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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

Honorable Walton J. McLeod, IV, Circuit Court Judge

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ORLANDO M. COLEMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001887

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# APPENDIX

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**VOLUME II OF II**
**PAGES 501-699**

INDEX

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of General Sessions
Roger Couch, Circuit Court Judge

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Case Nos. 2014-GS-46-3857
2014-GS-46-3858

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State of South Carolina .....Respondent,

versus

Orlando Martinez Coleman .....Appellant.

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# FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**



**Rules**

## STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in denying Mr. Coleman's motion to quash the second indictment when the indictments were identical, merely stated the elements of the offense charged with no temporal limitation within the asserted timeline, and placed concerns for the difficulty the prosecution faced in obtaining more exact dates above preservation of the constitutional and statutory principles afforded for an accused in order to provide them sufficient notice and an opportunity to prepare a defense against the charged faced.

II. Whether the trial court abused its discretion in qualifying Ms. Laurie Caldwell as an expert in delayed disclosure when the vast amount of her knowledge, experience, training, and skill was in the field of forensic interviewing and her testimony was sufficiently reliable under Rule 702, SCRE, when the expert testimony before the jury improperly bolstered and vouched for the minor child's credibility in violation of Rule 608, SCRE, and when the minimal probative value of the expert testimony was substantially outweighed by its prejudicial effect.

## STATEMENT OF THE CASE

On December 11, 2014, Appellant Orlando Martinez Coleman was indicted by the York County Grand Jury for two counts of criminal sexual conduct with a minor, first degree, having occurred between August 24, 2010 and June 15, 2012. See Indictments, December 11, 2014. The case was set for trial and a jury was selected on January 12, 2015, and a pre-trial Jackson v. Denno hearing held on January 13, 2015, but was subsequently continued prior to the presentation of opening statements due to an illness of the public defender and was rescheduled in February of 2015, and was continued for weather-related court closures. R. p. 32 - 33. On February 26, 2015, the two indictments were amended with the only change made relating to the timeline of the alleged incidents: May 13, 2011 through June 15, 2012. See Amended Indictments, February 26, 2015.

Trial commenced in the Court of General Sessions of York County before the Honorable Roger Couch and jury on March 16 and continued through March18, 2015. R. p. 1. The State of South Carolina was represented by assistant solicitors Sharon O'Hayon and Erin Joyner. R. p. 1. Mr. Coleman was represented by assistant public defenders Ashley Anderson and Melissa Inzerillo. R. p. 1. At the conclusion of the trial, Mr. Coleman was found guilty on both indictments. R. p. 249. Judge Couch sentenced Mr. Coleman to twenty-five (25) years for each guilty verdict to run concurrently with credit for the five hundred twenty-seven (527) already served, ordered electronic monitoring, and ordered sex offender registry. R. p. 251-52.

This appeal follows.

## STATEMENT OF FACTS

Appellant, Orlando Martinez Coleman, and his mother resided at the Pace's River Apartments in York County, South Carolina, from approximately May 13, 2011, through November of 2011. R. p. 18. Sometime during the month of November, 2011, Mr. Coleman and his mother moved away from Pace's River Apartments. R. p. 18-19. On or about June of 2013, Mr. Coleman graduated from high school and subsequently completed the Youth Challenge put on by the South Carolina National Guard in hopes of transferring into the military. R. p. 250.

During the summer of 2013, the minor child reported inappropriate sexual touching done by Mr. Coleman and a criminal investigation began. R. p. 15. The minor child attended a forensic interview with Safe Passage, a child advocacy center located in Rock Hill, South Carolina, on or about September 24, 2013. R. p. 119. An officer made initial contact with Mr. Coleman on September 25, 2013, and interviewed him with regard to the allegations made by the minor child. R. p. 121. Thereafter, the officer sought a warrant for Mr. Coleman's arrest and executed the warrant on October 8, 2013. R. p. 122-23. Mr. Coleman remained in custody while awaiting and through trial, then was transferred to the Lee Correctional Institution upon sentencing by Judge Couch. R. p. 251-52.

During presentation of its motions in limine, the defense made a timely motion to quash the second indictment, Case No. 2014-GS-46-3858, on the grounds that this indictment which covered the second alleged offense "fail[ed] to provide sufficient notice to adequately and effectively defend against the allegations" therein. R. p. 3. Defense counsel argued that the timeline alleged upon both incidents changed drastically from the arrest warrant and incident report, through discovery and subsequent interviews with the minor

child, and upon both presentation of indictments true billed by the grand jury, such that Mr. Coleman was not provided sufficient notice and information to form a proper defense as to the second incident. R. p. 3-5. After hearing arguments from both parties and considering the case of State v. Baker, Judge Couch denied the defense's motion to quash but not before amending the indictments to indicate that one was assigned to the "staircase" incident and the second to the "tennis court" incident. R. p. 22-24.

Also during motions in limine, defense counsel moved to restrict any witness from offering testimony that would bolster or vouch for the credibility of the minor child. R. p. 9. Upon the state's proffer of expert testimony, the defense objected under Rule 702, 608, and 403, SCRE. R. p. 45-46. After hearing the parties' examination of the proffered witness and legal arguments, Judge Couch agreed to qualify Ms. Laurie Caldwell as an expert in delayed disclosure, but limited the scope of her testimony to two specific facts: "that late reporting does occur in a large number of majority of the cases and that children do have difficulty relating time and dates during interviews." R. p. 89-90. During Ms. Caldwell's direct examination, the State elicited testimony that went beyond the limited scope allowed by the judge and defense counsel made timely objections to her testimony, which were both sustained but not before the jury heard the expert's testimony. R. p. 163-66.

## ARGUMENT

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "We are bound by the trial court's factual findings unless they are clearly erroneous." Id. at 6, 545 S.E.2d at 829.

**I. The trial court erred when it denied the Defendant's motion to quash the second indictment despite clear evidence that the indictment was unconstitutionally overbroad and did not include any temporal limitation within the asserted timeline of the alleged offenses, which prejudiced Mr. Coleman by denying him sufficient notice of the charged offenses and time to effectively prepare a defense.**

Federal and South Carolina constitutional principles firmly establish than an individual accused of a criminal act has the right to know the charges they must defend against and that the accused must have sufficient notice of those charges in order to prepare a defense. U.S. Const. amend XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law..."); S.C. Const. art. I, § 11 ("[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed...."). South Carolina further institutes this federal constitutional principle in requiring that "no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...." S.C. Code Ann. § 17-19–10 (2015). An indictment is an essential instrument in providing notice of the alleged offense to an accused, thus an indictment must comport with federal and statutory provisions protecting an accused's right to receive notice of the charges faced. State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015).

In State v. Gentry, the South Carolina Supreme Court established that upon being notified of the nature and scope of the charges against them, an accused may then

challenge the "propriety of the accusation" by challenging the sufficiency of the indictment or the "truth of the accusation" through a judgment of his peers. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 499–500 (2005). If a sufficiency challenge against an indictment is raised in a timely manner, the trial court must give due consideration to the defendant's claim and analyze the sufficiency of the indictment to determine whether the charge was stated with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer and whether he may plead an acquittal. Baker, 411 S.C. at 589, 769 S.E.2d at 863 (referencing the standards as set forth in State v. Gentry). Should a timely challenge to the propriety of the accusation be made, a trial court shall view the facts and circumstances as they existed pre-trial with a practical eye to determine whether an accused was taken by surprise such that he was unable to present an appropriate defense. See State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007) ("In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances."); see also State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991) ("one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him."). Accordingly, the sufficiency of an indictment is examined objectively on a case-by-case basis, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (citing State v. Means, 367 S.C. at 383, 626 S.E.2d at 353-54), see also Wade at 306 S.C. at 83, 409 S.E.2d at 782 (denying defendant's request to abandon the case-by-case approach and instead adopt a

*per se* rule that a two-year timeframe in an indictment is unconstitutionally overbroad) (citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)).

In the present case, Mr. Coleman's defense counsel made a pre-trial motion prior to the jury being sworn to quash the second of the two indictments[1] Mr. Coleman faced, arguing that the second indictment and information contained therein regarding the second alleged incident failed to provide sufficient notice of the allegations to Mr. Coleman such that he was deprived of the opportunity to adequately and effectively assert a defense. R. p. 3. Specifically, defense counsel cited to the vacillating and shifting timeline that morphed from one to two indictments, which under *Baker* and its progeny, unfairly prejudiced Mr. Coleman's ability to identify the timeframe in question and prepare a proper defense. R. p. 3-6. The trial court ultimately denied the defense's motion to quash as a matter of law, but not before amending both indictments to add the phrases "staircase" and "tennis court" to help the jury distinguish each indictment from the other and to identify the specific instance being tried under each indictment. R. p. 10-24. Mr. Coleman was found guilty of the charge alleged in each indictment. R. p. 249.

**A. The indictments did not provide sufficient notice of the offenses Mr. Coleman faced as they only included the elements of the offense charged and an overbroad timeline without any specificity as to when the alleged acts occurred, which denied Mr. Coleman adequate notice and opportunity to prepare a complete defense.**

An indictment cannot simply state the elements of the crime charged – it must state with "sufficient certainty and particularity" the offense with which an accused is

[1] At the start of trial on March 16, 2015, the Defendant faced two separate indictments, Case Numbers 2014-GS-46-3857 and 2014-GS-46-3858. The language on the face of both indictments were identical, both alleging Criminal Sexual Conduct with a Minor, First Degree having occurred between May13, 2011, through June 15, 2012. Defense counsel's pretrial motion requested the trial court quash the second indictment, Case Number 2014-GS-46-3858, which covered the incident to have occurred second in time.

charged such that the accused may "know what he is called upon to answer and whether he may plead an acquittal." Baker, 411 S.C. at 590, 769 S.E.2d at 864. Indictments that state a timeline within which certain criminal acts allegedly occurred without any temporal limitation identified within it are unconstitutionally overbroad and do not afford an accused proper notice of the offense they must defend against. Id. at 590, 592, 769 S.E.2d at 864, 865. The concept of proper notice is intertwined with that of preparation, in that "the notice function of an indictment necessarily includes an assessment of whether an accused has the opportunity to prepare a defense." Id. at 590, 769 S.E.2d at 864 n.4.

Proper notice provides an accused the opportunity to research, prepare, and present a defense and, more specifically, provide opportunity for an accused to present a complete defense such as an alibi. Baker 411 S.C. at 591, 769 S.E.2d 864-65. In Baker, the defendant was originally presented with indictments that alleged criminal offenses occurred during the summers of 2002, 2003, and 2004, which the defendant had approximately one year to prepare to defend. Id. at 590, 769 S.E.2d at 864. Two weeks prior to trial, the indictments were amended to include a timeframe extending over a six-year period (1998 – 2004) with a lack of any temporal limitation specific to each allegation therein. Id. The Supreme Court found that this significantly expanded timeframe presented two weeks prior to trial prejudiced Baker by preventing him from effectively defending himself and establishing his whereabouts during the timeframe

presented in the indictments.[2] Id. at 591, 769 S.E.2d at 864. Although Baker did not submit an alibi defense, the Supreme Court believed it impossible for Baker to produce evidence to establish such a complete defense due to the expansive timeframe and lack of specificity within that timeframe.[3] Id., 769 S.E. 2d at 865. Thus, this defect in the indictments in that they were unconstitutionally overbroad and lacked any temporal limitation or specificity therein, prejudiced Baker and the trial court's decision to deny the defense's motion to quash and Baker's subsequent convictions were reversed. Id. at 592, 769 S.E. 2d at 865.

Prior to the Baker decision, our courts have held that where the language of the crime charged within an indictment is "substantially in the language of the common law or of the statute" of the offense such that the "nature of the offense charged may be easily understood" that an indictment would pass legal muster as a sufficient notice document. Baker, 411 S.C. at 593, 769 S.E.2d at 865-66, (Toal, C.J., dissenting) (citing S.C. Code Ann. Section 17-19-20 (2003) and State v. Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853). Prior decisions regarding sufficiency challenges also considered whether time was a material element of the offense and chose not to create a rule establishing that a lengthy time period alleged in an indictment was per se overbroad. Tumbleston, 376 S.C. at 98-99, 654 S.E.2d at 853-54; Wade, 306 S.C. at 85, 409 S.E.2d at 783. The dissent in Baker

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[2] The Supreme Court also noted that the defense had difficulty obtaining Baker's employment records for a portion of the timeframe covered by the indictments, which added to his inability to establish his whereabouts during that time. Baker, 411 S.C. at 591, 769 S.E.2d at 864.

[3] The Supreme Court noted that the only complete defense to the charges Baker faced would be an alibi, noting that with such a defense an accused "attempts to prove that he was at a place so distant that his participation in the crime was impossible" and that such a defense must produce evidence to cover the entire time the accused's presence was required to commit the offence. Baker, 411 S.C. at 591, 769 S.E.2d at 864-65 (citing State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980)).

cited to the opinions in Gentry, Tumbleston, and Wade to support their argument that the very language contained within the indictment, which closely resembled the statutory language of the offense charged, gave sufficient notice to the defendant such that the court knew what judgment to pronounce, the defendant knew what he was called to answer, and that the defendant knew the elements of the offense with which he was charged. Baker, 411 S.C. at 596, 769 S.E.2d at 867 (Toal, C.J., dissenting). Despite the dissent's concern that the majority conflated the concepts of notice and preparation in its opinion, the majority specifically held that merely stating the elements of the offense charged was not sufficient notice to an accused; there must be some temporal limitation provided within the indictment to provide certainty and particularity to the accused to provide proper notice and opportunity for preparation of a defense. Id. at 592, 769 S.E.2d 865, see also dissent at 595/867. Thus, Baker removed any requirement that time be an element of an offense when considering sufficiency and specificity within a stated timeline in an indictment and that an accused is prejudiced where a complete defense (alibi) would be otherwise available but for a lack of specificity within an overly broad timeline. Id.

The shifting and expansive timeline as it existed pre-trial in Mr. Coleman's case falls squarely within the concerns of Baker in that Mr. Coleman was denied proper notice and the opportunity to prepare a complete defense due to the defects within his indictments. The timeframe provided by and through the state from Mr. Coleman's arrest in October of 2013 through the morning of trial in March of 2015 fluctuated as follows: a single incident allegedly occurred on September 1, 2011;[4] a single incident allegedly

[4] See R. p. 14.

occurred during the summer of 2011;[5] two incidents allegedly occurred between August of 2010 – June of 2012;[6] two incidents allegedly occurred between May 2011 – June 2012;[7] and one "staircase" incident allegedly occurred first in time and second "tennis court" incident allegedly occurred second in time via trial court amendment made pre-trial on March 16, 2015.[8] For the fourteen-month period between Mr. Coleman's date of arrest in October of 2013, through the first indictments being true billed on December 11, 2014, Mr. Coleman prepared his defense based upon an incident allegedly occurring on September 1, 2011, or possibly the more generalized "summer" of 2011, then shifted that timeframe slightly to a period of May through November of 2011, encompassing the duration of Mr. Coleman's residency at the Pace's River Apartments. R. p. 4. It was not until the presentation of the indictments true billed on December 11, 2014, one month prior to the original trial date, that the timeframe significantly broadened to include a timeframe of August 24, 2010 – June 15, 2012. R. p. 21; see also Indictments true billed December 11, 2014. After the January 2015 trial was continued,[9] the indictments were amended and true billed on February 26, 2015, with a May 13, 2011, through June 15, 2012 timeframe. See Indictments true billed February 26, 2015. Trial was then held beginning March 16, 2015. R. p. 1. Thus, Mr. Coleman faced a drastically expanded period of time within which he was to prepare his defense with insufficient notice to do

[5] See R. p. 14.
[6] See Indictments (2) true billed December 11, 2014, approximately one month prior to the start of trial.
[7] See Indictments (2) true billed on February 26, 2015, two weeks prior to the start of trial.
[8] See Trial Court's amendment to indictments. R. p. 23-24.
[9] A continuance of January 2015 trial was granted due to illness of the public defender then postponed again in February due to weather-related court closures. R. p. 17-18.

so prior to trial, placing this matter squarely within the concerns addressed and ruled upon in Baker.

The drastic change in timeline asserted in the indictments Mr. Coleman faced in addition to the lack of sufficient notice and information to support any specificity within that timeframe effectively prevented Mr. Coleman from investigating, researching, or preparing a proper defense. Throughout the fourteen-month period Mr. Coleman prepared his defense, he did so with the understanding that the alleged incidents occurred sometime between May 13, 2011, and November of 2011, while he and his mother resided at the same apartment complex as the minor child. R. p. 13; 18. During that investigation period, the information provided through discovery, assertions made by the state in its communications with defense counsel,[10] and statements made by the minor child during forensic interviews[11] and to law enforcement, all indicated that both alleged incidents occurred at some point during 2011, and most likely between May through November of that year. R. p. 14-19. The information that continued to trickle in and the affirmative statements given by the state's attorney effectively established these 2011 guideposts for defense counsel for the entirety of their investigation. R. p. 16-17. It was not until February of 2015 when the state notified defense counsel that it had changed its theory as to the timeline in this matter and intended to proceed at trial with the theory that

[10] Defense counsel noted that in September of 2014, almost one year after Mr. Coleman's arrest, the state did disclose the minor child informed the state that the second incident may have occurred sometime between January to June of 2012, but the state later informed defense counsel in January of 2015 that upon looking further into the minor child's statements, it believed the minor child was actually relating the incidents to extraneous events all occurring in 2011. R. p. 16.

[11] To include a copy of the forensic interview taken on September 24, 2013, indicating two different incidents but with no distinction or reference as to time in any manner. R. p. 15.

one incident occurred in 2011 and the second in 2012.[12] R. p. 18. Thus, the state's belated presentation of its theory that the second incident occurred sometime in 2012 provided to Mr. Coleman a mere two weeks prior to trial, severely undercut Mr. Coleman's ability to fully investigate, research, and prepare an effective defense for that indictment.

Upon its evaluation and ruling in light of the defense's motion to quash the second indictment, the trial court failed to give due consideration to and application of the principles established in Baker, that *but for* the lack of temporal limitation specified within the timeline on the indictments, and belated notice given to Mr. Coleman two weeks prior to trial, Mr. Coleman would have been able to investigate, research, and prepare a complete defense (alibi). In attempting to comply with the Baker decision, the trial court examined the indictments under the Gentry standard, using a practical eye looking at the circumstances as they existed pre-trial to determine whether the indictments were sufficient to give notice to the court as to what judgment to pronounce, notice to the defendant to know what he was called upon to answer, and whether it apprised the defendant of the elements of the offense charged. R. p. 11. However, instead of correctly applying the Baker principles and concerns noted by the majority, the trial court noted the concerns of the dissent in Baker and imposed its own sufficiency standard finding the indictments were sufficient, reasoning that the state in Mr. Coleman's case had made a "good faith effort to narrow the timeframe" given the nature of the particular investigation. R. p. 23. The trial court then mentioned the necessity for it to determine whether Mr. Coleman suffered any prejudice based upon the nature of the indictments,

[12] Although these communications between the state and defense are not part of the indictment or produced to the court and incorporated into the trial record, the state informed the court that this rendition of the circumstances as stated by the defense was "pretty much exactly as defense has stated." R. p. 20.

but failed to enumerate any internal evaluation as to that matter, and instead repeated his belief that the state put forth a good faith effort to narrow the scope of the allegations and denied the defense's motion. R. p. 23. The Baker court did not consider nor hinge its ruling on any "good faith effort" analysis, thus this proffered reasoning to support the trial court's denial of the defense's motion was not supported in law. Furthermore, the trial court made no indication of any weighing as to the prejudice Mr. Coleman suffered due to his lack of notice to prepare a defense as to the second indictment; thus it is unclear as to whether the trial court weighed anything in the balance other than the state's good faith effort to attempt to narrow a timeline. As the trial court failed to comply with the principles established in Baker, its decision to deny the defense's motion to quash the second indictment should be reversed.

The language of the indictments themselves also did not provide any specificity as to when the alleged acts were to have occurred to provide Mr. Coleman specific notice of the charges he was to defend against. The trial court, when reviewing the indictments as they existed pre-trial in light of the Baker decision, noted that both indictments read exactly the same and did not include any language to differentiate which specific event or allegations were being made within each individual indictment.[13] R. p. 10. The trial court noted that it was "concerned with the fact that the two indictments, while the attorneys may be aware of what they refer to, basically are the same indictment" and that it found the indictments to be "confusing as they [then] exist[ed]." R. p. 23. To combat these concerns, arguably to *give proper notice and clarity* to the jury as to the charges Mr.

[13] Both indictments closely resembled the statutory language of S.C. Code Ann. Section 16-3-655 and did not differentiate as to what specific incident was being alleged within the general May 2011 through June 15, 2012 timeframe. R. p. 10-11.

Coleman faced and from which, they as the trier of fact, were to determine Mr. Coleman's guilt or innocence, the court amended the indictments to identify the first indictment as referring to the "staircase" incident and the second as the "tennis court" incident with the "staircase" incident occurring first and the "tennis court" incident occurring second. R. p. 23-24. Although the trial court went on to reason that this slight amendment to the indictments did not change the elements of the offense and was done in an effort to clarify the separate charges for the jury, these amendments by the court drastically changed the characterization of the offenses, with nothing being done to clarify or narrow the expansive timeline, within mere minutes of the jury being sworn and the matter proceeding to trial. R. p. 24. This clarification to the jury effectively pinpointed a specific location, without any clarification as to the timeline of the alleged incidents within a severely truncated timeframe for the defendant to research and prepare a complete defense afforded under Baker.

The indictments as they stood at and during Mr. Coleman's trial were insufficient to give proper notice under a Baker analysis and should have been quashed prior to trial. The shifting timeline effectively restricted the defense's investigation of the matter strictly to a 2011 timeframe for nearly fourteen months, then greatly expanded the timeframe one month prior to trial, and finally morphed into its final form within weeks prior to the March 2015 trial. This vacillating timeline and lack of specificity within that altered timeframe so close in time to trial effectively prevented Mr. Coleman from any real chance to investigate, research, and prepare a proper defense to the charges he faced. Furthermore, the very language of the indictments in all forms did not offer any distinction between the incidents or allegations to which they referred such that the trial

court had to alter the indictments the morning of trial. Therefore, as the trial court failed to correctly apply the standard established in Baker and incorrectly found the state's indictment sufficient given the circumstances as they exited pre-trial, this court should reverse the trial court's decision to deny the defense's motion to quash the second indictment and reverse Mr. Coleman's conviction as to that indictment.

**B. The defects within the indictments, which effectively denied Mr. Coleman adequate information and notice to prepare a defense, and the trial court's misplaced protection of the difficulty it would impose upon the prosecution to require more temporal limitations within its asserted timeline unfairly prejudiced Mr. Coleman and placed him in a position in which he was inadequately prepared to combat the charges against him.**

Constitutional and statutory provisions should not give way to an inability of the prosecution to adequately give notice, and specificity within that notice, to an accused in child sexual abuse cases. Baker, 411 S.C. at 592, 769 S.E.2d at 865. Where difficulties such as a child's inability to specify a date or give consistent statements after initiation of a criminal action appear to impair the state's ability to provide a set timeframe with specificity within that timeframe, those impediments cannot be used as an excuse to allow an insufficient indictment to stand against an accused. Id. Regardless of this concern for the difficulty of the state to narrow a timeline in an indictment presented in cases before it,[14] the Supreme Court in Baker specifically noted that in cases where an indictment is unconstitutionally overbroad due to a lack of specificity within the timeframe alleged, the indictment will not pass legal muster. Id. In Baker, the majority

[14] But see Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse."); Wade, 306 S.C. at 84, 409 S.E.2d at 783 (finding that based upon the testimony of the eight-year-old victim, the indictment was "narrowed as much as possible under the circumstances.").

was well aware of the concerns cited by the dissent regarding the "difficulty the prosecution faces in identifying exact dates in child sexual abuse cases," yet firmly established that "the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." Baker, 411 S.C. at 592, 769 S.E.2d at 865; but see Baker at 596, 867 dissent (stating that this ruling would hinder the State's ability to prosecute these kinds of cases and essentially created a requirement not otherwise supported by Gentry and its progeny). Notwithstanding these concerns potentially posed to the prosecution in attempting to exact dates from a minor child, the Baker decision made clear that the focus of the analysis in a challenge to the sufficiency of an indictment should be upon the sufficiency of notice and opportunity to prepare an effective defense presented to an accused. Id. at 591-92, 769 S.E.2d at 865. Where an indictment is unconstitutionally overbroad and does not provide temporal limitations within the asserted timeline, an accused is prejudiced and such defects in an indictment render it insufficient. Id.

Through the shifting timeline asserted by the state throughout its investigation of Mr. Coleman's case, the morphing of one charge and incident to two, and the lack of notice that the second incident occurred within the January to June 2012 timeframe until mere weeks before trial, the defense was essentially handicapped in its ability to prepare a proper defense and, more specifically, denied Mr. Coleman the opportunity to research, prepare, and present an alibi defense for the second indicted incident. Upon being notified by the state that it believed the second incident occurred sometime in 2012 and that was the theory the state intended to proceed with at trial, the defense was thrown into a different position than it had been in the preceding approximately fifteen months since

Mr. Coleman's arrest. R. p. 18-19. This 2012 timeframe pinpointed a period of time Mr. Coleman and his mother no longer resided at the same apartment complex as the minor child and presented a liturgy of factors that, with proper notice and research, could have presented an alibi for Mr. Coleman. R. p. 19. In addition to no longer living at the same apartment complex as the minor child in 2012, Mr. Coleman did not have a driver's license to transport himself back to the scene of the alleged second incident, was currently attending high school during the Spring 2012 semester several miles from the minor child's apartment complex, and Mr. Coleman's mother worked and thus had periods of time where she would have been unable to transport Mr. Coleman. R. p. 19.

Each of these factors presented in argument by defense counsel indicated several scenarios that, upon proper notice and the chance to research, may have allowed the defense to determine whether Mr. Coleman was at or near the property where the second incident was alleged to have occurred. R. p. 19. It was this drastic change in the timeframe in which the second incident allegedly took place within a few weeks prior to trial after the defense had investigated and prepared under auspice from the state that both incidents occurred in 2011, that formed the basis of the defense's motion to quash and evidences the prejudice Mr. Coleman suffered at the hand of the state's lack of specificity within their indictments. R. p. 19. Without being afforded the proper notice required under Baker where an expansive timeline, lack of specificity within that timeline, and lack of notice to the accused, Mr. Coleman was effectively prevented from having an opportunity to prepare a proper defense or alibi and was unduly prejudiced.

Therefore, the trial court failed to properly apply the Baker principles and recognize that the indictments did not provide sufficient notice to Mr. Coleman of the

charges he was to defend against, specifically with regard to the lack of specificity within the alleged timeframe. Furthermore, this insufficiency unduly and unfairly prejudiced Mr. Coleman from any ability to prepare a complete defense to his charges. Due to these failures and resulting prejudice, the trial court's denial of the defenses motion to quash the second indictment should be reversed.

**II. The trial court abused its discretion when it qualified Laurie Caldwell as an expert witness in delayed disclosure because she did not have the requisite qualifications to testify to that field of study, the expert qualification was merely a venire used by the state to allow a trained forensic interviewer to testify as an expert and bolster the credibility of the minor child's testimony, and such qualification and allowance of expert testimony unfairly prejudiced Mr. Coleman's case.**

It is well within the discretion of the trial court whether to qualify an individual as an expert and its decision to so qualify as well as to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. State v. Douglas, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006). Notwithstanding this preserved degree of deference to the trial court, labeling an individual an expert before a jury is a task to be "jealousy guarded by the court and never loosely bandied about." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). Beyond qualifying an individual as an expert, the trial court also has an affirmative gatekeeping duty with regard to all expert testimony subject matter, including non-scientific and experienced-based testimony. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In the present case, the state made a proffer of evidence to tender Ms. Laurie

Caldwell as an expert in delayed disclosure. R. p. 45-91. The defense objected to Ms. Caldwell's qualifications under Rule 702, SCRE, arguing that, if qualified, her testimony would amount to improper bolstering and vouching for the credibility of the minor child's testimony under Rule 608, SCRE, and that the probative value of the expert testimony, if any, would be substantially outweighed by unfair prejudice under Rule 403, SCRE. R. p. 45-46. After both parties were allowed to examine Ms. Caldwell's qualifications and testimony before the trial court, and upon entertaining extensive legal arguments from both parties, the trial court reluctantly agreed[15] to qualify Ms. Laurie Caldwell an expert in "delayed disclosure" but limited her range of testimony to specific topics within the field of delayed disclosure. R. p. 89-90. Despite the trial court's clear limitation for Ms. Caldwell's expert testimony, the state elicited testimony from Ms. Caldwell in the presence of the jury that not only violated the trial court's ruling, but drew heavily upon her extensive experience, training and skill in the field of forensic interviews while under the label of being an "expert" witness, causing substantial prejudice to Mr. Coleman. R. p. 157-69.

**A. The trial court abused its discretion when it qualified Caldwell as an expert in delayed disclosure because the subject matter was not of such specialized or technical knowledge that expert testimony was necessary, Caldwell did not have the requisite level of experience, knowledge, or skill to testify as an expert with regard to delayed disclosure, and the substance of Caldwell's testimony did not show sufficient indicia of reliability based upon Caldwell's training, knowledge, and experience.**

Where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the

[15] The trial court noted its belief that qualifying Ms. Caldwell as an expert at all was a "dangerous way to go" but that the state wanted an expert. R. p. 87-88.

form of an opinion or otherwise." Rule 702, SCRE. Expert testimony is permitted where the subject matter before the trier of fact is beyond the realm of ordinary lay knowledge and, once qualified as an expert, the witness is permitted to testify regarding information not within their own personal knowledge and may use information made available to them to present their expert opinion. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (comparing to the testimony of a lay witness who may only testify to matters within their own personal knowledge that does not require any special knowledge, skill, experience, or training). Prior to admitting any expert testimony, a court must also determine that the subject matter is beyond the ordinary knowledge of the jury, that the expert has acquired the requisite knowledge and skill to be qualified as an expert in the particular subject matter, and that the substance of the expert's testimony is reliable. State v. Brown, 411 S.C. 332, 340, 768 S.E.2d 246, 250 (Ct. App. 2015) (citing Watson, 389 S.C. at 446, 699 S.E.2d at 175).

Once the subject matter is deemed to be beyond the ordinary knowledge of the jury, a trial court must evaluate whether the proffered expert, although not necessarily a specialist in the particular branch of the field, maintains the requisite knowledge and skill to qualify as an expert in the particular subject matter. Watson, 389 S.C. at 446, 699 S.E.2d at 175. While our courts have held that "[t]he general characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury," particularly when the victim is a child, the individual providing such testimony to the trier of fact must also be *qualified in the field* or subject matter being provided. Brown, 411 S.C. at 342, 768 S.E.2d at 251 n.1 (noting that the appellant had not challenged the qualifications of the witness as an expert in delayed disclosure thus

this second prong of the Watson test was not addressed, but upholding the testimony of one expert as relevant and necessary because the juror's qualifications indicated they had little to no knowledge of sexual abuse and that the appellant had extensively cross-examined the various victims specifically regarding delayed disclosure.); see also State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004). Where an expert's testimony involves a non-scientific subject matter, the trial court must make a threshold determination to assess the qualifications of the individual as well as the reliability of the subject matter, which are both analyzed under the analytical framework established in State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009); see also State v. Chavis, 412 S.C. 101, 106-07, 771 S.E.2d 336, 338-39 (2015). However, where an individual merely testifies as to their personal observations and experiences, it may be considered unnecessary for that individual to be qualified as an expert. See State v. Douglas, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608 (2009) (finding that it was unnecessary for the trial court to qualify an individual as an expert in the field of forensic interviewing as the witness merely testified to her personal observations, experiences, and interview with the minor child).

Once an individual is qualified as an expert in a particular subject matter, the trial court must then make a threshold determination as to the reliability of the expert's testimony under Rule 702, SCRE. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009) (specifying that "the familiar tenant of evidence law that a continuing challenge to evidence goes to weight, not admissibility has never been intended to supplant the gatekeeping role of the trial court") (internal citations omitted). It is crucial that the substance of an expert's testimony be reliable due to the weight a jury tends to give the

testimony of an expert by the very nature of their expert designation. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (analyzing the reliability of expert testimony and noting that the bolstering present in their case "especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury."). "Evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) (finding that although the expert was sufficiently trained in the RATAC protocol and used that during her interviews, no other evidence was presented to support that the expert's conclusions or impressions were accurate, peer reviewed, or had any identification of her error rate, thus determining the reliability requirement of Rule 702, SCRE was not met). Thus, any expert testimony that does not show the requisite indicia of reliability should not be admitted.

Although behavioral evidence may be admissible and an appropriate subject matter for expert testimony under Brown, such expert testimony must also be relevant, beyond the ordinary knowledge of the jury, and so specialized in nature that *expert* testimony is necessary. In the present case, the state did not make a sufficient offer of proof that the sworn jury had any particular need for expert testimony in the field of delayed disclosure,[16] nor any showing that information drawn from any witness or the defense during cross examination regarding the minor child's delayed disclosure of the incidents such that expert testimony on delayed disclosure was necessary under Rule 702,

[16] The state did argue that it felt "the jury may feel like this is not common, may not know how common delayed disclosure actually is" but made no proffer specific to this sworn jury that it would, in fact, assist them in *understanding* what delayed disclosure was as a subject matter. R. p. 77-78.

SCRE. R. p. 45-91. Thus the subject matter of delayed disclosure, particularly in the manner the state intended to present expert testimony to clarify for the trier of fact, did not qualify under Rule 702, SCRE and should not have passed the first threshold under Watson.

Even if expert testimony to explain delayed disclosure had been necessary for the trier of fact to understand the evidence before it, Ms. Caldwell failed to prove sufficiently *qualified* by her knowledge, skill, experience, training, or education under Rule 702, SCRE to testify as an expert in the designated field of delayed disclosure. During the state's initial examination during the proffer for Ms. Caldwell, it drew on her vast educational and training background in child sexual and physical abuse investigations, with extensive training in the field of forensic interviewing including her years of experience teaching "all over South Carolina in the field of child forensic interviewing," as well as in North Carolina, Virginia, Nevada, and Florida. R. p. 46-50. Although Ms. Caldwell disclosed she had previously been qualified as an expert in the field of delayed disclosure, defense counsel quickly had her admit that a large majority of her experience was predominately in forensic interviewing, that she had not received any specialized degree or subspecialty within her training in the area of delayed disclosure, and that she had not done any research nor had any hypothesis tested in the field of delayed disclosure, and instead relied on the research of others for her basis of knowledge about the study of delayed disclosure. R. p. 51, 53-54, 59. If anything, Ms. Caldwell revealed her exposure to and knowledge of the subject of delayed disclosure was enveloped within her training and materials she read in her role as a forensic interviewer, but could not provide any connection between her extensive knowledge and training as a forensic

interviewer and that of any similar level of skill, knowledge, or training specific to delayed disclosure. R. p. 55, 56-57.

As similarly established in Douglas, it was unnecessary for Ms. Caldwell to be qualified as an expert not only because she lacked the requisite knowledge, skill, education, and training to be so qualified, but Ms. Caldwell merely testified to her *personal observations and experiences* that children gave delayed reports of abuse in the course of her employment as a forensic interviewer. R. p. 60. The expert testimony proffered by Ms. Caldwell revealed that she could only testify to articles she had read and her personal observations of delayed disclosure as it presented during her forensic interviews, but there were no other indicators of the reliability of her expert testimony sufficient to meet the White threshold of reliability.[17] R. p. 63. Like the expert in Chavis, Ms. Caldwell may have been extensively trained in the field of forensic interviews and the RATAC protocol, which may have included elements of exposure to the field of delayed disclosure, but no other evidence was presented to show that any of Ms. Caldwell's conclusions for either delayed disclosure or as a forensic interviewer were supported or accurate, peer reviewed, or that she had any way to determine her error rate. R. p. 52-54, 59. Although the trial court ultimately qualified Ms. Caldwell as an expert in

[17] The trial court noted its concerted effort to lead the state away from requesting Ms. Caldwell be qualified as an expert: "I was trying to lead the state into just saying we won't even offer her as an expert, we'll just offer her as somebody that can testify from her experience as to what she's found in her interviews. They didn't bite on the bait, so I can't go there. They want her to be an expert." R. p. 87. The trial court went further to state its belief that the state's request was "probably a dangerous way to go, but that's okay." R. p. 88.

delayed disclosure, it specifically limited her testimony to two specific facts that fell well within the range of her personal experience and observation.[18] R. p. 90.

Therefore, the subject matter of delayed disclosure was not one that required expert testimony to assist the trier of fact, Ms. Caldwell was not qualified to testify as an expert in the field of delayed disclosure, and Ms. Caldwell's proffered expert testimony did not meet the threshold of reliability under White and is progeny. As such, the trial court abused its discretion when it qualified Ms. Caldwell as an expert in delayed disclosure and allowed her to testify before the jury.

**B. The trial court further abused its discretion when it qualified Caldwell as an expert in delayed disclosure because it effectively allowed the state to admit expert testimony in the field of forensic interviewing, allowing the expert to bolster the credibility of the minor child's testimony and statements by vouching for a class of victims the minor child fell within, in violation of the holding in Kromah and Rule 608, SCRE.**

The Supreme Court made clear in Kromah that qualifying an individual as an expert in forensic interviewing is unnecessary and improper because although the nature of the work of a forensic interviewer may be useful for law enforcement investigations, it is not appropriate for a courtroom nor as a subject matter that would fall within the scope of Rule 702, SCRE. Kromah, 401 S.C. at 357, 737 S.E.2d at 499 nn.4-5 (2013) (reiterating the holding in State v. Douglas, wherein it was found to be unnecessary for a qualification of expertise in forensic interviewing given the lack of specialized knowledge required for such a qualification and going on to establish that the court could not envision any future instance in which such a qualification would ever be necessary).

[18] Ms. Caldwell's testimony was limited to: one, that "late reporting does occur in a large number of majority of the cases" and two, "that children do have difficulty relating time and dates during interviews." R. p. 90.

The very nature of the work of a forensic interviewer is to determine the veracity of claims made by potential victims, acting essentially as a "human truth-detector," which errs dangerously close to invading the province of the jury in vouching or bolstering the credibility of a victim's statements and allegations. Id.; see also State v. Portillo, 408 S.C. at 71, 757 S.E.2d at 724 (Ct. App. 2014) (stating "[i]t is undeniable that the primary purpose for calling a forensic interviewer as a witness is to lend credibility to the victim's allegations."). The non-scientific method of interviewing used by forensic interviewers, known as the RATAC[19] method, assists the interviewer in determining the truth of the subject's statements and although this method may be useful in the initial law enforcement investigative process, it is not appropriate for presentation in the courtroom where such methods may "run afoul of evidentiary rules and a defendant's constitutional rights." Id. With this level of likelihood that a forensic interviewer, if qualified as an expert, would tow the line of improper bolstering and vouching merely by testifying as to the nature and quality of their work and experiences therein, coupled with the incredible weight that a jury naturally gives to an expert by virtue of their expert designation, the likelihood of prejudice to an accused when these two elements coexist before a jury is high.

Although an expert may testify to facts not within their personal knowledge and render an opinion based upon information provided to them, they may not render an opinion or testify as to the reliability or credibility of a child victim in a sexual abuse matter. See Kromah, 401 S.C. at 358-59, 737 S.E.2d at 500; see also State v. Portillo, 408

[19] RATAC: Rapport, Anatomy, Touch, Abuse Scenario, and Closure – a method used nationwide in forensic interviews of children when physical and/or sexual abuse is alleged. Kromah, 410 S.C. at 357, 737 S.E.2d at 499 (citing State v. Douglas, 380 S.C. 499, 500, 671 S.E.2d 606, 607 (2009)).

S.C. 66, 71, 757 S.E.2d721, 724 (Ct. App. 2014). Courts have held that where experts, particularly those qualified in the field of forensic interviewing, have indicated that they believed the victims' allegations of abuse, such testimony is impermissible and improperly bolsters the child victim's testimony. See Kromah, 401 S.C. at 356 and 358, 737 S.E.2d at 498-99 (2013) (finding an expert stating a "compelling finding" of physical abuse was problematic)[20] (citations omitted); see also State v. McKerley, 396 S.C. at 465, 725 S.E.2d at 142 (noting the comments on the veracity of a victim's statements regarding their alleged sexual assault amounted to impermissible bolstering). When the comments or opinions given by expert witnesses rise to the level of bolstering, it has been found that the expert witness testimony admitted at trial was improper. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309-10 (Ct. App. 2000). Even where an expert's testimony does not directly conflict with the guidelines established in Kromah, if there is no other way to interpret the testimony other than that it amounts to vouching for the credibility of the victim's statements or behavior, the expert's testimony amounts to improper bolstering. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful") see also Jennings, 394 S.C. at 483,

[20] The Supreme Court in Kromah established guidelines to instruct a forensic interviewer regarding what testimony should avoid during trial: informing the jury that the child was instructed to be truthful, rendering a direct opinion affirming the child's veracity or tendency to tell the truth, any statement even indirect that vouches for a child's credibility, any statement indicating that the forensic interviewer believes the child's allegations, or any opinion indicating the child's behavior was further evidence of the child's veracity. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

716 S.E.2d at 96 (Kittredge, J., concurring) (referring to the forensic interviewer's statement in the reports as "patently inadmissible evidence").

It is patently clear that the vast majority of Ms. Caldwell's experience, knowledge, training, and skill were grounded in the field of forensic interviewing of children who have reported sexual or physical abuse. R. p. 45-91. Ms. Caldwell had traveled across the United States to train others in the field of child forensic interviewing, had received extensive training in the subject herself, had twenty-eight (28) years of experience in child sexual and physical abuse investigations, conducted over two thousand (2,000) forensic interviews, and was trained in the RATAC method. R. p. 46-49, 51, 53-54, 58. The state themselves even mistakenly referred to Ms. Caldwell as "the forensic interviewer" when attempting to exhibit her qualifications in the field of delayed disclosure. R. p. 58. When Ms. Caldwell was called to testify before the jury, she testified to her extensive knowledge, experience, and training in forensic interviewing, while only briefly mentioning that she had previously been qualified as an expert in delayed disclosure at the point she was qualified as an expert in delayed disclosure. R. p. 158-61. Although Ms. Caldwell was named an expert in "delayed disclosure," the substance of her testimony providing the foundation of her expertise heard by the jury was that of a forensic interviewer.

During her testimony, Ms. Caldwell briefly testified to the definition of delayed disclosure before her testimony drew an objection from the defense that her testimony went beyond the limited scope set by the trial court. R. p. 163-66. The trial court sustained the objection, but not before the jury heard Ms. Caldwell testify that "[i]t is more common for a six-year-old, and all other ages of children, to delay in reporting their

sexual abuse." R. p. 164. This testimony went beyond the permitted generalized scope of delayed reporting within Ms. Caldwell's experience and offered an expert opinion regarding a specific fact in the present case: that six year olds commonly issue delayed reports. R. p. 164. This validation that delayed reporting is common in six-year-old children made by Ms. Caldwell who was designated an expert before the jury, vouched for the credibility of the testimony and statements of the minor child who was herself six years old when the alleged incidents occurred. The trial court did find that the state improperly asked Ms. Caldwell about a specific age "that just happens to be the age of the complaining party or the victim in this case" which fell outside his ruling regarding the limited scope of Ms. Caldwell's testimony. R. p. 165. Furthermore, immediately after this improper testimony was presented to the jury and the defense's objection sustained, the state elicited additional testimony about Ms. Caldwell's extensive experience as a forensic interviewer, had her define what a forensic interview was, describe the purpose of forensic interviews, and identify the typical age range of children she had interviewed during her forensic interviews. R. p. 167.

The substance of Ms. Caldwell's testimony with regard to forensic interviews and the depth of her knowledge, experience, training, and skill as a forensic interviewer makes clear that the state used the expert designation of "delayed disclosure" as a venire to disguise their expert forensic interviewer. As our Supreme Court in Kromah has unequivocally held that no expert designation for forensic interviewers is necessary due to the nature of the work of a forensic interviewer or proper due to the weight a jury tends to give to expert witnesses, the state's request and the trial court's decision to qualify Ms.

Caldwell as an expert was improper under Rules 608 and 702, SCRE, and should be reversed.

**C. The highly prejudicial nature of Caldwell's testimony evidencing her vast experience as a forensic interviewer, her label as an "expert" regardless of the designated subject matter of expertise, and the ability of the jury to link her statements with those made by the minor child which amounted to improper bolstering substantially outweighs the dearth of probative value provided by Caldwell's testimony.**

Evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Our courts have made clear that "expert testimony and behavioral evidence are admissible where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993); see also State v. Weaverling, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) (confirming this principle as stated in Schumpert and going on to explain that the probative value of such relevant testimony so greatly assists the trier of fact in explaining typical patterns of adolescent victims of sexual assault and in understanding their behavior and often strange demeanor that a trier of fact might otherwise lack insight and knowledge to understand that any prejudicial effect is outweighed). Furthermore, there must be a "reasonable probability the jury's verdict was influenced by the challenged evidence" to show prejudice in evidence admitted by a court. Brown, 411 S.C. at 339, 768 S.E.2d at 249 (referencing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

There is a danger of unfair prejudice when an expert is qualified in any subject matter because it is inescapable that a jury is more likely to give more weight to an expert's testimony by virtue of their expert designation alone. Kromah, 401 S.C. at 357, 737 S.E.2d at 499 (noting that although no more weight should be given to an expert than

any other witness, it is clear jurors have a tendency to attach more significance to the testimony of experts, thus the discretion of a trial court in labeling such an expert should be jealously guarded) (citations omitted). The weight of this unfair prejudice naturally attached to expert testimony is enhanced when such qualification of an expert is unnecessary, especially when that designation is in the field of forensic interviewing. See Kromah, 401 S.C. at 357, 737 S.E.2d at 499 n.5 (stating "we could envision no circumstance where their [forensic interviewer's] qualification as an expert at trial would be appropriate" as, by the very nature of the work of a forensic interviewer they seek to determine the veracity of the victim's allegations and statements).

In light of Kromah's unequivocal determination that there is likely never a circumstance in which an expert qualification for forensic interviewers would be necessary and the problematic nature of their work in light of improper bolstering concerns, it would be nearly impossible to find a scenario in which the prejudicial effect of the admission of such an expert qualification or testimony from and expert would not vastly outweigh its probative value, if any. Although Ms. Caldwell was not designated an expert in the field of forensic interviewing, her liturgy of experience presented before the jury all pointed to her experience and expertise as a forensic interviewer. R. p. 158-68. Any attempt the state made to qualify Ms. Caldwell in any other field was an ineffective attempt to qualify their expert as an expert with her forensic interviewing qualifications, made in an attempt to circumvent the unequivocal directive in Kromah prohibiting such an expert designation. Furthermore, the entirety of Caldwell's testimony was her informing the jury of her credentials and experience as a forensic interviewer with

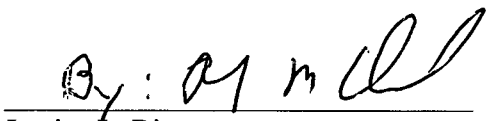
minimal testimony regarding delayed disclosure, rendering any probative value of her testimony substantially outweighed by its prejudicial effect under Rule 403, SCRE.

Therefore, the trial court abused its discretion when it qualified Ms. Caldwell as an expert in delayed disclosure and allowed her to testify before the jury. Her testimony improperly bolstered and vouched for the credibility of the child's testimony and statements as it confirmed tendencies of delayed reporting specifically in a class of children the same age of the minor child in this case. This testimony correlating the child's age with the credibility of the behavioral traits she exhibited, in addition to the continued objectionable testimony that went beyond the scope the trial court explicitly set for this expert testimony during the proffer of evidence. As her testimony provided extensive information regarding her knowledge, skill, training, and experience as a forensic interviewer, an remote probative value of Ms. Caldwell's testimony was substantially outweighed by the prejudicial effect to Mr. Coleman. Thus, this court should find the trial court abused its discretion and reverse Mr. Coleman's convictions.

## CONCLUSION

By reason of the foregoing arguments, Mr. Coleman's convictions should be reversed, and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

This 29th day of November, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from York County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2015-000611

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THE STATE,

Respondent,

vs.

ORLANDO MARTINEZ COLEMAN,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**South Carolina Cases**:

**Other Authorities**:

## STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Appellant's motion to quash the second of two first-degree criminal sexual conduct with a minor indictments because the indictments issued in Appellant's case were sufficient to fully provide him with the required notice in regard to the charges he was facing and the thirteen-month time frame alleged in the indictments was not unconstitutionally overbroad in light of the fact it could not be narrowed further based on the young age of the victim coupled with her inability to remember the precise dates and times of the sexual assaults and did not prevent Appellant from combating the charges against him.

II.

The trial judge committed no error in qualifying a witness as an expert and permitting her to testify in regard to the fact juvenile victims of sexual abuse frequently delay disclosing such abuse because the witness was personally qualified to testify on that subject matter based on her education, knowledge, training, and experience and because her testimony was beyond the common knowledge of the typical juror, could have assisted the jury in understanding the evidence presented during trial, met a threshold level of reliability, did not improperly vouch for or bolster the victim's testimony, and was not unduly prejudicial to Appellant.

## STATEMENT OF THE CASE

In October of 2013, Appellant Orlando Martinez Coleman was arrested following an investigation into allegations he sexually abused a minor child when she was six or seven years old. In December of 2014, the York County Grand Jury indicted Appellant for two counts of first-degree criminal sexual conduct with a minor. In February of 2015, the York County Grand Jury issued amended indictments again charging Appellant with two counts of first-degree criminal sexual conduct with a minor. On March 16, 2015, a jury trial was commenced in the York County Court of General Sessions with the Honorable Roger L. Couch, circuit court judge, presiding. At the conclusion of trial two days later, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a concurrent term of imprisonment of twenty-five years for each count of first-degree criminal sexual conduct with a minor. Appellant then timely filed a notice of appeal.

## STATEMENT OF FACTS

In September of 2013, Delissa Patterson ("Mother"), the mother of an eight-year-old girl ("Victim"), contacted law enforcement officers with the Rock Hill Police Department and alerted them Victim had disclosed she was sexually assaulted by Appellant Orlando Martinez Coleman at Paces River Apartments, an apartment complex located in Rock Hill, South Carolina, when Victim and her family had lived there a few years earlier. (R. pp. 104-105; p. 109; pp. 117-120; pp. 188-189; p. 195). In response, Detective Ryan Thomas began an investigation into the reported sexual abuse. (R. p. 119).

As part of his investigation, Detective Thomas referred Victim to a child advocacy center for a forensic interview, and an interview was conducted on September 24, 2013. (R. p. 119; p. 206). During that interview, Victim again disclosed she was sexually abused and described an incident occurring on a staircase and another incident occurring at a tennis court. (R. pp. 206-207; p. 211). However, Victim was unsure when the incidents occurred and was unable to provide a specific time frame for the sexual abuse. (R. p. 211).

Thereafter, on the following day, Detective Thomas made contact with Appellant, who was twenty years old at the time, and briefly spoke with him about the allegations at his residence. (R. p. 120; p. 128; p. 155). During their conversation, Appellant acknowledged he knew Victim and indicated he remembered she sometimes wore revealing clothing. (R. pp. 145-146; State's Ex. # 2 (Recording of Statements)). However, he denied ever touching Victim and claimed he had never done anything inappropriate to any children. (R. pp. 145-146; State's Ex. # 2).

A few weeks later, Detective Thomas arrested Appellant for sexually assaulting Victim. (R. pp. 122-123). Following the arrest, Detective Thomas informed Appellant of his rights and

again spoke with him about the allegations. (R. pp. 123-127; p. 127). During that interview, Appellant acknowledged he frequently hung out with Victim's brother. (State's Ex. # 2). However, once again, he insisted he did not do anything improper to Victim and claimed he pushed her off every time she tried to get into his lap. (State's Ex. # 2).

Subsequently, Appellant was indicted for two counts of first-degree criminal sexual conduct with a minor, and he proceeded to trial. (R. p. 2; pp. 25-26; pp. 253-256; pp. 257-260). At the outset of trial, defense counsel moved to quash the second of the two indictments issued in Appellant's case while also moving to restrict any witnesses from offering testimony that might bolster or vouch for Victim's credibility. (R. p. 3). In support of the motion to quash the second indictment, defense counsel cited to the decision in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), and argued the indictment and information provided to her did not provide sufficient notice for Appellant to adequately and effectively defend against the allegations raised in his case. (R. pp. 3-6). Furthermore, defense counsel asserted the time frame in which the alleged incidents occurred had shifted and, while conceding it is frequently difficult for a victim to pinpoint the specific date on which an incident occurred, contended she could not pinpoint a date for a potential alibi defense in the event such a defense was available. (R. pp. 4-5). In rebuttal, the solicitor noted Victim was nine years old at the time of trial and was unable to remember the dates on which the incidents occurred. (R. p. 5). Based on that fact, the solicitor indicated she could not pinpoint the dates of the incidents with more specificity or certainty than the time frames provided in the indictments. (R. pp. 5-6). The trial judge then took the matter under advisement. (R. pp. 7-8).

Thereafter, following a recess, the trial judge confirmed he reviewed the indictments issued in Appellant's case along with the decision in Baker and asked the solicitor to discuss the

manner in which the indictment process proceeded. (R. pp. 10-12). In response, the solicitor recounted Appellant was originally indicted for two counts of first-degree criminal sexual conduct with a minor in relation to an incident on a staircase and another incident at a tennis court after Appellant rejected an offer that would have permitted him to plead guilty to a single charge. (R. p. 12). Initially, the solicitor noted the indictments alleged a time frame for the incidents extending from 2010 to 2012, but she indicated she was able to narrow the time frame down further after she ascertained when Appellant moved to Paces River Apartments, the apartment complex where the incidents occurred, following an unsuccessful attempt to take the case to trial in January of 2015.[1] (R. pp. 12-13). At that point, the solicitor stated she advised defense counsel she intended to amend the indictments to narrow the time frame and obtained the amended indictments in February of 2015.[2] (R. p. 13). However, the solicitor indicated she had been unable to limit the time frame of the incidents any further based on the information provided by Victim. (R. pp. 13-14).

Following the solicitor's remarks, defense counsel asserted Appellant was initially arrested on an arrest warrant alleging a single incident that occurred on September 1, 2011, and she noted she was provided in October or November of 2013 with an incident report that

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[1] Originally, the indictments issued by the York County Grand Jury stated: "That on or about and between August 24, 2010 and June 15, 2012 in York County, South Carolina, the Defendant, Orlando Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of Section 16-3-655(A)(1), South Carolina Code of Laws (1976, as amended)." (R. pp. 253-256).

[2] Following the amendments, the indictments issued by the York County Grand Jury stated: "That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offenses of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended). Against the peace and dignity of the State, and contrary to the statute in such case made and provided." (R. pp. 257-260).

referenced two separate incidents – one on a staircase and one at a tennis court – that were alleged to have occurred in the summer of 2011. (R. pp. 14-15). Defense counsel further noted she was provided with a recording of Victim's forensic interview in which Victim did not reference the time frame of the incidents. (R. p. 15). Based on that information, defense counsel stated she began investigating the case under the assumption the incidents occurred in the summer of 2011 and obtained the lease contract for Appellant's family from Paces River Apartments. (R. p. 16). After that, defense counsel asserted she was provided with information in September of 2014 from the solicitor indicating the incidents might have occurred between January and June of 2012, and she further noted the solicitor subsequently provided additional information in January of 2015 indicating the incidents might have occurred while Victim was in first grade between 2011 and 2012. (R. p. 16). Because she initially believed the incidents were alleged to have occurred in 2011, defense counsel argued the defense had been put "in a different position" in regard to defending against an allegation alleged to have occurred when Appellant was not residing at Paces River Apartments. (R. pp. 18-19). However, defense counsel conceded Victim never identified a specific date of the incidents and efforts had been made to try to identify the pertinent dates. (R. pp. 19-20). Thereafter, in reply, the solicitor noted the information provided by defense counsel was largely accurate but reiterated the State had consistently alleged from the outset of the case the time frame of the incidents extended into 2012. (R. pp. 20-22).

After considering the arguments of counsel and the Baker decision, the trial judge found the time frame alleged in the indictments was reasonable under the circumstances while also finding the solicitor made a good faith effort to narrow the time frame as much as possible under the circumstances. (R. pp. 22-23). Furthermore, the trial judge found the indictments were

sufficient given the nature of the alleged offenses to allow Appellant to respond to the charges against him. (R. p. 23). As a result, the trial judge denied Appellant's motion to quash the second indictment. (R. pp. 22-23). However, the trial judge indicated he would amend the indictments to reflect one related to an incident alleged to have occurred on a staircase while the other related to an incident alleged to have occurred at a tennis court.[3] (R. pp. 23-24).

Thereafter, the trial proceeded forward, and the solicitor proffered the testimony of Laurie Caldwell, a witness with substantial experience in regard to juvenile victims of sexual abuse. (R. pp. 45-46). During the proffer, Caldwell testified she had a master's degree in social work, had previously worked as a SLED agent conducting investigations in cases involving children and vulnerable adults, had worked at a child advocacy center for over three years after working at SLED, and had then returned to working for SLED. (R. pp. 47-48). Likewise, she indicated she had approximately twenty-eight years of experience in child abuse and physical abuse investigations and had previously testified as an expert in regard to the topics of delayed disclosure, juvenile issues with chronology, and behavioral issues of juvenile victims of sexual abuse. (R. pp. 49-50). Additionally, Caldwell noted she had received training from numerous sources focused on child sexual abuse, had received specialized training on the subject of juvenile forensic interviews, had taught courses all over the country on juvenile forensic interviewing, had received training specifically regarding delayed disclosures, had trained others in regard to delayed disclosures and behavioral indicators of sexual abuse, and had received training in trauma-focused cognitive behavioral therapy for children. (R. pp. 47-56). Furthermore, Caldwell noted she had reviewed research materials related to those subjects, including materials on delayed disclosure, and had personal experience in regard to delayed disclosure from conducting over two thousand forensic interviews. (R. pp. 54-55). However,

[3] No objections were raised to the trial judge's amendments to the indictments. (R. p. 24; p. 216).

she conceded she had not personally published any papers or personally conducted any research, and she noted did not know her own personal error rate. (R. pp. 52-54).

As the proffer continued, Caldwell explained she had personally observed and encountered delayed disclosures, and she noted both her personal experience and the relevant research established children most frequently delay disclosing abuse. (R. pp. 58-59). Moreover, Caldwell indicated the consensus amongst the clinical community is delayed disclosures are common, and she noted she had personally reviewed research regarding delayed disclosures that was peer reviewed and was based at least in part on substantiated cases of sexual abuse. (R. pp. 59-60). Additionally, Caldwell testified delayed disclosures occurred in most of the cases in which she had been involved, and she noted her knowledge on the subject was based on her training, review of pertinent materials, and personal experience conducting forensic interviews. (R. pp. 59-60; p. 63). Furthermore, she indicated she did not interview Victim in Appellant's case and had not been provided any information about the case from the solicitor. (R. p. 69).

At the conclusion of the proffer, the trial judge clarified the solicitor simply intended to offer Caldwell's testimony to establish delayed disclosure is common and not to draw conclusions regarding Victim. (R. p. 72). Defense counsel then objected on a number of grounds, arguing Caldwell's testimony would constitute improper bolstering and vouching, Caldwell was not personally qualified as an expert because she lacked "credentials" and "subspecialties" in the field in which she was being offered, Caldwell's training was not "independent," Caldwell's personal experience was insufficient, the fields of expertise in which Caldwell was being offered were unreliable, and the testimony would be unduly prejudicial. (R. pp. 70-76). In response, the solicitor noted Caldwell had extensive training and experience and was capable of helping the jury understand a field of knowledge that was not widely known. (R.

pp. 77-78). Furthermore, the solicitor asserted Caldwell would not be vouching for Victim as Caldwell did not personally know the victim in Appellant's case. (R. p. 78).

At that point, the trial judge sought clarification from the solicitor as to what Caldwell was being offered to establish, and the solicitor explained Caldwell would simply be establishing delayed disclosure is common while indicating she intended to ask about the subject of delayed disclosure, ask if children have difficulty remembering dates and times, and ask what behavioral issues are observed in juvenile victims of sexual abuse.[4] (R. pp. 78-79; pp. 82-85). The trial judge then inquired of defense counsel if she was aware of anything suggesting delayed disclosure is not common, and defense counsel conceded she had not discovered anything disputing the fact delayed disclosures occurred in the majority of abuse cases. (R. pp. 85-87). Thereafter, the trial judge ruled Caldwell could testify as an expert based on her own personal experience. (R. p. 89). However, the trial judge ruled Caldwell would be limited to testifying delayed disclosures are common and children have difficulty remembering dates and times, and he noted anything outside of those areas would be objectionable. (R. pp. 89-90).

As the trial continued forward, Victim, who was nine years old at the time, testified about the abuse she suffered at Appellant's hands when she was younger. (R. p. 92; pp. 97-98). Specifically, she stated Appellant did things to her that made her "feel uncomfortable" on two occasions when she lived at Paces River Apartments. (R. p. 93). Regarding the first incident, Victim stated she was with her brother and cousins on a staircase, they eventually left, and Appellant asked her to sit on his lap when they were gone. (R. pp. 97-99). After that, she indicated Appellant put his hand in her pants, touched her vagina underneath her underwear, and

[4] Although the solicitor indicated she intended to ask Caldwell during trial about children's memory issues in regard to dates and times and about behavioral issues exhibited by juvenile victims following sexual abuse, the solicitor ultimately did not ask such questions when Caldwell testified before the jury, and Caldwell limited her testimony to simply explaining delayed disclosures are more common amongst juvenile victims of sexual abuse. (R. pp. 163-164; pp. 167-168).

digitally penetrated her until her brother and cousins returned. (R. pp. 100-101). Similarly, regarding the second incident, Victim stated she was with her cousins at a tennis court when Appellant approached. (R. p. 102). After that, she testified Appellant again put his hand underneath her underwear and digitally penetrated her vagina. (R. pp. 102-103). Subsequently, Victim indicated she did not see Appellant again until her family moved to a new apartment complex. (R. pp. 103-104). Once there, she stated she disclosed the abuse to her mother, and she noted she was unable to remember when the abuse occurred other than that it occurred when she was in first grade in 2011 and 2012. (R. pp. 104-106).

In addition to Victim's testimony, Detective Thomas testified about his investigation into the allegations of abuse, which culminated in Appellant's arrest, and an assistant manager from Paces River Apartments confirmed Appellant and his mother lived at the apartment complex from May 13, 2011, to November 14, 2011. (R. pp. 117-128; pp. 169-170). Also, Puja Amin, the forensic interviewer who interviewed Victim during the investigation, recounted Victim disclosed she was sexually abused on two occasions but was unable to provide a specific time frame for the abuse. (R. pp. 202-207; p. 211). Additionally, Victim's brother confirmed he frequently hung out with Appellant, who was older, at the apartment complex, and he noted he saw Appellant at the apartment complex even after Appellant moved away. (R. p. 172; pp. 174-179). Victim's brother further noted Victim reacted badly when Appellant visited with him after they moved to a new apartment complex shortly before the abuse was disclosed. (R. pp. 181-183). Similarly, Mother recounted she lived at Paces River Apartments with Victim, her other children, her sister, and her sister's children from 2010 to 2012, and she indicated Victim began playing outside at the apartment complex in May of 2011. (R. pp. 188-190). Mother further testified Victim's behavior changed once they moved to a new apartment complex in 2013, and

she indicated Victim cried whenever Appellant was around. (R. pp. 190-193). After that, Mother indicated Victim reported she was sexually abused, and she stated she quickly reported the allegations to the authorities once they were disclosed to her. (R. p. 195).

Likewise, as part of the State's case, Caldwell was called to the witness stand and testified before the jury. (R. p. 158). During her testimony, Caldwell discussed her educational background, specialized training, and experience in regard to child abuse and juvenile forensic interviewing. (R. pp. 158-161). She was then qualified as an expert in the field of delayed disclosure over defense counsel's objection. (R. pp. 161-162). After that, Caldwell explained to the jury a delayed disclosure meant abuse was not immediately reported and indicated delayed disclosures were more common than not. (R. p. 163). The solicitor then asked Caldwell if it would be common for a six-year-old victim to delay disclosure, and Caldwell responded: "It is more common for a six year old, and all other ages of children, to delay in reporting their sexual abuse." (R. p. 164). Following that question and response, defense counsel objected, and the trial judge excused the jury from the courtroom. (R. p. 164). The trial judge then sustained the objection and asked the solicitor "to ask the question as it relates to [Caldwell's] experience and her practice." (R. pp. 165-166). At that point, defense counsel asked for the question to be stricken, and the trial judge stated he would do so if defense counsel wished him to call attention to the matter. (R. p. 166). Defense counsel then appeared to ask the trial judge to strike the question outside the presence of the jury, and the trial judge indicated the only reason to do so would be for the jury's benefit while again offering to strike the question. (R. p. 166). In response, defense counsel stated: "I just want to make sure the record is preserved for that." (R. p. 166). Caldwell then resumed her testimony before the jury, indicated she had performed over two thousand forensic interviews of children of all ages over the course of the last twenty years,

and noted delayed disclosures were much more common based on her experience. (R. pp 167-168).

Subsequently, at the conclusion of the evidentiary phase of trial, both the State and the defense rested their cases, and Appellant's case was submitted to the jury following the presentation of closing arguments and jury instructions.[5][6] (R. pp. 217-248). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 249). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of twenty-five years. (R. pp. 251-252).

[5] During her closing argument, defense counsel focused the jury's attention on the fact Appellant had candidly admitted in his conversations with Detective Thomas he knew and had been in contact with Victim but repeatedly denied ever inappropriately touching her. (R. pp. 226-227). Additionally, defense counsel used her closing argument to attack the credibility of Victim by calling the jury's attention to perceived inconsistencies in Victim's statements regarding the sexual abuse. (R. pp. 224-231).

[6] As part of his jury instructions, the trial judge instructed the jurors on evaluating the testimony of expert witnesses and explained they were "not to give the opinion or the testimony of an expert witness any greater weight simply because that person was declared to be an expert." (R. pp. 240-241).

## ARGUMENT

I.

**The trial judge properly denied Appellant's motion to quash the second of two first-degree criminal sexual conduct with a minor indictments because the indictments issued in Appellant's case were sufficient to fully provide him with the required notice in regard to the charges he was facing and the thirteen-month time frame alleged in the indictments was not unconstitutionally overbroad in light of the fact it could not be narrowed further based on the young age of the victim coupled with her inability to remember the precise dates and times of the sexual assaults and did not prevent Appellant from combating the charges against him.**

Appellant contends the trial judge reversibly erred by refusing to quash the second indictment issued in his case. In support of that contention, Appellant relies almost exclusively on our Supreme Court's opinion in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), a sharply-divided plurality decision, while maintaining the thirteen-month time frame alleged in the second indictment was unconstitutionally overbroad and denied him both proper notice and an opportunity to prepare a complete alibi defense. Contrary to Appellant's contention, the indictments issued in Appellant's case were not unconstitutionally overbroad and provided sufficient notice such that the trial judge was able to know what judgment to pronounce in the event of a conviction, Appellant was able to know what he was called upon to answer, and Appellant was apprised of the elements of the offenses charged. Furthermore, the thirteen-month time frame alleged in the indictments was not unconstitutionally overbroad and, instead, was sufficiently specific – particularly in light of the young age of the victim and the victim's inability to be any more specific regarding the timing of the sexual abuse – such that Appellant was capable of combating the charges raised against him. Accordingly, under those circumstances, there was no legitimate basis upon which to quash either of the indictments issued in Appellant's case, and the trial judge properly denied Appellant's motion to quash the second of those indictments. Appellant's convictions should be affirmed.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). Importantly, a trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

## ANALYSIS

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a "notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The primary purpose of an indictment is " 'to put the defendant on notice of what he is called upon to answer, *i.e.*, to [apprise] him of the elements of the offense and to allow him to

decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted).

When evaluating an indictment, the indictment shall be considered to be sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). "[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999).

If a defendant wishes to challenge the sufficiency or validity of an indictment, the defendant must move to quash or dismiss the indictment prior to the jury being sworn. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). Such a motion challenging the sufficiency or validity of the indictment raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App.

2007); see also State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

When a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and to be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. In making such a determination, the trial judge must look to the indictment with a practical eye and examine the surrounding circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him as a result of the indictment. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.").

Notably, in State v. Wade, our Supreme Court considered a challenge to the sufficiency of a first-degree criminal sexual conduct with a minor indictment that alleged Wade sexually abused the victim at some unspecified point in time during a twenty-four-month span of time. Id., 306 S.C. at 80, 409 S.E.2d at 781. In finding that indictment to be sufficient and not overbroad, the Supreme Court rejected Wade's contention the broad span of time alleged in the indictment denied him an ability to prepare a defense to the charged offense, noting Wade proceeded with a defense of complete denial and further noting an ordinary individual would not be able to account for his whereabouts for purposes of an alibi defense even if the span of time alleged was just a month or some shorter period of time. Id. at 83-84, 409 S.E.2d at 783. Furthermore, the Supreme Court noted the time span alleged in the indictment was narrowed "as much as possible under the circumstances" based on the fact the victim was eight years old and unable to pinpoint the exact date on which the offense occurred. Id. at 84, 409 S.E.2d at 783. In light of those circumstances, the Supreme Court analyzed the indictment in Wade's case and determined it was neither unconstitutionally overbroad nor prejudicial to Wade in the sense it took him by surprise and prevented him from combating the charges against him. Id. at 86, 409 S.E.2d at 784.

Similarly, in State v. Tumbleston, this Court considered a challenge to the sufficiency of two indictments alleging Tumbleston sexually assaulted his granddaughter during a forty-two-month span of time. Id., 376 S.C. at 93, 654 S.E.2d at 850-851. In finding the indictments to be sufficient, this Court noted a two-pronged test had been adopted for determining whether a purportedly overbroad indictment was sufficient that required a court to determine whether time was a material element of the offense charged and whether the time period alleged in the indictment occurred prior to the return of the indictment. Id. at 98-99, 654 S.E.2d 853-854.

Applying that test to Tumbleston's case, this Court concluded both prongs were satisfied as time was not an element of the charged sexual offenses and the indictments were issued prior to the time periods in which the offenses were alleged to have occurred. Id. at 99, 654 S.E.2d at 854. Furthermore, this Court rejected Tumbleston's contention the broad time period specified in the indictments prevented him from adequately preparing his defense in light of the fact the indictments contained the necessary elements of the offense coupled with the fact Tumbleston proceeded forward with a defense of denial that was simply disbelieved by the jury. Id. at 102, 654 S.E.2d at 855.

More recently, in State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015), our Supreme Court considered a challenge to the sufficiency of multiple indictments that alleged sexual offenses involving minor victims occurred over a six-year span of time. In finding those indictments to be insufficient, a two-justice plurality joined by a single additional justice in result only noted the indictments in Baker's case originally alleged the sexual abuse occurred during an identifiable span of the summers of three separate years but were amended approximately two weeks before trial to **expand** the time frame of the allegations to cover a period extending continuously over the course of six years.[7] Id. at 590, 769 S.E.2d at 864. In light of that exceedingly broad six-year time frame coupled with the lack of specificity included in the indictments, the plurality concluded the indictments were unconstitutionally overbroad due to the fact no defendant "could effectively defend himself against a six-year time frame." Id. at 591-

[7] Notably, because the decision in Baker was a plurality decision, the portion of the decision reached on the narrowest ground constituted the precedential portion of that decision. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' "). In Baker, Justice Pleicones's concurrence **in result only** constituted the narrowest ground upon which the plurality's decision was reached. See Baker, 411 S.C. at 592, 769 S.E.2d at 865 (reversing Baker's case after two justices specified particular reasons why they believed reversal was appropriate while a single justice agreed reversal was appropriate but joined in the result only without specifying any grounds as to why he believed the case should be reversed). Thus, the decision in Baker has **no** precedential value beyond the peculiar facts of that particular case.

591, 769 S.E.2d at 864-865. Furthermore, the plurality concluded Baker was personally prejudiced in his case based on the short preparation time he had in light of when the overbroad indictments were issued coupled with the fact potentially exculpatory evidence was destroyed prior to his trial. Id. at 590-591, 769 S.E.2d at 864. As a result, the plurality concluded the indictments issued in Baker's case were unconstitutionally overbroad and the trial judge erred in refusing to grant his motion to quash. Id. at 592, 769 S.E.2d at 865. However, the plurality expressly noted the indictments would have been sufficient "[h]ad [they] alleged that the conduct occurred during the summer months of the years 1998 through 2004, i.e., June 1 until September 1" – a span of time covering twenty-one total months. Id. at 592, n. 5, 769 S.E.2d at 865.

In the case sub judice, Appellant was indicted for two counts of first-degree criminal sexual conduct with a minor, and the indictments issued in his case included the relevant language from the statutes defining the offenses with which Appellant was charged. See S.C. Code Ann. § 16-3-655(A)(1) (explaining a person is guilty of first-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age"). Under those circumstances, the indictments were sufficient to provide Appellant with notice that apprised him of the elements of the charged offenses, allowed him to decide whether to plead guilty or stand trial, and enabled the trial judge to know what judgment to pronounce in the event Appellant was convicted. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) ("[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is

convicted."); see also State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) ("An indictment is ordinarily sufficient if it is in the language of the statute.").

Moreover, time was not an element of charged offenses of first-degree criminal sexual conduct with a minor. See State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."). In light of that fact, the solicitor was **not** required to identify the specific date and time each of the charged crimes occurred with exactitude in order for the indictments to be constitutionally sufficient. See State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) ("Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. . . . Here, both indictments sufficiently notified Wingo of the offenses with which he was charged since time is not a material element of either the offense of first degree criminal sexual assault or the offense of contributing to the delinquency of a minor and since the indictments allege the commission of the offenses during periods that preceded the date of the indictments."); see also United States v. Kimberlin, 18 F.3d 1156, 1159 (4th Cir. 1994) (" 'Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.' " (citation omitted)). Instead, the solicitor was only required to fully apprise Appellant of the information available to the State regarding the time, place, and date of the crimes, and she did just that to the best of her abilities in Appellant's case. See State v. Wilcox, 808 P.2d 1028, 1033 (Utah 1991) ("[W]e have recognized that there are notice problems, especially as to the date, place, and time inherent in prosecutions based on the testimony of very young victims. . . . If we were to hold that in all such circumstances, no offense could be charged because the alleged victim is too young to testify with certainty concerning the times, dates, or places where the

abuse occurred, we would leave the youngest most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child's inability to remember the exact dates and places of the abuse impaired the abuser's ability to prepare an alibi defense. In frank recognition of this fact, we have been less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved. . . . We have suggested that **so long as the elements of the crimes are covered by the factual allegations and the defendant is fully apprised of the State's information regarding the time, place, and date of the crimes, any lack of factual specificity goes not to the constitutional adequacy of notice, but to the credibility of the State's case**." (emphasis added)); see also S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Significantly, subsequent to Appellant's arrest, the solicitor provided Appellant and the defense with all the information available to the State regarding when the sexual abuse occurred. Specifically, as acknowledged by defense counsel during trial, the solicitor provided her with information more than a year before trial that established Victim was unable to specifically identify the dates and times of the sexual abuse and that suggested the abuse occurred at some point in 2011. Then, as the case proceeded forward closer to trial, the solicitor continued to provide defense counsel with updated information about the case as it became known to her and alerted defense counsel in September of 2014, which was roughly five months before

Appellant's case ultimately went to trial, the sexual abuse potentially occurred as late as June of 2012 based on her discussions with Victim. Thereafter, in December of 2014, which was approximately three months before Appellant's case was ultimately tried, the solicitor obtained indictments that – consistent with the information available to the solicitor – indicated the sexual abuse occurred between August 24, 2010, and June 15, 2012, a twenty-two month span of time. Finally, approximately two weeks before trial, the solicitor obtained amended indictments that **significantly narrowed** the previously identified time frame of the sexual abuse to a defined period extending from May 13, 2011, to June 15, 2012, a span of time covering just thirteen months that unquestionably preceded the date the indictments were issued.

Critically, when viewing those facts and circumstances with a practical eye while also taking into consideration the young victim's inability to be more precise in identifying the dates and times of the sexual abuse, the time periods alleged in the indictments issued in Appellant's case were reasonable and sufficient to provide Appellant with adequate notice to prepare his defense without being unconstitutionally overbroad. Cf. Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("We reject the notion that a specified time period prevented Tumbleston from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise Tumbleston that he must be prepared to address his conduct towards [the victim] between 2001 and June of 2004."). Notably, the thirteen-month time frame alleged in the indictments was much, much more narrow than the six-year time period found to be improper in the Baker decision. Even more notably, the time period alleged in Appellant's case was **substantially** shorter than the twenty-one-month span of time the plurality indicated would have been sufficiently specific to pass constitutional muster in Baker. Furthermore,

although the indictments in Appellant's case were amended only two weeks before trial, the late amendment to the indictments – unlike the late amendment in Baker – **reduced** as opposed to expanded a time frame that Appellant had been aware of for at least a period of approximately three months before trial.

Moreover, in light of the surrounding circumstances that existed prior to trial, the indictments in Appellant's case did **not** prejudice Appellant to the extent he was taken by surprise and unable to combat the charges against him as a result of the indictment. Importantly, Appellant was fully aware from a point shortly after his arrest Victim, who was between the ages of six and seven when she was sexually assaulted and who was only nine years old by the time of trial, was not able to specifically identify the dates and times of the incidents, and defense counsel was capable of exploiting Victim's uncertainty – which the jury was also unquestionably made aware of – to attack her credibility during trial. Likewise, Appellant's defense based on his discussions with Detective Thomas was a complete defense of denial as opposed to an alibi defense, which was not available to Appellant in light of the fact he did **not** dispute he knew and had contact with Victim, and the time frame identified in the indictments in no way impacted his ability to deny the charges during trial. See State v. Cozza, 71 Wash. App. 252, 259-260, 858 P.2d 270, 275 (Wash. Ct. App. 1993) ("[W]hether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense. Although our ruling does not allow the defendant to use the child's inability to recall dates as a sword to escape a trial, he or she can use the long time frame to attack the credibility of the child witness. In addition, the defendant may also deny the conduct, or offer innocent explanations for the child's sexual knowledge. Moreover, the requirement that the defendant be proved guilty beyond a reasonable doubt adequately protects the defendant's rights. The trier of

fact hears both that the child witness cannot specify a date and that the defendant is thereby precluded from raising an alibi defense. Both are considered in the deliberations that require guilt to be found beyond a reasonable doubt." (citations omitted)); see also People v. Fritts, 72 Cal. App. 3d 319, 326, 140 Cal. Rptr. 94, 97 (Cal. Ct. App. 1977) ("Since appellant's alibi defense was not specific as to dates but total, in that he made a blanket denial of ever having molested his stepdaughter, he was not prejudiced by the manner of charging [him with a lewd act alleged to have occurred sometime during a twelve-month time span]."); State v. Brim, 2010 S.D. 74, __, 789 N.W.2d 80, 84 (S.D. 2010) ("The lack of precise dates of the abuse did not deprive Brim of his defense. . . . Brim's defense was a complete denial of any sexual act occurring during the entire period of time covered by the indictment."). Furthermore, Appellant and defense counsel were aware of the general time frame being alleged in regard to the timing of the sexual abuse at least three months before Appellant's trial took place and were aware of the reduced time frame several weeks before trial when the solicitor provided additional information and obtained the amended indictments, which gave Appellant a much better opportunity to prepare his defense than the defendant was afforded in Baker. See generally State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) ("The parties knew in September that this case was set for trial in January and full discovery had been afforded to Register from September forward. The fact that Register's counsel waited until the middle of December to investigate the evidence does not warrant a continuance.").

For those reasons, the indictments issued in Appellant's case – like the indictments issued in Wade and Tumbleston – were sufficiently specific to provide Appellant with the required notice in regard to the charges he was facing and were not unconstitutionally overbroad, particularly in light of the fact the thirteen-month time frame identified in the indictments could

not be narrowed any further due to the victim's age and inability to remember with complete precision. Cf. Wade, 306 S.C. at 86, 409 S.E.2d at 784 (finding an indictment alleging the charged incident occurred at some point during a twenty-four-month span of time was not unconstitutionally overbroad where the time frame identified in the indictment had been narrowed as much as possible under the circumstances); Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (rejecting Tumbleton's contention the indictments issued in his case, which alleged the charged incidents occurred at some point during a forty-two-month span of time, were unconstitutionally overbroad). Accordingly, the trial judge properly refused to quash the second indictment issued in Appellant's case.[8] See Tumbleston, 376 S.C. at 94, 654 S.E.2d at 851 ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."). Appellant's convictions should be affirmed.

[8] Notably, Appellant did not challenge the sufficiency of the first indictment, which contained the exact same thirteen-month time span alleged to be overbroad in the second indictment, as unconstitutionally overbroad, and, thus, the sufficiency of the first indictment – along with the sufficiency of the thirteen-month time frame alleged in that indictment – is the law of Appellant's case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (explaining unchallenged and unappealed rulings are the law of the case).

II.

**The trial judge committed no error in qualifying a witness as an expert and permitting her to testify in regard to the fact juvenile victims of sexual abuse frequently delay disclosing such abuse because the witness was personally qualified to testify on that subject matter based on her education, knowledge, training, and experience and because her testimony was beyond the common knowledge of the typical juror, could have assisted the jury in understanding the evidence presented during trial, met a threshold level of reliability, did not improperly vouch for or bolster the victim's testimony, and was not unduly prejudicial to Appellant.**

Appellant contends the trial judge abused his discretion by qualifying Caldwell as an expert in the field of delayed disclosure and permitting her to testify about that subject matter during trial. In support of that contention, Appellant maintains there was no particular need for expert testimony on delayed disclosure during his trial, Caldwell was not "sufficiently" qualified to testify as an expert on delayed disclosure, Caldwell's testimony on delayed disclosure did not meet a threshold level of reliability, Caldwell's testimony improperly vouched for and bolstered Victim's testimony, Caldwell actually testified as an improper forensic interviewing expert, and Caldwell's testimony was unduly prejudicial. To the contrary, Caldwell was personally qualified as an expert witness based upon her education, knowledge, training, and experience in the field of delayed disclosures of abuse by juvenile victims. Based on her education, knowledge, training, and experience, Caldwell possessed specialized knowledge on a subject matter beyond the common knowledge of the typical juror that was critical for the jurors to be able to evaluate and understand Victim's failure to immediately disclose the sexual abuse she suffered at Appellant's hands. Likewise, Caldwell's testimony met a threshold level of reliability. As a result, Caldwell's testimony satisfied all the requirements for it to be admitted as proper expert testimony during trial. Moreover, Caldwell's testimony did not improperly vouch for or bolster Victim's testimony, and the probative value of her testimony was not substantially outweighed by any potential for it to result in undue or unfair prejudice to Appellant. Under those

circumstances, the trial judge did not abuse his broad discretion by qualifying Caldwell as an expert witness and permitting her to testify about the frequency of delays in disclosures of abuse by juvenile victims. Appellant's convictions should be affirmed.

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)

("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

**ANALYSIS**

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying

science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial judge must also ensure the testimony "meets a threshold level of reliability, regardless of whether it is scientific or nonscientific." State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the

publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See White, 382 S.C. at 274, 676 S.E.2d at 688 ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

Critically, in cases such as Appellant's case where there are allegations of juvenile sexual abuse, "[e]xpert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and **behavioral science evidence** provided by psychiatrists, psychologists, and social workers." State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) (emphasis added), overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Regarding such testimony, appellate courts in South Carolina have consistently and repeatedly recognized "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and **the range of responses to sexual assault encountered by experts** is admissible." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) (emphasis added); see also State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise [in the field of child abuse assessment]: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.").

Significantly, "[s]uch testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." Weaverling, 337 S.C. at 475, 523 S.E.2d at 794; see State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred."). Moreover, rape trauma or behavioral characteristic evidence is often crucial in child sexual abuse cases because "[t]he inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." White, 361 S.C. at 414-415, 605 S.E.2d at 544. Furthermore, rape trauma and behavioral characteristic evidence is also particularly important to explain the often unusual behavior exhibited by victims of sexual abuse that might be beyond the knowledge of the average juror. See Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 ("It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor."); see also United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) ("[The expert witness's] testimony was helpful to the jury because some jurors would not have a general understanding of an eight-year-old's sexual knowledge and vocabulary and the level of sensory detail to look for in a child's allegations of sexual abuse."); People v. Baenziger, 97 P.3d 271, 275 (Colo. Ct. App. 2004) ("**Because the 'lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior or which social scientists have observed from studying rape victims,'** expert testimony explaining these reactions is helpful to the jury in determining whether this delay should support the conclusion that the sexual assault did not occur.' " (citations omitted and emphasis added)); People v. Carroll, 95 N.Y.2d 375, 387, 740 N.E.2d 1084, __ (N.Y. 2000) ("We have long held that expert testimony regarding rape trauma

syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]"). Accordingly, "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

In the case at bar, testimony was presented establishing Victim did not immediately disclose the sexual abuse inflicted upon her by Appellant and, instead, delayed disclosing that abuse for roughly two years. Based on that testimony, expert testimony was needed in Appellant's case to educate the jury in regard to delayed disclosures so the jurors would be able to appropriately consider and evaluate the evidence regarding Victim's delayed disclosure during trial in light of the fact the subject matter of delayed disclosures is a field of specialized knowledge outside the common knowledge and experience of ordinary jurors. See State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 251 (Ct. App. 2015) (finding expert testimony in a child sexual abuse case, including testimony in regard to delayed disclosures, was necessary and relevant to a fact in issue because Brown's victims delayed disclosing the abuse for nearly three years and because ordinary jurors might not have experience with issues such as delayed disclosure); see also Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact **to understand the evidence** or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (emphasis added)). For that reason, the State was required to – and did – present an expert in the field of delayed disclosure in order to educate the jury on that subject matter. See Anderson, 413 S.C. at 221, n. 6, 776 S.E.2d at 80 (recognizing it

is necessary for a witness to be an expert to testify in regard to delayed disclosures in sexual abuse cases).

Beyond the necessity of the expert testimony in Appellant's case, Caldwell, the expert offered by the State, was personally qualified to testify as an expert in the field of delayed disclosure as she possessed specialized knowledge regarding the behavior of juvenile victims of sexual abuse, including in regard to delayed disclosures of abuse, based on her education, knowledge, training, and experience. Specifically, Caldwell had an educational background in social work along with a master's degree in that field, had participated in and conducted training on forensic interviewing **and** delayed disclosures over the course of the last **twenty years**, was the director of forensic services at a child advocacy center for several years, had personally conducted **over two thousand forensic interviews** of children ranging in age from three to seventeen, had investigated cases involving crimes against children for many years while working at SLED, had personally reviewed research in the field of delayed disclosure, had previously been qualified as an expert witness in that field, and had personally observed and encountered delays in disclosures during her many years both investigating abuse cases and conducting forensic interviews in such cases. See State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) (finding the trial judge properly found a forensic interviewer to be qualified as an expert in the field of "behavioral characteristics displayed by child abuse victims" where the forensic interviewer testified she was a licensed professional counselor, she had a master's degree in clinical psychology, she had training that involved working with children in situations involving allegations of sexual abuse, she had worked on multiple cases involving sexually abused children, and she had attended training seminars and educational courses regarding sexual abuse); see also State v. Carpenter, 147 N.C. App. 386, 393, 556 S.E.2d 316,

321 (N.C. Ct. App. 2001) ("Vaughn was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education. Vaughn had received a masters degree in social work and later had an internship lasting two years at Duke University Medical Center where she interviewed suspected victims of child sexual abuse. At the time of trial, Vaughn was a licensed clinical social worker and her job involved evaluating and interviewing children and families when it was suspected that the children had been maltreated. Prior to this employment, Vaughn had several other jobs in which she interviewed and evaluated child victims of sexual abuse. In fact, Vaughn estimated that she had interviewed a couple thousand children throughout her career. Thus, Vaughn was properly qualified as an expert in the area of child sex abuse evaluations and interviewing."); see generally State v. Morris, 376 S.C. 189, 204, 656 S.E.2d 359, 367 (2008) ("Despite Appellant's argument to the contrary, the status of [the witness's] law license is completely irrelevant to his qualification as an expert. The evidentiary rule governing the qualification of experts says nothing about professional licensing requirements, and a licensing requirement seems wholly incompatible with Rule 702's operational framework."). As a result, Caldwell possessed specialized knowledge in an area of expertise beyond the common knowledge of the average juror. See Brown, 411 S.C. at 342, 768 S.E.2d at 251 (holding the subject of delayed disclosure is beyond the ordinary knowledge of a jury and necessitates expert testimony from a qualified expert); see also Schumpert, 312 S.C. at 505-506, 435 S.E.2d at 861 ("[The witness] testified she had a master's degree in social work and specialized in child and adolescent services. She attended training seminars regarding sexual abuse survivors and worked on more than one hundred cases involving sexually abused children. We find no abuse of discretion in her qualification as an expert [in the field of sexual abuse]."). Furthermore, Caldwell's specialized

knowledge was in an area that was critical for the jury to be able to properly evaluate and understand the evidence and testimony related to Victim's failure to immediately disclose what had been done to her following the sexual abuse. See State v. Rogers, 293 S.C. 505, 506, 362 S.E.2d 7, 8 (1987) ("Evidence of behavioral traits of a sexual abuse child victim may be offered to explain inconsistencies in the behavior of the alleged victim."), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); see also State v. Roenfeldt, 241 Neb. 30, 39, 486 N.W.2d 197, 204 (Neb. 1992) ("The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, **without being familiar with the alleged victim**, is that '[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,' and 'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.' " (emphasis added, brackets in original, and citation omitted)); State v. Kaufman, 187 Ohio App. 3d 50, 85, 931 N.E.2d 143, 170 (Ohio Ct. App. 2010) (holding an expert witness was properly permitted to testify on general background information regarding delayed disclosure by juvenile victims of sexual abuse even though the expert did not know any of the specific facts related to Kaufman's victims). Accordingly, the trial judge did not abuse his broad discretion in finding Caldwell was personally qualified to testify as an expert in regard to delayed disclosures.

Likewise, in addition to Caldwell being personally qualified to testify as an expert, Caldwell's testimony on the subject matter of delayed disclosures by juvenile victims of sexual abuse was sufficiently reliable to warrant its admission as it was based on her own personal experiences in numerous cases involving juvenile victims of sexual abuse coupled with her review of research and studies conducted on cases of sexual abuse involving juvenile victims, including substantiated cases of abuse. See John E. B. Meyers, Expert Testimony in Child

Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)). Moreover, behavioral science evidence, including behavioral science evidence regarding delays in disclosures by juvenile victims of sexual abuse, has historically been recognized as admissible by the majority of courts in the United States, including courts in South Carolina. See Schumpert, 312 S.C. at 505-506, 435 S.E.2d at 861-862 (holding an expert in the field of sexual abuse was properly qualified to testify in regard to the victim's behavioral characteristics and the fact those characteristics were typical for victims of sexual abuse); Weaverling, 337 S.C. at 474-475, 523 S.E.2d at 794 (instructing expert testimony concerning the common behavioral characteristics exhibited by juvenile victims of sexual abuse was relevant, helpful, and admissible); see also State v. Crespo, 114 Conn. App. 346, 373, 969 A.2d 231, 248 (Conn. App. Ct. 2009) ("Such expert testimony, related to the issue of delayed reporting of sexual abuse, falls within the type of social framework testimony that has been deemed relevant in assessing a victim's conduct in cases of sexual abuse."); Harris v. State, 283 Ga. App. 374, 381, 641 S.E.2d 619, 625 (Ga. Ct. App. 2007) (recognizing experts are properly permitted to testify in regard to the typical patterns of behavior exhibited by rape victims); People v. Spicola, 16 N.Y.3d 441, 465, 947 N.E.2d 620, __ (N.Y. 2011) (recognizing the majority of states allow the introduction of expert testimony to explain delayed disclosure and

other behavioral characteristics exhibited by juvenile victims of sexual abuse). Notably, demonstrating the general acceptance and reliability of such evidence, the trial judge – before qualifying Caldwell as an expert – asked defense counsel if she was aware of any information of any kind casting doubt on Caldwell's conclusion delayed disclosures were common amongst juvenile victims of sexual abuse, and defense counsel conceded in response she was **not** aware of any information that would cast doubt on the reliability of that conclusion. Cf. State v. Jones, 273 S.C. 723, 732, 259 S.E.2d 120, 125 (1979) (finding the trial judge properly exercised his discretion in admitting expert testimony on "bite-mark" evidence where "[t]here was no showing that the techniques and theories employed were other than accepted by the photographic and dental communities"). Under those circumstances, the trial judge committed no error in finding the subject matter of Caldwell's testimony regarding delayed disclosures met a threshold level of reliability such that it was admissible.

Finally, beyond satisfying all the necessary requirements to be admitted as expert testimony, Caldwell's testimony did **not** improperly bolster or vouch for Victim's credibility or result in any undue or unfair prejudice to Appellant. Specifically, Caldwell, who had no personal experience with Victim, did not testify she believed Victim, Victim had actually been sexually abused, Victim was telling the truth, Victim's behavior suggested she was telling the truth, or Victim's disclosure was compelling. Cf. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding testimony to constitute improper bolstering in a child sexual abuse case where the witness testified she recommended Chavis not be around the victim for any reason, which could only be interpreted as a statement the witness believed the victim's claim Chavis had sexually abused her); State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing forensic interviewers should not testify about a child's veracity or tendency to tell

the truth, vouch for a child's believability, state they made a compelling finding of abuse, assert they believed the child, or indicate the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings). Instead, Caldwell simply explained juvenile victims of sexual abuse of all ages frequently and commonly delay disclosing that abuse, and her testimony on that subject matter was exceedingly brief and limited.[9] Cf. Brown, 411 S.C. at 344-345, 768 S.E.2d at 252-253 (holding expert testimony regarding the high frequency of delayed disclosures in child sexual abuse cases did not constitute improper bolstering); State v. Smith, 411 S.C. 161, 171, 767 S.E.2d 212, 218 (Ct. App. 2014) (finding an expert witness did not improperly vouch for the juvenile victim in a sexual assault case where the expert did not give an indication as to his belief in regard to the victim's truthfulness and, instead, offered testimony that was "an appropriately general explanation of the medical or scientific reasons a child might not immediately disclose sexual trauma"). As a

[9] On appeal, Appellant identifies Caldwell's statement "[i]t is more common for a six-year-old, and all other ages of children, to delay in reporting their sexual abuse" as testimony improperly vouching for and bolstering Victim's testimony due to the fact Victim was approximately six years old at the time she was sexually abused. Notwithstanding the fact Caldwell's statement did not single out a particular age of child as it clearly conveyed six-year-olds **and all other ages of children** commonly delay disclosing abuse, Appellant's appellate challenge to that particular portion of Caldwell's testimony is not properly preserved for appellate review because the trial judge **sustained** defense counsel's objection to the question and defense counsel only moved for the testimony to be stricken from the record **outside** the presence of the jury. See State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) ("The requirement that a party move to strike objectionable testimony applies when an objection has been *sustained*."); see also State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (finding when "the appellant obtained the only relief he sought, this court has no issue to decide"); State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide.").

result, Caldwell did not improperly bolster or vouch for the credibility or believability of Victim, and the probative value of her testimony, which was very high in light of the fact Victim delayed disclosing the sexual abuse, outweighed any potential for undue or unfair prejudice.[10] See State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror."), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009); see also Brown, 411 S.C. at 347, 768 S.E.2d at 254 (holding expert testimony regarding the field of delayed disclosure had a high probative value because it "was relevant to help the jury understand various aspects of the victims' behavior and provided insight into the often strange demeanors of sexually abused children"); see generally State v. Gonzalez, 150 N.H. 74, 78, 834 A.2d 354, 358 (N.H. 2003) ("We have recognized that a layperson is not capable of making such observations because 'a child's delayed disclosure of abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused.' Because of its counterintuitive nature, expert testimony may be permitted to educate the jury about apparent inconsistent behavior by a victim following an assault ant to 'provid[e] useful information that is beyond the common experience of an average juror.' " (brackets in original and citations omitted)). Accordingly, the trial judge committed no error in admitting Caldwell's expert testimony.

[10] Significantly, any prejudice that could have resulted to Appellant from the jury being aware juvenile victims of sexual abuse frequently delay disclosing such abuse was from the legitimate probative force of that evidence in relation to the issues raised by the evidence presented in his case. See State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged. 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " (citation omitted)).

In conclusion, the trial judge properly qualified Caldwell as an expert based on her education, knowledge, training, and experience and permitted her to testify on a reliable and accepted area of specialized knowledge that could have been helpful to the jury in understanding the evidence presented during trial. See Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Under those circumstances, the trial judge did not abuse his broad discretion by admitting Caldwell's expert testimony on the subject of delayed disclosures of sexual abuse. See Henry, 329 S.C. at 273, 495 S.E.2d at 466 ("There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge."). Appellant's convictions should be affirmed.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: _____
Mark R. Farthing

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ATTORNEYS FOR RESPONDENT

November 18, 2016

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Orlando Martinez Coleman, Appellant.

Appellate Case No. 2015-000611

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Appeal From York County
Roger L. Couch, Circuit Court Judge

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Unpublished Opinion No. 2018-UP-090
Heard December 6, 2017 – Filed February 21, 2018

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**AFFIRMED**

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Chief Appellate Defender Robert Michael Dudek, of Columbia; and Jessica Leigh Birt, of Charleston County Public Defender's Office, both for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Respondent.

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**PER CURIAM:** Orlando Martinez Coleman appeals his convictions for two counts of criminal sexual conduct (CSC) with a minor in the first degree, arguing

the circuit court erroneously denied his motion to quash an amended indictment and abused its discretion in permitting Laurie Caldwell to testify as an expert witness in delayed disclosure. Coleman further asserts the circuit court's erroneous rulings unfairly prejudiced his case. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The circuit court properly denied Coleman's motion to quash the amended indictment. Other than narrowing the timeframe for the "tennis court incident" from August 24, 2010 through June 15, 2012, to May 13, 2011 through June 15, 2012, the amended indictment included the same information as the original: the elements of the alleged offense,[1] Coleman's name and date of birth, the victim's name and date of birth, and the factual allegation that Coleman "did commit the sexual battery upon and with [the] victim . . . by digitally penetrating her vagina with his finger." *See* S.C. Code Ann. § 17-19-20 (2014) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."); *State v. Gentry*, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005) (explaining that if a defendant timely objects to an indictment on the ground of insufficiency, "the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged"); *contra State v. Baker*, 411 S.C. 583, 590, 769 S.E.2d 860, 864 (2015) (finding that when examining the indictments in view of all the surrounding circumstances, the appellant was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him, when two weeks before trial, the State presented the appellant with new indictments charging him with offenses that allegedly occurred over a six-year period, rather than three identifiable summers as alleged in the original

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[1] Section 16-3-655(A) of the South Carolina Code (Supp. 2012) states, in pertinent part, "A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age . . . ."

indictments); *id.* at 592 n.5, 769 S.E.2d at 865 n.5 ("We emphasize that our decision does not preclude the State from re-indicting Baker . . . using appropriate time limitations for the charged offenses. Had the indictments alleged that the conduct occurred during the summer months of the years 1998 through 2004, . . . we believe the indictments would have been sufficient."). Additionally, we note that a precise time is not an element of CSC with a minor in the first degree. *See State v. Tumbleston*, 376 S.C. 90, 99, 654 S.E.2d 849, 854 (Ct. App. 2007) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct." (quoting *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991))).

2. The circuit court did not abuse its discretion in qualifying Laurie Caldwell as an expert witness in delayed disclosure. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010) ("The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion."). Initially, we find Caldwell had the requisite qualifications to testify as an expert in the field of delayed disclosure. *See State v. Chavis*, 412 S.C. 101, 106–07, 771 S.E.2d 336, 339 (2015) ("First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable."); *Watson*, 389 S.C. at 446, 699 S.E.2d at 175 ("[Additionally,] the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury."); *State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior."); *State v. Brown*, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015) (finding the specialized knowledge of an independent expert witness in child abuse dynamics and disclosure regarding the behavioral characteristics of child sexual abuse victims was "relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse"); *State v. Weaverling*, 337 S.C. 460, 474–75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("[B]oth expert testimony and behavioral evidence . . . . assist[] the jury in understanding some of the aspects of the behavior of victims and provide[] insight into the sexually abused child's often strange demeanor." (citations omitted)). Next, we find Caldwell's expert testimony that "[i]t is more common for a six year old, and all other children, to delay in reporting sexual abuse" did not improperly bolster the victim's credibility. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 ("Because the [forensic interviewer] never commented on

the credibility of the minor victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims, we find such testimony did not improperly bolster the minor victims' testimony. Although [she] testified that between seventy and eighty percent of children delay disclosing abuse, she never commented on the applicability of that statistic to the victims in this case. Instead, [the forensic interviewer] testified in broad terms regarding various reasons sex abuse victims may delay disclosure and how the disclosure process progresses more generally."). Further, we note Caldwell neither interviewed nor examined the victim. *See State v. Anderson*, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.").

**AFFIRMED.**

**WILLIAMS, THOMAS, and MCDONALD, JJ., concur.**

**FORM 5**

FILED-RECEIVED

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
County of York 2018 JUL 20 AM 11:20 2018CP4602206
)
Orlando Coleman #363390 HAMILTON
Full name and prison number (if any) of Applicant C.C.P.& GS
YORK COUNTY, SC
)
v. )
) **APPLICATION FOR**
)
State of South Carolina ) **POST-CONVICTION RELIEF**
)
)
)

## INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wisacky Highway, Bishopville, South Carolina 29010

2. Name and location of Court which imposed sentence York County Court of General Sessions, York, South Carolina

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2014-GS-46-03857; CSS w/ Minor 1st

(b) 2014-GS-46-03858; CSC w/ Minor 1st

592

(c) N/A

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

(a) March 18, 2015; Twenty-five (25) years

(b) March 18, 2015; Twenty-five (25) years

(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes, I did.

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. N/A

iii. N/A

(c) the date of each such result:

i. February 21, 2018

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. N/A

iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) _____

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

(a) _____

(b) _____

(c) _____

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

(a) _____

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (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 (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No, they have not.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (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) (10)(a); First Collateral Attack

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A

(b) your trial, if any? Yes, I was.

(c) your sentencing? Yes, I was.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, I was.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

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

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

i. Ashley Anderson & Melissa Izevillo,

ii. Jessica Bivit & David Alexander, Post Office Box 11589, Columbia, South Carolina 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial & Sentencing

ii. South Carolina Court of Appeals

iii. _____

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

20. Are you now under sentence from any other court that you have not challenged?
No, I am not.

STATE OF SOUTH CAROLINA )
) VERIFICATION
County of York )

I, Orlando Coleman, 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 attacked in this application; and that the matters and allegations therein set forth are true.

Orlando Coleman

SWORN to and subscribed before me this 19 day of July, 2018.

Monique Greene (L.S.)
*Notary Public*

My Commission Expires: 9-29-2021

**APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF**

I, Orlando Coleman, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Orlando Coleman
*Applicant*

SWORN or affirmed to and subscribed before me this 19 day of July, 2018.

Unique Greene
*Notary Public*

My Commission Expires: 9-29-2021

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF YORK | IN THE COURT OF COMMON PLEAS<br>FOR THE SIXTEENTH JUDICIAL CIRCUIT |
| Orlando Coleman, #363390,<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | Case No.: 2018-CP-46-2206<br><br>**RETURN AND MOTION TO DISMISS** |

The State (Respondent), making its Return to the application for post-conviction relief filed on July 31, 2018, would respectfully show this Court:

## I. Procedural History

Orlando Coleman (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted by the York Grand Jury in December 2014 for first degree criminal sexual conduct with a minor (2014-GS-46-3857; 2014-GS-46-3858). In February of 2015, the York County Grand Jury issued amended indictments again charging Applicant with two counts of first-degree criminal sexual conduct with a minor. Ashley Anderson, Esquire, and Melissa Izevillo, Esquire, represented Applicant. Assistant Solicitor Sharon J. Ohayon of the Sixteenth Circuit Solicitor's Office prosecuted the case. Applicant proceeded to trial before the Honorable Roger L. Couch. The jury convicted Applicant as indicted. On March 18, 2015, Judge Couch sentenced Applicant to a concurrent term of imprisonment of twenty-five years for each count of first-degree criminal sexual conduct with a minor, along with credit for time served of 527 days.

Applicant filed a timely notice of appeal. Appellate Defenders Jessica Birt and Robert Dudek of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 21, 2018. The remittitur was returned to the

circuit court on March 13, 2018.

## II. Factual History

In September of 2013, Delissa Patterson (Mother), the mother of an eight-year-old girl (Victim), contacted law enforcement officers with the Rock Hill Police Department and alerted them Victim had disclosed she was sexually assaulted by Applicant at Paces River Apartments, an apartment complex located in Rock Hill, South Carolina, when Victim and her family had lived there a few years earlier. (R. pp. 104-105; p. 109; pp. 117-120; pp. 188-189; p. 195). In response, Detective Ryan Thomas began an investigation into the reported sexual abuse. (R. p. 119).

As part of his investigation, Detective Thomas referred Victim to a child advocacy center for a forensic interview, and an interview was conducted on September 24, 2013. (R. p. 119; p. 206). During that interview, Victim again disclosed she was sexually abused and described an incident occurring on a staircase and another incident occurring at a tennis court. (R. pp. 206-207; p. 211). However, Victim was unsure when the incidents occurred and was unable to provide a specific time frame for the sexual abuse. (R. p. 211).

Thereafter, on the following day, Detective Thomas made contact with Applicant, who was twenty years old at the time, and briefly spoke with him about the allegations at his residence. (R. p. 120; p. 128; p. 155). During their conversation, Applicant acknowledged he knew Victim and indicated he remembered she sometimes wore revealing clothing. (R. pp. 145-146; State's Ex. # 2 (Recording of Statements)). However, he denied ever touching Victim and claimed he had never done anything inappropriate to any children. (R. pp. 145-146; State's Ex. # 2).

A few weeks later, Detective Thomas arrested Applicant for sexually assaulting Victim. (R. pp. 122-123). Following the arrest, Detective Thomas informed Applicant of his rights and again spoke with him about the allegations. (R. pp. 123-127; p. 127). During that interview,

Applicant acknowledged he frequently hung out with Victim's brother. (State's Ex. # 2). However, once again, he insisted he did not do anything improper to Victim and claimed he pushed her off every time she tried to get into his lap. (State's Ex. # 2).

Subsequently, Applicant was indicted for two counts of first-degree criminal sexual conduct with a minor, and he proceeded to trial. (R. p. 2; pp. 25-26; pp. 253-256; pp. 257-260). At the outset of trial, defense counsel moved to quash the second of the two indictments issued in Applicant's case while also moving to restrict any witnesses from offering testimony that might bolster or vouch for Victim's credibility. (R. p. 3). In support of the motion to quash the second indictment, defense counsel cited to the decision in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), and argued the indictment and information provided to her did not provide sufficient notice for Applicant to adequately and effectively defend against the allegations raised in his case. (R. pp. 3-6). Furthermore, defense counsel asserted the time frame in which the alleged incidents occurred had shifted and, while conceding it is frequently difficult for a victim to pinpoint the specific date on which an incident occurred, contended she could not pinpoint a date for a potential alibi defense in the event such a defense was available. (R. pp. 4-5). In rebuttal, the solicitor noted Victim was nine years old at the time of trial and was unable to remember the dates on which the incidents occurred. (R. p. 5). Based on that fact, the solicitor indicated she could not pinpoint the dates of the incidents with more specificity or certainty than the time frames provided in the indictments. (R. pp. 5-6). The trial judge then took the matter under advisement. (R. pp. 7-8).

Thereafter, following a recess, the trial judge confirmed he reviewed the indictments issued in Applicant's case along with the decision in Baker and asked the solicitor to discuss the manner in which the indictment process proceeded. (R. pp. 10-12). In response, the solicitor recounted Applicant was originally indicted for two counts of first-degree criminal sexual conduct with a

minor in relation to an incident on a staircase and another incident at a tennis court after Applicant rejected an offer that would have permitted him to plead guilty to a single charge. (R. p. 12). Initially, the solicitor noted the indictments alleged a time frame for the incidents extending from 2010 to 2012, but she indicated she was able to narrow the time frame down further after she ascertained when Applicant moved to Paces River Apartments, the apartment complex where the incidents occurred, following an unsuccessful attempt to take the case to trial in January of 2015.[1] (R. pp. 12-13). At that point, the solicitor stated she advised defense counsel she intended to amend the indictments to narrow the time frame and obtained the amended indictments in February of 2015.[2] (R. p. 13). However, the solicitor indicated she had been unable to limit the time frame of the incidents any further based on the information provided by Victim. (R. pp. 13-14).

Following the solicitor's remarks, defense counsel asserted Applicant was initially arrested on an arrest warrant alleging a single incident that occurred on September 1, 2011, and she noted she was provided in October or November of 2013 with an incident report that referenced two separate incidents – one on a staircase and one at a tennis court – that were alleged to have occurred in the summer of 2011. (R. pp. 14-15). Defense counsel further noted she was provided with a recording of Victim's forensic interview in which Victim did not reference the time frame of the

[1] Originally, the indictments issued by the York County Grand Jury stated: "That on or about and between August 24, 2010 and June 15, 2012 in York County, South Carolina, the Defendant, Orlando Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of Section 16-3-655(A)(1), South Carolina Code of Laws (1976, as amended)." (R. pp. 253-256).

[2] Following the amendments, the indictments issued by the York County Grand Jury stated: "That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offenses of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended). Against the peace and dignity of the State, and contrary to the statute in such case made and provided." (R. pp. 257-260).

incidents. (R. p. 15). Based on that information, defense counsel stated she began investigating the case under the assumption the incidents occurred in the summer of 2011 and obtained the lease contract for Applicant's family from Paces River Apartments. (R. p. 16). After that, defense counsel asserted she was provided with information in September of 2014 from the solicitor indicating the incidents might have occurred between January and June of 2012, and she further noted the solicitor subsequently provided additional information in January of 2015 indicating the incidents might have occurred while Victim was in first grade between 2011 and 2012. (R. p. 16). Because she initially believed the incidents were alleged to have occurred in 2011, defense counsel argued the defense had been put "in a different position" in regard to defending against an allegation alleged to have occurred when Applicant was not residing at Paces River Apartments. (R. pp. 18-19). However, defense counsel conceded Victim never identified a specific date of the incidents and efforts had been made to try to identify the pertinent dates. (R. pp. 19-20). Thereafter, in reply, the solicitor noted the information provided by defense counsel was largely accurate but reiterated the State had consistently alleged from the outset of the case the time frame of the incidents extended into 2012. (R. pp. 20-22).

After considering the arguments of counsel and the Baker decision, the trial judge found the time frame alleged in the indictments was reasonable under the circumstances while also finding the solicitor made a good faith effort to narrow the time frame as much as possible under the circumstances. (R. pp. 22-23). Furthermore, the trial judge found the indictments were sufficient given the nature of the alleged offenses to allow Applicant to respond to the charges against him. (R. p. 23). As a result, the trial judge denied Applicant's motion to quash the second indictment. (R. pp. 22-23). However, the trial judge indicated he would amend the indictments to

reflect one related to an incident alleged to have occurred on a staircase while the other related to an incident alleged to have occurred at a tennis court.[3] (R. pp. 23-24).

Thereafter, the trial proceeded forward, and the solicitor proffered the testimony of Laurie Caldwell, a witness with substantial experience in regard to juvenile victims of sexual abuse. (R. pp. 45-46). During the proffer, Caldwell testified she had a master's degree in social work, had previously worked as a SLED agent conducting investigations in cases involving children and vulnerable adults, had worked at a child advocacy center for over three years after working at SLED, and had then returned to working for SLED. (R. pp. 47-48). Likewise, she indicated she had approximately twenty-eight years of experience in child abuse and physical abuse investigations and had previously testified as an expert in regard to the topics of delayed disclosure, juvenile issues with chronology, and behavioral issues of juvenile victims of sexual abuse. (R. pp. 49-50). Additionally, Caldwell noted she had received training from numerous sources focused on child sexual abuse, had received specialized training on the subject of juvenile forensic interviews, had taught courses all over the country on juvenile forensic interviewing, had received training specifically regarding delayed disclosures, had trained others in regard to delayed disclosures and behavioral indicators of sexual abuse, and had received training in trauma-focused cognitive behavioral therapy for children. (R. pp. 47-56). Furthermore, Caldwell noted she had reviewed research materials related to those subjects, including materials on delayed disclosure, and had personal experience in regard to delayed disclosure from conducting over two thousand forensic interviews. (R. pp. 54-55). However, she conceded she had not personally published any papers or personally conducted any research, and she noted did not know her own personal error rate. (R. pp. 52-54).

[3] No objections were raised to the trial judge's amendments to the indictments. (R. p. 24; p. 216).

As the proffer continued, Caldwell explained she had personally observed and encountered delayed disclosures, and she noted both her personal experience and the relevant research established children most frequently delay disclosing abuse. (R. pp. 58-59). Moreover, Caldwell indicated the consensus amongst the clinical community is delayed disclosures are common, and she noted she had personally reviewed research regarding delayed disclosures that was peer reviewed and was based at least in part on substantiated cases of sexual abuse. (R. pp. 59-60). Additionally, Caldwell testified delayed disclosures occurred in most of the cases in which she had been involved, and she noted her knowledge on the subject was based on her training, review of pertinent materials, and personal experience conducting forensic interviews. (R. pp. 59-60; p. 63). Furthermore, she indicated she did not interview Victim in Applicant's case and had not been provided any information about the case from the solicitor. (R. p. 69).

At the conclusion of the proffer, the trial judge clarified the solicitor simply intended to offer Caldwell's testimony to establish delayed disclosure is common and not to draw conclusions regarding Victim. (R. p. 72). Defense counsel then objected on a number of grounds, arguing Caldwell's testimony would constitute improper bolstering and vouching, Caldwell was not personally qualified as an expert because she lacked "credentials" and "subspecialties" in the field in which she was being offered, Caldwell's training was not "independent," Caldwell's personal experience was insufficient, the fields of expertise in which Caldwell was being offered were unreliable, and the testimony would be unduly prejudicial. (R. pp. 70-76). In response, the solicitor noted Caldwell had extensive training and experience and was capable of helping the jury understand a field of knowledge that was not widely known. (R. pp. 77-78). Furthermore, the solicitor asserted Caldwell would not be vouching for Victim as Caldwell did not personally know the victim in Applicant's case. (R. p. 78).

At that point, the trial judge sought clarification from the solicitor as to what Caldwell was being offered to establish, and the solicitor explained Caldwell would simply be establishing delayed disclosure is common while indicating she intended to ask about the subject of delayed disclosure, ask if children have difficulty remembering dates and times, and ask what behavioral issues are observed in juvenile victims of sexual abuse.[4] (R. pp. 78-79; pp. 82-85). The trial judge then inquired of defense counsel if she was aware of anything suggesting delayed disclosure is not common, and defense counsel conceded she had not discovered anything disputing the fact delayed disclosures occurred in the majority of abuse cases. (R. pp. 85-87). Thereafter, the trial judge ruled Caldwell could testify as an expert based on her own personal experience. (R. p. 89). However, the trial judge ruled Caldwell would be limited to testifying delayed disclosures are common and children have difficulty remembering dates and times, and he noted anything outside of those areas would be objectionable. (R. pp. 89-90).

As the trial continued forward, Victim, who was nine years old at the time, testified about the abuse she suffered at Applicant's hands when she was younger. (R. p. 92; pp. 97-98). Specifically, she stated Applicant did things to her that made her "feel uncomfortable" on two occasions when she lived at Paces River Apartments. (R. p. 93). Regarding the first incident, Victim stated she was with her brother and cousins on a staircase, they eventually left, and Applicant asked her to sit on his lap when they were gone. (R. pp. 97-99). After that, she indicated Applicant put his hand in her pants, touched her vagina underneath her underwear, and digitally penetrated her until her brother and cousins returned. (R. pp. 100-101). Similarly, regarding the

[4] Although the solicitor indicated she intended to ask Caldwell during trial about children's memory issues in regard to dates and times and about behavioral issues exhibited by juvenile victims following sexual abuse, the solicitor ultimately did not ask such questions when Caldwell testified before the jury, and Caldwell limited her testimony to simply explaining delayed disclosures are more common amongst juvenile victims of sexual abuse. (R. pp. 163-164; pp. 167-168).

second incident, Victim stated she was with her cousins at a tennis court when Applicant approached. (R. p. 102). After that, she testified Applicant again put his hand underneath her underwear and digitally penetrated her vagina. (R. pp. 102-103). Subsequently, Victim indicated she did not see Applicant again until her family moved to a new apartment complex. (R. pp. 103-104). Once there, she stated she disclosed the abuse to her mother, and she noted she was unable to remember when the abuse occurred other than that it occurred when she was in first grade in 2011 and 2012. (R. pp. 104-106).

In addition to Victim's testimony, Detective Thomas testified about his investigation into the allegations of abuse, which culminated in Applicant's arrest, and an assistant manager from Paces River Apartments confirmed Applicant and his mother lived at the apartment complex from May 13, 2011, to November 14, 2011. (R. pp. 117-128; pp. 169-170). Also, Puja Amin, the forensic interviewer who interviewed Victim during the investigation, recounted Victim disclosed she was sexually abused on two occasions but was unable to provide a specific time frame for the abuse. (R. pp. 202-207; p. 211). Additionally, Victim's brother confirmed he frequently hung out with Applicant, who was older, at the apartment complex, and he noted he saw Applicant at the apartment complex even after Applicant moved away. (R. p. 172; pp. 174-179). Victim's brother further noted Victim reacted badly when Applicant visited with him after they moved to a new apartment complex shortly before the abuse was disclosed. (R. pp. 181-183). Similarly, Mother recounted she lived at Paces River Apartments with Victim, her other children, her sister, and her sister's children from 2010 to 2012, and she indicated Victim began playing outside at the apartment complex in May of 2011. (R. pp. 188-190). Mother further testified Victim's behavior changed once they moved to a new apartment complex in 2013, and she indicated Victim cried whenever Applicant was around. (R. pp. 190-193). After that, Mother indicated Victim reported

she was sexually abused, and she stated she quickly reported the allegations to the authorities once they were disclosed to her. (R. p. 195).

Likewise, as part of the State's case, Caldwell was called to the witness stand and testified before the jury. (R. p. 158). During her testimony, Caldwell discussed her educational background, specialized training, and experience in regard to child abuse and juvenile forensic interviewing. (R. pp. 158-161). She was then qualified as an expert in the field of delayed disclosure over defense counsel's objection. (R. pp. 161-162). After that, Caldwell explained to the jury a delayed disclosure meant abuse was not immediately reported and indicated delayed disclosures were more common than not. (R. p. 163). The solicitor then asked Caldwell if it would be common for a six-year-old victim to delay disclosure, and Caldwell responded: "It is more common for a six year old, and all other ages of children, to delay in reporting their sexual abuse." (R. p. 164). Following that question and response, defense counsel objected, and the trial judge excused the jury from the courtroom. (R. p. 164). The trial judge then sustained the objection and asked the solicitor "to ask the question as it relates to [Caldwell's] experience and her practice." (R. pp. 165-166). At that point, defense counsel asked for the question to be stricken, and the trial judge stated he would do so if defense counsel wished him to call attention to the matter. (R. p. 166). Defense counsel then appeared to ask the trial judge to strike the question outside the presence of the jury, and the trial judge indicated the only reason to do so would be for the jury's benefit while again offering to strike the question. (R. p. 166). In response, defense counsel stated: "I just want to make sure the record is preserved for that." (R. p. 166). Caldwell then resumed her testimony before the jury, indicated she had performed over two thousand forensic interviews of children of all ages over the course of the last twenty years, and noted delayed disclosures were much more common based on her experience. (R. pp 167-168).

Subsequently, at the conclusion of the evidentiary phase of trial, both the State and the defense rested their cases, and Applicant's case was submitted to the jury following the presentation of closing arguments and jury instructions.[5][6] (R. pp. 217-248). Thereafter, at the conclusion of trial, the jury convicted Applicant as indicted. (R. p. 249). Following the verdict, the trial judge sentenced Applicant to an aggregate term of imprisonment of twenty-five years. (R. pp. 251-252).

**III. Current Post-Conviction Relief Application**

In his first and current application for post-conviction relief, Applicant did not state or allege why he is being held in custody unlawfully.

Attached to this Return and incorporated by reference are the records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

**IV. Motion for Summary Dismissal of Application**

Respondent submits the allegations in the application should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160, and because the allegations are clearly refuted by the record such that there is no genuine of issue of material fact requiring an evidentiary hearing.

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[5] During her closing argument, defense counsel focused the jury's attention on the fact Applicant had candidly admitted in his conversations with Detective Thomas he knew and had been in contact with Victim but repeatedly denied ever inappropriately touching her. (R. pp. 226-227). Additionally, defense counsel used her closing argument to attack the credibility of Victim by calling the jury's attention to perceived inconsistencies in Victim's statements regarding the sexual abuse. (R. pp. 224-231).

[6] As part of his jury instructions, the trial judge instructed the jurors on evaluating the testimony of expert witnesses and explained they were "not to give the opinion or the testimony of an expert witness any greater weight simply because that person was declared to be an expert." (R. pp. 240-241).

An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... **Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.**

S.C. Code Ann. § 17-27-20 (emphasis added). Further, section 17-27-20(B) expressly states PCR "is not a substitute for. . . direct review of the sentence or conviction." Applicant's allegations raise only direct appeal issues which are procedurally barred in PCR, and the Court should summarily dismiss these allegations.

PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). "In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel." Id. at 363-64, 527 S.E.2d at 747. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton

v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised all of these issues on appeal, and his failure to do so has waived these allegations as grounds for relief.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court should dismiss Applicant's allegations for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

**V. Any Future Amendments and Invocation of Discovery Process**

Applicant must specify any claims he intends to raise at the evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

**VI. Response to Any and All Other Allegations**

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

**VII. Request Applicant to file an Amended Application**

WHEREFORE, Respondent requests Applicant, through his counsel, amend his application for Post-Conviction Relief within thirty days to state a cognizable claim for post-conviction relief. Failure to appropriately amend his application will result in Respondent seeking to dismiss the application for failure to state a claim upon which relief can be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JANELL H. GREGORY
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 17, 2019

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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK ) | |
| Orlando Coleman, 363390, ) | **AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF** |
| Applicant, ) | |
| Vs. ) | Case No. 2018-CP-46-02206 |
| State of South Carolina ) | |
| Respondent. ) | |

Applicant, by and through his Attorney, Jonathan D. Waller, Esquire, would amend his Application for Post-Conviction Relief filed July 26, 2018, by adding the claims of ineffective assistance of to question 10 and by adding the following specific prayers for relief to his original allegations:

1. As to representation rendered by Ashley Anderson, Esquire and Melissa Inzerillo, Esquire:
    a. Counsel were ineffective for failing to object to the trial judge's amendment of the indictments.
    b. Counsel were ineffective for failing to object to the "amended" indictments being provided to, or viewed by, the jury prior to or during deliberations.
    c. Counsel were ineffective for failing to object to the trial judge's instruction to the State to confer with a witness, under oath and in the middle of her testimony, during a break in the proceedings.
2. As to appellate representation rendered by Jessica L. Birt, Esquire:

a. Counsel was ineffective for failing to consult, involve, and advise Applicant in the preparation of his appeal and during the appeal process.

b. Counsel was ineffective for failing to raise the meritorious issue of the indictments being "amended" by the trial judge and submitted to the jury.

Respectfully submitted,

Jonathan D. Waller
Angell Molony, LLC
210 Newberry Street NW
Aiken, South Carolina 29801
ATTORNEY FOR APPLICANT

August 31, 2022

Aiken, South Carolina

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| STATE OF SOUTH CAROLINA<br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE SIXTEENTH JUDICIAL CIRCUIT |
| Orlando Coleman, #363390<br>Applicant, | ) | Case No.: 2018-CP-46-2206 |
| v. | ) | **AMENDED RETURN** |
| State of South Carolina,<br>Respondent. | ) | |



In response to Applicant Orlando Coleman's application for post-conviction relief filed on July 31, 2018, and amended on September 7, 2022, Respondent makes the following Amended Return and would respectfully show this Court:

## I. Procedural History

Orlando Coleman (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted by the York Grand Jury in December 2014 for first degree criminal sexual conduct with a minor (2014-GS-46-3857; 2014-GS-46-3858). In February of 2015, the York County Grand Jury issued amended indictments again charging Applicant with two counts of first-degree criminal sexual conduct with a minor. Ashley Anderson, Esquire, and Melissa Inzerillo, Esquire, represented Applicant. Assistant Solicitor Sharon J. Ohayon of the Sixteenth Circuit Solicitor's Office prosecuted the case. Applicant proceeded to trial before the Honorable Roger L. Couch. The jury convicted Applicant as indicted. On March 18, 2015, Judge Couch sentenced Applicant to a concurrent term of imprisonment of twenty-five years for each count of first-degree criminal sexual conduct with a minor, along with credit for time served of 527 days.

Applicant filed a timely notice of appeal. Appellate Defenders Jessica Birt and Robert Dudek of the Office of Appellate Defense perfected the appeal. The South Carolina Court of

Appeals affirmed Applicant's conviction on February 21, 2018. The remittitur was returned to the circuit court on March 13, 2018.

**II. Factual History**

In September of 2013, Delissa Patterson (Mother), the mother of an eight-year-old girl (Victim), contacted law enforcement officers with the Rock Hill Police Department and alerted them Victim had disclosed she was sexually assaulted by Applicant at Paces River Apartments, an apartment complex located in Rock Hill, South Carolina, when Victim and her family had lived there a few years earlier. (R. pp. 104-105; p. 109; pp. 117-120; pp. 188-189; p. 195). In response, Detective Ryan Thomas began an investigation into the reported sexual abuse. (R. p. 119).

As part of his investigation, Detective Thomas referred Victim to a child advocacy center for a forensic interview, and an interview was conducted on September 24, 2013. (R. p. 119; p. 206). During that interview, Victim again disclosed she was sexually abused and described an incident occurring on a staircase and another incident occurring at a tennis court. (R. pp. 206-207; p. 211). However, Victim was unsure when the incidents occurred and was unable to provide a specific time frame for the sexual abuse. (R. p. 211).

Thereafter, on the following day, Detective Thomas made contact with Applicant, who was twenty years old at the time, and briefly spoke with him about the allegations at his residence. (R. p. 120; p. 128; p. 155). During their conversation, Applicant acknowledged he knew Victim and indicated he remembered she sometimes wore revealing clothing. (R. pp. 145-146; State's Ex. # 2 (Recording of Statements)). However, he denied ever touching Victim and claimed he had never done anything inappropriate to any children. (R. pp. 145-146; State's Ex. # 2).

A few weeks later, Detective Thomas arrested Applicant for sexually assaulting Victim. (R. pp. 122-123). Following the arrest, Detective Thomas informed Applicant of his rights and

again spoke with him about the allegations. (R. pp. 123-127; p. 127). During that interview, Applicant acknowledged he frequently hung out with Victim's brother. (State's Ex. # 2). However, once again, he insisted he did not do anything improper to Victim and claimed he pushed her off every time she tried to get into his lap. (State's Ex. # 2).

Subsequently, Applicant was indicted for two counts of first-degree criminal sexual conduct with a minor, and he proceeded to trial. (R. p. 2; pp. 25-26; pp. 253-256; pp. 257-260). At the outset of trial, defense counsel moved to quash the second of the two indictments issued in Applicant's case while also moving to restrict any witnesses from offering testimony that might bolster or vouch for Victim's credibility. (R. p. 3). In support of the motion to quash the second indictment, defense counsel cited to the decision in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), and argued the indictment and information provided to her did not provide sufficient notice for Applicant to adequately and effectively defend against the allegations raised in his case. (R. pp. 3-6). Furthermore, defense counsel asserted the time frame in which the alleged incidents occurred had shifted and, while conceding it is frequently difficult for a victim to pinpoint the specific date on which an incident occurred, contended she could not pinpoint a date for a potential alibi defense in the event such a defense was available. (R. pp. 4-5). In rebuttal, the solicitor noted Victim was nine years old at the time of trial and was unable to remember the dates on which the incidents occurred. (R. p. 5). Based on that fact, the solicitor indicated she could not pinpoint the dates of the incidents with more specificity or certainty than the time frames provided in the indictments. (R. pp. 5-6). The trial judge then took the matter under advisement. (R. pp. 7-8).

Thereafter, following a recess, the trial judge confirmed he reviewed the indictments issued in Applicant's case along with the decision in Baker and asked the solicitor to discuss the manner in which the indictment process proceeded. (R. pp. 10-12). In response, the solicitor recounted

Applicant was originally indicted for two counts of first-degree criminal sexual conduct with a minor in relation to an incident on a staircase and another incident at a tennis court after Applicant rejected an offer that would have permitted him to plead guilty to a single charge. (R. p. 12). Initially, the solicitor noted the indictments alleged a time frame for the incidents extending from 2010 to 2012, but she indicated she was able to narrow the time frame down further after she ascertained when Applicant moved to Paces River Apartments, the apartment complex where the incidents occurred, following an unsuccessful attempt to take the case to trial in January of 2015.[1] (R. pp. 12-13). At that point, the solicitor stated she advised defense counsel she intended to amend the indictments to narrow the time frame and obtained the amended indictments in February of 2015.[2] (R. p. 13). However, the solicitor indicated she had been unable to limit the time frame of the incidents any further based on the information provided by Victim. (R. pp. 13-14).

Following the solicitor's remarks, defense counsel asserted Applicant was initially arrested on an arrest warrant alleging a single incident that occurred on September 1, 2011, and she noted

[1] Originally, the indictments issued by the York County Grand Jury stated: "That on or about and between August 24, 2010 and June 15, 2012 in York County, South Carolina, the Defendant, Orlando Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of Section 16-3-655(A)(1), South Carolina Code of Laws (1976, as amended)." (R. pp. 253-256).

[2] Following the amendments, the indictments issued by the York County Grand Jury stated: "That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offenses of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended). Against the peace and dignity of the State, and contrary to the statute in such case made and provided." (R. pp. 257-260).

she was provided in October or November of 2013 with an incident report that referenced two separate incidents – one on a staircase and one at a tennis court – that were alleged to have occurred in the summer of 2011. (R. pp. 14-15). Defense counsel further noted she was provided with a recording of Victim's forensic interview in which Victim did not reference the time frame of the incidents. (R. p. 15). Based on that information, defense counsel stated she began investigating the case under the assumption the incidents occurred in the summer of 2011 and obtained the lease contract for Applicant's family from Paces River Apartments. (R. p. 16). After that, defense counsel asserted she was provided with information in September of 2014 from the solicitor indicating the incidents might have occurred between January and June of 2012, and she further noted the solicitor subsequently provided additional information in January of 2015 indicating the incidents might have occurred while Victim was in first grade between 2011 and 2012. (R. p. 16). Because she initially believed the incidents were alleged to have occurred in 2011, defense counsel argued the defense had been put "in a different position" in regard to defending against an allegation alleged to have occurred when Applicant was not residing at Paces River Apartments. (R. pp. 18-19). However, defense counsel conceded Victim never identified a specific date of the incidents and efforts had been made to try to identify the pertinent dates. (R. pp. 19-20). Thereafter, in reply, the solicitor noted the information provided by defense counsel was largely accurate but reiterated the State had consistently alleged from the outset of the case the time frame of the incidents extended into 2012. (R. pp. 20-22).

After considering the arguments of counsel and the Baker decision, the trial judge found the time frame alleged in the indictments was reasonable under the circumstances while also finding the solicitor made a good faith effort to narrow the time frame as much as possible under the circumstances. (R. pp. 22-23). Furthermore, the trial judge found the indictments were

sufficient given the nature of the alleged offenses to allow Applicant to respond to the charges against him. (R. p. 23). As a result, the trial judge denied Applicant's motion to quash the second indictment. (R. pp. 22-23). However, the trial judge indicated he would amend the indictments to reflect one related to an incident alleged to have occurred on a staircase while the other related to an incident alleged to have occurred at a tennis court.[3] (R. pp. 23-24).

As the trial continued, Victim, who was nine years old at the time, testified about the abuse she suffered at Applicant's hands when she was younger. (R. p. 92; pp. 97-98). Specifically, she stated Applicant did things to her that made her "feel uncomfortable" on two occasions when she lived at Paces River Apartments. (R. p. 93). Regarding the first incident, Victim stated she was with her brother and cousins on a staircase, they eventually left, and Applicant asked her to sit on his lap when they were gone. (R. pp. 97-99). After that, she indicated Applicant put his hand in her pants, touched her vagina underneath her underwear, and digitally penetrated her until her brother and cousins returned. (R. pp. 100-101). Similarly, regarding the second incident, Victim stated she was with her cousins at a tennis court when Applicant approached. (R. p. 102). After that, she testified Applicant again put his hand underneath her underwear and digitally penetrated her vagina. (R. pp. 102-103). Subsequently, Victim indicated she did not see Applicant again until her family moved to a new apartment complex. (R. pp. 103-104). Once there, she stated she disclosed the abuse to her mother, and she noted she was unable to remember when the abuse occurred other than that it occurred when she was in first grade in 2011 and 2012. (R. pp. 104-106).

[3] No objections were raised to the trial judge's amendments to the indictments. (R. p. 24; p. 216).

In addition to Victim's testimony, Detective Thomas testified about his investigation into the allegations of abuse, which culminated in Applicant's arrest, and an assistant manager from Paces River Apartments confirmed Applicant and his mother lived at the apartment complex from May 13, 2011, to November 14, 2011. (R. pp. 117-128; pp. 169-170). Also, Puja Amin, the forensic interviewer who interviewed Victim during the investigation, recounted Victim disclosed she was sexually abused on two occasions but was unable to provide a specific time frame for the abuse. (R. pp. 202-207; p. 211). Additionally, Victim's brother confirmed he frequently hung out with Applicant, who was older, at the apartment complex, and he noted he saw Applicant at the apartment complex even after Applicant moved away. (R. p. 172; pp. 174-179). Victim's brother further noted Victim reacted badly when Applicant visited with him after they moved to a new apartment complex shortly before the abuse was disclosed. (R. pp. 181-183). Similarly, Mother recounted she lived at Paces River Apartments with Victim, her other children, her sister, and her sister's children from 2010 to 2012, and she indicated Victim began playing outside at the apartment complex in May of 2011. (R. pp. 188-190). Mother further testified Victim's behavior changed once they moved to a new apartment complex in 2013, and she indicated Victim cried whenever Applicant was around. (R. pp. 190-193). After that, Mother indicated Victim reported she was sexually abused, and she stated she quickly reported the allegations to the authorities once they were disclosed to her. (R. p. 195).

**III. Current Post-Conviction Relief Application**

In his original application for post-conviction relief, Applicant did not state or allege why he is being held in custody unlawfully. Respondent made its return and moved to dismiss the application for failure to state a claim. A hearing was held before the Honorable Edward W. Miller, circuit court judge, on August 29, 2022, on Respondent's motion to dismiss. Judge Miller

indicated he would grant the motion to dismiss unless Applicant filed an amended application within fourteen days.

Subsequently, on September 7, 2022, Applicant filed, through counsel, and amended application raising the following grounds for relief:

1. Ineffective Assistance of trial counsel Ashley Anderson and Melissa Inzerillo:
    a. "Counsel were ineffective for failing to object to the trial judge's amendment of the indictments";
    b. "Counsel were ineffective for failing to object to the 'amended' indictments being provided to, or viewed by, the jury prior to or during deliberations";
    c. "Counsel were ineffective for failing to object to the trial judge's instruction to the State to confer with a witness, under oath and in the middle of her testimony, during a break in the proceedings."
2. Ineffective assistance of appellate counsel Jessica L. Birt:
    a. "Counsel was ineffective for failing to consult, involve, and advise Applicant in the preparation of his appeal and during the appeal process";
    b. "Counsel was ineffective for failing to raise the meritorious issue of the indictments being 'amended' by the trial judge and submitted to the jury."

**IV. Response to Amended Allegations**

Respondent submits that Applicant is not entitled to post-conviction relief and that every allegation of ineffective assistance raised in his amended application is without merit. Nevertheless, because the application potentially raises factual issues not conclusively refuted by the record, Respondent requests an evidentiary hearing be scheduled to resolve all of the issues raised in the amended application. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

**Ineffective Assistance of Counsel, Generally**

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction

or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth

Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also *Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and

raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 687 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

**Failure to Object to Trial Judge's Amendment of the Indictments**

Respondent submits Applicant cannot satisfy either prong of the *Strickland* test as to this allegation. The trial judge amended the indictments by labelling one "staircase incident" and the other "tennis court incident." These amendments were made in response to Applicant's complaint that the indictments failed to identify the charged offenses with sufficient specificity. Applicant has not presented any argument as to why the trial court's amendment of the indictments was erroneous, how his defense was prejudiced by the amendments, or why trial counsel should have objected. *See* S.C. Code Ann. § 17-19-100 (providing a court may amend an indictment provided the amendment does not change the nature of the offense charged).

**Failure to Object to Amended Indictments Being Presented to the Jury**

Respondent submits Applicant cannot satisfy either prong of the *Strickland* test as to this allegation. Applicant has not explained why the indictments, which the trial court amended following Applicant's own complaint that the indictments were insufficiently specific, should not have been presented to the jury. Applicant has also failed to explain how he was prejudiced by the presentation of the indictments, especially where the trial court properly instructed the jury that the indictments were merely charging instruments, not evidence. (R. pp. 31–32).

**Failure to Object to Trial Court's Instructing State to Confer with a Witness**

Respondent submits Applicant cannot satisfy either prong of the *Strickland* test as to this allegation. Applicant has not specified which witness the trial court allegedly asked the State to confer with, nor how Applicant was prejudiced by this alleged occurrence.

**Failure to Involve Applicant in Preparation of his Appeal**

Respondent submits Applicant cannot satisfy either prong of the *Strickland* test as to this allegation. Applicant has not explained what additional grounds for appeal might have been raised had appellate counsel consulted with him more frequently during the appellate process or how the outcome of his appeal would have been different.

**Failure to Raise Issue of Trial Court's Amendment of the Indictments**

Respondent submits Applicant cannot satisfy either prong of the *Strickland* test as to this allegation. As discussed above, Applicant has presented no argument as to why the trial court's amendment of the indictments in this case was improper or prejudicial. In addition, because trial counsel did not object to the trial court's amendment of the indictments, the issue was not preserved for appeal. *See, e.g., State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (holding a contemporaneous objection must be made to preserve an issue for appeal). Finally, even if the issue were both preserved and potentially meritorious, appellate counsel does not have a duty to raise every non-frivolous issue on appeal, but may pick and choose issues to maximize the likelihood of a favorable outcome. *See Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

For these reasons, Respondent submits Applicant will be unable to meet his burden of proof as to any of the allegations raised in his amended application for post-conviction relief. However, to the extent these allegations concerns issues of fact not conclusively refuted by the record, Respondent requests an evidentiary hearing be scheduled to fully resolve Applicant's claims. *See Sharper*, 279 S.C. at 266, 305 S.E.2d at 249.

**V. Any Future Amendments and Invocation of Discovery Process**

Applicant must specify any claims he intends to raise at the evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. *See* Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

**VI. Response to Any and All Other Allegations**

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

**VII. Conclusion**

WHEREFORE, Respondent respectfully requests an evidentiary hearing be scheduled in order to resolve the factual questions raised by Applicant's current amended application for post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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By:_____
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10/6, 2022

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF YORK CASE NO. 2018-CP-46-02206

ORLANDO COLEMAN,
Plaintiff,
-vs-
STATE OF SOUTH CAROLINA,
Defendant.

TRANSCRIPT OF RECORD

December 7, 2022
York, South Carolina

B E F O R E:

Honorable Walton J. McLeod, IV, Judge.

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

Mr. Jonathan D. Waller
Attorney at Law
Attorney for the Plaintiff
Columbia, South Carolina

Mr. Zachary Jones
Assistant Attorney General
Attorney for the Defendant
Columbia, South Carolina

Shannon E. McGilberry, CVR-M
Court Reporter

I N D E X

THE COURT: Okay. We ready to proceed on our next case here?

MR. JONES: Yes, Your Honor. May it please the Court. This is the matter of *Orlando Coleman versus The State of South Carolina*, case number 2018-CP-46-2206. My name is Zachary Jones for the State and Mr. Coleman is here, along with his counsel, Jonathan Waller.

Mr. Coleman was indicted by the York County Grand Jury in December 2014 for first degree CSC with a minor, 2014-GS-46-3857 and 2014-GS-46-3858.

In February of 2015, the York County Grand Jury issued amended indictments, again, charging him with two counts of first degree CSC with a minor.

Ashley Anderson, at the time, now Ashley Stopinksi, and Melissa Inzerillo represented Mr. Coleman and the solicitor was Sharon J. Ohayon of the Sixteenth Circuit Solicitor's Office.

He proceeded to trial before the Honorable Roger L. Couch and a jury. The jury convicted him as indicted and on March 18th, 2015 Judge Couch sentenced him to a concurrent term of imprisonment for twenty-five years for each count of first degree CSC with a minor, along with credit for time served of 527 days.

Mr. Coleman filed a timely notice of appeal. He was represented on appeal by Appellate Defender Jessica Birt, as

well as Robert Dudek of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed his conviction on February 21st, 2018 and the remittitur was sent on March 13, 2018.

Mr. Coleman filed the present post-conviction relief application on July 31st, 2018. It was amended on September 7th of this year and now I'll turn it over to Mr. Waller.

THE COURT: All right. Mr. Waller, good morning.

MR. WALLER: Good morning, Your Honor. Please the Court.

Judge, when Mr. Coleman originally filed his application I don't believe he actually had any grounds and I think the lines for the grounds were blank.

We at some point got a discovery order, were able to get the solicitor's file and the public defender's file and so amended the application. Your Honor, I believe you have a copy of that app- -- of the amendment?

THE COURT: Yeah. Dated August 31st?

MR. WALLER: Yes, sir, Your Honor.

THE COURT: Okay.

MR. WALLER: It's five grounds. We are going to proceed on that --

THE COURT: That'd be paragraph 1(a) through (c) and 2(a) and (b)?

MR. WALLER: That's correct, Your Honor.

THE COURT: And you're proceeding forward on all those grounds today?

MR. WALLER: Yes, sir.

THE COURT: You ready to call your first witness?

MR. WALLER: Yes, sir, Your Honor.

THE COURT: Proceed.

MR. WALLER: I call Orlando Coleman.

THE COURT: All right.

(ORLANDO COLEMAN, being first duly sworn, was examined and testified as follows):

THE COURT: And our court reporter's trying to -- and, sir, our court reporter's trying to take everything down you're saying, so if you could remove your mask so she could also see you speaking. I appreciate it. Thank you.

All right. Mr. Waller.

MR. WALLER: Thank you, Your Honor. May it please the Court.

DIRECT EXAMINATION

ORLANDO COLEMAN BY MR. WALLER:

Q. Good morning, Mr. Coleman. How are you today?

A. I'm all right.

Q. All right. Mr. Coleman, if you wouldn't mind please speaking up a little bit so everyone, especially our court reporter, can hear everything you say. Mr. Coleman, I want to take you back to when you were first arrested. Do you

remember when you were first arrested?
A. Yeah, vaguely.
Q. Okay. How old were you when you were arrested?
A. I think I was like twenty years old. I had just turn twenty, like, on that month ago.
Q. It's been, what, nine years, about, since you got arrested?
A. Close to that.
Q. When you were first arrested, what were the charges you were arrested for?
A. What I was originally arrested for was criminal sexual conduct in the second degree.
Q. Okay.
A. And when I got arrested, I stayed in the county, like, a year and six months before they finally supposedly amended it to first -- first degree and --
Q. Okay. All right. Let me back up just a little bit. So you were arrested for criminal sexual conduct with a minor in the second degree to start?
A. (Nods head affirmatively)
Q. Just one count or multiple counts?
A. Just one.
Q. Just one. Okay. And you answered my next question. You were, obviously, -- were you given a bond and just couldn't make it or were you denied bond?

A. I wasn't given a bond until, like, -- well, I mean, I got denied it, but I wasn't given a bond hearing, I'm going to say that, I wasn't given a bond hearing until, like, the last trial I had.
Q. Okay.
A. Before the last trial I had.
Q. About how long after you were arrested were you -- did you get a lawyer?
A. I really don't remember. It's been a while.
Q. Okay. Were you in -- sitting in the county for a while without anybody representing you?
A. Not -- not that long.
Q. Okay.
A. I remember I wasn't sitting in there that long.
Q. Okay. Did you go to your first bond hearing with or without a lawyer?
A. I had -- I think I had a lawyer.
Q. Okay. Who was the first lawyer that represented you?
A. I don't remember his last name, but it was, like, Phil something.
Q. Okay. How did he come to represent you? Was he appointed or did you hire him?
A. He was appointed.
Q. Okay. Was he with the public defender's office?
A. Yes, sir.

Q. How long did he represent you?
A. I only seen him once and I don't know how long he was assigned to me, but I only seen him once and then Ms. Ashley Anderson was appointed my public---
Q. Okay.
A. ---defender.
Q. How about how long into your detention did Ms. Anderson come to represent you?
A. I think before I went to my trial with what's his -- what's his name? The other -- I can't remember his name. Like I say, it's been a while. I can't -- can't remember all these people name without --
Q. That's okay.
A. -- without the transcript.
Q. That's okay. All right. And at some point Ms. Inzerillo came to represent you as well?
A. (Nods head affirmatively)
Q. And do you know, was she just brought in to help with the trial or do you know?
A. As far as I know, she was -- she was helping.
Q. Okay. But she wasn't -- she wasn't representing you by yourself until you were headed to trial. Is that right?
A. Yeah.
Q. Okay. All right. At what point -- you mentioned earlier that you -- your indictments changed from or your

charges changed from criminal sexual conduct with a minor second degree, one count, to first degree. Was it more than one count on first degree?

A. Yeah. They changed it to two counts of criminal sexual conduct first degree and then just charged me twice for it.

Q. Okay.

A. But I got two indictments for it, though.

Q. When you first met with Ms. Anderson, what did y'all talk about?

A. Really, I don't remember the conversa- -- I just know I told her I wanted to go to trial.

Q. Okay. Did y'all talk about your constitutional rights, your right to a trial? Y'all talk about that?

A. I think I talked about a fast and speedy trial.

Q. Okay. You were -- you'd given a statement in this case? Is that right?

A. (Nods head affirmatively)

Q. Did y'all talk about your statement at all?

A. Yeah. I think so. Yeah.

Q. Okay. You gave a statement to law enforcement prior to your arrest. Is that right?

A. Uh-huh.

Q. Okay.

COURT REPORTER: Sir, please answer verbally.

THE WITNESS: Oh.

A. Yes, sir.
Q. Yes or no. Okay. So at some point you decided you were going to trial?
A. (Nods head affirmatively)
Q. Okay.
COURT REPORTER: Sir, please answer verbally.
A. Yes, sir.
Q. Did you and Ms. Anderson or you and Ms. Inzerillo discuss the -- how a trial would go, the procedures of a trial?
A. Say that again, please.
Q. Did you and Ms. Anderson or you and Ms. Inzerillo discuss the process of a trial, the procedures that would take place during a trial?
A. I remember Ms. Inzerillo and I think he was a investigator from the public defender's office, we was talking about it one time.
Q. Okay.
A. But I think that was about the only time we did talk about it, other than when we was, like, during the trial.
Q. Okay. Had you ever been a part of a criminal jury trial before?
A. Like, -- explain that. Like, had I --
Q. Have you ever been a defendant in a criminal trial with a jury in general sessions court before this trial?

A. Yeah. Before the trial that convicted me?
Q. Yes.
A. Yeah.
Q. Okay. So you were familiar with the process?
A. Sort of.
Q. Okay. When the indictments changed or when the charges changed, what did you and Ms. Anderson discuss about the changes in the indictments?
A. I remember asking her how were they able to change my indictments to first degree and they changed the time when it supposedly happened after I had been in the county for so long and not let me know about it at the time. I remember asking about that. I really don't remember her answer, but I remember asking about that, though.
Q. Okay. I want to ask you a little bit about the time issue. So when you were originally charged, there was a range of time that the crime alleged to occur. Is that right?
A. At first they said the summer of 2011.
Q. Okay. How did it change?
A. I don't -- I don't know how it changed. It just -- I remember it being there when I asked for my motion for discovery and when I had my -- when I first got my motion discovery, it was saying the summer 2011 and then by the time I went to the trial that got me convicted, it was

saying somewhere between, I think, what, 2010/2012?
Q. Okay. So the time got bigger?
A. Yeah.
Q. Timing got bigger. All right. You had two counts at this point. Is that right?
A. Yes, sir.
Q. On the indictments, and if you don't recall this, that's fine, was there a way -- were the time frames and the details given on the indictments the same or different than -- compared to each other?
A. It was exactly the same.
Q. Okay. But you were charged with two counts?
A. Yeah.
Q. Was there any way on the indictments to differentiate what was supposed to be what?
A. Well, the judge, when Ms. Inzerillo pointed that out, that it was exactly the same, the judge had written on there, one stating that it was the tennis court and one stating that it was in a stairway.
Q. So the judge wrote on the indictments that happened?
A. (Nods head affirmatively)
Q. When did that take place? During the trial?
A. Yeah. When they -- they asked to approach the Bench.
Q. Okay. Did you and Ms. Anderson or you and Ms. Inzerillo have a change to discuss the fact the indictments

were the same prior to coming into court?
A. No.
Q. Okay. When y'all were preparing for trial, did you ask Ms. Anderson or Ms. Inzerillo to investigate anything on your behalf?
A. Yeah. I asked for witnesses---
Q. Okay.
A. ---to come speak on my behalf, but I -- like, I -- at the time I wasn't familiar how the whole process goes. So I was told that I couldn't do that 'cause that would be like bolstering my statement or whatever, but apparently the victim could, though.
Q. Okay. So these incidents were alleged to have happened at an apartment complex. Is that right?
A. Yes, sir.
Q. Where you were living at some point?
A. Yes, sir.
Q. The time frame given in the indictments, were you living there the entire time?
A. No.
Q. Okay. Did you have a chance to talk to Ms. Anderson or Ms. Inzerillo about that?
A. I told them about that. When they -- when I had my first interview or interrogation, whatever you want to call it with the detective, I told him that the last time I lived

at that place I had been 16 years old and by the time I left there I was just about to turn 17. So I wasn't even living there when I was 17 years old, 'cause on the indictments it said I was 17 years old when the crime allegedly took place, but I wasn't even living there then when I was 17.

Q. Okay. Were you able to communicate that to Ms. Anderson and Ms. Inzerillo?

A. I told them that.

Q. Did y'all discuss whatever their findings might have been from their investigation?

A. Sort of. I don't remember the details, but sort of.

Q. What was your impression of the conversation?

A. I felt like they were kind of in a tight space, trying to get that communicated to the judge, whatever.

Q. What do you mean a tight space?

A. I don't -- I don't know if they was able to really express that I wasn't really the age that they was trying -- that they was stating that I was at the time. I don't think that really something that --

Q. Okay. So you think that your age at the time was an important issue, looking at -- on the indictments?

A. Considering what I told the detective, yeah.

Q. Okay.

A. And he obviously went a whole 'nother direction with it.

Q. Did you talk to your lawyers about that?
A. Yeah. I told them that.
Q. Do you what their -- what was their response?
A. They told me they was going to look into it. Like I told you, there was a investigator from the public defender's office. He say he was going to look into it, too, but I don't know what happened after that.
Q. Okay. Going into the trial, as y'all are preparing for trial, what did you think your defense was or defenses if you had multiple?
A. Really, I didn't really feel like I was prepared enough to defend myself, because once they told -- once I realized during the trial that there was a whole different indictment that I was going in there for, I was like how -- I didn't understand how they could do that.
Q. What do you mean a different indictment?
A. Like, with the time situation, how they trying to, like, broaden it so that it can supposedly get me there at the scene of crime, whatever, I felt like I was, like, trapped in that, whatever.
Q. Okay. Do you -- have you not seen a copy of the amended or changed indictment prior to --
A. Not until the trial?
Q. Okay. Do you know if your lawyers had seen it?
A. I'm not sure.

Q. Okay. Did y'all discuss that a change had been made?
A. After I was made aware of it during the trial and we went on recess, we discussed about it and I asked them about that.
Q. Okay. Going into the trial, though, before you knew about that, did you -- were you -- felt that y'all had some defenses that you were going to present?
A. So-so.
Q. Okay.
A. Really, so-so.
Q. Do you remember what they were?
A. Not really.
Q. Okay. All right. How many times do you think you met with Ms. Anderson or Ms. Inzerillo or their investigator?
A. I think I -- I seen the investigator more times than I seen Melissa or the -- or Ashley, but I think I seen Ashley and Melissa, like, I think, three or four times.
Q. Okay. When you say Melissa, you mean Ms. Inzerillo, Melissa Inzerillo? When you say Ashley, you mean Ashley Anderson. Is that right?
A. Like, both of them together and sometimes one would come when the other one couldn't.
Q. Okay. Okay. All right. Mr. Coleman, ultimately, you were convicted in this case and we've heard your sentence here today. An appeal was filed on your behalf. Is that

right?
A. Uh-huh. Yes, sir.
Q. Tell me about that process. When were you first able to communicate with Ms. Birt?
A. That's been a while ago, but I know I talked to her, I think, twice on the phone.
Q. Okay.
A. And I didn't even realize that how that process went either, but I know I stayed -- I served two years before I finally heard something back from my appeal and they denied and stuff.
Q. Okay. But as far as preparing what was presented to you, you would have -- you'd have left York County and gone to R&E?
A. Kirkland.
Q. Columbia.
A. Yeah. I went to R&E. I had already went to R&E. I stayed there 33 days and then I got sent to Lee Correction---
Q. Okay.
A. ---and I stayed there for, like, six months, going to the law library back and forth and then all of a sudden I got a letter saying that she was -- Jessica Lee Birt was my lawyer for my direct appeal. So once I got her information, I started writing her and asking her questions about my case

and what was going to happen during it and all that, but I only got to talk to her on the phone twice the whole time that process was going on.

Q. Okay. You talked to her when you were -- you'd left R&E and --

A. When I was at Lee.

Q. And that was before or after your initial brief or your final appellant's brief had been submitted. Do you know?

A. I think so. I'm not sure.

Q. Okay. Mr. Coleman, the issues with the indictments we've talked about, the adding a charge, the changing of the time frame, your age, you said that's something that came up during the trial. Is that right?

A. Yeah.

Q. Would you have -- you have known -- would you have had a chance to discuss that with your lawyers or was time limited because you're in the courtroom and the trial's going on?

A. Like I said, when they called recess and by that time they had expressed to me that I had got the CSC first and two counts and all this stuff, that's when I was talking to them about it and I was asking them questions about how they were able to do that and whatnot, but---

Q. Okay.

A. ---that's all we talked about when we did talk about

it.

Q. So any allegations that we've raised in your case from your trial and as it alleges against your trial counsel all occurred kind of in the courtroom. Is that right?

A. Uh-huh.

Q. Okay.

A. Yes, sir.

Q. A little bit out of your hands. Is that right?

A. Yes, sir.

Q. Okay. Mr. Coleman, I think I've asked you all the questions that I have. Is there anything that you think I've left out or neglected to ask about Ms. Inzerillo, Ms. Anderson's representation of you at your trial or Ms. Birt's representation of you in your appeal?

A. No, sir. I do have a question, but I'm not sure if it would be appropriate right now.

Q. Well, you're the witness. You don't get to ask any questions, but I'll be happy to talk to you when you're over here at the table. Is there anything that you think I've left out that the judge needs to be aware of?

A. Not that I can think of right now.

MR. WALLER: Thank you, Mr. Coleman. Please answer any questions the Attorney General's Office has for you.

THE COURT: All right. Cross-examination.

MR. JONES: Your Honor, I have no questions for Mr.

Coleman.

THE COURT: All right. The witness may step down. Any other witnesses?

MR. WALLER: Nothing further from the applicant.

THE COURT: Well, you want to give me a brief summation, I guess?

MR. WALLER: Well, Your Honor, --

THE COURT: I think I wrote down my notes, but --

MR. WALLER: Your Honor, I would imagine the Attorney General's Office is going to call trial counsel. I'll be happy to --

THE COURT: Oh. I'm sorry. I was just making sure you were paying attention.

MR. WALLER: Yes, sir.

THE COURT: All right. Thank you.

MR. JONES: All right. Thank you, Your Honor.

THE COURT: I was treating it like a directed verdict.

MR. WALLER: Yes, sir.

MR. JONES: Your Honor, the State calls Melissa Inzerillo.

THE COURT: All right. Good morning.

MS. INZERILLO: Good morning, Your Honor.

(MELISSA INZERILLO, being first duly sworn, was examined and testified as follows):

DIRECT EXAMINATION

MELISSA INZERILLO BY MR. JONES:

Q. Thank you, Ms. Inzerillo. Can you give the Court a background of how you became involved in the representation of Mr. Coleman?

A. Yes. From what I can remember, Ms. Anderson, who's now Ms. Stopinski, was appointed to the case and I came on board, I think, pretty early on to assist her with the case.

Q. And at the time you got involved, do you recall what the indictments alleged against Mr. Coleman?

A. I think he was originally charged with CSC second with a minor and a resisting arrest.

Q. And at some point those indictments were amended to CSC first with a minor?

A. Yes, and the resisting arrest was ultimately dismissed.

Q. When you went to trial, do you recall what the indictments initially said at the beginning of trial?

A. I don't and I have to apologize. We can't find the physical file which had most of the notes on it. I do recall there was an issue with the indictments because the date range kept changing and so initially when we got, you know, the initial date range on the warrants, we investigated that and looking for any potential alibis and then I believe Ms. Stopinski would go to the solicitor, you know, and -- in anticipation of an alibi and then the date

range would change again and so we kept having that problem. The -- and so, ultimately, I can't remember the dates of that. Ms. Stopinski may have referenced it in the transcript in her motion, but I can't remember the dates, but I do remember that the indictments kind of being a moving target for a while, which is why Ms. Stopinski made the pretrial motion that she made.

Q. All right. Do you recall learning anything in your investigation of Mr. Coleman's alibi issue?

A. His -- I remember his mother telling our investigator that there were times they did not live at that particular apartment complex. So our investigator went out, I would say, at least two or three times that I can remember to the utility company. I went with him at least once. Ms. Stopinski and I may have gone with him another time, trying to figure out if they were drawing utility at that particular place at that particular time. Each time -- we did not present an alibi, so I would assume that none of that panned out, but I do recall us going to the utility company, trying to figure out, within the date ranges that we were given, if he did in fact live there so that we could present an alibi.

Q. And, now, the -- Mr. Coleman has alleged in his application for post-conviction relief an allegation about one of the witnesses, an issue related to one of the

witnesses, Ms. Melissa Patterson.
A. Uh-huh.
Q. Do you have a copy of the transcript with you?
A. Yes, sir.
Q. Could you turn to page 285?
A. Yes.
Q. And could you explain to the Court, just briefly, this portion of Ms. Patterson's testimony, what concerned you about it and what you did in response?
A. Sure. From the arraignment transcript, it appears that Ms. Patterson is the mother of the children and there was a child -- one of her children was the victim and then there was another one of her children that the victim may have said something to, trying to report it earlier, but also, I think she may have inter- -- talked to another child or something. So there was a couple of children involved here and when she took the stand, it appeared to me that her testimony was going down the path of violating the time and place rule under hearsay for -- that's applicable to CSC cases and so to head that off, I made an objection. The -- and the -- it appears that Ms. Ohayon, who was the prosecutor, acknowledged that the questioning had been a bit clumsy and that did appear to be where they were headed. The Court also tended to agree and so I made that objection to, basically, avoid a bigger issue and stop it from being

testified to.
Q. All right.
MR. JONES: I think that's the questions I have for you, Ms. Inzerillo. Thank you so much.
THE WITNESS: Thank you.
THE COURT: Cross-examination.

CROSS-EXAMINATION

MELISSA INZERILLO BY MR. WALLER:

Q. Good morning, Ms. Inzerillo. How are you?
A. Good, Mr. Waller. How are you?
Q. I'm doing well. Thank you. If I could, what was the factual allegations against Mr. Coleman that you understood from the time you got involved in the case?
A. In general, from the time we were involved, there was an allegation that a young female child accused him of touching her.
Q. Okay. And did it start out the same -- the allegations start the same as they ended up or -- I know there were some modifications to the time frame.
A. Uh-huh.
Q. He was originally arrested for one count.
A. Yes.
Q. Okay. When did it become known, I guess, that there were multiple counts involved?
A. I don't know. Sometime during our representation. I

don't think -- I don't recall there being any surprise to us at trial that there was a second allegation. I think we were made aware of that fairly early on. I believe Ms. Ohayon made us aware of the change in indictments as well, 'cause I do -- I don't remember the specific conversations, but I remember there being several conversations between Ms. Stopinski and Ms. Ohayon about the indictments.

Q. Okay. The indictments were a big issue. Is that right?

A. Yes, sir.

Q. What was your -- what research did y'all do as far as the time frames or allegations being specific enough to allow you to present a defense?

A. I will defer to Ms. Stopinski's answer on that if she is called. She did a lot of that research and made that pretrial motion, but I do remember us doing at least a West Law search, trying to find any case law. Practically speaking for us, it seemed to be a moving target, so it was a practical matter because we couldn't settle on an alibi. We couldn't determine what to help -- you know, what to defend Orlando against because the date ranges kept changing and so that also with the -- I think Ms. Stopinski argued vagueness overbreadth and a notice element because at some point in the conversations between Ms. Stopinski and Ms. Ohayon, notice was becoming an issue. We were -- every time

we would figure out what we could defend against, we'd get a new time frame under the indictment and so at that point there was discussions about addressing in trial.

Q. Okay. In your experience, is it -- how hard is it to come up with an alibi defense or even maybe not an official alibi defense over a two-year period?

A. It can be difficult. You know, a lot of times defendant's don't know what they were doing at a particular time. You know, when you're dealing with cases like this, sometimes children's testimony is vague in and of itself. They remember it's cold outside, well, that's winter and so we tried -- you know, obviously, that was the first thing we looked at, 'cause over a year and a half or two-year period, with it being an apartment complex, is it likely someone didn't live there the whole time and so that was the first thing we looked at and I believe his mother made us aware there may have been some issues with that. So we did try very hard to at least try to isolate something, if no other point than to whittle down the time frame. You know, if he hasn't lived there the last six months, then certainly that would help us factually.

Q. Okay. And I know you didn't argue this motion, but the two indictments were identical, both their time frame and also lack of defining of or differentiating where it took place or anything like that.

A. Right.
Q. What -- how did y'all prepare to challenge the fact that they were identical? And then what was your concern when the judge handwrote on the indictments?
A. Well, I believe in our conversations with the State, we were aware of the two specific incidences. There was a tennis court incident and I can't remember what the other one was, but we knew that from our conversations with the State. We had talked to Orlando about that and so, you know, all of us went into the trial understanding those were the context of the two indictments and, as you said, Ms. Stopinski made that motion, but in that motion it was conveyed to the judge that those were the two particular incidences and so from my perspective, you know, him clarifying that, we viewed that as a clarification, not that he was commenting on anything or swaying the jury one way or another. It was just a clarification of the two incidences.
Q. Okay. So you didn't have any concern -- based on that answer, you didn't have any concern when those indictments with his notations were sent back to the -- with the jury?
A. No. I think if we had concerns about it, we would have objected.
Q. During the testimony of Ms. Patterson, I believe you did her cross. You've already been asked this on direct. A break was taken and the judge seemed to indicate --

MR. WALLER: And, Your Honor, this is on page 286 of the transcript.

Q. -- judge seemed to indicate that the solicitor's office should discuss with Ms. Patterson during the break what she can and can't get into, I guess. Was there a -- was there a strategic reason for not -- first of all, do you know if any of the conversation happened between the witness currently sworn and the solicitor's office during that break?

A. I don't have any independent recollection, but generally, if I sense there's an issue, then I would address it and I believe Ms. Patterson, when we resumed testimony, did testify according to time and place. So I -- judging by that, I tend to think there was a discussion to limit her testimony.

Q. Was there a strategic reason or other reason for not making an objection on the record to that conversation?

A. Yes. I had made, basically, a preemptive objection, I mean, just to sort of stop where this was going and the judge agreed with us. It appeared Ms. Ohayon also agreed that we were getting into sort of tenuous territory and with the judge's request to basically meet with the witness to narrow down that testimony to avoid the issue, strategically, I wasn't going to object to that because it was going to achieve my objective, avoiding a mistrial and anything that could have happened had she continued on the

path that I saw us going down.
Q. Okay. You weren't part of any conversation they may or may not have had?
A. Not that I recall. No.
Q. So you wouldn't know if it was limited to specifically what the judge asked to address or if they got into other issues?
A. I don't know that.
MR. WALLER: Beg the Court's indulgence.
Thank you, Ms. Inzerillo. I have nothing further.
THE COURT: Redirect?
MR. JONES: No redirect, Your Honor.
THE COURT: Witness is excused. Thank you.
THE WITNESS: Thank you, Your Honor.
MR. JONES: Your Honor, the State would call Ashley Stopinski.
THE COURT: Very well.
(ASHLEY STOPINSKI, being first duly sworn, was examined and testified as follows):

DIRECT EXAMINATION

ASHLEY STOPINSKI BY MR. JONES:
Q. Good morning, Ms. Stopinksi.
A. Good morning.
Q. Do you recall how you became involved in the representation of Mr. Coleman?

A. I was appointed. We did -- we were able to see in the computer file that our office was appointed on October 9th, 2013. Initially, another attorney in the public defender's office, Phil Smith, I believe, met with Mr. Coleman shortly after his arrest to establish that we were appointed and I would have been appointed sometime after that in October of 2013.

Q. All right. And do you recall, generally, the issues with the indictments that I believe Ms. Inzerillo testified to?

A. Yes. I recall that there was a lot of back and forth about the indictments in this specific case.

Q. Do you recall at beginning of the trial making a motion regarding the indictments on the basis that they were, first of all, that there were two indictments that were identical and, second of all, that they covered a time frame that didn't make it clear which incident was which?

A. Yes.

Q. And do you recall what the Court did as a result of that motion?

A. I recall the Court -- that the Court did deny the motion to quash the indictments and that the judge, then, did handwrite the -- there were always two incidents alleged, the staircase incident and the tennis court

incident and that had been consistent throughout the course of the case. I believe the incident report was where those first appeared and may have been either the incident report or the forensic interview, so -- but the indictments never alleged as to which numbered indictment pertained to which alleged incident and the judge, I believe, handwrote in a identifier, either staircase or tennis court, on the indictments.

Q. All right. And did you see any ground to object to that at the time?

A. No. We had made the objection, actually, the record shows, to the indictments in the motion to quash. As to the actual writing in of that, I didn't see that as being an issue, because for me it was more of a clarification for the jury. The jury could very well find that the State -- that Mr. Coleman was not guilty of one charge, was guilty of the other, you know, not guilty of both, however it was. Absent that, there was nothing other than the number to distinguish the two indictments and I viewed that just as a clarification to make sure the jury was putting their verdict down on what they intended to.

MR. JONES: Thank you. I believe that's all the questions I have for you right now.

THE COURT: Cross-examination.

CROSS-EXAMINATION

ASHLEY STOPINKSI BY MR. WALLER:

Q. And I apologize. I'm going to -- I've seen Anderson written a thousand---

A. That's all right.

Q. ---times, so I'm going to do that sometimes. Ms. Stopinski, I'm going to assume from your last answer there you did not -- you didn't have any objection to the indictments being clarified or modified by the judge. You didn't have any objection to those modified versions going back to the jury. Right?

A. No.

Q. When -- what was the defense that y'all were able to come up with leading up to trial?

A. I think ultimately at the end -- at the trial it was more of a just a reasonable doubt. I think, as best as I can recall, there were some details that the children testified to that had changed over time. I think -- I was looking through. I think I argued at some point that the details got more specific as time passed and it was a general reasonable doubt. We had initially, I believe, as Ms. Inzerillo testified to, we had looked into, initially, an alibi defense. When that did not work out, then we -- it was more of the credibility, the details, the lack of details, the non-specificity of the time frame, some of the

things that just generally, in our opinion, added up to reasonable doubt, so.

Q. And you justified that in your mind leading up to the trial, it was always known there were two separate incidents. When -- why was he charged with one and then indicted for two or when did that change? Was that from the incident report from the beginning or was that supplemented later?

A. It was -- there was one warrant -- I don't remember and I don't have the file, as we said, we haven't been able to locate it. I don't remember if the warrant alleged more than one or it just mentioned one. I know as of the time of the incident report, which would have come with the original -- the initial packet of discovery, that the two incidents were alleged in that. I cannot remember that came out of the forensic interview with the child. I can't remember if that was the detective's subsequent investigation, but I know as of the time that all of the discovery was provided to our office, the incident report already had two allegations made.

Q. Okay. And the enhancement, for lack of a better term, from second degree to first degree, that was based on the age of the child---

A. Yes.

Q. ---and Mr. Coleman. Is that right?

A. Yes.

MR. WALLER: Beg the Court's indulgence, please.

Q. During the trial when these motions are being ruled on and things are happening, were you able to, during breaks or at lunch, discuss any of the changes with Mr. Coleman?

A. I don't recall at this time any memory-wise what we would have discussed. I can say that Ms. Inzerillo was involved very early on. Barton O'Kelley, our investigator in our office, was involved early on, so there were three of us involved pretty much almost, practically speaking, from the beginning of this case through the trial. So we did try to have good communication with Mr. Coleman throughout. I remember him authorizing his mother to be entitled to meet with us separately to have all of the case materials. So I will say that there were the three of us. Sometimes he would meet with all of us, sometimes one, sometimes two, but I can't testify at this point as to specifically meetings.

Q. Sure. But during the trial he was aware of what was going on or what the rulings would have meant, even if not immediately. Is that right?

A. We would have been explaining and --

Q. Okay.

A. -- and as I remember generally, the general practice when Ms. Inzerillo and I did trials together is I believe Mr. O'Kelley would usually sit next to the client and would

be there as well to sort of answer any questions. That was what I remember is the general way we operated as well, so.

MR. WALLER: Thank you. I have nothing further.

MR. JONES: Nothing further from the State.

THE COURT: All right. Witness is excused.

MR. JONES: At this time the State would call Jessica Birt.

THE COURT: All right.

(JESSICA BIRT, being first duly sworn, was examined and testified as follows):

DIRECT EXAMINATION

JESSICA L. BIRT BY MR. JONES:

Q. Thank you, Ms. Birt.

A. Uh-huh.

Q. Do you recall how you became involved in the representation of Mr. Coleman on appeal?

A. Yes. I was actually a private attorney at the time, just working in a small firm and the Bar offered an opportunity for lawyers to accept appellate cases under the guise and guidance of the Indigent Defense Office in Columbia and so I accepted one of the cases, I believe it was, in the fall of 2015 and then was assigned this case through the Office of Indigent Defense.

Q. And so did you discuss the appeal with Mr. Coleman?

A. I did. We did -- as he indicated, we had a couple of

phone calls together, but I'd say probably the majority of our correspondence was in writing. He wrote me several letters. I wrote him several letters back, tried to keep him appraised of the general appellate process. I did request a few extensions, so I explained that to him and why, you know, sharing outline, time lines, things like that with him and I did also have a few conversations over the phone with his mother and other family members as well.

Q. All right. Do you recall the two grounds you raised in your brief?

A. Yes.

Q. Did one of them have to do with the indictments?

A. Yes, it did. Just that the judge improperly denied the motion to quash the indictments.

Q. And was that based on the breadth -- the overbreadth and vagueness of the indictments?

A. It was.

Q. And do you recall the Court of Appeals' decision on that?

A. Yes. The Court believed -- the appellate court believed that the circuit court properly denied the defense's motion to quash.

Q. All right. Did you, in reviewing the transcript, did you -- were you told, either by Mr. Coleman or did you decide yourself to raise the issue of the judge writing

"tennis court incident" and "staircase incident" on the indictment sheets?

A. So when I received the file and I went through, you know, conversations with the Office of Indigent Defense, we can only raise on appeal what was raised as an objection at trial, so in that sense we're inherently limited as to what we can bring up and I remember going through the transcript and that, obviously, was a very big issue. You could just tell from reading the transcript that that at trial was a huge point of contention. And so, the motion to quash was really the only legal ground that we could, on appeal, really take up, because without any kind of objection from a trial attorney and a ruling by that trial judge, we don't really have the -- the appellate court wouldn't have any grounds to review it. So the handwriting itself, specifically, I don't remember being a specific issue, which is why it wasn't raised, but the actual denial of the motion to quash, because the indictments were very broad in time and, you know, had changed so much, it did seem very problematic. We did absolutely bring that up, but -- yeah, but I don't remember that the handwriting was a specific separate objection that we could have had grounds to raise on appeal.

MR. JONES: I think that's the only questions I have for you. Please answer any questions Mr. Waller has.

THE COURT: Cross-examination.

MR. WALLER: Thank you, Your Honor.

CROSS-EXAMINATION

JESSICA L. BIRT BY MR. WALLER:

Q. Thank you, Ms. Birt. Just a few questions. What is -- what's your process for determining which issues to raise?

A. So in receiving a transcript, you have to read it first to see what objections were raised at all at trial. I went through the transcript, read it start to finish, and wrote down, basically, every idea I possibly had, probably more I could have raised on appeal, and then I went back through and tried to figure out, you know, standard of review, all of that kind of thing, which ones would be even available to me on appeal and then beyond that, the next level of review for myself would be, you know, even if it's available, do we have the information, the law, everything else behind it, to make it a worthwhile issue to raise on appeal. In this particular case, I did all of that and then also met with -- I don't know if I met with Mr. Dudek specifically. I know there were several other associates in his office that I met with who would give provisions of the transcripts my thoughts and then they would kind of go back and forth about with me and that's how we eventually narrowed it down to the two main issues we raised on appeal.

Q. Okay. How did your process relate with your client in

an appeal situation?
A. So in an appeal situation, I -- I tend to make sure that my client understands, you know, to what extent we have avenues to actually bring up issues. You know, when I spoke with Mr. Coleman and I spoke with his family, you know, a lot of what they wanted to discuss was the facts of the trial and I listened to everything they said and all the concerns they had because, of course, it could play into how we would draft or write or create, you know, structure our argument, but of course, you know, the appellate court is limited to reviewing issues of fact, especially when there's a jury. It's a little different when it's a Bench trial, but -- so I did have to -- I listened, but I did have to explain to the Colemans, you know, both him and his mother that, you know, my hands were tied to a certain extent as to what issues I could raise and while they were very important to them clearly because they had lived it through trial and through this experience, that, you know, it really had to be siphoned down for an actual appeal.
Q. When you spoke with him on the phone or spoke with his family, had you already done your review of the transcript and already kind of form- -- started to formulate your ideas on what issues you might raise or did you meet with him first or how does that process work?
A. To be honest, in the beginning, I know specifically for

this case I read the transcript. That's the document I had. I had put in a request for the public defender's office to provide me with their file. I think I wrote a letter to the client and also he indicated that, you know, he had family members who wanted to speak with me, so I reached to them. I kind of did that all at once. The actual timing of who came in first, I'm not sure. I do know that after reviewing the transcript and speaking with this family and receiving letters from Mr. Coleman, I kind of took the totality of that before creating any kind of appellate brief outline. And I do know there was a little bit of a delay in I wanted to wait in turning in the appellate -- the final draft of the appellate brief, because we were waiting on actual physical copies of the indictments. Since that had been brought up so many times as an issue, I wanted to make sure I had those physical copies before finalizing anything, but the actual order of operation is kind of send all my feelers out to see what comes in first and just kind of go from there, but I did -- I did try to keep an open mind, as much as possible, again, within the confines of what you can bring up on appeal.

Q. Okay. Are there any issues -- you said you did not raise any issue regarding the handwriting on the indictment, first, almost 'cause it wasn't object to. Did you make any -- did you review it at all to see if there would have been

a meritorious issue?
A. At the time I did -- I mean, I did all the legal research I could possibly find on indictments on whether or not -- you know, how to basically, you know, win on a motion to quash, what the statutory parameters are as far as timing and, you know, specificity, that kind of thing. I didn't see anything in my legal research that indicated that a handwritten note would be something that I could raise specifically, like you're saying, a meritorious argument in and of itself. If I had, I probably would have raised it, because I know that it was something I discussed with the public defenders and Mr. Coleman and his family at length, you know, just that that was an issue, but I didn't -- I don't recall finding anything in my legal research about that.
Q. Okay. Would you consider this a scrivener's error or the writing isn't correcting an error, it's adding information.
A. Uh-huh.
Q. Was there -- in your research was there a process to amend or clarify these indictments that could have been done without re-submitting to the grand jury?
A. Are you saying -- I'm a little confused, I guess. Are you saying that the trial court could have been accused of that or had an objection made that we could have raised on

appeal because it wasn't raised at trial?

Q. I'm asking if, through your research, you saw any avenues where this wasn't preserved for appeal---

A. Uh-huh.

Q. ---and so that's why we didn't raise it, but there was an issue and if you didn't research it, you didn't research it. That's -- I understand that. Was there anything that you saw in your research, though, that would indicate that changes to an indictment after being submitted to the grand jury can properly go to a jury?

A. Not that I felt applied to this case. No.

MR. WALLER: Beg the Court's indulgence, please.

Thank you, Ms. Birt. I have nothing further.

MR. JONES: Just briefly.

REDIRECT EXAMINATION

JESSICA L. BIRT BY MR. JONES:

Q. Thank you, Ms. Birt. I believe you -- you testified that you did research the indictment issues as thoroughly as you could, including looking out for anything that might have had to do with these handwritten notes?

A. That's correct.

Q. All right.

MR. JONES: That's my only question. Thank you.

THE COURT: Any recross?

MR. WALLER: Nothing further, Your Honor.

THE COURT: All right. The witness can step down.

THE WITNESS: Thank you, sir.

MR. JONES: Your Honor, the State rests.

THE COURT: All right. Anything else?

MR. WALLER: Nothing further, Your Honor.

THE COURT: Okay. Any summary you want to give me, just --

MR. WALLER: Just briefly, Your Honor. I think the two allegations that we have made, they all revolve around two issues. I think that in this situation the indictments were amended and I do think that that is something that needed to be preserved for review.

THE COURT: When you say amended, you mean handwritten amendment?

MR. WALLER: Yes, Your Honor.

THE COURT: Okay.

MR. WALLER: Just to --

THE COURT: Not the CSC first by itself, but you mean just the handwritten note placed on it?

MR. WALLER: Correct. The change to either clarify or however you want to call it, the handwriting by the judge in the courtroom, I think, would not constitute a scrivener's error, you know, correction that way. I think it was adding information that could have been almost a comment on the backs of -- by providing information that wasn't submitted

to the grand jury, I don't think it was properly done without being resubmitted.

THE COURT: Okay.

MR. WALLER: And then the other issue we have is regarding the solicitor's office being almost instructed to speak to a witness during a break while in they're in the middle of the their testimony.

THE COURT: Okay. And that was -- if I recall, that had to do with the time and place issue, which we deal with in sex- -- criminal sexual conduct cases involving minors?

MR. WALLER: Yes, Your Honor. That was the instruction from the judge. I believe the testimony from Ms. Inzerillo was that she obviously wasn't part of that conversation, doesn't know what else was said. I'm not making any sort of ---

THE COURT: Right.

MR. WALLER: ---allegations against the solicitor's office.

THE COURT: Just that it should have been -- well, I'll let you --

MR. WALLER: Just that it should have been preserved—

THE COURT: Okay.

MR. WALLER: ---for appellate review.

THE COURT: Okay.

MR. WALLER: Thank you, Your Honor.

THE COURT: Thank you. Mr. Attorney General.

MR. JONES: Thank you, Your Honor. Regarding the indictments, of course, the Court has authority to make limited amendments to the indictment, provided they do not change the nature of the offense charged. That's discussed in our return to the amended allegations and the State would submit that that's exactly the situation we had here. This was just a minor alteration to the indictments that did not change the nature of the offense charged, it said nothing about the elements of the offense, just to clarify which indictment was which, because the two were identical.

THE COURT: And it was a CSC first with a minor before he showed up at the courthouse and then after verdict, in other words, it didn't change the amount of punishment—

MR. JONES: Correct, Your Honor.

THE COURT: ---a potential defendant could face?

MR. JONES: Correct, Your Honor. The indictments are -- they're in the record if you haven't seen them yet, but absolutely all that the judge did was write "tennis court incident" and "staircase incident" in his own handwriting on the indictment sheets.

THE COURT: Okay.

MR. JONES: I have heard no argument that convinces me that that was improper and, regardless, it was done partially to resolve the issue that the -- that trial

counsel had, which was that the indictments were not very clear. I mean, they were identical. They weren't clear as to which incidents they were referring to. It was a way to try and narrow that and clarify that.

THE COURT: Okay.

MR. JONES: Of course, the trial counsel did make a motion to quash the indictments altogether because of the time range represented in them; that was preserved. It was addressed on appeal. The Court of Appeals ruled against Mr. Coleman on that issue, but the State submits that trial counsel and appellate counsel could have done nothing further with the indictments than what they did.

THE COURT: Okay.

MR. JONES: As for Ms. Patterson's testimony, again, that was, as Ms. Inzerillo testified, that was as a result of the -- you know, she was concerned that the testimony was veering into inadmissible territory. She brought that to the attention of the judge and the judge asked the -- asked that the -- well, it's all contained on page 286 of the record.

THE COURT: It's in the record, but I gather that the Court --

MR. JONES: The Court agreed with Ms. Inzerillo and the solicitor apparently also agreed with Ms. Inzerillo and as a result of all that, the solicitor, when the questioning

resumes, the solicitor says, I withdraw the last question, and rephrased the question in a way that Ms. Inzerillo testified addressed her concerns. So that was consistent with Ms. Inzerillo's trial strategy. The State submits it was a valid trial strategy to try and keep inadmissible testimony out and the --

THE COURT: Which would have prejudiced the defendant.

MR. JONES: Right; exactly. It would have been hearsay testimony about the allegations made by the victim against the defendant. So, yes, Your Honor, it would have been prejudicial to leave it in and, presumably, ineffective not to address it, so.

THE COURT: I'll take it under advisement and if I have any additional questions for you, I'll reach out to you directly. Okay?

MR. WALLER: Thank you, Your Honor.

MR. JONES: Thank you, Your Honor.

(END OF REQUESTED TRANSCRIPT)

* * * * * * * * *

STATE OF SOUTH CAROLINA )

) C E R T I F I C A T E

COUNTY OF YORK )

I, the undersigned Shannon E. McGilberry, official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Common Pleas Court for York County, South Carolina, on the 7th day of December, 2022.

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

In witness whereof, I have hereunto subscribed my name, this 30th day of May, 2023.

_____

Shannon E. McGilberry, CVR-M

My Commission Expires:

April 26, 2027

| | | |
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| STATE OF SOUTH CAROLINA<br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE SIXTEENTH JUDICIAL CIRCUIT |
| Orlando Coleman, #363390<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | ) | Case No.: 2018-CP-46-2206<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Orlando Coleman ("Applicant") on July 31, 2018, and amended on September 7, 2022. The Court convened an evidentiary hearing into the matter on December 7, 2022, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent.

After reviewing all records and evidence before the 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:

## PROCEDURAL HISTORY

Applicant was indicted by the York Grand Jury in December of 2014 for first degree criminal sexual conduct with a minor (2014-GS-46-3857; 2014-GS-46-3858). In February of 2015, the York County Grand Jury issued amended indictments, again charging Applicant with two counts of first degree criminal sexual conduct with a minor. Ashley Stopinski, Esquire (Ashley Anderson at the time of trial), and Melissa Inzerillo, Esquire, represented Applicant. Assistant Solicitor Sharon J. O'Hayon of the Sixteenth Circuit Solicitor's Office prosecuted the case. On March 16, 2015, Applicant proceeded to a jury trial before the Honorable Roger L.

Couch. The jury convicted Applicant, and on March 18, 2015, Judge Couch sentenced Applicant to concurrent terms of imprisonment for twenty-five years on each count of first degree criminal sexual conduct with a minor, along with credit for time served of 527 days.

Applicant filed a timely notice of appeal. Appellate Defenders Jessica Birt and Robert Dudek of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. *State v. Coleman*, Op. No. 2018-UP-090 (S.C. Ct. App. filed Feb. 21, 2018). The remittitur was sent on March 13, 2018.

## FACTUAL HISTORY

In September of 2013, Delissa Patterson (Mother), the mother of an eight-year-old girl (Victim), contacted law enforcement officers with the Rock Hill Police Department and alerted them Victim had disclosed she was sexually assaulted by Applicant at Paces River Apartments, an apartment complex located in Rock Hill, South Carolina, when Victim and her family had lived there a few years earlier. In response, Detective Ryan Thomas began an investigation into the reported sexual abuse.

As part of his investigation, Detective Thomas referred Victim to a child advocacy center for a forensic interview, and an interview was conducted on September 24, 2013. During that interview, Victim again disclosed she was sexually abused and described an incident occurring on a staircase and another incident occurring at a tennis court. However, Victim was unsure when the incidents occurred and was unable to provide a specific time frame for the sexual abuse.

Thereafter, on the following day, Detective Thomas contacted Applicant, who was twenty years old at the time, and briefly spoke with him about the allegations at his residence. During their conversation, Applicant acknowledged he knew Victim and indicated he remembered she

sometimes wore revealing clothing. However, he denied ever touching Victim and claimed he had never done anything inappropriate to any children.

A few weeks later, Detective Thomas arrested Applicant for sexually assaulting Victim. Following the arrest, Detective Thomas informed Applicant of his rights and again spoke with him about the allegations. During that interview, Applicant acknowledged he frequently hung out with Victim's brother. However, once again, he insisted he did not do anything improper to Victim and claimed he pushed her off every time she tried to get into his lap.

Subsequently, Applicant was indicted for two counts of first-degree criminal sexual conduct with a minor, and he proceeded to trial. At the outset of trial, defense counsel moved to quash the second of the two indictments issued in Applicant's case while also moving to restrict any witnesses from offering testimony that might bolster or vouch for Victim's credibility. In support of the motion to quash the second indictment, defense counsel cited to the decision in *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015), and argued the indictment and information provided to her did not provide sufficient notice for Applicant to adequately and effectively defend against the allegations raised in his case. Furthermore, defense counsel asserted the time frame in which the alleged incidents occurred had shifted and, while conceding it is frequently difficult for a victim to pinpoint the specific date on which an incident occurred, contended she could not pinpoint a date for a potential alibi defense in the event such a defense was available. In rebuttal, the solicitor noted Victim was nine years old at the time of trial and was unable to remember the dates on which the incidents occurred. Based on that fact, the solicitor indicated she could not pinpoint the dates of the incidents with more specificity or certainty than the time frames provided in the indictments. The trial judge then took the matter under advisement.

Thereafter, following a recess, the trial judge confirmed he reviewed the indictments issued in Applicant's case along with the decision in *Baker* and asked the solicitor to discuss the manner in which the indictment process proceeded. In response, the solicitor recounted Applicant was originally indicted for two counts of first-degree criminal sexual conduct with a minor in relation to an incident on a staircase and another incident at a tennis court after Applicant rejected an offer that would have permitted him to plead guilty to a single charge. Initially, the solicitor noted the indictments alleged a time frame for the incidents extending from 2010 to 2012, but she indicated she was able to narrow the time frame down further after she ascertained when Applicant moved to Paces River Apartments, the apartment complex where the incidents occurred, following an unsuccessful attempt to take the case to trial in January of 2015.[1] At that point, the solicitor stated she advised defense counsel she intended to amend the indictments to narrow the time frame and obtained the amended indictments in February of 2015.[2] However, the solicitor indicated she had been unable to limit the time frame of the incidents any further based on the information provided by Victim.

Following the solicitor's remarks, defense counsel asserted Applicant was initially arrested on an arrest warrant alleging a single incident that occurred on September 1, 2011, and she noted

[1] Originally, the indictments issued by the York County Grand Jury stated: "That on or about and between August 24, 2010 and June 15, 2012 in York County, South Carolina, the Defendant, Orlando Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of Section 16-3-655(A)(1), South Carolina Code of Laws (1976, as amended)." (R. pp. 253-256).

[2] Following the amendments, the indictments issued by the York County Grand Jury stated: "That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offenses of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended). Against the peace and dignity of the State, and contrary to the statute in such case made and provided." (R. pp. 257-260).

she was provided in October or November of 2013 with an incident report that referenced two separate incidents – one on a staircase and one at a tennis court – that were alleged to have occurred in the summer of 2011. Defense counsel further noted she was provided with a recording of Victim's forensic interview in which Victim did not reference the time frame of the incidents. Based on that information, defense counsel stated she began investigating the case under the assumption the incidents occurred in the summer of 2011 and obtained the lease contract for Applicant's family from Paces River Apartments. After that, defense counsel asserted she was provided with information in September of 2014 from the solicitor indicating the incidents might have occurred between January and June of 2012, and she further noted the solicitor subsequently provided additional information in January of 2015 indicating the incidents might have occurred while Victim was in first grade between 2011 and 2012. Because she initially believed the incidents were alleged to have occurred in 2011, defense counsel argued the defense had been put "in a different position" in regard to defending against an allegation alleged to have occurred when Applicant was not residing at Paces River Apartments. However, defense counsel conceded Victim never identified a specific date of the incidents and efforts had been made to try to identify the pertinent dates. Thereafter, in reply, the solicitor noted the information provided by defense counsel was largely accurate but reiterated the State had consistently alleged from the outset of the case the time frame of the incidents extended into 2012.

After considering the arguments of counsel and the *Baker* decision, the trial judge found the time frame alleged in the indictments was reasonable under the circumstances while also finding the solicitor made a good faith effort to narrow the time frame as much as possible under the circumstances. Furthermore, the trial judge found the indictments were sufficient given the nature of the alleged offenses to allow Applicant to respond to the charges against him. As a result,

the trial judge denied Applicant's motion to quash the second indictment. However, the trial judge indicated he would amend the indictments to reflect one related to an incident alleged to have occurred on a staircase while the other related to an incident alleged to have occurred at a tennis court.[3] The judge then handwrote "(Staircase incident.)" on Indictment No. 2014-GS-46-3857 and "(Tennis Court Indictment)" on Indictment No. 2014-GS-46-3858.

As the trial continued, Victim, who was nine years old at the time, testified about the abuse she suffered at Applicant's hands when she was younger. Specifically, she stated Applicant did things to her that made her "feel uncomfortable" on two occasions when she lived at Paces River Apartments. Regarding the first incident, Victim stated she was with her brother and cousins on a staircase, they eventually left, and Applicant asked her to sit on his lap when they were gone. After that, she indicated Applicant put his hand in her pants, touched her vagina underneath her underwear, and digitally penetrated her until her brother and cousins returned. Similarly, regarding the second incident, Victim stated she was with her cousins at a tennis court when Applicant approached. After that, she testified Applicant again put his hand underneath her underwear and digitally penetrated her vagina. Subsequently, Victim indicated she did not see Applicant again until her family moved to a new apartment complex. Once there, she stated she disclosed the abuse to her mother, and she noted she was unable to remember when the abuse occurred other than that it occurred when she was in first grade in 2011 and 2012.

In addition to Victim's testimony, Detective Thomas testified about his investigation into the allegations of abuse, which culminated in Applicant's arrest, and an assistant manager from Paces River Apartments confirmed Applicant and his mother lived at the apartment complex from May 13, 2011, to November 14, 2011. Also, Puja Amin, the forensic interviewer who interviewed

[3] No objections were raised to the trial judge's amendments to the indictments. (R. p. 24; p. 216).

Victim during the investigation, recounted Victim disclosed she was sexually abused on two occasions but was unable to provide a specific time frame for the abuse. Additionally, Victim's brother confirmed he frequently hung out with Applicant, who was older, at the apartment complex, and he noted he saw Applicant at the apartment complex even after Applicant moved away. Victim's brother further noted Victim reacted badly when Applicant visited with him after they moved to a new apartment complex shortly before the abuse was disclosed. Similarly, Mother recounted she lived at Paces River Apartments with Victim, her other children, her sister, and her sister's children from 2010 to 2012, and she indicated Victim began playing outside at the apartment complex in May of 2011. Mother further testified Victim's behavior changed once they moved to a new apartment complex in 2013, and she indicated Victim cried whenever Applicant was around. After that, Mother indicated Victim reported she was sexually abused, and she stated she quickly reported the allegations to the authorities once they were disclosed to her.

**CURRENT POST-CONVICTION RELIEF APPLICATION**

In his original application for post-conviction relief, Applicant did not state or allege why he is being held in custody unlawfully. Respondent made its return and moved to dismiss the application for failure to state a claim. A hearing was held before the Honorable Edward W. Miller, circuit court judge, on August 29, 2022, on Respondent's motion to dismiss. Judge Miller indicated he would grant the motion to dismiss unless Applicant filed an amended application within fourteen days.

Subsequently, on September 7, 2022, Applicant filed, through counsel, an amended application raising the following grounds for relief:

1. Ineffective Assistance of trial counsel Ashley Anderson and Melissa Inzerillo:
    a. "Counsel were ineffective for failing to object to the trial judge's amendment of the indictments";

b. "Counsel were ineffective for failing to object to the 'amended' indictments being provided to, or viewed by, the jury prior to or during deliberations";
c. "Counsel were ineffective for failing to object to the trial judge's instruction to the State to confer with a witness, under oath and in the middle of her testimony, during a break in the proceedings."

2. Ineffective assistance of appellate counsel Jessica L. Birt:
   a. "Counsel was ineffective for failing to consult, involve, and advise Applicant in the preparation of his appeal and during the appeal process";
   b. "Counsel was ineffective for failing to raise the meritorious issue of the indictments being 'amended' by the trial judge and submitted to the jury."

## 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. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's trial, the records of the York County Clerk of Court regarding the subject convictions, Applicant's appellate records, and the original and amended applications for post-conviction relief. 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:

### I. Ineffective Assistance of Counsel, Generally

Applicant's allegations of ineffective assistance of trial counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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). "[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."). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "This does not require a showing that counsel's actions 'more likely

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 performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

**II. Failure to Object to Trial Judge's Amendment of the Indictments**

The Court finds Applicant has failed to satisfy either prong of the *Strickland* test as to this allegation. The trial judge's amendment of the indictments was limited to labeling them, respectively, as the "staircase incident" and the "tennis court incident." Counsel Inzerillo testified at the evidentiary hearing that, in her view, the amendments were not objectionable:

> [W]e were aware of the two specific incidences. There was a tennis court incident and I can't remember what the other one was, but we knew that from our conversations with the State. We had talked to Orlando about that and so, you know, all of us went into trial

> understanding those were the context of the two indictments . . . we viewed [the amendments] as a clarification, not that [the judge] was commenting on anything or swaying the jury one way or another. It was just a clarification of the two incidences.

(PCR Tr. p.27, lines 5–17). Similarly, Counsel Stopinski testified that "there were always two incidents alleged, the staircase incident and the tennis court incident [,] and that had been consistent throughout the course of the case. . . . I viewed [the amendments] just as a clarification to make sure the jury was putting their verdict down on what they intended to." (PCR Tr. p.30, line24–p.31, line 22).

This Court finds that the trial court's minor amendments merely made necessary clarifications and distinguished the otherwise identical indictments, and did not result in any surprise to Applicant (who knew from the outset that the Victim was alleging the abuse occurred at those two locations), and did not alter the nature or any elements of the charged offense. *See* S.C. Code Ann. § 17-19-100 (providing a court may amend an indictment provided the amendment does not change the nature of the offense charged). Moreover, the amendments were made in response to Applicant's own complaint that the indictments failed to identify the charged offenses with sufficient specificity.

Applicant has alleged only two grounds on which he claims Trial Counsel should have objected to the amendment of the indictments. First, he argues that the omission of the incident locations from the indictments was not merely a scrivener's error. This argument has no relevance because the trial court's authority to amend indictments under section 17-19-100 is not limited to the correction of scrivener's errors; rather, the trial court may amend an indictment to address "any defect in form" or "any variance between the allegations of the indictment and the evidence offered in proof thereof." Applicant also claims that the information added by the trial court was not presented to the grand jury; however, this claim is purely speculative, since the grand jury is often

presented with evidence beyond what appears on the face of the indictment. Moreover, Applicant has provided no explanation as to how his defense was prejudiced by the amendments.

Accordingly, the Court finds Applicant has failed to prove either that Counsel was deficient for failing to object to the amendment of the indictments or that he was prejudiced thereby. This allegation is, therefore, denied and dismissed with prejudice.

**III. Failure to Object to Amended Indictments Being Presented to the Jury**

Similarly, the Court finds Applicant's allegation that Counsel should have objected to the amended indictments being presented to the jury is meritless. Applicant has not explained why the indictments should not have been presented to the jury. Applicant has also failed to explain how he was prejudiced by the presentation of the indictments, especially where the trial court properly instructed the jury that the indictments were merely charging instruments, not evidence. (R. pp. 31–32). The Court finds that just as there was no error in amending the indictments, there was likewise no objectionable error in presenting the indictments to the jury. *See* S.C. Code Ann. § 17-19-100 ("After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended . . . ."). Accordingly, Applicant has failed to prove either deficiency or prejudice as to this allegation.

**IV. Failure to Object to Trial Court's Instructing State to Confer with a Witness**

Applicant argues Counsel should have objected when the trial court instructed the State to confer with Delissa Patterson, one of the State's witnesses, during a break in the proceedings. At one point during direct examination, the solicitor asked Patterson if she ever figured out "what was going on" with Victim's change in behavior. Counsel Inzerillo objected, and the jury was excused from the courtroom. Counsel explained she was objecting on the ground that the question invited Patterson to repeat Victim's account of her sexual abuse at the hands of Applicant. Counsel argued

it would be improper for Patterson to testify regarding what Victim said, so Counsel wanted to make her objection known "before . . . that bell had been rung." The solicitor agreed to withdraw the question and rephrase it to elicit merely that Victim had made a disclosure and that Patterson had called the police. The trial court agreed that Patterson would not be permitted to testify regarding what Victim actually said. The court warned that an improper response by Patterson could possibly result in a mistrial and instructed the solicitor to talk to Patterson during a brief recess so that her testimony would not go beyond what was proper. After the recess, the jury was bought back into the courtroom, and the solicitor withdrew the last question and asked Patterson whether she called the police in 2013. Patterson answered that she called the police to report a sexual assault. Patterson did not repeat anything Victim said, except that the assault occurred when she lived at Pace's River during the summer of 2011. (Trial Tr. pp.284–288).

At the PCR evidentiary hearing, Counsel Inzerillo confirmed that the trial court's instructions to the solicitor to speak with Patterson while the court was in recess were given in response to Counsel's objection that Patterson's testimony seemed to be approaching inadmissible hearsay:

> [W]hen [Patterson] took the stand, it appeared to me that her testimony was going down the path of violating the time and place rule under hearsay for—that's applicable to CSC cases and so to head that off, I made an objection. . . . Ms. O'Hayon, who was the prosecutor, acknowledged that the questioning had been a bit clumsy and that did appear to be where they were headed. The court also tended to agree and so I made that objection to, basically, avoid a bigger issue and stop it from being testified to.

(PCR Tr. p.23, line 17–p.24, line 1). Counsel further testified that she had no reason to object to the trial court's instruction "because it was going to achieve my objective, avoiding a mistrial and anything that could have happened had [Patterson] continued on the path that I saw us going down." (PCR Tr. p.28, line 23–p.29, line 1).

The Court finds that Counsel has articulated a valid strategic reason for not objecting to the trial court's conduct in this regard. The trial court's instruction was plainly motivated by a desire to prevent Patterson from giving inadmissible hearsay testimony that could have been prejudicial to Applicant. As a result of the trial court's instruction, the solicitor withdrew the question to which Counsel had objected and asked a more limited series of questions. Patterson's response was appropriately limited to time and place in accordance with Rule 801(d)(1)(D), SCRE ("A statement is not hearsay if . . . [it is] consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident."). Applicant complains that Counsel was not a party to the solicitor's off-the-record discussion with Patterson and, therefore, was not able to tell what was said or to preserve any potential issues for appellate review. However, there is no evidence that the solicitor said anything improper to Patterson; on the contrary, the record reflects that the solicitor's questions following the brief recess were much more limited in scope and tailored to stay within the hearsay rule. Far from being prejudicial, this result was likely favorable to Applicant, as it arguably prevented the jury from hearing Patterson reiterate Victim's account.

Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to this issue. This claim is, therefore, denied and dismissed with prejudice.

**V. Failure to Involve Applicant in Preparation of his Appeal**

Applicant next argues Appellate Counsel failed to adequately consult with him during the preparation of his appeal. Appellate Counsel Jessica Birt testified at the PCR hearing that she communicated with Applicant during the preparation of his appeal by telephone and written correspondence; she also spoke to members of Applicant's family over the phone during that time. (PCR Tr. p.35, line 24–p.36, line 8). She recalled that Applicant and his family wanted to raise

factual issues, so she had to explain to them that the ability to challenge the jury's factual findings on appeal was limited and she was going to narrow the issues to those most likely to succeed on appeal. (PCR Tr. p.39, lines 2–19).

The Court finds Appellate Counsel adequately consulted with Applicant during the preparation of his appeal. Appellate Counsel credibly testified that she communicated with Applicant directly and with his family about the appeal and understood the issues he wanted her to raise, although ultimately, she focused on the legal issues she thought were most likely to succeed. Therefore, the Court finds Applicant has not proved Counsel was deficient as to this allegation.

In addition, Applicant has not explained what additional grounds for appeal might have been raised had appellate counsel consulted with him more frequently during the appellate process or how the outcome of his appeal would have been different. Therefore, the Court also finds Applicant has failed to prove prejudice. Because Applicant has not met his burden of proving either deficiency or prejudice as to this allegation, the Court finds it must be denied and dismissed with prejudice.

**VI. Failure to Raise Issue of Trial Court's Amendment of the Indictments**

Finally, Applicant contends Appellate Counsel was ineffective for failing to raise the issue of the trial court's amendment of the indictments on appeal. As discussed above, Applicant has failed to establish that the trial court's amendment of the indictments in this case was improper or prejudicial. In addition, because trial counsel did not object to the trial court's amendment of the indictments, the issue was not preserved for appeal. *See, e.g., State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (holding a contemporaneous objection must be made to preserve an issue for appeal). Finally, even if the issue were both preserved and potentially meritorious,

appellate counsel does not have a duty to raise every non-frivolous issue on appeal but may pick and choose issues to maximize the likelihood of a favorable outcome. *See Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). The Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation; therefore, this allegation is denied and dismissed with prejudice.

**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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and

2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

**IT IS SO ORDERED.**

WALTON J. MCLEOD, IV
Presiding Judge
Sixteenth Judicial Circuit

Lexington, South Carolina

**WITNESSES**

RHPD / Thomas

**ARREST WARRANT NUMBER**

2013A4620303620

**ACTION OF GRAND JURY**

/s/ Rebecca W. Meares

TRUE BILL

12-11-2014 True Billed

Shirley Bowman Sanders

*Foreperson of Grand Jury*

*Date:* 2-26-15

**VERDICT**

Guilty

E. G. Jan Jr.

*Foreperson of Grand Jury*

*Date:* March 18, 2015

694

**AMENDED**
**DOCKET NO. 2014-GS-46-03858**

**The State of South Carolina**

**County of York**

**COURT OF GENERAL SESSIONS**

**FEBRUARY 26, TERM 2015**

**THE STATE**

**VS.**

**ORLANDO MARTINEZ COLEMAN**

**INDICTMENT FOR**

**CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE**

SC Code: § 16-03-0655(A)(1)
CDR Code: 0385

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

**Defendant**

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

_____

_____

**Defendant**

**Witness:**

_____

**C.C.C. PLS. AND G.S.**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

INDICTMENT



At a Court of General Sessions convened on February 26, 2015, the Grand Jurors of York County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE**

(Tennis Court Incident) RZC

That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman (Date of Birth: [redacted], 1993) did commit the sexual battery upon and with victim, MINOR [redacted] (Date of Birth: [redacted], 2005), by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SHARON J. OHAYON
ASSISTANT SOLICITOR

**WITNESSES**

RHPD / Thomas

**ARREST WARRANT NUMBER**

DI2013A4620303620

**ACTION OF GRAND JURY**
/s/ Rebecca W. Mears
**TRUE BILL**
12-11-2014 True Billed
Shirley Bowman Sanders
*Foreperson of Grand Jury*
*Date:* 2/26/15

**VERDICT**
Guilty

E. G. [illegible]
*Foreperson of Grand Jury*
*Date:* March 18, 2015

**AMENDED**
**DOCKET NO. 2014-GS-46-03857**

**The State of South Carolina**

**County of York**

**COURT OF GENERAL SESSIONS**

**FEBRUARY 26, TERM 2015**

**THE STATE**

**VS.**

**ORLANDO MARTINEZ COLEMAN**

**INDICTMENT FOR**

**CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE**

SC Code: § 16-03-0655(A)(1)
CDR Code: 0385

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

**Defendant**

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

**Defendant**

**Witness:**

**C.C.C. PLS. AND G.S.**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

INDICTMENT



At a Court of General Sessions convened on February 26, 2015, the Grand Jurors of York County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE**
(Staircase incident.) Aze

That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman (Date of Birth: [redacted], 1993) did commit the sexual battery upon and with victim, MINOR [redacted] (Date of Birth: [redacted], 2005), by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SHARON J. OHAYON
ASSISTANT SOLICITOR

COUNTY OF YORK

STATE VS.

ORLANDO MARTINEZ COLEMAN

AKA:

Race: Black Sex: M Age: 21

DOB: [redacted] SS#: [redacted]

Address: [redacted]

City, State, Zip: Rock Hill, SC 29732

DL# [redacted] SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 2014GS4603858

A/W: 2013A4620303620

Date of Offense: 09/01/2011

S.C. Code §: 16-03-0655(A)(1)

CDR Code #: 0385

CERTIFIED TRUE COPY

2015 MAR 19 AM 10:02

YORK COUNTY, SC

RECEIVED

MAR 23 2015

SC Court of [illegible]

# SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Criminal Sexual Conduct with a Minor 1st Degree

In violation of § 16-3-655(A)(1) of the S.C. Code of Laws, being a CDR Code [illegible]

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Sharon J. Ohayon, Assistant Solicitor 100713 SC Bar #

Defendant

Attorney for Defendant 72492 SC Bar #

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 25 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3/18/15

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 527 days

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.**

## SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing**

Total: $_____ plus 20% fee: _____ $_____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

| | | |
|---|---|---|
| *Fine: _____ | | $_____ |
| §14-1-206 (Assessments 107.5%) | | $_____ |
| §14-1-211 (A)(1)(Conv. Surcharge) | $100 | $100.00 |
| §14-1-211 (A)(2)(DUI Surcharge) | $100 | $_____ |
| §56-5-2995 (DUI Assessment) | $12 | $_____ |
| §56-1-286 (DUI Breath Test) | $25 | $_____ |
| Proviso 47.9 (Public Def/Prob) | $500 | $_____ |
| §14-1-212 (Law Enforce. Funding) | $25 | $25.00 |
| §14-1-213 (Drug Court Surcharge) | $150 | $_____ |
| §50-21-114 (BUI Breath Test Fee) | $50 | $_____ |
| §56-5-2942(J) (Vehicle Assessment) | $40/ea | $_____ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $5.00 |
| 3% to County (if paid in installments) | $ | $_____ |
| **TOTAL** | | $130.00 |

☐ **Ordered** **PTUP** _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $_____ Beginning _____

$_____ Paid to Public Defender Fund

Other: Acc 14-05-46-3857 for requirements

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: David Hamilton

Court Reporter: Shirley Bloom

Presiding Judge: [signature]

Judge Bar ID: 1418 Judge Code: 2135

Sentence Date: 3-18-15

SCCA/217 (03/2011)

699

COUNTY OF YORK
STATE VS.
ORLANDO MARTINEZ COLEMAN
AKA:
Race: Black Sex: M Age: 21
DOB: [redacted] SS#: [redacted]
Address: [redacted]
City, State, Zip: Rock Hill, SC 29732
DL# [redacted] SID#

INDICTMENT/CASE#: 2014GS4603857
A/W: DI2013A4620303620
Date of Offense: 09/01/2011
S.C. Code §: 16-03-0655(A)(1)
CDR Code #: 0385

CERTIFIED TRUE COPY
2015 MAR 19 AM 10:02
DAVID HAMILTON Minor
CLERK OF COURT
YORK COUNTY, SC

# SENTENCE SHEET

*CDL Yes ☐ No ☒ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☒

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Criminal Sexual Conduct in the First Degree

In violation of § 16-3-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code above.

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Sharon J. Ohayon, Assistant Solicitor 100713 SC Bar #

Defendant

Attorney for Defendant 72492 SC Bar #

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 25 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3/18/15

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 527 days

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.**

## SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** **PTUP** _____

Total: $_____ plus 20% fee: _____ $_____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Recipient: _____ Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $_____ Beginning _____

$_____ Paid to Public Defender Fund

| | | |
|---|---|---|
| *Fine: | | $ |
| §14-1-206 (Assessments 107.5%) | | $ |
| §14-1-211 (A)(1)(Conv. Surcharge) | $100 | $ 100.00 |
| §14-1-211 (A)(2)(DUI Surcharge) | $100 | $ |
| §56-5-2995 (DUI Assessment) | $12 | $ |
| §56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| §14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| §14-1-213 (Drug Court Surcharge) | $150 | $ |
| §50-21-114 (BUI Breath Test Fee) | $50 | $ |
| §56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ 5.00 |
| 3% to County (if paid in installments) | $ | $ |
| **TOTAL** | | $ 130.00 |

Other: 1. Electronic monitoring required
2. Sex offender registry is required

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: David Hamilton
Court Reporter: Shirley Broom

Presiding Judge:
Judge Bar ID: 1418 Judge Code: 2135
Sentence Date: 3-18-15

SCCA/217 (03/2011)