the answer to the first one. I
11 do remember your brother bringing them over. The
12 second question you asked me, do I find it odd? And
13 so, Mr. -- Your Honor, if -- if -- if there's an
14 inconsistency -- if that's -- if that's an
15 inconsistency great enough to have prejudiced Mr.
16 Cartwright, if there's an argument to be made about
17 that, I'm not quite so sure I see it, but that
18 doesn't mean it's not there. I will say this, where
19 the sheets were located, I wonder if that's as
20 important as how the semen got on them. Now, he did
21 testify that -- that they started off in the laundry
22 room, and they ended up in -- in -- in the other
23 bedroom. It's kind of odd that -- to me, it's kind
24 of odd, and maybe it's not odd to that situation,
25 what's odd is that it wasn't washed, it wasn't

1 thrown in the laundry. Why would it still be in
2 that room? And that's probably a question the Jury
3 asked themselves.

4 MR. CARTWRIGHT: And -- and --

5 MR. PHILLIPS: So --

6 MR. CARTWRIGHT: Yes, sir?

7 BY MR. PHILLIPS:

8 Q. Mr. Cartwright, and if -- and you can let
9 -- Mr. Routzong, I think the heart of it was in the
10 first trial, once Mr. Cartwright presented that as
11 his defense, his son's bedroom, the State's
12 strategy, their theory of the case changed. What we
13 had discussed about earlier on cross-examination.
14 When he brought you those bed sheets and explained
15 that, you know, what, essentially, had been provided
16 him, the theory had changed in the second trial, why
17 didn't -- why wasn't that addressed? What strategic
18 reason was, you know, provided that you didn't
19 address that issue of the State changing their
20 theory on that evidence?

21 A. The most -- the most clear I can try to
22 make that for you, Mr. Phillips, is, I don't -- I
23 don't think I was aware that there was a change --
24 change of strategy, at least not from my viewpoint.
25 My -- my viewpoint, well, the sheets could have been

1 moved here or there, or wherever, it doesn't matter,
2 the question is how did they get on there? And he
3 had the opportunity to testify to that. It's --
4 it's just kind of very strange that it -- let's --
5 let's assume that his testimony is accurate. We
6 have no reason, other than the verdict, I'm not
7 trying to reargue that; but if we assume for a
8 minute that what he said was true, it could have
9 been moved anywhere at that point. Why wasn't it
10 washed? Why wasn't, you know, but the whole thing
11 is, he -- he offered an explanation as to why
12 there's his DNA on the sheet. It was not believed
13 by the Jury. And I do agree with you, any
14 inconsistencies in a case, and I agree, in fairness
15 to Mr. Cartwright, and there's many inconsistencies
16 that you can point out that's helpful to the
17 defense, with the inconsistencies of the State's
18 case. If -- if that's an inconsistency, and it
19 appears to be, it should be brought forward to -- to
20 the Jury. I -- I don't disagree with that. I'd be
21 a fool not to agree with that. That's as accurate
22 as I can tell you about my strategy. My focus was
23 on how did it get on the sheets? And, apparently,
24 it -- apparently, I was not -- to me, it didn't make
25 much sense, since sheets can be moved here and

1 there, how did they get out of there? Wherever the
2 -- if somebody wanted to plant them, they could have
3 put it on his son's bedroom, he could have put it in
4 her bedroom. If you believe him, somebody had to
5 put it there, and it was maybe just forgotten, I
6 don't know. That's as clear as I -- I apologize,
7 that's as clear as I can try to make that.

8 THE COURT: All right, any -- anything further,
9 in regards to your client's question, Counsel?

10 MR. PHILLIPS: None from me, Your Honor. Mr.
11 Cartwright?

12 MR. CARTWRIGHT: Just one thing is, in -- in --
13 in making his initial statement, --

14 MR. NEUBAUER: Yeah. Your Honor --

15 MR. CARTWRIGHT: -- there was --

16 MR. NEUBAUER: -- I feel we are going beyond the
17 scope of the initial question, and --

18 THE COURT: All right, well, I -- I note the
19 objection for the record, let's go, Mr. Cartwright.
20 Let me hear from you, and we'll see what's on -- and
21 I'll note your objection for the record.

22 MR. CARTWRIGHT: The -- the initial statement,
23 the DNA was only brought into play by testimony to
24 start with. The initial statement was nothing had
25 happened that day, nothing. It was two weeks,

1 almost ten days later before they received an
2 accusation that something had took place.

3 THE COURT: All right.

4 MR. CARTWRIGHT: Yes.

5 THE COURT: Well -- and -- and, Mr.

6 Cartwright --

7 MR. CARTWRIGHT: On that day.

8 THE COURT: Mr. Cartwright, I appreciate you
9 letting me know that, but at this point it's not --
10 it's not -- it's not appropriate to make statements,
11 it's -- it's questioning the witness; and so I think
12 you've made your point, and, certainly, I -- I
13 understand completely what -- what the both -- point
14 of the counter point is on that as it relates to the
15 -- the sheets, and bringing up inconsistencies, and
16 what Mr. Routzong thought was the significance of
17 the -- of the sheets, and -- and where they were. I
18 certainly understand where everybody's coming from.
19 So with that, Mr. Routzong, I've got no objection to
20 you, sir, being excused. Anything further for him
21 for the State?

22 MR. NEUBAUER: No, Your Honor.

23 THE COURT: All right, from the Defense?

24 MR. PHILLIPS: No, Your Honor.

25 THE COURT: All right, Mr. Routzong, thank you.

1 Have a good weekend, sir.

2 MR. ROUTZONG: You have a good weekend everyone.

3 THE COURT: Yes, sir.

4 MR. PHILLIPS: Thank you.

5 THE COURT: All right, I'm happy to hear -- Mr.
6 Neubauer, I'm happy to hear from you, sir.

7 MR. NEUBAUER: Thank you, Your Honor.

8 CLOSING STATEMENT

9 MR. NEUBAUER: It's the State's contention
10 that Mr. Cartwright has failed to meet his burden of
11 proof establishing, number one, his counsel's
12 performance was deficient, or, two, that it
13 prejudiced him. Initially, his counsel indicated he
14 reviewed -- or he would have -- he believes he would
15 have reviewed discovery with Applicant, indicating
16 he does not recall Applicant providing him with the
17 names of any witnesses for him to investigate. He's
18 indicated that he met with Mr. Cartwright's brother
19 to receive photos of the trailer that they've lived
20 in, that that was the only witness that he was
21 provided to meet with. Counsel testified that he
22 investigated each aspect of the case, and felt that
23 -- or that he felt was relevant to Applicant's
24 defense, or he did not investigate an issue further
25 based on a strategic decision that he did not

1 believe they were necessary.

2 Counsel has a duty to make a reasonable
3 investigation. He's indicted he investigated -- his
4 investigation was tailored to the issues that he
5 thought were relevant for the defense of Mr.
6 Cartwright. Further, Mr. Cartwright, has a duty to
7 present any evidence or facts that could have been
8 developed through further investigation, and he's
9 failed to do so. That Mr. Cartwright's indicated
10 that counsel could have looked into stuff -- into
11 more stuff. He's failed to present any evidence,
12 which if it had been discovered, it would have made
13 a difference throughout this case.

14 Counsel's indicated his reasoning for not
15 sequestering the witnesses was that they previously
16 testified in a prior trial, and they -- there was a
17 likelihood that they knew what the other was going
18 to say already. Additionally, according to State v.
19 Carmack, 388 SC 190, the mere opportunity for the
20 State's witnesses to compare testimony is
21 insufficient to compel sequestration. Mr.
22 Cartwright and his attorney have alleged that the
23 witnesses should have been sequestered to avoid in
24 that hearing what the other witnesses would have
25 said; however, based on the case law that exists,

1 that would not have been a sufficient reason to
2 sequester witnesses. Further, counsel has indicated
3 the valid reason why he did not believe there was a
4 need to sever the charges, as if these charges had
5 been severed, and Mr. Cartwright had been convicted
6 separately through different trials, he could have
7 been facing a great -- a larger sentence --

8 MR. PHILLIPS: Objection, Your Honor, that --
9 there was no testimony to this.

10 THE COURT: And that -- that's -- he's surmising
11 his closing is what he says the evidence shows. I'm
12 going to overrule that. I'll give wide latitude.
13 This is a -- this is an example of an objection
14 during a closing. That was part -- part of this
15 evidence today we were about to go into some, it had
16 some of that. Kind of ironic. But I -- I'll --
17 I'll let him continue, and I'll give you every
18 opportunity to respond, Counsel.

19 MR. PHILLIPS: Thank you, Your Honor.

20 THE COURT: Go ahead, sir.

21 MR. NEUBUER: Further, during our initial day of
22 this hearing, Mr. Routzong indicated that he felt
23 the charges related to the same general form of
24 conduct, though they occurred at different times, so
25 that might have been a reason why he felt the

1 sequestration what -- or not sequestration, but
2 severance of the charges might not have been
3 necessary. Though Applicant argues the indictments
4 were vague or overbroad, the indictments mirror the
5 language of the statute Applicant was charged with,
6 and were limited to a one-year portion of time,
7 correlating with the victims' age. According to
8 State v. Wade, which is 306 SC 79, the Supreme Court
9 held an indictment was not -- or an indictment in a
10 first degree criminal sexual conduct with a minor
11 case was not unconstitutionally vague or overbroad,
12 even though the alleged offense occurred at some
13 point with a two-year time period. These
14 indictments were specifically tailored to one-year
15 time periods correlating with the victims' ages, and
16 based on the case law at the time, it would have --
17 it would not have been considered unconstitutionally
18 vague or overbroad. Counsel testified he did not
19 feel the need to hire an expert witness in the case,
20 regarding DNA or the photo. Counsel indicated that
21 Mr. Cartwright admitted that it was his semen on the
22 bedsheets, so further investigations in the DNA was
23 unnecessary. And further, the introduction of the
24 photo itself was not necessary in Mr. Routzong's
25 eyes, as he was able to convey the same general

1 point by expressing that Mr. Cartwright found this
2 photo, believed it was his stepdaughter, and pursued
3 it not only to police, but to a local news station.
4 Regarding voir dire, Wall v. Keys, SC -- or 331 SC
5 310, it was indicated the manner in which questions
6 regarding jurors are related to a party, has an
7 interest, or has expressed or formed an opinion, his
8 pursuit of -- I apologize, I have like half of that
9 quote.

10 THE COURT: It's okay.

11 MR. NEUBUER: The scope of -- I apologize,
12 further, the scope of additional voir dire is within
13 the sound discretion of the Trial Court. Though
14 counsel requested certain questions be added to the
15 Court's voir dire, it was in the Court's discretion
16 to decide which voir dire questions were asked, and
17 the Court declined to include two questions that
18 Counsel had requested for this case. Regarding
19 issues of specific testimony that Counsel could have
20 objected to, Counsel has indicated that he did not
21 believe the testimony was objectionable at the time;
22 and though Counsel has indicated in hindsight that
23 he could have objected, Strickland v. Washington
24 requests that the Court assess Counsels'
25 performance, while making effort -- every effort to

1 eliminate the distorting effects of hindsight.
2 Counsel properly objected numerous times throughout
3 the trial, and was successful throughout many of the
4 objections. Though there are instances where he
5 could have objected further, Counsel has indicated
6 his reasoning, at the time, that he did not feel
7 those particular matters were objectionable
8 throughout the course of the trial. Though he's
9 assessed that with the hindsight and the ability to
10 review the transcript almost a decade later, he sees
11 that there are instances where he probably could
12 have objected. Regarding the search for the truth
13 argument, Applicant has cited the case of State v.
14 Alexi, and in this case, the Court indicated that
15 reference to the Jury's duty to determine the truth
16 from testimony that's presented after the Jury's
17 been fully instructed on the State's burden of
18 proof, does not create a reasonable likelihood that
19 the Jury will adeem the State's burden of proof to
20 have been shifted to the Defendant. The -- that
21 instance is exactly what occurred here. Judge Early
22 informed the Jury of the State's burden of proof,
23 and tailored his search to the truth language, if
24 you want to call it that, to the Jury's
25 determination of which facts they felt were true in

1 this case, not who they believed, the Defendant, or
2 the State. I feel that it is disingenuous to equate
3 this case to a search for the truth language, and as
4 it merely shows that Judge Early was attempting to
5 tell the Jury to determine which witness testimony
6 they believed and make their decision on whether the
7 State has met their burden of proof based on the
8 testimony that they believed credible. As far as
9 the issues with challenging Dr. Alicia Benedetto,
10 Counsel indicated he saw an issue with Benedetto
11 being qualified as an expert witness, and challenged
12 her qualification, both before the trial and at the
13 time that she was qualified. Counsel indicated that
14 he based his argument for not having Ms. Benedetto
15 qualified on case law he received from Mr. -- or
16 from Robert Dedick (phonetic) while he was preparing
17 for this trial. Further, regarding his failure to
18 object is beyond the scope of qualifications -- or
19 objecting to testimony from Benedetto as beyond the
20 scope of her qualifications. Counsel indicated that
21 he felt the question was improper and objected, but
22 he may not have made the best possible objection at
23 that time. As far as Applicant's issues with
24 Appellate counsel goes, Appellate counsel does not
25 have an obligation to raise every nonfrivolous issue

1 that is presented by the record. Appellate counsel
2 indicted his reason for raising the issues that he
3 did on appeal, and why he chose not to address other
4 issues. Additionally, Appellate counsel testified
5 he had previously raised issues that were not
6 preserved for review to have the Court establish
7 that they were not properly preserved, but he
8 elected to not do so in this case, and instead
9 focused his argument on the issues he thought had
10 the highest chance of success. And further the case
11 of Nichols v. United States, that 563 F.3d 249, has
12 clearly indicated that applicants do not have a
13 constitutional right to assist in some Appellate
14 counsel for petitions to the United States Supreme
15 Court, though Mr. Dedick, if he felt he probably
16 could have raised the issue of using Mr.
17 Cartwright's attempted suicide during the course of
18 a trial, that that could have been raised in the
19 Supreme Court. There was no obligation for Mr.
20 Dedick to do. So we feel that though there are
21 issues that could have been raised in hindsight,
22 regarding Mr. Routzong's assistance and Mr. Dedick's
23 assistance, that those, at the time, would have been
24 -- or that the actions of both counsels, at the
25 time, would have been deemed reasonable, though it

1 may not have been perfect representation, it is
2 clearly competent representation and reasonable
3 representation; and we feel the Applicant has failed
4 to show how counsel was deficient or how he was
5 prejudiced by counsel's performance.

6 THE COURT: Let me ask you something.

7 MR. NEUBAUER: Yes, sir.

8 THE COURT: I understand -- now, this -- I don't
9 understand why he would not go and try to put the
10 picture into evidence, because -- or try to confirm
11 that it was a picture of -- of the -- the victim.
12 Because a) if it was the picture of the victim,
13 everything in this case rises on credibility of the
14 -- of the witness, the victim, and that's -- that's
15 the ship rises or falls. And so if the picture's
16 in, and the victim denies it, and the expert says
17 it's her, the Jury could look at it and see that
18 it's her, then that, potentially, destroys her
19 credibility. I -- and quite frankly makes the
20 gentleman whose testimony was, that -- no offense,
21 Mr. Cartwright, that you're not a likeable guy, I'm
22 I don't know you, sir, I'm taking the evidence --
23 the information I've received over the past three or
24 four days we've been together, spread out over
25 several weeks, it kind of makes him, potentially,

1 more likeable. I just -- I don't understand that.

2 MR. NEUBAUER: And, Your Honor, I believe -- and
3 I'm -- I believe that this testimony came out
4 through the course of this, however, during my
5 conversation with Mr. Routzong, as well, it may have
6 come out, I am certain that I asked Mr. Routzong
7 whether he believed the woman indicated -- or in the
8 photo was, in fact, the victim, and he indicated
9 that he did not believe that after reviewing the
10 photo; and that he felt that the introduction of the
11 photo showing minors exposing themselves as not
12 necessary to the issue. That he was able to convey
13 his defense, which was by raising -- by Mr.
14 Cartwright raising this issue, by Mr. Cartwright
15 bringing it up to police, bringing it up to [REDACTED]
16 (phonetic), bringing it up to Hoss, going to the
17 news with it, that that alone, that exposure, that
18 -- the manner in which that was addressed would have
19 either embarrassed or infuriated [REDACTED] enough to
20 cause her to fabricate these allegations. So it was
21 his belief that he was able to convey the same point
22 without needing to introduce a photo that may or may
23 not have been the victim.

24 THE COURT: Okay, all right. Thank you, sir.
25 All right, Counsel, I'm happy to hear from you, as

1 it relates to closing, and anything that I -- I
2 brought up. I just -- I brought that up simply
3 because I was curious as to the thought behind it,
4 and I think -- I think the -- I think the Attorney
5 General certainly provided me with some food for
6 thought, as it relates to the questions that I
7 raised. Go ahead.

8 CLOSING STATEMENT

9 MR. PHILLIPS: Thank you, Your Honor. Regarding
10 the allegations of ineffective assistance of
11 counsel, trial counsel denied Applicant's right to
12 effectiveness of counsel as guaranteed by the 6th
13 and 14th Amendments to the United States
14 Constitution, Article 1, Sections 3 and 14 of the
15 South Carolina Constitution. Specifically, Trial
16 Counsel's unreasonably deficient performance fell
17 below an objective standard of reasonableness, under
18 prevailing, professional norms, and prejudiced the
19 Applicant, because there's a reasonable probability
20 that but for Trial Counsel's errors, the result of
21 the proceedings would have been different, on
22 deciding, essentially, the Strickland v. Washington
23 standards for ineffective assistance of counsel
24 claims. In conclusion, that counsel's conduct so
25 undermined the proper functioning of the adversarial

1 process, that the trial could not be relied upon as
2 having produced a just result. Also, the second
3 part is, that Appellate counsel denied Applicant's
4 right to effective assistance of counsel as
5 guaranteed by the 6th and 14th Amendments to the
6 United States Constitution, and Article 1, Sections
7 3 and 14 of the South Carolina Constitution.
8 Specifically, Appellate counsel's unreasonably
9 deficient performance prejudiced the Applicant,
10 because there's a reasonable probability that but
11 for Appellate counsel's errors, the results of the
12 proceeding would have been different. Specifically
13 as to the allegations, starting, again, with the
14 testimony, Your Honor, I think in this case, as you
15 heard, there was a trial, that the first trial
16 occurred in November. The first time that Routzong,
17 according to his notes, spoke with -- the first note
18 that he had, spoke over the phone to an incarcerated
19 Applicant was March 5th. The trial in this case
20 started on April 15th. He says he met with him,
21 potentially, because he said one of them,
22 potentially, could have been a phone call, he wasn't
23 -- his notes were -- he said he definitely spoke to
24 him for a couple of hours, that's what both of the
25 other notes said on April 4th and April 13th. He

1 had no notes, specifically, related to any
2 witnesses. No notes as to whether he reviewed the
3 discovery with him. No notes as to really any of
4 the allegations that were addressed during this
5 hearing as far as his preparation, and his strategic
6 reasons for presenting the defense that he -- that
7 he did, and in his preparation for trial.
8 Specifically, in his advisement of rights to the
9 Applicant, as to his decision to testify, he had no
10 notes, as to how he discussed that with him, again,
11 as to the preparation and -- and investigation in
12 this case. If Your Honor -- I mean I can cite all
13 the relevant case law to each individual allegation.
14 I don't know if Your Honor would -- I didn't -- I
15 wouldn't --

16 THE COURT: No, but I've got a question.

17 MR. PHILLIPS: Yes, Your Honor.

18 THE COURT: When did he get the transcript?

19 MR. PHILLIPS: I asked that question on --

20 THE COURT: Yeah, you did, and so I thought
21 maybe you knew the answer. You know, sometimes
22 lawyers know the answer before they ask the --

23 MR. PHILLIPS: I wish --

24 THE COURT: -- the question.

25 MR. PHILLIPS: I wish I did. That's the

1 problem, we don't have any record of it, neither did
2 he.

3 THE COURT: Well, that's kind of a quick
4 turnaround for -- this was a November trial?

5 MR. PHILLIPS: That's correct, from --

6 THE COURT: And he was in -- and the -- and the
7 second trial started the middle of April?

8 MR. PHILLIPS: Yes, your Honor.

9 THE COURT: That's a quick turnaround.

10 MR. NEUBAUER: I have a -- I apologize for
11 interjecting. I've a copy of the transcript from
12 the first trial, and the only note shows that it was
13 received by the Solicitor's Office on January 28th
14 of 2013, but again, as Mr. Phillips indicated
15 there's no record stating when Mr. Routzong would
16 have received that from the Solicitor.

17 THE COURT: I mean -- but that's still -- I mean
18 I would assume -- and I'm looking at -- and I'm
19 looking right here, and you're right it was -- it
20 was the - the court reporter's Certificate of
21 Reporter is dated January 27th, so, you know --

22 MR. PHILLIPS: The -- I mean the issue is he had
23 no notes of when he even received it, or when he
24 reviewed it for preparation of it. I mean, again,
25 generally, when you're preparing for trial, you do

1 take notes, specifically, if you're reviewing a
2 transcript for impeachment evidence. And, again,
3 there was no notes as to his preparation in his
4 review of that transcript or when he received it.
5 He didn't have even any records to who when he
6 received the discovery, or if he received the
7 updated discovery, or any -- as far as the case
8 file, how he received the case file after the
9 private attorney -- the hung jury from the first
10 trial from the private counsel.

11 THE COURT: Now, Mr. Phillips, I would agree
12 with you that the -- the thing that -- I practiced
13 criminal law for 30 years, it's a pretty quick
14 turnaround from 3/5 to 4/15 for a trial --

15 MR. PHILLIPS: That --

16 THE COURT: -- of this significance. Quite
17 frankly, I think everybody really acknowledges --
18 acknowledges that, but I -- I understand the issues
19 about not documenting or having that information,
20 but go -- go ahead, go ahead.

21 CLOSING STATEMENT CONTINUES:

22 MR. PHILLIPS: Well, specifically, going --
23 I mean, again, with that amount of time that the
24 heart of it was that he did not have the ability to
25 be fully prepared. Now, his testimony was -- was

1 different than that.

2 THE COURT: Correct.

3 MR. PHILLIPS: And so, you know, the next
4 question, had he said that he did not have enough
5 time would have been -- that they would have been
6 appropriate to move for a continuance, but that's
7 not what his testimony was. His testimony --
8 testimony was he believed he was prepared, or at
9 least that's my recollection of the testimony. Now,
10 I disagree based on the fact of the short turnaround
11 time, as Your Honor, noted, and his notes of what he
12 did have is one phone call and two meetings, and not
13 knowing when he had the full discovery file or the
14 trial transcript from the first one. If he ends up
15 getting the trial -- the first trial transcript and
16 discovery after one of those meetings, then we know,
17 for a fact, that that never happened. One of the
18 allegations before Your Honor is that he didn't
19 review the full discovery file with Mr. Cartwright
20 and go through the evidence. Again, specifically,
21 as to his failure to prepare for trial, but not only
22 to review that evidence with Mr. Cartwright, going
23 into trial. Specifically, as to -- we kind of walk
24 in the same -- I'll -- I'll address the Appellate
25 counsel real quick, because it's pretty -- pretty

1 brief. Our main issues with the ineffective
2 assistance of Appellate counsel, we're not waiving
3 all the issues raised, but the specific ones I want
4 to bring to the Court's attention is, essentially,
5 that Trial Counsel, based on Appellate's counsel
6 failure to bring the issue of -- or the incorrect
7 legal standards for qualifying the expert, that it's
8 either ineffective assistance of Appellate counsel
9 for not raising that issue, or its ineffective
10 assistance of Trial Counsel for failing to preserve
11 for Appellate review the -- the legal standard that
12 was presented to qualify the expert, Ms. Benedetto.
13 Since her -- her testimony, at least from my review
14 of it, was a very critical point in what was present
15 to the Jury, which we've had the case law to support
16 how it's a very thin line with this type of expert
17 testimony, and walking that line of where the
18 prejudice get -- where it gets -- underly
19 prejudicial to a Defendant, especially with the
20 blind experts in here. Also, the second part is
21 that the expert's testimony went beyond the scope of
22 her expertise. Either Appellate counsel was
23 ineffective for failing to raise that issue, or
24 Trial Counsel was ineffective for failure to
25 preserve that issue for Appellate review. Those are

1 the two that I really want to point out,
2 specifically, as to Appellate counsel, again, not
3 waiving the other issues raised, those are the ones
4 that I wanted to put out, specifically. As to Mr.
5 Hayes' testimony, you'll have to give me second,
6 Your Honor, I'm going back through notes, since he
7 didn't testify in the previous hearing, that he
8 didn't recall any of the conversations with Mr.
9 Cartwright, or any -- or any preparation for
10 pretrial motions, and preparation for this trial, he
11 was not able to provide any testimony to support
12 Trial Counsel, Mr. Routzong's preparation for trial.
13 There was no corroborating evidence that they -- of
14 -- of what was actually done to prepare for the
15 trial. And there really wasn't, other than the --

16 THE COURT: Whoa, whoa, whoa, wait. I'm sorry,
17 I'm -- I'm trying to multi-task. I'm trying to look
18 at something here --

19 MR. PHILLIPS: Yes, Your Honor.

20 THE COURT: -- and I'm listening to you, and I
21 can't multi-task, so let's back up. Let's back up a
22 second. What were you just saying?

23 MR. PHILLIPS: That co-counsel, second Chair,
24 Mr. Hayes, there was no testimony from him that,
25 essentially, said, you know, here are the things --

1 outlining the things they did to prepare for trial,
2 other than Mr. Hayes did say he called the Office of
3 Appellate defense for his specific legal issue as
4 far as the expert, but there was no testimony from
5 Mr. Hayes that would support that Mr. Routzong, lead
6 counsel, had done all the things necessary to
7 prepare for trial. The issues that we're going into
8 -- to address, specifically, again, that we know
9 there was only --

10 THE COURT: Right.

11 MR. PHILLIPS: -- two meetings with the
12 Applicant in this case. And, again, I'm not -- as,
13 Your Honor, kind of pointed, and didn't want me to
14 go case law more specific than I have to; but,
15 specifically, in this case, there wasn't any
16 specific investigation into any specific witnesses.
17 There were no notes on that. There wasn't any
18 questioning, or a follow-up on any potential bias of
19 [REDACTED], and any -- and her boyfriend, and
20 any potential criminal investigation or charges that
21 were presented.

22 THE COURT: But what -- what assistance did you
23 want him to -- to -- because don't you have that
24 burden?

25 MR. PHILLIPS: As far as presenting the

1 witnesses, specifically, yes, Your Honor. The --
2 the main -- the critical issue is, as far as his
3 cross-examination not presenting a specific witness
4 here, because, yes, we would have to call a specific
5 witness, if there was one that would -- that would
6 be involved; but one where he failed to even look to
7 see if there was anything pending with the -- the
8 boyfriend, at the time, based on -- again, I don't
9 think it was totally flushed out during the hearing,
10 but in the trial transcript, there's the -- the
11 daughter admits that there was a pending -- and that
12 she -- she denies there was anything pending with
13 her, but admits that she was trying to help her
14 boyfriend. And so --

15 THE COURT: Were there --

16 MR. PHILLIPS: She did -- she does admit that
17 there was some motive for her --

18 MR. NEUBAUER: Your Honor, I would -- I
19 apologize, I would object just to the statement that
20 she said she was trying to help her boyfriend.

21 THE COURT: Well --

22 MR. NEUBAUER: And I believe the record will
23 reflect that she was giving information regarding a
24 drug investigation involving her boyfriend, not that
25 she was trying to assist him. And I apologize, I

1 just wanted to clarify that particular point.

2 THE COURT: All right, well, I'll note your
3 objection for the record. I overrule you. Let's --
4 go ahead, sir.

5 MR. PHILLIPS: Thank you, Your Honor. Again,
6 there was the testimony from the Applicant regarding
7 his timeline of the times when he was not in the
8 home, and was working out-of-state, and I understand
9 counsel's testimony, but you had a broad timeline
10 here, but, specifically, going to our issue of a
11 motion to quash the indictments, when you have a
12 span of 18 years, 28 indictments, all of them
13 spanning over a year; and then the issue of having
14 an overbroad or vague indictment, it's not a novel
15 issue. State v. Baker is not the watershed case
16 that -- that makes this issue for the first time.

17 THE COURT: Yeah, but -- yeah, but in these type
18 of cases, and I -- when I've had them, it always
19 seems like the indictments are -- are rather -- are
20 rather broad timewise, simply because of other
21 things. I think you're dealing with children. I
22 mean that --

23 MR. PHILLIPS: Well --

24 THE COURT: That just seems pretty -- I mean to
25 my experience, that's pretty routine of these type

1 -- in this types of cases; is that not - is that not
2 the case?

3 MR. PHILLIPS: Well, it's routine, but that's
4 why State v. Baker shows the prejudice, the -- the
5 whole heart of why it's so difficult in those cases
6 to provide a alibi defense. If they had any
7 specific dates in that range, then he could show
8 whether he was in the home or not with -- with, you
9 know, where he was living at the time. I think the
10 even stronger argument, I think a very strong
11 argument is, the severance argument. You have three
12 victims in a case that have different offers of
13 proof, that have distinct -- distinct date ranges,
14 and it wasn't a continuous course of conduct. I
15 think that is a case where counsel has an absolute
16 duty to move to sever those, because now you have,
17 basically, the State able to bolster, that you have
18 three children all claiming abuse, again, over this
19 vast amount of indictments; and because all --
20 they're not provable by the same evidence, and
21 they're not from a continuous force of conduct,
22 they're perfect for a severance, and the State could
23 try them individually, and they -- each case can
24 stand on their own. And that in and of itself, by
25 not moving to sever those cases, especially, even in

1 this case, where he didn't move to sever or
2 sequester the witnesses, you have the opportunity,
3 wherein, essentially, the prejudice is just -- it's
4 just too high, it's a -- it's a mountain too high to
5 climb. There's no way that a jury, in my opinion,
6 when you have 28 indictments and three children
7 making these allegations, and there are different
8 offers of proof cases that could stand on their own,
9 for the defense attorney not to move to sever those
10 cases, to me, is one of the strongest, most -- to
11 me, shocking arguments that we have, because I
12 think, if you stand -- if you separate these cases
13 individually, of course, the State to try to 404B
14 them, but that's a whole other issue to try -- that
15 -- as far as the admission of -- of that evidence,
16 as well. I tried a CSC last November, we had a
17 motion to sever in that case, it was granted, and
18 certain things didn't come in through 404B, and that
19 we had a not guilty verdict. I think that is --
20 what evidence, obviously, goes before the Jury is
21 paramount. When they have 28 indictments, three
22 victims, and they're all, basically, saying the same
23 thing, you have this unduly prejudicial bolstering,
24 essentially, of -- just -- just the same problem you
25 have with propensity evidence.

1 THE COURT: And you can tell where there's
2 smoke, there's fire.

3 MR. PHILLIPS: That you took the words out of my
4 mouth, I was about to say that, sir. Yes, exactly,
5 the whole problem with propensity evidence. And so
6 the -- to me, the severance issue is one -- is -- is
7 definitely one of the strongest issues he has on
8 proving ineffective assistance of counsel. With
9 that being said, as far as just trying to walking
10 through. Now, as far as the discussions, there
11 was --

12 THE COURT: Let me ask you something. What
13 about his argument -- the only argument I heard him
14 making concerning severance, was this whole really,
15 I guess, the -- the, you know, the 40 bad act type
16 of evidence, but his being L-locked. I mean that --
17 that -- I heard him talking about that, more than
18 anything else. What about that?

19 MR. PHILLIPS: Well --

20 THE COURT: That is a -- that's a -- that's a
21 valuable consideration.

22 MR. PHILLIPS: Well, I think his testimony now
23 was that he would -- he would have moved to sever,
24 and there was no strategic reason. So I mean he
25 says he would have moved to sever now, but as far as

1 the -- the other part of that, given the nature of
2 the sentence imposed, and the amount of the time
3 that you can get with this, with consecutive
4 sentences, I don't think there's really any
5 differences, other than the fact that somebody could
6 try to on most serious -- serious offenses, try to
7 actually seek the L-lock (phonetic); but when you're
8 facing, again, his sentences was imposed here, he
9 got 40 years, that's a De Facto life sentence,
10 especially when you do the life calculations with
11 SEDC. He's facing -- he received 30 years on the
12 first degree. Again, only one set was a consecutive
13 sentence, every -- everything else was concurrent in
14 this case.

15 THE COURT: All right. All right, go ahead, go
16 ahead.

17 MR. PHILLIPS: Thank you, Your Honor.

18 CLOSING STATEMENT CONTINUES:

19 MR. PHILLIPS: Specifically, it's regarding
20 the discussion of suicide being argued as evidence
21 of guilt. Again, having no notes regarding that
22 issue, and being prepared to specifically address
23 that issue, we argue is also ineffective assistance
24 of counsel, especially considering it was a novel
25 issue that was raised on appeal. Unfortunately, as

1 you heard, the -- from Appellate counsel, that it
2 wasn't federalized and he had not thought about it
3 being a federalized issue, one that you could be
4 able to petition the United States Supreme Court to
5 review. Also, with voir -- during the voir dire
6 there were other witnesses -- or, excuse me, other
7 potential jurors, who said they had -- there were
8 similar types of behavior from -- which was related
9 to the trial, none of that discussion with the Trial
10 Court was put on the record, and none of those juror
11 numbers were put on the record. And, again, a lot
12 of this, Your Honor, were put in a very difficult
13 place like you -- when you asked earlier about when
14 he received the transcript. And it's very difficult
15 to prove a negative, because it -- we -- we have --
16 we have no -- he has no notes, and we have no
17 ability to -- to know the answer. Just like we have
18 no idea what those jurors told the Judge, and what
19 their juror numbers are, especially in a case as
20 charged as a sex abuse case with children. When
21 somebody had similar types of behavior that,
22 potentially, there could be arguments for
23 ineffective assistance of counsel, if not moving to
24 strike for cause those jurors, but we'll never know,
25 because he didn't preserve that for Appellate

1 review. He didn't have that preserved for the
2 record. As far as --

3 THE COURT: Yeah, but he didn't even use all of
4 his strikes, right?

5 MR. PHILLIPS: Well, and I -- I mean I guess
6 that -- that goes back to the next part of it, it's
7 if he was put in a position, where, again, I
8 understand, Your Honor's position there, where he
9 didn't use all of his strikes, but when it comes to
10 those people in the jury pool, I still think he has
11 to preserve that for the record, and make sure --
12 because, again, I don't know whether those Jurors
13 were called, and I -- it doesn't -- I don't -- I
14 can't make an argument that he should have struck
15 them, I don't know their juror numbers, that's the
16 -- again, it's -- it's very difficult in these cases
17 to prove the unknown. Because one of the jurors
18 that got seated could have been one of those jurors
19 that went up at the bench conference and said
20 something that they should have been struck for
21 cause, or at least should have made a strategic
22 decision to strike them using statutory strikes, but
23 we'll never -- we'll never know that, because he
24 didn't preserve it

25 THE COURT: You're saying that -- and -- and you

1 figure, if he walked up to a bench conference, and
2 he indicated that he did walk up to the bench
3 conference, as I recollect. I'm assuming that's
4 what it was. I think he testified that he was
5 there. He was inches -- I say inches, very close to
6 the court reporter, I think he testified to that.
7 They were right there. She -- he was assuming that
8 the court reporter, that he or she, was do -- make
9 -- making notes of -- of this, so I mean it -- it
10 would seem to me it's -- in as much detail as he
11 recalled, as it relates to that, that if -- that if
12 someone's going to make a disclosure to the Judge,
13 that he would make note of that, and go back, and
14 strike somebody who'd do a comp, or whatever. And,
15 of course, I guess your -- your question is, not
16 that you -- not -- you're not saying that he didn't
17 do that, it's just that you don't know whether he
18 did that, and that's what's prejudicing your client?

19 MR. PHILLIPS: Sort of, yeah, halfway
20 there. So, Your Honor, I agree that you would
21 assume that he would have notes of these things, but
22 there would be -- there -- if we go that route, I
23 believe, if he was providing competent, effective
24 assistance of counsel, there'd be notes of a lot of
25 the questions that we've had today, and like you

1 said, there'd be notes of the discussions, and
2 identifying the jurors and what they said, but we
3 don't have notes of anything. I mean nothing -- none
4 of my -- most of my questions, I -- my answer I
5 wrote is no notes on my -- on my sheet.
6 Specifically, as to Juror Number 94's conversation
7 with the Trial Court, having some type of -- as a
8 relative with the victim, as his quote, as the Court
9 knows he had no notes on that. He did move to
10 strike for cause, which was denied, but he has no
11 notes on that, and he did, ultimately, use a strike
12 on that juror, but he had no notes regarding that
13 issue, as well. Again, in this case, giving
14 credibility being such a cornerstone of the case,
15 Trial Counsel's failure to sequester the witnesses,
16 I understand it's a low bar there, but given the
17 type of cross-examination necessary, the impe -- how
18 critical impeachment is of witnesses, not to move to
19 sequester these witnesses and allow them to hear
20 each other's testimony, and to make sure, again, how
21 things are -- are -- are being done in the
22 Courtroom. And I understand there was a -- a first
23 trial, but that doesn't alleviate counsel's duty to
24 ensure that the Applicant receives a fair trial.
25 Again, still going back to his ability to be

1 prepared within let's say 40 days of a very, very
2 serious trial, with 28 indictments, is what's more
3 shocking to me. We've -- we've addressed the motion
4 to quash issue, the motion to sever. He --

5 THE COURT: What about the comments of the
6 Judge? What about -- what about the facial
7 expressions? So is there -- is there a notation of
8 facial expressions being made, or -- or people are
9 just saying that's the way that this Judge
10 particularly is. And I can say I've appeared in
11 front of Judge Early before, I'm new to this bench,
12 and I've tried cases in front of Judge Early in
13 Aiken County. And so what I'm asking is, is there a
14 -- is there anything in the record that reflects to
15 these nods, or shakes, or whatever was kind of being
16 spoken of as eloquently as possibly could be spoken
17 of the testimony that we received, but that's what
18 I'm trying to figure out.

19 MR. PHILLIPS: Well, that -- and that goes to
20 the heart of it, there was no objection by counsel
21 to put that on the record. I think, you know, when
22 you're looking at --

23 THE COURT: Put what on the record?

24 MR. PHILLIPS: Facial expressions, those --
25 those -- the demeanor. Because what we do have on

1 the record is the Judge intervening and -- and
2 stopping the Applicant's testimony.

3 THE COURT: Got that. And I -- and he made a
4 comment about --

5 MR. PHILLIPS: Making the -- telling the
6 Prosecutor to object, yeah.

7 THE COURT: Right. I - I understand that, we've
8 got a record of that. What I'm asking is though, is
9 there anything in the record that reflects any type
10 of -- of facial matters, or his -- I mean where is
11 that coming from?

12 MR. PHILLIPS: Specifically, it came -- it came
13 from Mr. Routzong, he's the one that had interjected
14 the facial expressions through his testimony.

15 THE COURT: Today?

16 MR. PHILLIPS: That's right.

17 THE COURT: Or -- yeah, or -- or whatever we --
18 he -- okay, so not in the transcript?

19 MR. PHILLIPS: Not to my knowledge.

20 THE COURT: In the transcript.

21 MR. PHILLIPS: Not to my --

22 THE COURT: Anything in the - and, of course, I
23 understand facial expressions generally wouldn't
24 appear in the transcript, what I'm saying is, no one
25 made any objection and said that -- you're saying

1 that Routzong has now said that -- that -- that
2 Judge Early was doing this?

3 MR. PHILLIPS: Yes.

4 MR. NEUBAUER: And, Your Honor?

5 THE COURT: Yes.

6 MR. NEUBAUER: I apologize, I would interject
7 and just say that I believe Routzong's testimony was
8 Judge Early had a habit of doing that throughout the
9 - his representa -- or the times he's, I guess,
10 tried a case in front of him, but there was no
11 testimony provided today saying that he specifically
12 made facial expressions during this trial, and,
13 additionally, there's nothing on the record showing
14 the -- any expressions, or any physical demeanor by
15 Judge Early was, I guess --

16 THE COURT: Well, and - and, too, this is a
17 little bit different, you know, I'm not just being
18 quiet, and letting you make your closing, but I'm
19 really trying to help -- help myself better
20 understand what's going on, because believe it or
21 not, I pretty much read those -- this stuff, and --
22 and have a pretty good grasp of the testimony that
23 went on today. So -- and -- and that was my
24 recollection was that Judge -- that he was
25 testifying that Judge Early, for lack of better

1 words, this was his habit, or this is the way he was
2 when he always was doing it, that's what I picked up
3 on, but I didn't recall him saying that -- and what
4 you're saying is, Mr. Phillips, is, you believe he
5 was specifically referring to this trial?

6 MR. PHILLIPS: Yeah, I -- I think he had a line
7 that he said, if it -- at least at one point, where
8 he said -- I think it's yes, but I think he also had
9 a line that he said, if he didn't happen in this
10 trial, he would be shocked, that that was the way he
11 ran his courtroom, I think.

12 THE COURT: Your client's wanting to say
13 something now. It's not an appropriate time for him
14 to do anymore speaking.

15 MR. PHILLIPS: Yes, Your Honor, and I'll address
16 -- I'll --

17 THE COURT: Sorry about that. Go -- go ahead,
18 counsel, I'm not gonna interrupt you, go ahead.

19 MR. PHILLIPS: Your Honor, so I think -- believe
20 one of the lines that Mr. Routzong had was that he
21 would have been shocked if there wasn't that going
22 on throughout the trial, based on all of his other
23 trials; and I think he might have alluded to, but he
24 -- remember he -- I hate to kind of go back to the
25 same thing, and I know I'm beating a little bit of a

1 dead horse, but he didn't have -- Trial Counsel,
2 basically, didn't have much memory of the trial,
3 other than what was kind of memorialized, in many
4 respects.

5 THE COURT: Well, that's not necessarily unfair,
6 given the length of time we're facing. I don't -- I
7 don't know that that, you know --

8 MR. PHILLIPS: But he did say he found the other
9 issues objectionable, that were -- that are
10 contained in the --

11 THE COURT: Yes, sir. Yes, sir.

12 MR. PHILLIPS: And, of course, one of the things
13 that he said he didn't find objectionable, but I --
14 I would still just bring to Your Honor's attention,
15 and I know you -- Your Honor has a good grasp of --
16 of the allegations, is in the Trial Court's opening
17 instructions, as well as in the closing charges to
18 the Jury, the references, the quotes regarding true
19 and just verdict, speaks the truth, essentially, the
20 search for the truth language, the burden shifting
21 under State v. Daniels, that when having them at
22 both the beginning and end of the trial as bookends,
23 I think it highlights and enhances the prejudice of
24 what the -- our Supreme Court has now said several
25 times, and -- and, essentially, admonished the Bar

1 -- or the Bench and Bar from presenting this. And I
2 know this was in the standard instructions until --
3 hopefully, I think they took them out, but I -- I
4 know until somewhat recently they were still there,
5 which is -- which is incredible to me, but --

6 THE COURT: The books say they three months ago
7 still had them in there.

8 MR. PHILLIPS: So I know that -- I mean I know
9 it's a -- it's a problem that, although they keep
10 admonishing the Bench about it, I -- I think, like
11 you said, there's still in the jury instructions,
12 the standard jury instructions that are provided.
13 And so I -- I do feel this is a problem, because the
14 only thing that I think the Judge can comment on, in
15 -- in that regard is that there is an absolute
16 burden on the State to prove each and every element
17 beyond a reasonable doubt. And as far as the Jury's
18 finders of fact, they are the finders of fact, but
19 they can't comment on the truth part, the truth
20 function part of it, because that dilutes the
21 burden. That's the burden shifting --

22 THE COURT: All right. What else do you got?

23 MR. PHILLIPS: And, again, I -- instead of
24 hitting every issue, I'm going to just hit on the
25 ones that I know Your Honor wants me to highlight,

1 as Your Honor says, you have a good handle on all
2 the other issues.

3 THE COURT: Now, I don't want you to cut short.

4 MR. PHILLIPS: No, I mean I'll make sure that we
5 -- I mean, generally, in PCR cases, Your Honor, what
6 I -- what I've also done is, where we provide,
7 essentially, kind of memorandums with the --
8 outlining the arguments as, you know, a little bit
9 more of a legal memoranda, instead of the
10 application, outlining the arguments presented; but,
11 specifically, in this case, we believe that Trial
12 Counsel failed to object to the Trial Court's
13 application of an incorrect legal standard,
14 regarding the qualifying of the State's expert
15 witness. As I said earlier, it would -- there'd be
16 either a -- either a failure to preserve the issue
17 for Appellate review, or Appellate counsel failed to
18 raise the issue, but, specifically, under the
19 standard, there wasn't any -- Mr. Hayes testified
20 that there wasn't a proffer, and, you know, he -- he
21 -- he said quite frankly, he forgot that he did the
22 motion, but when he looked back, there wasn't a
23 proffer on the legal standard that was presented.
24 And in this case, our arguments are where the Trial
25 Court limited counsel's voir dire, regarding

1 questioning the -- regarding questioning the
2 witness' qualifications, qualified the witness as an
3 expert, and the -- essentially, the standard
4 provided was incorrect. It only permitted the
5 questioning of the witness, based on reliability and
6 validity in the field itself, after he was already
7 -- after he had already deemed the person an expert.
8 That colloquy -- basically, how all that lays out in
9 the transcript, in my opinion, was all incorrect in
10 how it should have been done to qualify the expert
11 witness, but the incorrect legal standard, I think,
12 is the bigger issue on ineffective assistance of
13 counsel. Again, our other arguments that Trial
14 Counsel failed to object and move to strike the
15 expert witness testimony from going beyond the scope
16 of her expertise. Specifically, as a expertise, the
17 area of expertise focused on was a perspective of a
18 child experiencing abuse, but the witness improperly
19 testified, essentially, as a psychological profiler
20 of the accused, and kind of went into, basically,
21 kind of what was typical for an abuser to have a
22 favorite age to sexually abuse. And our argument's
23 that -- that that should have been objected to, and
24 properly preserve for Appellate review. Trial
25 Counsel said he -- he never subpoenaed the -- the

1 witness, specifically, that had the medical
2 condition, they couldn't come to trial, that he
3 relied solely on the letter. There was no
4 additional records, or anything else provided and
5 allowed for that testimony to be read into the
6 record, which he participated in, which I -- I agree
7 with him, and he says a reflection. He doesn't know
8 of any other case where that's really done, where
9 the defense counsel participates in the State's
10 case, as a State's, you know, partici -- while
11 presenting State's evidence. And so kind of all --
12 all of that together we argue is prejudicial, should
13 -- should have been objected to, should have -- or
14 should not have stipulated to, and he should have
15 her subpoenaed. I understand it's a very sensitive
16 subject, but he still has a duty to provide a
17 zealous defense to the Applicant; and given the
18 nature of how credible that different testimony --
19 that testimony is, as far as kind of holding -- as
20 far as say corroborative testimony of the other --
21 the other victim's -- the victim's testimony, it
22 would be imperative that he, one, make sure that she
23 was there to testify, two, at least allow for the
24 Court to make that determination, instead of him
25 stipulating it. And the -- the next part is one

1 being, you know, having -- being prepared for that.

2 THE COURT: Yeah, of course -- of course, if it
3 was true, which is what he testified to, if it was
4 true, he didn't have a reason to doubt it, she comes
5 up there with, you know, on death's door with a
6 feeding tube and oxygen, I mean isn't that going to
7 garner unbelievable sympathy for her testimony,
8 perhaps jurors to put undue emphasis on her
9 testimony, by virtue of her being a, you know, a
10 dying witness, almost a dying declaration, somebody
11 who would not lie?

12 MR. PHILLIPS: Well, certainly --

13 THE COURT: That was his -- that was his counter
14 to it, as I recollect, and --

15 MR. PHILLIPS: Well, I agree, Your Honor, as far
16 as what you're presenting. The problem is with the
17 stipulation, we never make it that far for the Court
18 to make that determination. In other words, had
19 there been more information provided by the
20 Solicitor's office, then the Judge, as Your Honor,
21 would have said, "Sure, she -- she is excused, we
22 can read the testimony in," but his stipulation kind
23 of prevents that adversarial nature of at least
24 having that extra layer of proof, that, again, and
25 -- and once he has confirmation, he could have then

1 easily agreed and stipulated at that point, but he
2 stipulated without any additional.

3 THE COURT: How would he get the confirmation?
4 The Court would have the witness come? Because --

5 MR. PHILLIPS: Well, I -- we don't know anything
6 about the letter, that's the problem is, he didn't
7 have the letter in his file. We don't know anything
8 about the letter. It wasn't marked as a Court's
9 exhibit. He -- I mean, again, as -- if we're
10 talking about Appellate review, I understand that it
11 -- it's difficult, but as somebody that's argued
12 Appellate cases when the Appellate Court doesn't
13 have --

14 THE COURT: Yeah.

15 MR. PHILLIPS: -- anything to review, I mean I
16 don't know what the letter says. Was it from a
17 medical doctor, specifically? Was it her, you know,
18 treating physician? We don't -- we don't know, and
19 that -- again, it's difficult to prove it negative
20 when we don't have the evidence.

21 THE COURT: Have you read some of the
22 information out of the -- out of the transcript,
23 concerning the -- the letter? Didn't -- didn't the
24 Solicitor in his closing -- didn't they bring that
25 up? Was palliative care, and it was -- wasn't that

1 in the transcript?

2 MR. NEUBAUER: Yes, Your Honor, it was
3 stipulated to on page four of the initial part of
4 the transcript. There was a letter from Hospice
5 itself, which was a medical facility that she would
6 have been in.

7 THE COURT: Right, right.

8 MR. NEUBAUER: -- where she would have been held
9 at, and that --

10 THE COURT: Okay.

11 MR. NEUBAUER: -- more cancer, palliative,
12 and on pain management.

13 THE COURT: All right, that -- that --

14 MR. NEUBAUER: -- was only on pain management.

15 THE COURT: Hold on, yeah, hold -- hold on, hold
16 on. That -- I've got you, that -- that's enough,
17 Attorney Neubauer.

18 MR. NEUBAUER: I apologize.

19 THE COURT: No, you're fine, but, yeah. All
20 right, go -- go ahead, and I'm -- I'm not going to
21 ask any more questions.

22 MR. PHILLIPS: Oh, no, you're fine, Your Honor,
23 ask as many as you need. From Melinda Lively's
24 testimony, we brought up the -- essentially, the
25 bolstering on the direct examination of the

1 Prosecutor asking her, "Did you hear [REDACTED] [REDACTED],
2 or [REDACTED] [REDACTED] test -- did you hear her
3 testify?" And then, basically, reiterating through
4 the questioning, about not contacting police,
5 because of threats. As, you know, the -- as the
6 victim stated, essentially, bolstering another
7 witness by saying, she's -- she was there to hear
8 her testify, then have her bolster it by confirming
9 that she did, and that's -- that's her testimony
10 that that was correct. Basically, corroborating for
11 another witness that was the key witness.

12 THE COURT: All right.

13 MR. PHILLIPS: All right, as far as -- again,
14 for failure to object to preserve for Appellate
15 review, there was the -- on direct examination of
16 Melinda Lively, regarding -- there was an objection
17 by Mr. Routzong for asked and answered that was
18 overruled. Our argument was that it, again, it went
19 beyond the scope of time and place, and constituted
20 improper bolstering, where he -- the Prosecutor
21 asks, "In 1999 or 2000, whenever this paperwork was
22 just showed to you from the divorce, is that the
23 first time you found out, or alleged that your
24 daughter had been abused by the Defendant?" And
25 then she -- she confirms, "Yes," and starts to go

1 into that -- that process, or explanation, excuse
2 me. There was a failure to move to strike on --
3 obviously, Your Honor's well -- well aware of those
4 issues, where he had been sustained on the issues of
5 striking testimony, "If my mom told me to lie," then
6 he gets it sustained, as well as objection. Leading
7 objection to the -- for the main -- one of the main
8 complaining witnesses. As to -- again, the
9 recreation of the testimony, he -- like, as he said
10 he's had a lot of time - Mr. Routzong said he had a
11 lot of time to reflect on that, and he wouldn't have
12 done it again this time. That he's never ever heard
13 of a defense counsel participating like that in that
14 type of situation. He had no -- there was no
15 strategic reason for why he did it, and,
16 specifically could have object -- objected to it.
17 As to the DSS -- the testimony from the DSS agent,
18 as far as the DSS complaint, an investigation from
19 2001, based on the cross-examination that was
20 presented, Mr. Routzong admitted that he should have
21 crossed further, to provide the explanation that --
22 the fact that the DSS investigation from 2001 was
23 not only unrelated, but the fact that a complaint
24 was alleged was not any way indicative that there
25 was a finding of abuse, or that anything related to

1 confirm that allegation; which, you know, in my
2 opinion, it shouldn't be admissible at all, but with
3 that, he agreed that there should have been further
4 cross-examination to have that presented to be
5 clearly. He agreed there was no strategic reason
6 for failing to object, or move to strike, when the
7 testimony of the DSS agent went beyond scope of time
8 or place. When she said she received a call from
9 her supervisor saying, "We received a report of
10 sexual abuse concerning [REDACTED] [REDACTED], and here
11 stepfather Harold Cartwright," and that testimony.
12 During the testimony of the jailer, the Prosecutor
13 failed to specifically identify Mr. Cartwright, and
14 through cross-examination, Mr. Routzong admitted
15 that he was the one that, essentially, brought in
16 the Defendant's identity through his questioning,
17 and then it was allowed. And then on redirect the
18 Prosecutor did the in-court identification, allowing
19 that specifically, as to the picture that -- with
20 the rooms were concerned from the first trial to the
21 second trial. In the first trial you had the
22 picture being different from the second trial, where
23 they used the son's bedroom, that was obviously part
24 of what Mr. Cartwright's follow-up question was,
25 where, essentially, Mr. Routzong admitted that he

1 failed to cross-examine the State's witnesses on
2 this discrepancy of what was presented from the
3 first trial to the second trial, their -- their
4 theory. And then what was presented -- and then his
5 failure to present that in closing argument,
6 essentially, a cross and close issue, regarding the
7 State, basically, changing their theory of how this
8 took place, or where -- the location of where this
9 took place, and the evidence they presented. Now,
10 as far as the main issue that Your Honor had,
11 regarding the picture that was found on the
12 Internet, and there was the denials by the State
13 witnesses, and by indicating that, you know, [REDACTED]
14 [REDACTED] was not in any such pictures, and -- and the
15 other pictures that were referenced during the
16 trial, and, of course, Mr. Cartwright's testimony
17 regarding that. Mr. Routzong testified he didn't
18 believe it to be relevant or helpful, however, it
19 went -- it struck at the heart of the State's case,
20 or at least the credibility of the State's key
21 witnesses as to their motive and bias to lie,
22 specifically, if that was a provable -- although
23 they denied that if he was to at least admit it and
24 mark it, it would have been preserved for Appellate
25 review, and would have been able to be presented,

1 specifically, on -- on that issue on appeal, as
2 well, if denied, if he would have proffered it, as
3 well, if he was denied the ability to present it,
4 admit it into evidence. As to the issue where there
5 was a case that the law did change on State v.
6 Stukes, a 2016 case, where our South Carolina Code
7 of Laws says that the -- a victim in the -- in a
8 criminal sexual conduct case need not be
9 corroborated, where the State v. Stukes finds that
10 that charge to the Jury is unconstitutional. In
11 this case it wasn't objected to. I understand State
12 v. Stukes is a case that comes out after this trial,
13 but it was an issue that was there. It could have
14 been objected to, it could have been presented, same
15 as it was in Stukes, and would have been available
16 to be argued for Mr. Cartwright, as it was for Mr.
17 Stukes. Specifically, as far as arguments are
18 concerned, United States v. Cronin 466 US 648, that
19 Trial Counsel failed to subject the prosecution's
20 case. It's a meaningful adversarial testing by not
21 adequately preparing for trial and having an
22 unreasonable trial strategy. We believe given the
23 context and the short amount of time that he had in
24 this voluminous case, with the 28 indictments, and
25 the three different victims in this case that had

1 the different offers of proof, given the fact that
2 he had only spoke to the Applicant three times, but
3 only met with him twice, according to his notes, I
4 -- I think is indicative, given a lot of the other
5 issues that we've presented as a -- kind of a
6 cumulative error argument, that would fall under a
7 chronic type of -- of issue.

8 With that, Your Honor, I'll be happy to address
9 any other questions, any specifics. Obviously,
10 we're not waiving any of the other allegations that
11 were raised, but we believe that to be the heart of
12 the Applicant's case.

13 THE COURT: All right. Well, gentlemen, let me
14 just tell you, it's been a pretty thorough PCR.
15 Y'all both did a good job. Longest PCR I've ever
16 attended as a -- even as a -- my first set as the
17 Judge, but, no, I had -- no, this is part of the
18 first week we had, but as far as being a lawyer,
19 Lord have mercy, not this long. We've -- we've --
20 we've put in three -- three days of work on this.
21 And I think there's, you know, I think they're all
22 grounds that needed to be covered, at least hashed
23 out. What I'm going to do is, I'm just going have
24 each of you send me proposed Orders, and what I'm
25 going end up doing is, I guarantee you I'll be

1 marking through whatever I end up doing. It ain't
2 going be either one of your Orders, but send me
3 something outlining proposed Order, send it to the
4 other side, and probably what I'm going end up doing
5 is probably coming up with some combination thereof,
6 and putting something together, probably adding to
7 it, in addition, and I'll put something together.
8 Is 30 days enough time for y'all to do that,
9 Attorney General Neubauer?

10 MR. NEUBAUER: Your Honor, I hate to ask, would
11 it be fine if I requested 45 days? I have a oral
12 argument with the Supreme Court on March 9th that's
13 going take --

14 THE COURT: Sure, that's -- that's absolutely
15 fine. Mr. Phillips, you don't object to that, do
16 you?

17 MR. PHILLIPS: No, I would -- I would ask the
18 same, if we could --

19 THE COURT: Is 45 days good?

20 MR. PHILLIPS: Barring a trial coming out of the
21 woodwork, given the current schedule, 45 days should
22 be sufficient.

23 THE COURT: Well, y'all, if there's a problem,
24 y'all talk it out, and let me know, okay?

25 MR. PHILLIPS: Yes, Your Honor, thank you.

1 MR. NEUBAUER: Thank you, Your Honor.

2 THE COURT: All right, Mr. Cartwright, good luck
3 to you, sir. A lot of -- a lot of information to
4 take in. You've got good folks working all around,
5 and so that makes it easier, certainly, for me. I
6 appreciate it. So, gentlemen, I'm going to go ahead
7 -- Cathy, thank you so much for your time today, and
8 I hope you have a great weekend, okay?

9 COURT REPORTER: Thank you, Your Honor, hope you
10 do also.

11 THE COURT: All right, thank y'all, bye-bye.

12 MR. NEUBAUER: Thank you, Your Honor.

13 (Whereupon, the hearing was concluded at 3:44 p.m.)

14 ---END OF TRANSCRIPT---

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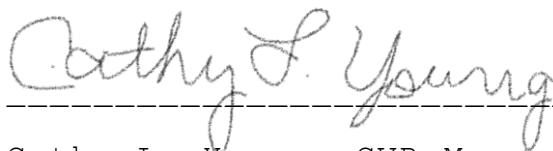
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CERTIFICATE OF REPORTER

I, Cathy L. Young, CVR-M, for the Second
Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial
of the captioned case, relative to appear, in the
Circuit Court for Aiken County, South Carolina, on
the 25th day of February, 2022.

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

A handwritten signature in cursive script that reads "Cathy L. Young". The signature is written in dark ink and is positioned above a horizontal dashed line.

Cathy L. Young, CVR-M

Court Reporter and Notary

Public in and for South Carolina

My Commission expires: 3-28-2029

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
	)	
Harold Cartwright,	)	Case No.: 2019CP0201582
	)	
Applicant,	)	
	)	
v.	)	ORDER GRANTING APPLICANT
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before the Court on Harold Cartwright's application for Post-Conviction Relief (PCR). Applicant appeared before the Court on February 3, 2022, for a virtual hearing on the above-captioned PCR action. Dayne Phillips represent Applicant, and Assistant Attorney General Michael Neubauer represented Respondent. Chief Appellate Defender Robert Dudek, Public Defenders David Hayes and Michael Routzong, and Applicant testified at the evidentiary hearing. However, Mr. Routzong was unable to complete his testimony during the February 3 hearing due to technical difficulties with Applicant's internet connection. The hearing was continued to the following day but ended prematurely due to technical issues with the court reporter's internet connection.

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After reviewing the proposed orders from the parties and weighing the evidence presented at the hearing, this Court grants the PCR application requesting a new trial based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor, first degree; sixteen (16) counts of lewd act with a minor; two counts (2) criminal sexual conduct with a minor, second degree; one (1) count of criminal sexual conduct, first degree; and one (1) count of criminal sexual conduct, third degree.

On April 15, 2013, Applicant proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Michael Routzong and David Hayes represented Applicant, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts on all charges on April 18, 2013. The Trial Court sentenced Applicant to *concurrent* sentences of thirty (30) years imprisonment for criminal sexual conduct in the first degree conviction and criminal sexual conduct with a minor in the first degree conviction; twenty (20) years imprisonment for the criminal sexual conduct with a minor in the second degree conviction; and fifteen (15) years imprisonment for the lewd act upon a child convictions. However, the Trial Court imposed a *consecutive* sentence of ten (10) years for the criminal sexual conduct in the third degree conviction.

On September 30, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App. filed September 30, 2015). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Applicant, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, Op. No. 27842 (S.C. Sup. Ct.

filed September 26, 2018).

On June 26, 2019, Applicant filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

On June 29, 2020, Applicant filed an amended application requesting PCR. Applicant also filed a redacted amended application on July 9, 2020:

Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

Specifically, Applicant alleged the following acts or omissions of ineffective assistance of Trial Counsel:

- (1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- (2) Trial Counsel failed to hire expert witnesses to conduct an independent review of the forensic evidence presented by the State and to testify in rebuttal of the State's evidence and arguments when it was reasonable and necessary to do so in preparation for Applicant's second trial. See *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Specifically, the electronic evidence seized by the police and DNA evidence.
- (3) Trial Counsel failed to adequately investigate Victim 1's involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State.
- (4) Trial Counsel failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations.
- (5) Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.
- (6) Trial Counsel failed to properly cross-examine and impeach the State's witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses' prior inconsistent statements to the police.
- (7) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and

reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

- (8) Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.
- (9) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and misstated the law.
- (10) Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial.
- (11) Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.
- (12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. See *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).
- (13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in camera* hearing). See Rule 702, SCORE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).
- (14) Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for *an abuser* to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCORE; *State v. Ellis*,

345 S.C. 175, 547 S.E.2d 490 (2001).

- (15) Trial Counsel erroneously stipulated to a witness's medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. See Rule 804, SCORE; *Dodd v. Berlinsky*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).
- (16) Trial Counsel failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain. See *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).
- (17) Trial Counsel failed to move for the Trial Court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.
- (18) Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).
- (19) Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. See Rule 615, SCORE.
- (20) Trial Counsel by failed to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him regarding "similar types of behavior." Notably, Trial

Counsel failed to preserve for appellate review the issue and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror's numbers were placed on the record with whom the judge spoke. See U.S. Const. amends. V, VI, XIV.

- (21) Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows." Notably, Counsel sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. See U.S. Const. amends. V, VI, XIV.
- (22) Trial Counsel failed to move to sever Applicant's charges where the three (3) primary complaining witnesses alleged conduct over three (3) distinct and large periods of time, did not arise out of a single chain of circumstances, and are not proved by the same evidence. See *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996).
- (23) Trial Counsel failed to object and preserve for appellate review the Trial Court's initial instructions to the jury that were tantamount to instructions to search for the truth, violative of Due Process, and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, "you twelve collectively act as one, decide what the true facts are...", and "you will be in a position then to render a true and just verdict, an verdict that speaks the truth of the case", and "It's your civic responsibility to pay close attention and decide whose telling the truth." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (24) Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."
- (25) Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Applicant] can't be innocent...", and where the State used that same quote against the defense in its close, saying, "As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant's guilty," and where use of such a statement could not be considered a reasonable trial strategy.

- (26) Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), “Now, sitting here today, telling these events to these 13 strangers, how are you doing?” to which the witness responded, “I would rather be at home with my children, but it’s something that needs to be done; I’m glad I finally get to tell what happened.” See *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).
- (27) Trial Counsel failed to object and preserve for appellate review the Prosecutor’s improper bolstering when Melinda Lively (mother of Victim 2) answered in the affirmative to the State’s question, “Did you just hear Victim 2 testify?” and later indicated that she did not contact police because of threats from the Applicant “as [Victim 2] stated.”
- (28) Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, “In 1999, had you learned that your daughter, [Victim 2], had been abused *by the Defendant*?” to which the witness replied, Yes, when she was four.” See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (29) Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, “My mom told me to lie then....,” and Counsel’s hearsay objection was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (30) Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel’s objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (31) Trial Counsel failed to properly argue and preserve for appellate review Counsel’s objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, “Your honor, I’m having a real hard time hearing her testimony,” and the Court ordered her to speak up.
- (32) Trial Counsel provided ineffective assistance by reaffirming the complaining witness’s version of events regarding her initial recantation of the allegations by asking her, “[Y]ou’re saying it was your mom, Buffy Cartwright that ultimately convinced you to recant?”, and Victim 1 responded, “Yes.” This highly prejudicial questioning reaffirmed the State’s case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.

- (33) Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.
- (34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. See *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.
- (35) Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (36) Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be, the issues will be what they're asking you to look for to keep tuned into *what they intend to prove*, what the case is about." See U.S. Const. amends. V, VI, XIV.
- (37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- (38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy [REDACTED] prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the

second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.

- (39) Trial Counsel failed to object during the “acting-out” of Buffy [REDACTED] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (40) Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant’s consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant’s waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).
- (41) Trial Counsel failed to object and move to strike the State’s redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed, what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.
- (42) Trial Counsel failed to object and move to strike the State’s redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant’s identification on cross-examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was hanging in his cell present in the courtroom.
- (43) Trial Counsel provided ineffective assistance where Applicant stated *in camera* at the end of the State’s case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3’s actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom

(victim's brother's old bedroom), where Counsel failed to cross-examine the State's witnesses regarding this discrepancy (the location of evidence critical to the State's case, and it is unknown whether Trial Counsel obtained a complete copy of the prior trial transcript before the second trial. However, it true, then failing to examine this area cannot be a valid trial strategy).

- (44) Trial Counsel provided ineffective assistance where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly said so, where State witnesses repeatedly indicated Victim 3 was not in any such pictures, and where Counsel failed to proffer any such photographs into evidence to support his theory.
- (45) Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. See U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal
- (46) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses."
- (47) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...", and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (48) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).
- (49) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. See *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881

(2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); *See State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977, 122 S.Ct. 404 (2001) (“[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]”) (citations omitted); *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (“[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.”) (quotation omitted); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002) (finding trial counsel's decision not to object to prosecutor's improper vouching for the credibility of the State's witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.).

- (50) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. Cronin*, 466 U.S. 648 (1984); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness”); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that “labeling counsel's actions as “trial strategy” does not automatically immunize an attorney's performance from sixth amendment challenges.”).

Furthermore, Applicant also alleged the following acts or omissions of ineffective assistance of Appellate Counsel:

- (1) Appellate Counsel failed to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt.
- (2) In the event Trial Counsel properly preserved the issue in his pre-trial motions and objections to the Trial Court immediately prior to the witness's testimony, then Appellate Counsel failed to raise and argue the issue of the

Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 about the reliability and validity of field itself after the witness was deemed "expert" by the court and after the State's direct examination—all of which was held in the presence of the jury rather than *in camera*? See Rule 702, SCORE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010). See also *Staubes v. Folly Beach*, 339 S.C. 406, 529 S.E.2d 543(2000); and *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004).

- (3) In the event Trial Counsel properly preserved the issue in his contemporaneous objection ("leading") to the Trial Court, then Appellate Counsel provided failed to raise and argue the issue of whether the expert witness's testimony went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for *an abuser* to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701and 702, SCORE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001)
- (4) Appellate Counsel failed to raise and argue Trial Counsel's objection where the Trial Court refused to ask Defense Questions 1 and 3 during *voir dire*, where Question 1: "Have you, any member of your family, or friend been impacted in anyway by Sexual Crime or Sexual Assault or Child Molestation?" and Question 3: "Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?" Notably, the questions sought by Counsel would have elicited the prejudicial bias to disqualify jurors who answer in the affirmative, and thus, depriving Applicant of a fair trial if allowed on the jury panel.
- (5) Appellate Counsel failed to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised and ruled upon by the Trial Court. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004).

EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified that his first trial ended in a mistrial due to a hung jury. Applicant also testified that he originally had private counsel during

the first trial but that his original lawyer was subsequently relieved as counsel prior to the second trial. Applicant further testified that his second lawyer and lead counsel, Mr. Routzong, did not review all the photographs with him prior to trial.

Applicant testified that he told Mr. Routzong regarding the following character witnesses: Sammy Morton, Uncle Larry Britt, and his ex-bosses. Applicant also testified that he provided a timeline to Mr. Routzong of when he lived in the home. Applicant further testified that he informed Mr. Routzong of [REDACTED] involvement in a drug investigation. Notably, Applicant testified that the testimony related to where critical evidence was collected by police changed from the first trial (in daughter's bedroom) and the second trial (in son's bedroom), and that the identities of the females in the pornographic picture that he found on the internet depicted his daughter and her friends.

Chief Appellate Defender Robert Dudek testified regarding his experience as an appellate defender. Mr. Dudek also testified that the prosecution's use of Applicant's attempted suicide as evidence of guilt was a novel issue in South Carolina. Mr. Dudek further testified that based on his research there was a jurisdictional split. Mr. Dudek maintained that he ultimately decided not to file a Petition for Writ of Certiorari to the United States Supreme Court because he did not believe this was a federal issue. As to the remaining issues raised by Applicant regarding ineffective assistance of Appellate Counsel, Mr. Dudek maintained that he only raised meritorious issues that were preserved for appellate review.

Public Defender David Hayes testified that his role as co-counsel was limited to the State's expert witness, Alicia Benedetto. Specifically, Mr. Hayes admitted that he did not request an *in camera* hearing or move to proffer his challenge of the witness's

testimony despite that the Trial Court had already qualified the witness as an expert and only permitted questioning of the witness on the reliability and validity of the field itself.

Public Defender Michael Routzong maintained that he met with Applicant for hours and reviewed the discovery with him. Mr. Routzong stated that he does not remember whether he reviewed all the photographs with Applicant or the names of any specific witnesses to interview. Mr. Routzong indicated that he discussed trial strategy with Applicant, including the defense strategy of attacking the credibility of the State's witnesses. Mr. Routzong testified that Applicant embarrassed his daughter by going on the news alleging that she and her friends were posting nude pictures on the internet. Notably, Mr. Routzong testified that he did not remember Applicant's computer being seized.

Mr. Routzong testified that Applicant's first trial was in November of 2012 and the second trial occurred a few months later in 2013. Specifically, he testified that he was appointed on March 5, 2013, and the second trial began on April 15, 2013. Mr. Routzong acknowledged that he did not request documentation regarding the [REDACTED] alleged involvement in an unrelated drug investigation, or whether there were any possible deals provide by the police or Prosecutor's office. Mr. Routzong further acknowledged that he did not consult with an expert witness regarding any DNA or digital evidence.

Mr. Routzong maintained that he believed Applicant's timeline of when he lived in the home was too remote to use as a defense. Mr. Routzong admitted that he did not have any specific notes regarding when he received the discovery or his review of the discovery with Applicant. Mr. Routzong stated that he did not recall or have any notes

regarding potential character witnesses to testify on Applicant's behalf or his discussion explaining to Applicant the risks of testifying at trial.

Mr. Routzong admitted that he did not request or file a supplemental motion for discovery regarding the DNA evidence that was in the State's possession. Mr. Routzong testified that he did not recall when several jurors noted "similar types of behavior" when addressing the judge during *voir dire* and that he did not know bench conferences were not transcribed. Mr. Routzong also admitted that he had no notes regarding juror number 94's conversation with the Trial Court (particularly when he moved to have the juror struck for cause but was forced to use a peremptory strike on the juror). Mr. Routzong further submitted that he did not believe a *Batson* issue was appropriate in this case.

Mr. Routzong explained that he did not move to sequester the witnesses because they had already testified in the first trial (despite his strategy to attack each witness's credibility). Mr. Routzong claimed that he did not believe the indictments were overbroad or vague. Notably, Mr. Routzong testified that he had no strategic reason for not moving for severance of the charges and doesn't remember considering to sever the charges.

Mr. Routzong testified that he did not believe the admission of Applicant's consent to search form and buccal swab obtain by the State constituted a statement and was therefore not a *Jackson v. Denno* issue. Mr. Routzong did not believe the Trial Court's initial instructions to the jury constituted burden shifting. Mr. Routzong also did not believe that the State's opening statement was prejudicial when the Prosecutor argued that the dates on the indictments were true.

Mr. Routzong admitted that he had not subpoenaed Buffy [REDACTED] prior to his stipulation of reading her prior testimony in the record. Mr. Routzong claimed that he did

not believe it was improper bolstering or objectionable for the State to have the victim's mother acknowledge her daughter's prior testimony and then confirm what the daughter said was true. Mr. Routzong also claimed that he had no strategic reason for objecting when the Prosecutor referenced alleged prior abuse. Mr. Routzong stated that he had no strategic reason for not moving to strike an improper hearsay statement and other sustained objections by Trial Counsel.

Mr. Routzong acknowledged that he had never heard of a defense attorney helping recreate the testimony of a state's witness. Mr. Routzong testified that, in hindsight, he would not have participated in the recreated testimony. Mr. Routzong admitted that he had no strategic reason and should have objected to Buff [REDACTED] prior testimony that went beyond the scope of time and place and constituted improper bolstering when the Prosecutor asked if the witness and police found out about Applicant allegedly molesting [REDACTED].

Mr. Routzong noted that he should have conducted a more thorough cross-examination based on the DSS investigation. Mr. Routzong again noted he had no strategic reason for failing to object to hearsay that went beyond the scope of time and place, constituted improperly bolstering, and hearsay within hearsay regarding the DSS Agent's testimony about receiving a call from her supervisor. Mr. Routzong also maintained that he thought he opened the door when the State's DNA expert went beyond the scope of cross-examination on redirect regarding the potential destruction of DNA evidence caused by washing and drying sheets.

Mr. Routzong stated he thought that he had referenced Applicant's name during cross-examination of the jailer, James Hettich, who conducted an in-court identification

of Applicant. Mr. Routzong testified that he does not believe that the pornographic picture Applicant alleged he found on the internet depicting Victim 3 and her friends was relevant or helpful to the defense. Mr. Routzong admitted that Judge Early would make faces and make it seem to the jury as if the lawyer is not prepared but claimed he could not remember the judge's exact demeanor during this trial. Mr. Routzong further testified that he had no strategic reason for not objecting to the Trial Court's instructions to the jury regarding his comments, "It is your duty to determine what the true facts are and what the truth is and who is telling the truth..." and "You're to make your decision based solely on what you determine the true facts are in this case."

LAW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

upon as having produced a just result” when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, “[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic “[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, “for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses at the hearing, assessed their credibility, and weighed the testimony accordingly based on the evidence and facts of the case. This Court also reviewed the Clerk of Court records regarding the Applicant’s convictions and sentences, the trial transcript, the applications for post-conviction relief, and the legal arguments made by the lawyers. Therefore, the relevant findings of fact and conclusions of law are set forth below as required by Section 17-27-80 of the South Carolina Code of Laws.

This Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland*, 466 U.S. at 687-88. This Court also finds that Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, this Court has concluded that Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Ineffective Assistance of Trial Counsel

(1) *Applicant alleges Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.*

The United States Supreme Court has held, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; See *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Notably, this Court has held, "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any

aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, “while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597) (emphasis added). This Court has also found it “was not objectively reasonable given the defense theory of the case” for counsel not to call witnesses who would have “added significantly to the credibility of petitioner’s case”. *Lounds*, 380 S.C. at 462, 670 S.E.2d at 650. See generally *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had counsel introduced relevant and favorable evidence at trial).

This Court finds that Trial Counsel was ineffective in failing to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant’s defense because of the significantly limited amount of time Counsel had to prepare for trial (approximately one month). See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360; *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and **to allow himself enough time for reflection and preparation for trial.**’”) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968) (emphasis added)).

Trial Counsel also failed to adequately investigate [REDACTED] involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State. Trial Counsel also failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations. Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

Trial Counsel further failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain.

(2) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague.

This Court finds that Trial Counsel was ineffective in failing to move to quash the twenty-eight indictments against Applicant as unconstitutionally overbroad and vague because each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. See *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).

(3) Trial Counsel failed to move to sever Applicant's charges.

This Court finds that Trial Counsel was ineffective in failing to move for severance of Applicant's charges because the three primary complaining witnesses alleged conduct over three distinct and large periods of time, did not arise out of a single chain of circumstances, and are not proved by the same evidence. See *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996).

(4) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics.

This Court finds that Trial Counsel was ineffective in failing to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702, SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

(5) Trial Counsel failed to object and preserve for appellate review the Trial Court's initial instructions to the jury

This Court finds that Trial Counsel was ineffective in failing to object and preserve for appellate review the Trial Court's initial instructions to the jury that were tantamount to the improper "search for the truth" language in violation of Due

Process and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, “you twelve collectively act as one, decide what the true facts are...”, and “you will be in a position then to render a true and just verdict, an verdict that speaks the truth of the case”, and “It’s your civic responsibility to pay close attention and decide whose telling the truth.” See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

(6) Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay.

This Court finds that Trial Counsel was ineffective in failing to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she “received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright.” See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

(7) Trial Counsel failed to object during the “acting-out” of Buffy [REDACTED] prior testimony.

This Court finds that Trial Counsel was ineffective in failing to object during the “acting-out” of Buffy [REDACTED] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

- (8) ***Trial Counsel provided ineffective assistance where Applicant stated in camera at the end of the State's case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3's actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom (victim's brother's old bedroom).***

This Court finds that Trial Counsel was ineffective where Applicant stated *in camera* at the end of the State's case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3's actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom (victim's brother's old bedroom) because Counsel failed to cross-examine the State's witnesses regarding this discrepancy (the location of evidence critical to the State's case, and it is unknown whether Trial Counsel obtained a complete copy of the prior trial transcript before the second trial. However, it true, then failing to examine this area cannot be a valid trial strategy). See *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

- (9) ***Trial Counsel provided ineffective assistance where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly stated this occurred on the news.***

This Court finds that Trial Counsel was ineffective where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly said the same on the news because State witnesses repeatedly indicated Victim 3 was not in any such pictures, and where Counsel

failed to proffer any such photographs into evidence to support his theory

- (10) *Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury sua sponte, admonishing Applicant, and instructing the Prosecutor to object more.***

This Court finds that Trial Counsel was ineffective in failing to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. See U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal).

- (11) *Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury.***

This Court finds that Trial Counsel was ineffective in failing to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth..." and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

- (12) *Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering of the victim's mother.***

This Court finds that Trial Counsel was ineffective in failing to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda Lively (mother of

Victim 2) answered in the affirmative to the State's question, "Did you just hear Victim 2 testify?" and later indicated that she did not contact police because of threats from the Applicant "as [Victim 2] stated."

- (13) ***Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by the Defendant?" to which the witness replied, Yes, when she was four."***

This Court finds that Trial Counsel was ineffective in failing to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by the Defendant?" to which the witness replied, Yes, when she was four." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

- (14) ***Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy.***

This Court finds that Trial Counsel was ineffective in failing to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 466 U.S. 648 (1984); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an

attorney's performance from sixth amendment challenges.”).

(15) This Court also finds that Trial Counsel provided ineffective assistance of counsel based on the remaining allegations presented by Applicant individually and based on cumulative error. See *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (holding an appellant must demonstrate more than error to qualify for reversal pursuant to the cumulative error doctrine. Specifically, the errors must adversely affect a defendant’s right to a fair trial to qualify for reversal.).

- a. Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.*
- b. Trial Counsel failed to properly cross-examine and impeach the State’s witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses’ prior inconsistent statements to the police.*
- c. Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.*
- d. Trial Counsel failed to object and preserve for appellate review the Trial Court’s jury instructions that improperly shifted the burden of proof and misstated the law.*
- e. Trial Counsel’s failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant’s trial.*
- f. Trial Counsel failed to object and preserve for appellate review the State’s improper closing argument that was a misstatement of the evidence and unduly prejudicial.*
- g. Trial Counsel failed to object and move to strike the expert witness’s testimony that went beyond the scope of her expertise. Specifically, the witness’s admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological “profiler” of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701and 702, SCRE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).*
- h. Trial Counsel erroneously stipulated to a witness’s medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial*

the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. See Rule 804, SCRE; Dodd v. Berlinsky, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).

- i. Trial Counsel failed to move for the Trial Court to conduct follow-up voir dire questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.*
- j. Trial Counsel failed to move to quash the jury panel pursuant to Baston where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Schuler, 344 S.C. 604, 545 S.E.2d 805 (2001); State v. Rogers, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).*
- k. Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. See Rule 615, SCRE.*
- l. Trial Counsel by failed to object and move for individual voir dire when the Trial Court indicated to Counsel during the voir dire process that several jurors approached him regarding "similar types of behavior." Notably, Trial Counsel failed to preserve for appellate review the issue and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror's numbers were placed on the record with whom the judge spoke. See U.S. Const. amends. V, VI, XIV.*
- m. Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows." Notably, Counsel sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. See U.S. Const. amends. V, VI, XIV.*
- n. Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."*

- o. Trial Counsel improperly argued in his open statement that “[i]f they’re telling the truth, [the Applicant] can’t be innocent...,” and where the State used that same quote against the defense in its close, saying, “As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant’s guilty,” and where use of such a statement could not be considered a reasonable trial strategy.
- p. Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), “Now, sitting here today, telling these events to these 13 strangers, how are you doing?” to which the witness responded, “I would rather be at home with my children, but it’s something that needs to be done; I’m glad I finally get to tell what happened.” See *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).
- q. Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, “My mom told me to lie then...,” and Counsel’s hearsay objection was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- r. Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel’s objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- s. Trial Counsel failed to properly argue and preserve for appellate review Counsel’s objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, “Your honor, I’m having a real hard time hearing her testimony,” and the Court ordered her to speak up.
- t. Trial Counsel provided ineffective assistance by reaffirming the complaining witness’s version of events regarding her initial recantation of the allegations by asking her, “[Y]ou’re saying it was your mom, Buffy Cartwright that ultimately convinced you to recant?”, and Victim 1 responded, “Yes.” This highly prejudicial questioning reaffirmed the State’s case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- u. Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.

- v. *Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.*
- w. *Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be, the issues will be what they're asking you to look for to keep tuned into what they intend to prove, what the case is about." See U.S. Const. amends. V, VI, XIV.*
- x. *Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.*
- y. *Trial Counsel failed to object and preserve for appellate review the admission of Buffy [REDACTED] prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.*
- z. *Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and Jackson v. Denno to the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no Denno hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See U.S. Const. amends. IV; V, VI, XIV; Jackson v. Denno, 378 U.S.*

368 (1964).

- aa. Trial Counsel failed to object and move to strike the State's redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed, what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.
- bb. Trial Counsel failed to object and move to strike the State's redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant's identification on cross-examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was hanging in his cell present in the courtroom.
- cc. Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses."
- dd. Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).
- ee. Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. See *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating

information not presented to the jury supports the testimony[.]” (citations omitted); Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (“[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness’s credibility.”) (quotation omitted); Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) (finding trial counsel’s decision not to object to prosecutor’s improper vouching for the credibility of the State’s witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.).

Ineffective Assistance of Appellate Counsel

- (1) *Appellate Counsel failed to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt.***

This Court finds that Appellate Counsel was ineffective in failing to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt because of the jurisdictional split and Counsel’s failure to raise the issue federally.

CONCLUSION

Based on the foregoing reasons, this Court finds and concludes Applicant has established constitutional violations and deprivations that would require post-conviction relief. This Court finds that Trial Counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 687-88. This Court also finds that Trial Counsel’s deficient performance prejudiced Petitioner because it “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). This Court has concluded that Trial Counsel provided effective assistance of counsel because “there is a reasonable

probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). Therefore, this PCR application must be granted and Applicant shall receive a new trial.

IT IS ORDERED that Applicant's application for PCR is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Robert J. Bonds
Presiding Judge, Second Judicial Circuit

_____, 2021

_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
Harold Cartwright, #355084	)	Case No.: 2019-CP-02-01582
	)	
Applicant,	)	
	)	
v.	)	
	)	ORDER OF DISMISSAL
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Harold Cartwright (“Applicant”) on June 26, 2019. Respondent made its return on October 3, 2019. The Court convened an evidentiary hearing into the matter on February 2-3, 2022, and February 25, 2022, via the WebEx Virtual Courtroom of the Honorable Robert J. Bonds. Applicant was present at the hearing and represented by Dayve C. Phillips, Esq. Michael J. Neubauer, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Michael Routzong, Esq., and David Hayes, Esq. (“Trial Counsel”), and Applicant’s Appellate Counsel Robert Dudek, Esq. (“Appellate Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, and the pleadings. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. During its February 2012 term, the Aiken County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2012-GS-02-00304), eight counts of criminal sexual conduct with a minor, first degree (2012-GS-02-00306, 319, 321, 323, 325, 327, 329, 331), nineteen counts of lewd act upon a child (2012-GS-02-00307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 320, 322, 324, 326, 328, 330, 332), and criminal sexual conduct, third-degree (2012-GS-02-01682). On November 12–13, 2012, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. Applicant was represented by Robert J. Harte, Esq. The case was prosecuted by Assistant Solicitors Kevin N. Molony and John W. Weeks of the Second Circuit Solicitor’s Office. A new trial was ordered due to a hung jury.

On April 15–18, 2013, Applicant proceeded to a second jury trial before the Honorable Doyet A. Early, III. Applicant was represented by Michael Routzong and David Hayes. The case was prosecuted by Assistant Solicitors Kevin N. Molony and Ashley Agnew of the Second Circuit Solicitor’s Office. Following trial, the jury found Applicant guilty as indicted. Judge Early sentenced Applicant to concurrent sentences of thirty years for criminal sexual conduct, first degree, and each count of criminal sexual conduct with a minor, first degree, and a concurrent term of fifteen years for each count of lewd act upon a minor, along with a consecutive ten-year sentence for criminal sexual conduct, third degree.

Applicant subsequently filed a Notice of Appeal. On appeal, Applicant was represented by Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett of the South Carolina Commission of Indigent Defense, Appellate Division. In an unpublished opinion, the South Carolina Court of Appeals affirmed Applicant’s conviction and sentences following oral

arguments. *State v. Harold Cartwright III*, No. 2013-UP-000894 (Ct. App. filed September 30, 2015). Applicant filed a petition for a writ of certiorari with the South Carolina Supreme Court, which was granted. On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright III*, Op. No. 278842 (S.C. Sup. Ct. filed September 26, 2018).

Summary of Trial Testimony

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

At trial, Victim 1 testified Applicant 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 Applicant threatened to kill her, Victim 1, and himself.¹ Eventually, Victim 1 spoke with DSS about Applicant's abuse, but Applicant convinced her to recant. Applicant testified the abuse continued multiple times every year until 1995, when she was ten. Applicant 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 Applicant. (April 15–16, 2013, Trial Tr. pp.72–94).

Victim 2 testified Applicant 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, Applicant was arrested. However, Victim 2 testified she recanted at the urging of her mother, Buffy [REDACTED]. Victim 2 testified that, beginning in 2002,

¹ Lively recalled Victim 1 mentioning the abuse and corroborated her testimony that Lively did not contact law enforcement because she was too afraid of Applicant. (April 15–16, 2013, Trial Tr. p.95, line 7–p.96, line 3).

Applicant 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 Applicant sometimes bribed or forced her to agree to have sexual intercourse with him and threatened to kill her, her mother, Victim 3, and himself. (April 15–16, 2013, Trial Tr. pp.104–35).

Victim 3 testified Applicant 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 Applicant began forcing her to have sexual intercourse with him when she was fourteen. She testified Applicant stopped having sex with her in 2010, when Hoss Cartwright, Applicant’s son, moved into the house, but continued humping her in her room before school.² When investigators questioned Victim 3, she initially denied being abused by Applicant because she was afraid of him. Later, however, she told investigators Applicant molested her. (April 15–16, 2013, Trial Tr. pp.141–80).

The State and Trial Counsel stipulated that Buffy [REDACTED] was medically unavailable due to stage 4 cancer. The State introduced her prior testimony from Applicant’s first trial without objection. In that testimony, [REDACTED] stated she remembered Applicant 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 Applicant convinced [REDACTED] he had done nothing wrong. [REDACTED] testified Applicant 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. [REDACTED], 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. (April 15–16, 2013, Trial Tr.

² Hoss testified he could hear Applicant enter Victim 3’s room every morning and stay for an extended period of time. (April 17–18, 2013, Trial Tr. p.11, lines 18–24).

pp.182–97). DNA recovered from semen found on the bedsheets matched Applicant’s DNA. (April 17–18, 2013, Trial Tr. pp.31–42; pp.79–92).

The State also called clinical psychologist Dr. Alicia Benedetto. Over Trial 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. (April 17–18, 2013, Trial Tr. pp.47–79).

Finally, the State called James Hettich, a guard at the Aiken County Detention Center. He testified Applicant attempted to commit suicide while detained prior to trial. (April 17–18, 2013, Trial Tr. pp.100–04).

Applicant 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 [REDACTED] masturbating him on his son’s bed. He explained that he attempted suicide because he had been detained for thirty days, 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 Applicant confronted her about finding her picture on a pornographic website. (April 17–18, 2013, Trial Tr. pp.129–60).

Present Application

In his PCR application, Applicant alleges he is being held unlawfully for the following reasons:

- a. Ineffective assistance of Trial Counsel

1. Failure to interview critical witnesses and to challenge the credibility of the State's witnesses
2. Failure to hire expert witnesses to rebut the State's arguments based on an independent review of the forensic evidence
3. Failure to adequately investigate Victim 2's involvement in a drug investigation and any deals or offers possibly made to her by the State
4. Failure to adequately compare the timeline of when Applicant lived in the home to the timing of the allegations
5. Failure to obtain and review discovery with Applicant
6. Failure to properly impeach the State's witnesses based on inconsistencies between their statements at Applicant's second trial and their testimony at his first trial or their statements to police
7. Failure to interview witnesses regarding Applicant's good character and reputation and to request a jury instruction on good character and reputation
8. Providing erroneous advice regarding Applicant's decision to testify and failing to explain the risks involved in testifying as a witness
9. Failure to object to the trial court's erroneous and burden-shifting jury instructions
10. Failure to object to object to the admission of inadmissible and unduly prejudicial evidence
11. Failure to object to the State's improper closing argument that misstated the evidence and was unduly prejudicial
12. Failure to move to quash the twenty-eight indictments as unconstitutionally overbroad and vague because, apart from giving the year, they did not specify the dates on which the alleged offenses occurred, and the combined indictments covered a period of over eighteen years
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
15. Erroneous stipulation to a witness's medical unavailability due to stage 4 cancer and failure to object to admission of the witness's testimony from the previous trial
16. Failure to hire an expert to perform independent DNA testing of a bedsheet with a purported semen stain or to obtain documents from SLED regarding its policies, procedures, qualification, laboratory bench notes, and overall testing of the purported semen stain in order that the documents could be reviewed by such an expert
17. Failure to move for the trial court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could be fair to Applicant, and the potential juror's number

18. Failure to move to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), when the State struck two white female jurors from the petit jury but sat eleven white jurors, six of whom were female
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 Applicant’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
24. Failure to object to the State’s opening statement inviting the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations
25. Arguing to the jury that Applicant couldn’t be innocent if the victims were telling the truth, where that statement could not be considered a reasonable trial strategy
26. Failure to object and move to strike when the State delved into victim impact on direct examination by asking Victim 1 how she was doing
27. Failure to object to improper bolstering when Melinda Lively affirmed she had heard Victim 1 testify and later referred to Victim 1’s statement when testifying she did not contact police due to Applicant’s threats
28. Failure to object to hearsay when the prosecutor asked Melinda Lively whether she had learned that her daughter, Victim 1, had been abused by the Applicant and the witness replied, “Yes, when she was four”
29. Failure to move to strike Victim 2’s hearsay testimony after the trial court sustained Trial Counsel’s hearsay objection
30. Failure to move to strike Victim 2’s testimony in response to a leading question after the trial court sustained Trial Counsel’s objection
31. Failure to properly argue and preserve for appellate review Trial Counsel’s objection to the quietness of a complaining witness’s testimony
32. Prejudicial questioning of Victim 2 by phrasing a question in such a way as to reaffirm her version of events and strengthen the State’s case against Applicant
33. Failure to adequately prepare for trial by bringing a copy of a complaining witness’s prior testimony at the first trial to support his attempt to impeach the witness, causing the trial court to order Trial Counsel to move on to a new line of questioning
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 Applicant’s conduct satisfied the statutory elements of the charged offense

35. Failure to object to and move to strike the DSS agent's hearsay testimony that she received a call from her supervisor saying DSS had received a report of sexual abuse concerning Applicant and one of the alleged victims
36. Failure to object to the trial court's burden-shifting initial jury instruction that Counsel's opening statement would include "what they intend to prove"
37. Unreasonably attempting to impeach Victim 3 by questioning her about her various disclosures of abuse, reinforcing the State's theory that the victim previously disclosed the abuse to several people
38. Failure to object to the admission of Buffy [REDACTED] testimony from Applicant's first trial where Buffy [REDACTED] was alive and the State had not shown that it made reasonable efforts to obtain her presence at the second trial and where the testimony was admitted, not by a portion of the prior trial transcript, but by "acting out" the testimony, permitting the prosecution to add inflections and mannerisms that may not have occurred at the previous trial
39. Failure to object to hearsay testimony during the "acting out" of Buffy [REDACTED] prior trial testimony where she affirmed she and the police had found out Applicant was molesting Victim 2
40. Failure to object to admission of Applicant's consent to search form, buccal swab, and DNA evidence derived therefrom, where no hearing was requested or held regarding the voluntariness of Applicant's waiver as required by *Jackson v. Denno*, 378 U.S. 368 (1964)
41. Failure to object to and move to strike redirect testimony of the State's DNA expert as beyond the scope of cross-examination where the State asked if DNA evidence could be destroyed or affected by washing and drying sheets, despite Counsel never inquiring about the destruction of DNA
42. Failure to object to and move to strike redirect testimony of the jailer who purportedly saw Applicant hanging in his cell where the State failed to have the witness identify Applicant during direct examination and Trial Counsel never asked about Applicant's identification on cross-examination
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
44. Failure to proffer pornographic photographs discovered by Applicant to support the defense's theory that Victim 3 lied because Applicant publicly accused her of appearing in those photographs and to rebut the testimony of the State's witnesses that Victim 3 did not appear in any of the photographs
45. Failure to object to the trial court's repeated interruption and admonishment of Applicant during his testimony and request that the prosecutor object more often, which gave the impression of partiality before the jury
46. Failure to object to the trial court's comment, during closing jury instruction, that "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses"
47. Failure to object to the trial court's closing jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth and violative of due process

48. Failure to object to the trial court's jury instruction that testimony of the victim did not need to be corroborated
 49. Failure to object to the prosecutor's improper comments during closing argument that vouched for and bolstered the credibility of the State's witnesses
 50. Failure to subject the State's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy
- b. Ineffective assistance of Appellate Counsel
1. Failure to file a petition for a writ of certiorari in the United States Supreme Court on the issue of whether evidence of attempted suicide is admissible as evidence of guilt
 2. Failure to raise and argue the issue of the 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
 3. Failure to raise and argue the issue of whether the expert's testimony 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
 4. Failure to raise and argue the issue of the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?") and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have potentially disqualified biased jurors
 5. Failure to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised to and ruled on by the trial court.

As his requested relief, Petitioner seeks to have his convictions and sentences vacated and his indictments remanded for a new trial.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, 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), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 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.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (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*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). 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 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. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* 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)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

Allegations 1 and 50: Unspecified failures to investigate potential witnesses, adequately prepare for trial, and pursue a reasonable trial strategy

This Court finds these allegations to be without merit. Allegation 1 does not identify the witnesses Applicant claims Trial Counsel failed to investigate or explain how their testimony would have helped his case. *See, e.g., Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019) (holding a PCR applicant who claims trial counsel was ineffective for failing to call certain witnesses must produce those witnesses or their testimony at the PCR hearing); *Taylor v. State*, 258 S.C. 369, 378, 188 S.E.2d 850, 854 (1972) (holding a PCR applicant’s allegation that his trial counsel failed to adequately investigate his case was unsupported where the applicant failed to point out any beneficial evidence which could have been discovered by further investigation).

Allegation 50 does not explain with particularity what aspects of Trial Counsel’s preparation or strategy were inadequate or unreasonable; rather, Applicant cites *United States v. Cronin*, 466 U.S. 648 (1984), and claims Trial Counsel “failed to subject the prosecution’s case to meaningful adversarial testing.” This bare conclusion, devoid of supporting facts, is insufficient to merit a determination by this Court. *See Land v. State*, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980) (holding a PCR applicant must assert facts, as contrasted with conclusions, to meet the burden imposed upon him).

In *Cronic*, the Supreme Court of the United States held some circumstances “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” 466 U.S. at 658. However, Applicant has not explained how any of the circumstances in this case rose to such a level of severity.

Applicant did not clarify either of these allegations at the evidentiary hearing. In addition, the court finds these allegations are cumulative to other allegations in Applicant's PCR application raising issues of inadequate and unreasonable investigation of witnesses, trial preparation, and strategy. Therefore, Allegations 1 and 50 are denied and dismissed with prejudice.

Allegations 2 and 16: Failure to hire independent experts to review the State's DNA and electronic evidence

This Court finds these allegations to be without merit. Applicant did not present any expert testimony at the PCR hearing; therefore, any finding of prejudice would be merely speculative. *See, e.g., Dempsey v. State* 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Nor did Applicant make any attempt to show how reviewing SLED's documentation regarding its DNA testing of the bedsheet sample could have led Trial Counsel to discover evidence that would benefit his case. *See Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In fact, Applicant admitted the semen found on the bedsheet was his, explaining that his then-wife had masturbated him on his son's bed. Since Applicant did not dispute the State's identification of the semen as his, Trial Counsel had no reason to hire an expert to rebut the State's DNA analysis. Finally, Applicant has not identified the "electronic evidence seized by the police" that he claims could have been rebutted by an expert witness. As Trial Counsel testified before this Court, the State did not rely on any electronic evidence; the heart of the State's case was the testimony of Applicant's children. Accordingly, the Court finds Trial Counsel was not ineffective as to Allegations 2 and 16. Those allegations, therefore, are denied and dismissed with prejudice.

Allegation 3: Failure to investigate Victim 2's involvement in a drug investigation

This Court finds this allegation to be without merit. As above, Applicant failed to show there was any beneficial evidence at the PCR hearing that could have been discovered if Trial Counsel had further inquired into Victim 2's involvement in a drug investigation. *See Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Applicant's suggestion that Victim 2 was offered a deal by the State is not supported by any evidence presented at the PCR hearing. This court will not find prejudice based on mere speculation that a more searching inquiry into Victim 2's past would have been beneficial to Applicant's case. *See, e.g., Martin*, 427 S.C. at 455, 832 S.E.2d at 280 (holding an applicant's "mere speculation" as to what a witness's testimony would have been cannot, by itself, support a finding of prejudice). Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 4: Failure to investigate and compare the timeline of when Applicant lived in the home to the timing of the accusations

This Court finds this allegation to be without merit. At the PCR hearing, Applicant testified he provided Trial Counsel with a timeline of when he was not living in the home, claiming he occasionally spent a few weeks working in Atlanta. However, Applicant has not explained how any purported periods of absence from the home would have been inconsistent with the victims' disclosures of abuse occurring at uncertain times over many years. Trial Counsel testified he believed the timeline was not an effective alibi defense because the alleged abuse occurred so often over such an extended period that Applicant's occasional absence from the home made no difference. By not explaining how his case would have benefitted from further investigating the timeline of his absence from the home, Applicant has failed to prove his allegation that Trial Counsel was ineffective for failing to conduct such an investigation. *See Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 5: Failure to obtain and review with Applicant all discovery

Applicant alleges Trial Counsel failed to review all the photographs with him prior to trial. This Court finds this allegation to be without merit. Trial Counsel testified he spent hours going over discovery with Applicant. Without presenting further proof of Trial Counsel's alleged failure to review all the discovery with him, Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814. In addition, Applicant has not presented any new evidence or defenses that could have been discovered by Trial Counsel's further review of the discovery. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. *Id.* (citing *David v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 6: Failure to properly cross-examine and impeach the State's witnesses based on their prior inconsistent statements

This Court finds this allegation to be without merit. Applicant has not explained what prior inconsistent statements Trial Counsel should have used to impeach the State's witnesses. Without alleging specifically what Trial Counsel should have done to more effectively cross-examine and impeach the State's witnesses, Applicant has failed to overcome the strong presumption of adequate assistance or to prove the result of his trial would likely have been different. *See Butler*,

286 S.C. at 442, 334 S.E.2d at 814; *Harrington*, 562 U.S. at 112. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 7: Failure to interview favorable character witnesses and request a jury instruction on good character and reputation

Applicant alleges Trial Counsel failed to adequately prepare for trial by interviewing witnesses who could have testified to Applicant's good character and reputation. This Court finds this allegation to be without merit. Although Applicant named Sammy Morton, Larry Britt, and his ex-bosses as potential character witnesses, he failed to present any of them or offer any of their testimony at the PCR hearing. Failure to present purportedly favorable witnesses or evidence at the evidentiary hearing precludes a finding of prejudice. *See, e.g., Martin*, 427 S.C. at 455, 832 S.E.2d at 279–80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into Applicant's character at trial. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 8: Failure to explain the risks involved in Applicant's decision to testify

Applicant alleges Trial Counsel failed to properly advise him of the risks involved in testifying in his own defense. This Court finds this allegation to be without merit. Trial Counsel admitted he could not recall advising Applicant specifically of the risks involved in testifying; however, he testified that he always explains those risks to his clients, that Applicant would have known about cross-examination after watching the rest of the trial, and that the trial judge always informed defendants of their rights before they testified. In addition, Trial Counsel recalled

Applicant wanted to testify, and Trial Counsel believed it would be valuable to have Applicant stand up and tell the jury he was innocent. The Court finds Applicant has not proved Trial Counsel failed to properly advise him concerning testifying in his own defense by a preponderance of the evidence. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC. Applicant participated in two trials before two different judges, was represented by two sets of defense attorneys, testified in his own defense at both trials, and was cross-examined both times. It strains credulity to suggest he never learned, during that entire experience, the risks of testifying in his own defense. Furthermore, Applicant has not explained how he was prejudiced; Applicant never claimed that, but for Trial Counsel's alleged failure to properly advise him, he would not have chosen to testify. Therefore, Applicant has failed to show that, but for Trial Counsel's alleged errors, the result of his proceeding likely would have been different. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegations 9, 23, 36, 46, 47, and 48: Failures to object to the trial court's incorrect and burden-shifting jury instructions

Applicant alleges Trial Counsel failed to object when the trial court gave instructions to the jury that misstated the law, commented on the facts, and lessened the State's burden of proof. Allegation 9 raises the general issue of purportedly improper jury instructions, while Allegations 23, 36, 46, 47, and 48 concern the specific instances. This Court finds these allegations to be without merit.

In Allegations 23 and 47, Applicant alleges the trial court used truth-seeking language in its instructions to the jury. Instructions that charge the jury to "seek the truth" are disfavored because they run the risk of improperly shifting the burden of proof to the defendant; however, if the jury instructions, considered as a whole, are correct, isolated portions that may be misleading

do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000). 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 Applicant must be presumed innocent and need not offer any proof of his innocence. In addition, the trial court’s statements about determining “what the truth is and who is telling the truth” were made in the context of the jury’s prerogative to judge the credibility of witnesses, not in the context of the State’s burden of proof. The South Carolina Supreme Court has held such instructions permissible in the credibility context. *See id.* at 27–29, 538 S.E.2d at 251–53 (holding there was no reasonable likelihood of the jury applying a “seek the truth” instruction improperly, where the instruction was given in the context of witness credibility and the jury charge as a whole correctly explained reasonable doubt and the State’s burden of proof). In context, therefore, the instruction was not objectionable, and Trial Counsel was not ineffective for failing to object to it.

Similarly, in Allegation 36, Applicant alleges the trial court impermissibly shifted the burden of proof by telling the jury that the lawyers’ opening statements would set forth “what lawyers contend the facts will be, [what] the issues will be[,] . . . *what they intend to prove*, what the case is about.” Again, in the unlikely event the jury might have misinterpreted this isolated phrase to mean Applicant had some obligation to prove his innocence, the trial court’s jury instructions, considered as a whole, were free from error and cured any conceivable prejudice. *See id.* at 26–27, 538 S.E.2d at 251. Consequently, Trial Counsel was not ineffective for failing to object to this language.

In Allegation 46, Applicant claims the trial court commented on the facts by stating, “You’ve got a version of facts by some witnesses and a complete different version of the facts by other witnesses,” in violation of S.C. Const. art. V, § 21. To the extent this isolated statement

could be interpreted as an improper comment on the facts, this Court finds Applicant has shown no prejudice. In Applicant's testimony and in Trial Counsel's closing argument, the defense expressly claimed the complaining witnesses' accusations of sexual abuse were untrue; in fact, that claim was the heart of Applicant's defense. Trial Counsel had no reason to object to the trial court's express affirmance of a point that was necessary to his own client's theory of the case. In addition, there is no way any juror could have failed to notice that some witnesses gave a "different version of the facts" than others. Therefore, the trial court's statement was so obviously true that, even if Trial Counsel had made an objection on that ground, it could not possibly have changed the result of the proceeding. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Finally, in Allegation 48, Applicant claims Trial Counsel was ineffective for failing to object to the trial court's instruction that "the testimony of the victim in these cases need not be corroborated." Although that proposition is correct as a statement of law, its use as a jury instruction has been condemned by the South Carolina Supreme 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 Applicant'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. Trial Counsel was not deficient for failing to anticipate a change in the law. *See, e.g., Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). 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, these allegations are denied and dismissed with prejudice.

Allegation 10: Failure to object to inadmissible and unduly prejudicial evidence

This Court finds this allegation to be without merit. Allegation 10 does not explain what “inadmissible and unduly prejudicial evidence” Applicant believes Trial Counsel should have objected to. Nor did Applicant clarify this allegation at the evidentiary hearing. To meet his burden, Applicant must assert facts, not mere conclusions. *See Land*, 274 S.C. at 246, 262 S.E.2d at 737. To the extent Applicant’s other allegations set forth the issues of inadmissible and unduly prejudicial evidence, Allegation 10 is merely cumulative. Accordingly, this allegation is denied and dismissed with prejudice.

Allegations 11, 24, and 49: Failure to object during the State’s opening and closing arguments

Allegations 11, 24, and 49 all concern Trial Counsel’s failure to object to purportedly improper comments made during the State’s opening and closing arguments. The Court finds these allegations to be without merit. Allegations 11 and 49 allege the State made comments in its closing argument that misstated the evidence, were unduly prejudicial, were calculated to arouse the jurors’ passions or prejudices, and vouched for and bolstered the credibility of the State’s witnesses. However, neither allegation specifies *which* comments Applicant contends were improper, and Applicant did not clarify either allegation at the evidentiary hearing. Since Applicant has failed to identify with particularity the State’s remarks to which he claims Trial Counsel should have objected, this Court finds Applicant has failed to meet his burden of proving those allegations by a preponderance of the evidence. *See Land*, 274 S.C. at 246, 262 S.E.2d at 737.

Allegation 24 alleges Trial Counsel should have objected to the State’s reference to the indictments in its opening statement. Applicant contends the indictments were unconstitutionally

overbroad and vague because they failed to specify the exact dates on which the alleged offenses occurred; the merits of that issue are discussed in this Court's response to Allegation 12 below. Regardless of the propriety of the dates on the indictments, this Court finds there were no grounds for Trial Counsel to object to the State's reference to the indictments during its opening statement. The indictments each alleged the offenses occurred within a one-year period, dated based on the age of the victims; the State simply mentioned that fact in its opening statement to explain why the indictments were dated in that manner. Applicant has not explained how he was prejudiced by the State's brief and innocuous reference to the dates on the indictments. Even if the State's explanation of the indictments' dates was somehow improper, any error would have been cured when the trial court correctly charged the jury that the indictments were not evidence and that nothing should be inferred from the mere fact Applicant was indicted. *See, e.g., State v. Brown* 274 S.C. 48, 51, 260 S.E.2d 719, 721 (1979) (holding a trial court's "unfortunate" reference to the grand jury's returning a true bill was cured by the court's subsequent instruction that the grand jury proceedings were irrelevant and the State had the burden to prove the defendant guilty).

The Court finds Applicant has failed to prove Trial Counsel's assistance was ineffective as to Allegations 11, 24, and 49 by a preponderance of the evidence. Accordingly, these allegations are denied and dismissed with prejudice.

Allegation 12: Failure to move to quash the indictments as unconstitutionally overbroad and vague

Applicant alleges Trial Counsel failed to move to quash the twenty-eight indictments against him as unconstitutionally overbroad and vague where the indictments did not specify a date on which the alleged offenses occurred, but merely reflected that the offenses occurred within a one-year period. This Court finds this allegation to be without merit. The threshold for an

indictment to be valid is not high. *State v. Lewis*, 434 S.C. 158, 173, 863 S.E.2d 1, 9 (2021) (citing *United States v. Bates*, 96 F.3d 964, 970 (7th Cir. 1996) (“Indictments need not exhaustively describe the facts surrounding a crime’s commission nor provide lengthy explanations of the elements of the offense.”). A court must examine the sufficiency of an indictment with a practical eye in view of the surrounding circumstances. *Id.* at 172, 863 S.E.2d at 8. In this case, as in most cases of child sexual abuse, the alleged offenses occurred so often and over such an extended period of time that it would have been nearly impossible to fix exact dates for each individual instance of abuse. See *State v. Tumbleston*, 376 S.C. 90, 101–02, 654 S.E.2d 849, 855 (Ct. App. 2007) (holding indictments that alleged acts of sexual abuse occurring “between 2001 and June 2004” were valid due to the stealth and repetitive nature of the alleged conduct and the fact that the victim was a young child who could not remember exact dates and times).

Applicant argues *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred “between June 1, 1998 and September 1, 2004.” *Id.* at 586–87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. *Id.* at 590–92, 769 S.E.2d at 864–65. Applicant alleges the *Baker* holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of *Baker* are significantly different from the facts of this case. Applicant’s indictments have not been amended, and Applicant’s defense was based on attacking the victims’ credibility, not on an alibi. In addition, each of Applicant’s indictments alleged

offenses occurring within a one-year period, a much more specific time frame than the six-year period alleged in each of Baker's indictments. Finally, the *Baker* Court suggested that the indictments *would* have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances “with a practical eye,” this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. *See Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). Trial Counsel testified at the evidentiary hearing that he did not move to quash the indictments because he did not view them as objectionable. Trial Counsel was correct. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 13: Failure to object to the incorrect qualification of the State's expert in child sexual abuse dynamics

Applicant alleges Trial Counsel failed to object to the trial court's qualification of Dr. Benedetto as an expert in child sexual abuse dynamics. Applicant contends the qualification procedure was improper because the court limited Trial 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. This Court finds this allegation to be without merit. First of all, Trial 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. (April 17–18, 2013, Trial Tr. p.55, lines 1–12). Second, 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). 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 later. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 14: Failure to object to and move to strike Dr. Benedetto's statement that abusers typically seek victims of a particular age

Applicant alleges 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 Trial 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. This Court finds this allegation to be without merit because Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case, and any deficiency in failing to raise a proper objection to it did not prejudice Applicant. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 15, 38, and 39: Failure to object regarding the prior testimony of Buffy [REDACTED]

Allegations 15, 38, and 39 relate to the admission of Buffy [REDACTED] testimony from Applicant's prior trial. This Court finds these allegations to be without merit.

Allegation 15 alleges Trial Counsel should not have stipulated to [REDACTED] medical unavailability due to stage 4 cancer, which laid the foundation for the State's admission of her prior testimony, because [REDACTED] was still alive, still lived in Aiken County, and still had the same cancer at the time of the second trial. Of course, the mere fact that [REDACTED] was still suffering from the same disease does not mean her condition was the same. The second trial was conducted approximately six months after the first, during which time [REDACTED] stage 4 lung cancer appears to have advanced to the point that she was taken off all treatments but palliative care and pain management. It is not likely the trial court would have ordered [REDACTED] to appear in that condition, even if Trial Counsel had not stipulated that she was medically unavailable. *See* Rule 804(a)(4), SCRE. In addition, Trial Counsel testified he thought [REDACTED] illness would make her a very sympathetic witness for the State. Because Trial Counsel articulated a valid strategic reason for not seeking [REDACTED] presence, and because the trial court would likely have overruled any objection to the admission of [REDACTED] prior testimony on this ground, this Court finds Applicant has not proved Trial Counsel ineffective as to Allegation 15. *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.

Allegation 38, in addition to raising the same points as Allegation 15, also alleges Trial Counsel should have objected to the "acting out" of [REDACTED] testimony because the solicitor was able to insert inflections and mannerisms into her performance that may not have been present in the original trial. Applicant, however, has not identified which inflections or mannerisms the solicitor is alleged to have improperly adopted. In addition, the solicitor only "acted out" her own role; Trial Counsel portrayed Applicant's defense counsel in the first trial, and [REDACTED] was played by Ms. Emma Dicks. The solicitor, therefore, could not have inserted improper inflections and mannerisms into their performances, which greatly limits the scope of potential prejudice.

Furthermore, Trial Counsel testified at the evidentiary hearing that he had the same ability to alter mannerisms. He also testified he could not remember the solicitor making any exaggerated or excessive mannerisms. This Court finds Applicant has not met his burden to prove that the “acting out” of [REDACTED] testimony was harmful to his case. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Allegation 39 alleges Trial Counsel failed to object to a hearsay statement contained in [REDACTED] prior testimony. Specifically, at one point in the transcript of [REDACTED] testimony, the solicitor asked her if she found out in 2001 that Victim 2 had been abused, and she replied, “Yes.” (April 15–16 Trial Tr. p.184, lines 3–6). Applicant alleges Trial Counsel should have objected to this statement as unfairly prejudicial hearsay. However, the prior testimony of an unavailable witness is not subject to the rule against hearsay. Rule 804(b)(1), SCRE. At the evidentiary hearing, Trial Counsel testified he believed it would be futile to object to portions of [REDACTED] testimony, because it was admitted and presented to the jury as a whole; he also believed the trial judge would not agree to strike the whole thing, because [REDACTED] unavailability made the prior trial transcript admissible. This Court finds Trial Counsel was not ineffective because he articulated a valid strategic reason why he did not object to the question. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. In addition, [REDACTED] statement that Victim 2 accused Applicant of abuse in 2001 was cumulative to Victim 2’s testimony, the testimony of DSS investigator Michelle Price, and Applicant’s own testimony. Therefore, this Court finds Trial Counsel’s failure to object was not prejudicial. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Accordingly, these allegations are denied and dismissed with prejudice.

Allegation 17: Failure to move for follow-up questioning of a juror who indicated he knew one of the investigating officers

Applicant alleges Trial Counsel failed to move for follow-up *voir dire* of a juror who indicated he knew one of the investigating officers, which was necessary to determine whether the juror could decide the case fairly. This Court finds this allegation to be without merit. At the PCR hearing, Trial Counsel was questioned about a juror who knew a member of the *public defender's office*, but no evidence was presented that the juror knew one of the investigating officers. Trial Counsel testified he had no worries about that juror's impartiality because the juror stated in the transcript that he could be fair and impartial. In addition, Trial Counsel believed it might be beneficial to have a juror who knew someone in the public defender's office, which was a valid strategic reason for failing to object to the juror. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. The Court finds Applicant has not met his burden to show that Trial Counsel was ineffective for failing to move for additional *voir dire* of that juror. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 18: Failure to move to quash jury panel for *Batson* violation

Applicant, who is white, alleges Trial Counsel should have moved to quash the jury panel after the State struck two white female jurors. This Court finds this allegation to be without merit. *Batson* held that the purposeful exclusion of jurors on racial grounds violates a defendant's right to equal protection and that a "pattern" of peremptory strikes against potential jurors of the defendant's race "might give rise to an inference of discrimination." *Batson*, 476 U.S. at 96–97. In this case, however, Applicant admits that, despite striking two white jurors, the State ultimately sat eleven white jurors. This is unlike *Batson*, in which the prosecutor struck all jurors of the defendant's race from the venire. *Id.* at 83. The Court finds the composition of the jury in this case is not consistent with a discriminatory pattern of striking jurors of Applicant's race. Trial Counsel had no reason to infer, from only two strikes out of numerous white jurors, that the State

was employing its peremptory strikes in a racially discriminatory manner. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 19: Failure to move to sequester witnesses

Applicant alleges Trial Counsel failed to move to sequester the witnesses, which was prejudicial because the State repeatedly referred to prior witness testimony when questioning later witnesses. This Court finds this allegation to be without merit. All the witnesses had been present at the prior trial and had already heard one another's testimony. Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would have achieved nothing. As Trial 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, this Court finds Applicant 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. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 20: Failure to move to individually question jurors after the trial judge noted some jurors had approached him about "similar types of behavior"

Applicant alleges Trial Counsel should have moved to individually *voir dire* multiple jurors whom the trial court noted had approached him about "similar types of behavior;" Applicant also claims Trial Counsel failed to preserve the issue by putting those jurors' numbers and their conversations with the trial court on the record. This Court finds this allegation to be without merit. This allegation is not supported by any evidence presented to this Court; as Applicant admits, the purported interactions were not made a part of the trial court's record, and Applicant

did not present any additional evidence of the interactions at the evidentiary hearing. Applicant has, therefore, failed to carry his burden of proving deficiency and prejudice by a preponderance of the evidence. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 21: Failure to properly argue and preserve issues related to juror number 94

Applicant alleges Trial Counsel failed to properly preserve his request that juror number 94's conversation with the trial court be placed on the record, as well as his motion to strike juror number 94 for cause, after that juror stated during jury selection that she had a relative who was a victim "as the court knows." This Court finds this allegation to be without merit. Applicant admits juror number 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. Trial Counsel testified he did not even use up all of his peremptory strikes, because only nine jurors were struck in total, and he had ten strikes. Therefore, Applicant has failed to prove he was prejudiced by any alleged failure to preserve this issue. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 22: Failure to move to sever Applicant's charges

Applicant alleges Trial 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. *See, e.g., State v. Beekman*, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016). This Court finds this allegation to be without merit. 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. *Id.* at 637, 785 S.E.2d at 205 (providing examples). In this

case, the charged offenses were closely related in numerous ways: the victims were all Applicant's daughters or stepdaughters; the abuse almost always occurred in Applicant's home, typically in the victims' bedrooms before school; Applicant performed the same kinds of acts on multiple victims (oral sex on Victims 1 and 2, "humping" on Victims 2 and 3); Applicant would abuse each victim for years, then move on to the next victim after the previous victim moved away; and Applicant 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 [REDACTED] testified regarding Applicant'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 Applicant's suicide attempt in prison was used to prove his guilt regarding all three victims. Therefore, the joinder requirements were met in this case, and Trial Counsel had no ground to seek severance of the charges. Furthermore, at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a longer total term of imprisonment. This Court finds that Trial Counsel has articulated a valid reason for not moving to sever the charges and that he would not have succeeded if he did so move; therefore, Applicant has not proved Trial 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. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 25: Improper argument in Trial Counsel's opening statement

Applicant alleges Trial Counsel, in his opening statement, improperly argued that, if the victims were telling the truth, Applicant could not be innocent. Applicant claims the State was then able to use 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." This Court finds this allegation to be without merit. Clearly, if the jury believed the victims—who testified in detail about the crimes perpetrated by Applicant—it would also have to believe Applicant was guilty of those crimes. The heart of the case, for both sides, was the credibility battle between the victims and Applicant. 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 Trial Counsel's defense strategy. Furthermore, the fact that the victims' testimony was inconsistent with Applicant's innocence was so obvious that no prejudice could have resulted from either Trial 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 allegation is denied and dismissed with prejudice.

Allegation 26: Failure to object to and move to strike victim impact testimony

Applicant alleges Trial Counsel should have objected and moved to strike when the State "delved unopposed into victim impact" during direct examination of Victim 1 by asking her how she was doing. This Court finds this allegation to be without merit. Applicant cites *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), in support of his position. In that case, which involved a DUI car crash resulting in death, the prosecution introduced "poignant" testimony that the crash victim was recently married and photographs depicting the victim and her husband. *Id.* at 19, 488 S.E.2d at 314. The Supreme Court held the evidence was irrelevant, highly inflammatory, and likely affected the outcome of the trial because the other evidence of guilt was inconclusive. *Id.* at 20, 488 S.E.2d at 314. In this case, however, the State's brief inquiry into how Victim 1 was doing, though irrelevant, was not, by itself, likely to arouse the sympathy or prejudice of the jury. Furthermore, Victim 1's response to the State's question—that she "would rather be home with [her] children, but it's something that needs to be done"—was not "highly

inflammatory” victim impact evidence like the evidence at issue in *Livingston*. This Court finds Applicant was not prejudiced by the State’s brief inquiry or Victim 1’s lukewarm response. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 27: Failure to object to bolstering

Applicant alleges Trial Counsel should have objected on the ground of improper bolstering when the State asked Melinda Lively if she had heard Victim 1 testify, Lively affirmed she had, and Lively later indicated she had received threats from Applicant “as [Victim 1] stated.” This Court finds this allegation to be without merit. Improper bolstering occurs when a witness conveys to the jury that the witness believes the victim. *See, e.g., Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). Here, however, Lively never claimed to believe Victim 1; she merely corroborated the Victim 1’s account of Applicant’s threatening behavior. There was, therefore, no ground for Trial Counsel to object to improper bolstering. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 28: Failure to object to Lively’s testimony going beyond the time and place of the assault

Applicant alleges Trial Counsel should have objected when the State asked Melinda Lively, “In 1999, had you learned that your daughter, [Victim 1], had been abused by the Defendant?” and Lively relied, “yes, when she was four.” Applicant cites *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989), which states a witness may testify to the fact a victim complained of sexual assault as corroboration of the incident, but the testimony must be limited to the time and place of the assault and must not include particulars or details. *Id.* at 486–87, 386 S.E.2d at 243; *see also* Rule 801(d)(1)(D), SCRE. Applicant contends Lively’s reply was improper because it went beyond the

scope of time and place of the alleged assault into the details of Victim 1's complaint. This Court finds this allegation to be without merit. All Lively said was that (1) Victim 1 did disclose she had been abused by Applicant, and (2) Victim 1 alleged the abuse occurred when she was four. Victim 1's age when the abuse occurred is clearly relevant to the "time of the assault" and is, therefore, within the scope of time and place. In addition, Rule 801(d)(1)(B), SCRE, allows the admission of prior consistent statements by a testifying declarant when the declarant is charged with fabricating her testimony; in the trial in this case, Applicant accused Victim 1 of fabricating abuse allegations against him in 2011 because she bore him a grudge. Therefore, the evidence of Victim 1's prior statement would have been admissible even if Trial Counsel had successfully argued it went beyond the time and place of the assault, so Applicant was not prejudiced by Trial Counsel's failure to make that objection. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 29: Failure to move to strike hearsay testimony after the trial court sustained Trial Counsel's hearsay objection

Applicant alleges Trial Counsel should have moved to strike Victim 2's statement that her mother told her to lie, after the trial court sustained Trial Counsel's hearsay objection. This Court finds this allegation to be without merit. A statement that is not an assertion of fact is not hearsay, such as a command, an order or instruction, or an inquiry. 31A C.J.S. *Evidence* § 359. Ordering someone to lie is not an assertion, but a command; therefore, it is not subject to the rule against hearsay. Victim 2's testimony that her mother instructed her to lie about Applicant's abuse was not excludable under the hearsay rule, notwithstanding the trial court's decision to sustain Trial Counsel's hearsay objection. Therefore, Applicant was not entitled to have that testimony stricken from the record, so Trial Counsel's failure to move to strike Victim 2's response was not

prejudicial. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 30: Failure to move to strike leading testimony after the trial court sustained

Trial Counsel's leading objection

Applicant alleges Trial Counsel should have moved to strike Victim 2's responses to a series of leading questions asked by the State after the trial court sustained his objections to them. This Court finds this allegation to be without merit. Trial Counsel objected to the solicitor's line of questions asking whether Applicant was "humping" Victim 2 from the ages of twelve to fourteen or made Victim 2 perform oral sex during that time. After the trial court sustained the objection and admonished the solicitor not to ask leading questions, the solicitor rephrased his questions about whether Applicant continued to "hump" Victim 2 during that time period, and Victim 2 said he did. Therefore, even if Trial Counsel had moved to strike Victim 2's responses to the State's leading questions, the same testimony would have come in. The only thing that would not have come in is Victim 2's negative response to the solicitor's question about being made to perform oral sex, but excluding that response would not have helped Applicant. Therefore, this Court finds Applicant was not prejudiced by Trial Counsel's failure to move to strike that testimony. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 31: Failure to preserve the issue of Trial Counsel's difficulty hearing Victim 2

This Court finds this allegation to be without merit. At one point during Victim 2's direct examination by the State, Trial Counsel told the court he was having trouble hearing her. The trial court and the solicitor immediately asked Victim 2 to speak up. There is no indication that Trial Counsel's ability to effectively represent Applicant was compromised by this minor

inconvenience. The Court finds Applicant has not met his burden of proving, by a preponderance of the evidence, that Trial Counsel was ineffective as to this allegation. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 32: Ineffective questioning of Victim 2

Applicant alleges Trial Counsel provided ineffective assistance by asking Victim 2, “[Y]ou’re saying it was your mom, Buffy Cartwright, that ultimately convinced you to recant?” Applicant claims this phrasing was prejudicial because it reaffirmed the State’s case against Applicant. This Court finds this allegation to be without merit. Victim 2 had already testified that she originally recanted because her mother told her to, so allowing her to “reaffirm” that claim was not likely to be prejudicial to Applicant. Trial Counsel’s question followed a series of questions suggesting that Victim 2 had already denied the abuse occurred in private conversations with her mother, which (if believed by the jury) would have rebutted the State’s theory that her mother’s request for her to recant was made in bad faith. Therefore, asking Victims about the circumstances of her recantation was not an unreasonable trial strategy. This Court will not nitpick whether Trial Counsel employed the perfect phrasing in pursuing this strategy; the Sixth Amendment does not require perfect advocacy as judged with the benefit of hindsight. *See Yarborough*, 540 U.S. at 6. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 33: Failure to properly impeach Victim 2 with the transcript of her prior testimony

Applicant alleges “it appears [Trial Counsel] failed to have a copy of the transcript” of the first trial with him when he attempted to impeach Victim 2 with her prior testimony. This Court finds this allegation to be without merit.

At the prior trial, Victim 2 testified she would stay “at a friend’s house” to avoid having to come home to Applicant. Defense counsel asked her if that friend “was Tim Bowman who was the person you were involved with drugs with?” Victim 2 responded “Yes sir. Well” before being cut off by defense counsel’s next question.

At the second trial, Trial Counsel asked Victim 2 if she was ever involved with drugs, which she denied, claiming her boyfriend was the one involved with drugs. Trial Counsel stated, “But you actually testified in the other proceeding that you were involved,” and then showed Victim 2 a document, presumably the transcript of the prior trial. The trial court told Trial Counsel to show Victim 2 the “line and verse,” and Trial Counsel stated he had neglected to mark it. The trial court then told Trial Counsel to move on to his next question.

Assuming Trial Counsel was attempting to impeach Victim 2 with her statement from the prior trial, this Court finds Applicant suffered no prejudice. Victim 2’s statement at the prior trial was given in response to a complex leading question and was cut off before she could clarify it. If she had been able to respond to Trial Counsel’s insinuation, she likely would have given the same explanation she gave elsewhere in the trial: that Tom Bowman was her friend, that he was involved with drugs, but that she was not involved in his drug-related activities. Absent any indication that Victim 2 would have been caught in a lie had Trial Counsel properly confronted her with her prior testimony, this Court finds Applicant has failed to meet his burden to prove the result of his trial likely would have been different but for Trial Counsel’s inadequate preparation. *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), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 34: Failure to object and to move to strike Michelle Price’s testimony that implied the statutory elements of Applicant’s offense had already been proved

Applicant alleges Trial Counsel should have objected when Michelle Price testified DSS only becomes involved in a case “[i]f it meets the legal statute in the State of South Carolina.” Applicant claims this language lowers the State’s burden of proof in the eyes of the jury by suggesting the statutory elements of the offense have already been met. This Court finds this allegation to be without merit. At the evidentiary hearing, Trial Counsel admitted the possibility that the jury may have inferred DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price’s phrasing because there are not many ways to say what Price was trying to say. The Court finds Trial Counsel was not deficient in failing to object to Price’s statement, which was brief, technical, and not specifically related to Applicant’s case. 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. 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 confusion before the jury began its deliberations. Accordingly, Applicant has failed to show a reasonable likelihood that, but for the alleged error of Trial Counsel in failing to object to Price’s statement, the result of his trial would likely have been different. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this allegation is denied and dismissed with prejudice.

Allegation 35: Failure to object to and move to strike testimony that DSS received a report of sexual abuse concerning Victim 2 and Applicant

Applicant alleges Trial Counsel should have objected to and moved to strike Price’s statement that she “received a call from [her] supervisor saying [DSS] received a report of sexual abuse” concerning Victim 2 and Applicant. Applicant alleges this was improper bolstering and

prejudicial hearsay-within-hearsay because it went beyond the scope of time and place. This Court finds this allegation to be without merit. As already discussed, bolstering requires a witness to convey that she believes the victim; merely announcing that Victim 2 made a report does not imply that Price *believed* the report. *See, e.g., Briggs*, 421 S.C. at 324, 806 S.E.2d at 717. In addition, prior consistent statements of a testifying declarant (Victim 2, in this instance) may be admitted, notwithstanding the rule against hearsay, to rebut the charge that the declarant fabricated her testimony. Rule 801(d)(1)(B), SCRE. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 37: Failure to effectively impeach Victim 3

Applicant alleges Trial Counsel ineffectively questioned Victim 3 about her multiple disclosures of abuse, reinforcing the State's theory that Victim 3 was credible because she disclosed to several people. This Court finds this allegation to be without merit. Trial Counsel was attempting to show inconsistencies between the stories Victim 3 told various people about Applicant's abuse. In order to pursue that reasonable impeachment strategy, Trial Counsel necessarily had to question Victim 3 about the multiple reports she made to different people. There was a risk that the jury would be swayed more by the number of Victim 3's disclosures than by any purported inconsistencies therein, but the existence of a risk does not make a strategy unreasonable. The Court finds Trial Counsel's questioning of Victim 3 was part of a valid trial strategy, even though, with the benefit of hindsight, it may seem imperfect. *See Yarborough*, 540 U.S. at 6; *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 40: Failure to request a *Jackson v. Denno* hearing to challenge the voluntariness of Applicant's consent to the buccal DNA swab

Applicant alleges Trial Counsel failed to request a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing to challenge the voluntariness of his consent to the buccal swab that was later used to match his DNA to that of the semen on the bedsheet. This Court finds this allegation to be without merit. As discussed above, Applicant admitted the semen was his; he simply denied that it was related to any criminal activity. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. This Court finds Applicant has not proved that, but for the alleged error of Trial Counsel, the result of Applicant's trial would have been different. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 41: Failure to object and to move to strike the testimony of the State's DNA expert, Lilly Gallman, on redirect examination

Applicant alleges Trial Counsel should have objected to the State's redirect examination of Lilly Gallman where the State asked if DNA evidence can be destroyed by washing and drying bedsheets with DNA on them. Applicant contends this line of questioning went beyond the scope of Trial Counsel's cross-examination and was prejudicial because Buffy [REDACTED] had testified that Applicant asked her to wash Victim 3's bedsheets after he confessed to molesting Victim 3. This Court finds this allegation to be without merit. On cross-examination, Trial Counsel asked Gallman whether she detected a mixture of DNA on the bedsheet, and Gallman testified she only found Applicant's DNA. At the PCR hearing, Trial Counsel testified he was attempting to show Applicant's DNA from the bedsheet was not mixed with Victim 3's DNA, which might have cast doubt on the State's theory that the semen was from Applicant's abuse of Victim 3. Trial Counsel

believed the State brought up whether laundering the sheets could destroy DNA in order to explain why Victim 3's DNA was not found on them. Trial Counsel perceived that line of redirect questioning as a permissible response to the line of questioning he pursued on cross-examination, which is why he did not object. The Court finds Applicant has failed to prove Trial Counsel's decision not to object to the State's line of questioning fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 42: Failure to object and move to strike the State's redirect examination of James Hettich identifying Applicant as the man Hettich found attempting suicide

Applicant alleges Trial Counsel should have objected when the State asked Aiken County Detention Center guard James Hettich to point out the man he saw hanging in his cell, whereupon Hettich identified Applicant. Applicant contends this question exceeded the scope of Trial Counsel's cross-examination, which included no questions about Applicant's identification. This Court finds this allegation to be without merit. There was patently no prejudice from Hettich's identification of Applicant as the hanged man on redirect examination because he had already testified on direct examination that he saw "Inmate Cartwright" hanging by a sheet tied around his neck. Applicant has failed to prove any prejudice. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 43: Failure to cross-examine the State's witnesses about discrepancies as to whose bedroom the bedsheets were taken from

Applicant alleges Trial Counsel should have cross-examined the State's witnesses about whose bedroom the bedsheets were taken from that had Applicant's DNA on them. Applicant alleges 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; Applicant contends Trial Counsel should have exposed this discrepancy because the location of the sheets was critical to the State's case. This Court finds this allegation to be without merit. The heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Applicant's semen on the bedsheets. In addition, Victim 3 testified Applicant continued abusing her after she had started sleeping in Hoss's bedroom when Hoss moved out, so the presence of Applicant's semen on the sheets of Hoss's bed was consistent with Victim 3's testimony. The Court finds Applicant has failed to prove, by a preponderance of the evidence, that Trial 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), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 44: Failure to proffer pornographic photographs allegedly depicting Victim 3

Applicant alleges Trial Counsel should have proffered a group of pornographic pictures in order to prove Applicant's claim that the pictures depicted Victim 3. Applicant contends it was necessary to introduce the photographs to support Trial Counsel's theory that Victim 3 fabricated her abuse allegations in order to punish Applicant for exposing her participation in pornography. This Court finds this allegation to be without merit. Trial Counsel testified at the evidentiary hearing that he—like everyone else who testified having seen the photographs, except Applicant—did not believe the model in the photographs was Victim 3. In addition, during his closing argument, Trial Counsel argued that Victim 3 was motivated to retaliate against Applicant for *falsely* accusing her of posing for pornographic images. Therefore, proving the person in the photographs was actually Victim 3 was not necessary to Applicant's defense. Therefore, this Court finds Applicant has failed to establish, by a preponderance of the evidence, either Trial 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), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 45: Failure to object to the trial court’s interruptions of Applicant’s testimony

Applicant alleges Trial Counsel should have objected when the trial judge repeatedly interrupted Applicant’s testimony, admonished Applicant for giving hearsay testimony, and instructed the prosecutor to object more often to Applicant’s improper statements. Applicant contends the trial court usurped the role of the prosecutor and gave the appearance of partiality before the jury. This Court finds this allegation to be without merit.

During direct examination by Trial Counsel, Applicant’s testimony often deteriorated into irrelevant tangents, and he frequently attempted to testify to statements made by third parties. The trial court admonished him multiple times to give responsive answers to Trial Counsel’s questions and to refrain from testifying as to what other people said. At one point, the court admonished Trial Counsel for asking speculative questions and told the solicitor to “object to those speculation type of questions and answers.”

The court’s power includes the ability to maintain order and decorum. Applicant’s repeated failures to abide by the rules necessitated the court’s increasingly emphatic remonstrances. In addition, Trial Counsel testified at the PCR hearing that he did not believe the trial judge’s interjections were prejudicial to Applicant. Therefore, this Court finds Applicant has failed to establish, by a preponderance of the evidence, either Trial 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), SCRPC. Accordingly, this allegation is denied and dismissed with prejudice.

B. Ineffective Assistance of Appellate Counsel

In analyzing a claim of ineffective assistance of appellate counsel, courts must apply the *Strickland* test just as they would when analyzing a claim of ineffective assistance of trial counsel. *Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Therefore, a PCR applicant alleging ineffective assistance of appellate counsel must prove counsel's performance was deficient and the applicant was prejudiced thereby. *Id.*

Allegation 1: Failure to file a petition for a writ of certiorari in the United States Supreme Court

Applicant alleges Appellate Counsel should have filed a petition for a writ of certiorari in the United States Supreme Court on the issue of whether evidence of attempted suicide is admissible as evidence of guilt in South Carolina. This Court finds this allegation to be without merit. First of all, there is no right to discretionary review by the United States Supreme Court. *See Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 543–44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion.") *Cf. Jones v. Barnes*, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). In addition, the admissibility of evidence in a state criminal trial is not generally an issue of federal law, unless it implicates constitutional concerns. Applicant has not explained any basis for seeking review of his direct appeal by the United States Supreme Court on what is facially an issue of state law. Therefore, Applicant has not met his burden of showing Appellate Counsel was deficient for failing to request such review, or that he likely would have obtained review had he requested it. *See id.*; Rule 71.1(e), SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

**Allegation 2: Failure to raise issues related to Dr. Benedetto's qualification as an expert I
child sexual abuse dynamics**

Applicant alleges Appellate Counsel should have raised the issues of Dr. Benedetto's qualification as an expert as set forth in Allegation 13 discussed above. This Court finds this allegation to be without merit. 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. *See Fields*, 363 S.C. at 25, 609 S.E.2d at 509. 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 later, so any error in holding the qualification procedure in the jury's presence was harmless. *See State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013). Applicant has failed to prove that Appellate Counsel was ineffective for failing to raise this issue on appeal. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

**Allegation 3: Failure to raise issue of Dr. Benedetto's testimony that abusers typically seek
victims of a particular age**

Applicant alleges Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without merit. As discussed in response to Applicant's Allegation 14, Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent

with the State's theory of the case, and any deficiency in failing to raise it on appeal did not prejudice Applicant. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 4: Failure to raise issue of Trial Counsel's objection to the trial court's refusal to question jurors about sexual molestation

Applicant alleges Appellate Counsel should have challenged the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?") and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have elicited potential bias among the jurors. This Court finds this allegation to be without merit. Appellate Counsel testified he raised four issues on appeal; counsel is not required to raise every non-frivolous issue on appeal but may select among them to maximize the likelihood of a favorable outcome. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. The Court finds Appellate Counsel attempted to raise those issues he believed were most likely to obtain a favorable result. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 5: Failure to raise issue of Applicant's motion for directed verdict of acquittal

This Court finds this allegation to be without merit. On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Here, there was substantial evidence of Applicant's guilt: the three victims' detailed testimony. It would likely have been fruitless for Appellate Counsel to challenge the sufficiency of the State's evidence

on appeal, and he was not ineffective for declining to try. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this _____ day of _____, 2022.

ROBERT J. BONDS
Presiding Judge
Second Judicial Circuit

_____, South Carolina

THE STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
Harold Cartwright,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

Case No.: 2019CP0201582

ORDER GRANTING APPLICANT
POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert J. White, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my official capacity.

JUN 06 2022

Robert J. White
C.C.P. & G., Aiken County, S.C.
Charla Griffing
Deputy Clerk

This matter comes before the Court on Harold Cartwright's application for Post-Conviction Relief (PCR). Applicant appeared before the Court on February 3, 2022, for a virtual hearing on the above-captioned PCR action. Dayne Phillips represent Applicant, and Assistant Attorney General Michael Neubauer represented Respondent. Chief Appellate Defender Robert Dudek, Public Defenders David Hayes and Michael Routzong, and Applicant testified at the evidentiary hearing. However, Mr. Routzong was unable to complete his testimony during the February 3 hearing due to technical difficulties with Applicant's internet connection. The hearing was continued to the following day but ended prematurely due to technical issues with the court reporter's internet connection.

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After reviewing the proposed orders from the parties and weighing the evidence presented at the hearing, this Court grants the PCR application requesting a new trial based on ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

FILED

June 6 2022

Robert J. White CMP
C.C.P. & G.S.
Charla Griffing
Deputy Clerk

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor, first degree; sixteen (16) counts of lewd act with a minor; two counts (2) criminal sexual conduct with a minor, second degree; one (1) count of criminal sexual conduct, first degree; and one (1) count of criminal sexual conduct, third degree.

On April 15, 2013, Applicant proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Michael Routzong and David Hayes represented Applicant, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts on all charges on April 18, 2013. The Trial Court sentenced Applicant to *concurrent* sentences of thirty (30) years imprisonment for criminal sexual conduct in the first degree conviction and criminal sexual conduct with a minor in the first degree conviction; twenty (20) years imprisonment for the criminal sexual conduct with a minor in the second degree conviction; and fifteen (15) years imprisonment for the lewd act upon a child convictions. However, the Trial Court imposed a *consecutive* sentence of ten (10) years for the criminal sexual conduct in the third degree conviction.

On September 30, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App. filed September 30, 2015). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Applicant, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, Op. No. 27842 (S.C. Sup. Ct.

filed September 26, 2018).

On June 26, 2019, Applicant filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

On June 29, 2020, Applicant filed an amended application requesting PCR. Applicant also filed a redacted amended application on July 9, 2020:

Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

Specifically, Applicant alleged the following acts or omissions of ineffective assistance of Trial Counsel:

- (1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- (2) Trial Counsel failed to hire expert witnesses to conduct an independent review of the forensic evidence presented by the State and to testify in rebuttal of the State's evidence and arguments when it was reasonable and necessary to do so in preparation for Applicant's second trial. *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Specifically, the electronic evidence seized by the police and DNA evidence.
- (3) Trial Counsel failed to adequately investigate Victim 1's involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State.
- (4) Trial Counsel failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations.
- (5) Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.
- (6) Trial Counsel failed to properly cross-examine and impeach the State's witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses' prior inconsistent statements to the police.
- (7) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and

reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); Cf. *Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

- (8) Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.
- (9) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and misstated the law.
- (10) Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial.
- (11) Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.
- (12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. See *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).
- (13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in camera* hearing). See Rule 702, SCORE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).
- (14) Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for *an abuser* to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCORE; *State v. Ellis*,

345 S.C. 175, 547 S.E.2d 490 (2001).

- (15) Trial Counsel erroneously stipulated to a witness's medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. See Rule 804, SCRE; *Dodd v. Berlinsky*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).
- (16) Trial Counsel failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain. See *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).
- (17) Trial Counsel failed to move for the Trial Court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.
- (18) Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).
- (19) Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. See Rule 615, SCRE.
- (20) Trial Counsel by failed to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him regarding "similar types of behavior." Notably, Trial

Counsel failed to preserve for appellate review the issue and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror's numbers were placed on the record with whom the judge spoke. See U.S. Const. amends. V, VI, XIV.

- (21) Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows." Notably, Counsel sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. See U.S. Const. amends. V, VI, XIV.
- (22) Trial Counsel failed to move to sever Applicant's charges where the three (3) primary complaining witnesses alleged conduct over three (3) distinct and large periods of time, did not arise out of a single chain of circumstances, and are not proved by the same evidence. See *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996).
- (23) Trial Counsel failed to object and preserve for appellate review the Trial Court's initial instructions to the jury that were tantamount to instructions to search for the truth, violative of Due Process, and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, "you twelve collectively act as one, decide what the true facts are...", and "you will be in a position then to render a true and just verdict, an verdict that speaks the truth of the case", and "It's your civic responsibility to pay close attention and decide whose telling the truth." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (24) Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."
- (25) Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Applicant] can't be innocent...", and where the State used that same quote against the defense in its close, saying, "As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant's guilty," and where use of such a statement could not be considered a reasonable trial strategy.

- (26) Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), "Now, sitting here today, telling these events to these 13 strangers, how are you doing?" to which the witness responded, "I would rather be at home with my children, but it's something that needs to be done; I'm glad I finally get to tell what happened." See *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).
- (27) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda Lively (mother of Victim 2) answered in the affirmative to the State's question, "Did you just hear Victim 2 testify?" and later indicated that she did not contact police because of threats from the Applicant "as [Victim 2] stated."
- (28) Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by the Defendant?" to which the witness replied, Yes, when she was four." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (29) Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, "My mom told me to lie then...", and Counsel's hearsay objection was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (30) Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel's objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (31) Trial Counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up.
- (32) Trial Counsel provided ineffective assistance by reaffirming the complaining witness's version of events regarding her initial recantation of the allegations by asking her, "[Y]ou're saying it was your mom, Buffy Cartwright that ultimately convinced you to recant?", and Victim 1 responded, "Yes." This highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.

- (33) Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.
- (34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. See *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.
- (35) Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (36) Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be, the issues will be what they're asking you to look for to keep tuned into *what they intend to prove*, what the case is about." See U.S. Const. amends. V, VI, XIV.
- (37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- (38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy [REDACTED] prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the

second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.

- (39) Trial Counsel failed to object during the “acting-out” of Buffy [REDACTED] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (40) Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant’s consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant’s waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).
- (41) Trial Counsel failed to object and move to strike the State’s redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed, what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.
- (42) Trial Counsel failed to object and move to strike the State’s redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant’s identification on cross-examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was hanging in his cell present in the courtroom.
- (43) Trial Counsel provided ineffective assistance where Applicant stated *in camera* at the end of the State’s case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3’s actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom

(victim's brother's old bedroom), where Counsel failed to cross-examine the State's witnesses regarding this discrepancy (the location of evidence critical to the State's case, and it is unknown whether Trial Counsel obtained a complete copy of the prior trial transcript before the second trial. However, it true, then failing to examine this area cannot be a valid trial strategy).

- (44) Trial Counsel provided ineffective assistance where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly said so, where State witnesses repeatedly indicated Victim 3 was not in any such pictures, and where Counsel failed to proffer any such photographs into evidence to support his theory.
- (45) Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. See U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal
- (46) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses."
- (47) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...", and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (48) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).
- (49) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. See *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881

(2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); *See State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted); *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.") (quotation omitted); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002) (finding trial counsel's decision not to object to prosecutor's improper vouching for the credibility of the State's witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.).

- (50) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. Cronin*, 466 U.S. 648 (1984); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

Furthermore, Applicant also alleged the following acts or omissions of ineffective assistance of Appellate Counsel:

- (1) Appellate Counsel failed to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt.
- (2) In the event Trial Counsel properly preserved the issue in his pre-trial motions and objections to the Trial Court immediately prior to the witness's testimony, then Appellate Counsel failed to raise and argue the issue of the

Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the 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 about the reliability and validity of field itself after the witness was deemed "expert" by the court and after the State's direct examination—all of which was held in the presence of the jury rather than *in camera*? See Rule 702, SCORE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010). See also *Staubes v. Folly Beach*, 339 S.C. 406, 529 S.E.2d 543(2000); and *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004).

- (3) In the event Trial Counsel properly preserved the issue in his contemporaneous objection ("leading") to the Trial Court, then Appellate Counsel provided failed to raise and argue the issue of whether the expert witness's testimony went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for *an abuser* to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCORE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001)
- (4) Appellate Counsel failed to raise and argue Trial Counsel's objection where the Trial Court refused to ask Defense Questions 1 and 3 during *voir dire*, where Question 1: "Have you, any member of your family, or friend been impacted in anyway by Sexual Crime or Sexual Assault or Child Molestation?" and Question 3: "Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?" Notably, the questions sought by Counsel would have elicited the prejudicial bias to disqualify jurors who answer in the affirmative, and thus, depriving Applicant of a fair trial if allowed on the jury panel.
- (5) Appellate Counsel failed to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised and ruled upon by the Trial Court. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004).

EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified that his first trial ended in a mistrial due to a hung jury. Applicant also testified that he originally had private counsel during the first trial but that his original lawyer was subsequently relieved as counsel prior to the second trial. Applicant further testified that his second lawyer and lead counsel, Mr. Routzong, did not review all the photographs with him prior to trial.

Applicant testified that he told Mr. Routzong regarding the following character witnesses: Sammy Morton, Uncle Larry Britt, and his ex-bosses. Applicant also testified that he provided a timeline to Mr. Routzong of when he lived in the home. Applicant further testified that he informed Mr. Routzong of [REDACTED] involvement in a drug investigation. Notably, Applicant testified that the testimony related to where critical evidence was collected by police changed from the first trial (in daughter's bedroom) and the second trial (in son's bedroom), and that the identities of the females in the pornographic picture that he found on the internet depicted his daughter and her friends.

Chief Appellate Defender Robert Dudek testified regarding his experience as an appellate defender. Mr. Dudek also testified that the prosecution's use of Applicant's attempted suicide as evidence of guilt was a novel issue in South Carolina. Mr. Dudek further testified that based on his research there was a jurisdictional split. Mr. Dudek maintained that he ultimately decided not to file a Petition for Writ of Certiorari to the United States Supreme Court because he did not believe this was a federal issue. As to the remaining issues raised by Applicant regarding ineffective assistance of Appellate Counsel, Mr. Dudek maintained that he only raised meritorious issues that were preserved for appellate review.

Public Defender David Hayes testified that his role as co-counsel was limited to the State's expert witness, Alicia Benedetto. Specifically, Mr. Hayes admitted that he did not request an *in camera* hearing or move to proffer his challenge of the witness's testimony despite that the Trial Court had already qualified the witness as an expert and only permitted questioning of the witness on the reliability and validity of the field itself.

Public Defender Michael Routzong maintained that he met with Applicant for hours and reviewed the discovery with him. Mr. Routzong stated that he does not remember whether he reviewed all the photographs with Applicant or the names of any specific witnesses to interview. Mr. Routzong indicated that he discussed trial strategy with Applicant, including the defense strategy of attacking the credibility of the State's witnesses. Mr. Routzong testified that Applicant embarrassed his daughter by going on the news alleging that she and her friends were posting nude pictures on the internet. Notably, Mr. Routzong testified that he did not remember Applicant's computer being seized.

Mr. Routzong testified that Applicant's first trial was in November of 2012 and the second trial occurred a few months later in 2013. Specifically, he testified that he was appointed on March 5, 2013, and the second trial began on April 15, 2013. Mr. Routzong acknowledged that he did not request documentation regarding the [REDACTED] alleged involvement in an unrelated drug investigation, or whether there were any possible deals provide by the police or Prosecutor's office. Mr. Routzong further acknowledged that he did not consult with an expert witness regarding any DNA or digital evidence.

Mr. Routzong maintained that he believed Applicant's timeline of when he lived in

the home was too remote to use as a defense. Mr. Routzong admitted that he did not have any specific notes regarding when he received the discovery or his review of the discovery with Applicant. Mr. Routzong stated that he did not recall or have any notes regarding potential character witnesses to testify on Applicant's behalf or his discussion explaining to Applicant the risks of testifying at trial.

Mr. Routzong admitted that he did not request or file a supplemental motion for discovery regarding the DNA evidence that was in the State's possession. Mr. Routzong testified that he did not recall when several jurors noted "similar types of behavior" when addressing the judge during *voir dire* and that he did not know bench conferences were not transcribed. Mr. Routzong also admitted that he had no notes regarding juror number 94's conversation with the Trial Court (particularly when he moved to have the juror struck for cause but was forced to use a peremptory strike on the juror). Mr. Routzong further submitted that he did not believe a *Batson* issue was appropriate in this case.

Mr. Routzong explained that he did not move to sequester the witnesses because they had already testified in the first trial (despite his strategy to attack each witness's credibility). Mr. Routzong claimed that he did not believe the indictments were overbroad or vague. Notably, Mr. Routzong testified that he had no strategic reason for not moving for severance of the charges and doesn't remember considering to sever the charges.

Mr. Routzong testified that he did not believe the admission of Applicant's consent to search form and buccal swab obtain by the State constituted a statement and was therefore not a *Jackson v. Denno* issue. Mr. Routzong did not believe the Trial Court's initial instructions to the jury constituted burden shifting. Mr. Routzong also did not believe that the State's opening statement was prejudicial when the Prosecutor argued that the

dates on the indictments were true.

Mr. Routzong admitted that he had not subpoenaed Buffy [REDACTED] prior to his stipulation of reading her prior testimony in the record. Mr. Routzong claimed that he did not believe it was improper bolstering or objectionable for the State to have the victim's mother acknowledge her daughter's prior testimony and then confirm what the daughter said was true. Mr. Routzong also claimed that he had no strategic reason for objecting when the Prosecutor referenced alleged prior abuse. Mr. Routzong stated that he had no strategic reason for not moving to strike an improper hearsay statement and other sustained objections by Trial Counsel.

Mr. Routzong acknowledged that he had never heard of a defense attorney helping recreate the testimony of a state's witness. Mr. Routzong testified that, in hindsight, he would not have participated in the recreated testimony. Mr. Routzong admitted that he had no strategic reason and should have objected to Buff [REDACTED] prior testimony that went beyond the scope of time and place and constituted improper bolstering when the Prosecutor asked if the witness and police found out about Applicant allegedly molesting [REDACTED]

Mr. Routzong noted that he should have conducted a more thorough cross-examination based on the DSS investigation. Mr. Routzong again noted he had no strategic reason for failing to object to hearsay that went beyond the scope of time and place, constituted improperly bolstering, and hearsay within hearsay regarding the DSS Agent's testimony about receiving a call from her supervisor. Mr. Routzong also maintained that he thought he opened the door when the State's DNA expert went beyond the scope of cross-examination on redirect regarding the potential destruction of DNA evidence caused by