THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Case No. 2017-CP-11-00801
Appellate Case No. 2024-000128

Thomas Anthony Styla,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI OF RESPONDENT-PETITIONER

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QUESTIONS PRESENTED

1. Did the circuit court err in denying post-conviction relief with respect to trial counsel's failure to object and request a mistrial on the basis of improper statements made by the prosecution in closing argument?

2. Did the circuit court err in denying post-conviction relief with respect to trial counsel's failure to place on the record the objections, arguments, and rulings made in bench conferences not recorded and transcribed by the court reporter?

3. Did the circuit court err in denying post-conviction relief with respect to trial counsel's failure to object to evidence of the defendant's other alleged bad acts?

STATEMENT OF THE CASE

Respondent-Petitioner, Thomas Anthony Styla (hereafter, "Applicant"), filed a post-conviction relief ("PCR") application in the Cherokee County Court of Common Pleas on October 23, 2017, and later amended that application. App. pp. 503-11, 519-23. Petitioner-Respondent, the State of South Carolina (hereafter, "the State") filed a return on January 12, 2018. App. pp. 512-18.

The PCR application pertained to Applicant's 2016 conviction in Cherokee County General Sessions Court for criminal sexual conduct with a minor in the first degree. Applicant filed a direct appeal from that conviction, but his appellate attorneys concluded there were no viable, preserved issues for appeal, therefore he withdrew the appeal and instead pursued post-conviction relief. App. pp. 710-12.

Circuit Court Judge J. Mark Hayes, II, conducted a PCR hearing over two days, November 6, 2018, and September 27, 2019. Following the submission of briefs by both parties, Judge Hayes issued an informal decision on March 6, 2020, indicating he would

be denying the PCR application in all respects. App. pp. 810-910. An order of dismissal was filed February 25, 2021. App. pp. 913-99.

Applicant filed a motion for reconsideration, relief from judgment, or to alter or amend, to which the State filed a return. App. pp. 1000-08. Judge Hayes heard the motion on November 10, 2022. Following that hearing, Judge Hayes granted PCR as to one of Applicant's claims, in an order filed June 5, 2023. App. pp. 1076-88. The State filed a motion to alter, amend, and reconsider this order, which Applicant opposed in a written response. App. pp. 1089-1102. By order dated December 27, 2023, Judge Hayes denied the State's motion. App. pp. 1103-07.

On January 31, 2024, the State filed a notice of appeal with respect to the orders filed June 5, 2023, and December 27, 2023. On February 5, 2024, Applicant filed a notice of cross-appeal.

The issue on which the PCR court granted relief was a claim of ineffective assistance of Applicant's trial counsel in calling a witness at trial that counsel had not investigated or interviewed prior to trial. The State's petition for a writ of certiorari will likely address that issue. The questions presented by Applicant's petition for a writ of certiorari pertain to other claims of ineffective assistance as to which the PCR court denied relief. The facts material to those claims are set out below.

The charge of criminal sexual conduct stemmed from an allegation made by a minor, M.C., that Applicant penetrated her vagina with his fingers. M.C. testified the alleged conduct took place in December 2009, in her cousin's room in the home Applicant shared with her grandmother. The alleged incident occurred on the cousin's bed, with the cousin present in the room, sitting on the floor playing a video game. App.

pp. 76, 79-81. M.C. was nine years of age and in the fourth grade when the alleged conduct took place, but she did not make any allegation of the alleged conduct until she was fourteen and in the eighth grade. Her initial disclosure was to her middle school guidance counselor. App. pp. 75, 80, 85, 92, 215.

M.C. also testified about a time the following year when she and Applicant rode a four-wheeler together and he allegedly put his hands under her shorts. App. pp. 82-83. She testified that at another time later that year, Applicant allegedly asked if she wanted to get in bed with him and she said no. App. pp. 83-84. One of the claims of ineffective assistance was the failure of trial counsel to object to the testimony about these two additional alleged events as inadmissible "other bad acts" evidence.

The State called three other witnesses. The minor's mother testified the minor did not ever disclose to her any sort of sexual abuse, and she learned of the alleged sexual touching only when the school contacted her. App. pp. 137-38. The State also presented testimony from a former employee of the Sheriff's Department concerning the investigation and from an expert witness in the field of child sexual abuse dynamics. The only evidence of the alleged penetration came through the testimony of the minor, M.C., and hearsay evidence as to her prior statements.[1] The State offered no medical or forensic evidence or eyewitness testimony to corroborate M.C.'s testimony. Applicant denied the allegation and put up a defense, including his own testimony that he did not commit the alleged offense. Thus, the determination of Applicant's guilt or innocence turned entirely on whether the jury believed M.C. or Applicant. One of the claims of

[1] A witness called by the defense, the guidance counselor at M.C.'s school, testified to prior hearsay statements made to her by M.C. about the alleged conduct of Applicant. Trial counsel's calling of that witness, without conducting an investigation into what her testimony would be, was the basis for the PCR court's grant of relief in this case.

ineffective assistance was the failure of trial counsel to object and move for a mistrial with respect to improper argument by the assistant solicitor that vouched for the credibility of M.C. and its other witnesses, and the failure of trial counsel to move for a mistrial based on the assistant solicitor's improper statement to the jury, "I am thoroughly convinced beyond any doubt in my mind that he is guilty."

Many matters were taken up during the trial in bench conferences, with nothing placed on the record with respect to the objections or arguments made by counsel and the rulings made by the trial judge during the bench conferences. One of the claims of ineffective assistance was the failure of trial counsel to make a sufficient record of what occurred in the bench conferences to allow for appellate review of the court's rulings.

As noted above, the PCR court granted Applicant a new trial on the basis of ineffective assistance of counsel due to trial counsel's failure to investigate and interview one individual – the guidance counselor to whom the initial disclosure was made – before calling her as a witness for the defense. If this Court denies the State's petition for a writ of certiorari with respect to that ruling, Applicant does not need further review of his claims of error in the PCR court's other rulings because the result – a new trial – will be the same. However, if this Court grants the State's petition, Applicant respectfully requests that the Court also grant a writ of certiorari to review the PCR court's denial of relief on the questions raised herein.

ARGUMENT IN SUPPORT OF PETITION

The Sixth Amendment of the United States Constitution guarantees to a criminal defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *United States v. Cronic*, 466 U.S. 648, 654-56 (1984); *see* U.S. Const. amend. VI. Generally, to establish ineffective assistance of counsel, the PCR applicant must establish (1) that trial counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Tappeiner v. State*, 416 S.C. 239, 248-49, 785 S.E.2d 471, 476 (2016). The first component of the *Strickland* standard requires a showing that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688; *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018); *Tappeiner*, 416 S.C. at 248-49, 785 S.E.2d at 476; *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). The second component requires a showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Tappeiner*, 416 S.C. at 249, 785 S.E.2d at 476; *Matthews*, 350 S.C. at 275, 565 S.E.2d at 768. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Tappeiner*, 416 S.C. at 249, 785 S.E.2d at 476; *Matthews*, 350 S.C. at 275-76, 565 S.E.2d at 768. However, under certain circumstances, the second prong of the test is met due to a presumption of prejudice. *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-61.

I. THE CIRCUIT COURT ERRED IN DENYING POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST A MISTRIAL DUE TO THE PROSECUTION'S IMPROPER ARGUMENT.

Applicant raised claims of ineffective assistance of counsel with respect to counsel's deficient performance in addressing improper argument by the assistant solicitor during closing argument. The PCR court rejected those claims. Although the PCR court found the comments were improper in certain respects, the court found Applicant failed to show counsel was ineffective in the manner in which it dealt with the prosecutor's comments.

This aspect of Applicant's PCR claim focused on four specific comments by the assistant solicitor. The four challenged comments are contained in the passages quoted in the order of dismissal, App. pp. 990-92, and they are referenced therein as the first, second, third, and fourth remarks, based on the order in which they occurred. In the fourth challenged comment, the assistant solicitor stated:

> And I have no hesitating – hesitation asking you – and I am thoroughly convinced beyond any doubt in my mind that he is guilty –

App. p. 461, lines 2-5. Defense counsel interjected, "I have a matter of law." App. p. 461, line 6. Following a bench conference, the trial judge stated, "The jury will disregard the last comments made by the Solicitor. Disabuse your mind of those comments." App. p. 461, lines 8-10. Defense counsel did not move for a mistrial on the basis of this comment. In his testimony at the PCR hearing, trial counsel acknowledged he should have asked for a mistrial on the basis of this comment. App. p. 633. The PCR court found this comment was improper and objectionable, but the court further ruled it could not find counsel deficient in requesting a curative instruction rather than a mistrial. App. pp. 995-96, 1087.

In addition to this improper comment, the assistant solicitor made three other comments during closing argument that stated his personal opinion as to the credibility of the witnesses. The first:

> Because I believe what we put up was honest, was truthful, and consistent. I don't believe you could say the same thing about all the Defense witnesses.

App. p. 444, lines 14-17. The second:

> The witnesses we did call were truthful witnesses.

App. p. 451, line 7. The third:

> Do you know why she's able to do that, ladies and gentlemen? Because it's the truth . . . You saw her on the stand. I think you could tell that.

App. p. 457, lines 12-16. As to each of these comments, defense counsel failed to make any objection or move for a mistrial. In his testimony at the PCR hearing, trial counsel acknowledged he should have argued for a mistrial based on the fourth remark alone and also based on the totality of the assistant solicitor's argument that included the three additional comments, quoted above. App. p. 633. The PCR court did not find deficient performance with respect to counsel's failure to object or move for a mistrial based on these three expressions by the assistant solicitor of his personal opinion as to truthfulness of the witnesses.[2] App. pp. 993-95.

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[2] The PCR court found a different part of the "second remark" quoted in the order of dismissal to be inappropriate and objectionable but initially found it was not harmful. App. p. 994. This part of the prosecutor's closing argument pertained to the testimony of the guidance counselor and is relevant to the prejudice prong of the PCR court's ultimate finding that counsel rendered ineffective assistance by calling the counselor as a witness without having investigated or interviewed her prior to trial. The PCR court addressed this part of the closing argument in the order granting post-conviction relief. App. pp. 1080-82. This part of the prosecution's closing argument amplified the prejudice resulting from calling that witness, a matter that will be addressed in Applicant's return to the State's petition for a writ of certiorari.

The determination of the credibility of witnesses is a matter for the jury. *State v. Reyes*, 432 S.C. 394, 404, 853 S.E.2d 334, 339 (2020); *Tappeiner*, 416 S.C. at 250, 785 S.E.2d at 476. Accordingly, prosecutors may not vouch for the credibility of their witnesses. *State v. Busse*, 439 S.C. 104, 109-10, 886 S.E.2d 208, 211 (2023); *State v. Kelly*, 343 S.C. 350, 368-69, 540 S.E.2d 851, 860-61 (2001), *rev'd on other grounds*, 534 U.S. 246 (2002). Vouching occurs when a lawyer "'comment[s] favorably on the credibility of one or more witnesses based on the lawyer's personal knowledge.'" *Busse*, 439 S.C. at 109, 886 S.E.2d at 211, *quoting* Black's Law Dictionary (11th ed. 2019).

Prosecutors must confine their closing remarks to the record and the reasonable inferences therefrom. *Tappeiner*, 416 S.C. at 250, 785 S.E.2d at 477; *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A prosecutor may argue the credibility of the witnesses if the argument is based on the evidence in the record and its reasonable inferences. *Matthews*, 350 S.C. at 276, 565 S.E.2d at 768. However, advocacy becomes improper vouching when the prosecutor indicates to the jury that the credibility of the witness is based on anything other than the evidence. *Busse*, 439 S.C. at 109, 886 S.E.2d at 211.

One form of improper vouching occurs when a prosecuting attorney makes explicit personal assurances as to a witness's veracity. *See Busse*, 439 S.C. at 109-10, 886 S.E.2d at 211; *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *Kelly*, 343 S.C. at 368-69, 540 S.E.2d at 860; *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). Such vouching is improper because the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to rely on the government's judgment rather than its own. *Busse*, 439 S.C. at 111-12, 886 S.E.2d at

212; *Kelly*, 343 S.C. at 368-69, 540 S.E.2d at 860, *quoting United States v. Walker*, 155 F.3d 180 (3d Cir. 1998). The assistant solicitor's first, second, and third remarks, quoted above, were impermissible vouching.

A prosecutor may also not state his personal opinion as to the merits of the case or the guilt of the defendant. *Fortune v. State*, 428 S.C. 545, 552-53, 837 S.E.2d 37, 41 (2019); *State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982). The underpinnings of this prohibition are similar to those undergirding the prohibition of vouching for a witness's credibility: such statements made by a representative of the government acquire additional significance because of the position of public trust occupied by the speaker, and the danger is that a juror may be persuaded to rely on the opinion of the prosecutor instead of exercising his independent judgment as to the evidence. *See Fortune*, 428 S.C. at 552-54, 837 S.E.2d at 41-42. The prohibition against expressing a personal opinion as to the merits of the case rises to the level of an ethical obligation. *See Sloan*, 278 S.C. at 438, 298 S.E.2d at 93, *citing* DR 7-106(C)(4), Code of Professional Responsibility. As currently set out in the South Carolina Rules of Professional Conduct,

> A lawyer shall not . . . in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .

See Rule 407, SCACR, Rule 3.4(e). The assistant solicitor's first, second, and third remarks contravene Rule 3.4(e) by stating a personal opinion as to the credibility of the witnesses, and the fourth remark contravenes the admonition of *Fortune*, *Sloan*, and Rule 3.4(e) by stating a personal opinion as to the guilt of the accused.

Under the clear mandate of the above-cited authorities, counsel's failure to object to the first, second, and third remarks and failure to seek a mistrial on the basis of all four

remarks fell below an objective standard of reasonableness, constituting deficient performance. Counsel's deficient performance was also prejudicial. In this case, the evidence against the defendant came exclusively from the testimony of the minor, M.C., and her prior statements (which were in evidence due to counsel's ineffective assistance with respect to the guidance counselor). No direct or circumstantial evidence was introduced tending to corroborate M.C.'s claims. The defendant testified and denied the alleged misconduct. Where the finding of guilt or innocence turned solely on who the jury believed, the injection of four separate impermissible comments – three expressing the prosecutor's opinion as to the truthfulness of his witnesses and a fourth expressing his personal belief that the defendant was guilty – likely tipped the balance in the jury's mind in favor of a guilty verdict. This case is unlike *Von Dohlen*, where counsel's failure to object to a ***single*** improper comment – a golden rule argument – was held not to be prejudicial. *See Von Dohlen v. State*, 360 S.C. 598, 613, 602 S.E.2d 738, 743 (2004).

In deciding the prejudice prong of the test for ineffective assistance of counsel, the Court examines the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt. *See Vaughn*, 362 S.C. at 171 n.3, 607 S.E.2d at 76 n. 3; *Edmond v. State*, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000). Those considerations include the specific impact counsel's error had on the outcome of the trial and the strength of the state's case in light of all the evidence presented. *See Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. The court must consider the totality of the evidence presented. *Id.* Here, there was not overwhelming evidence of guilt. Rather, it was a "he said/she said" type of case. There was no independent evidence to corroborate the account of M.C. The defendant took the stand and denied the

allegations, and there was additional testimony from multiple witnesses as to the defendant's character and reputation for honesty and truthfulness. The specific impact of the assistant solicitor's improper comments was to influence the jury to accept the prosecutor's belief, rather than making its own determination, both as to witness credibility and as to the defendant's guilt. Because counsel made no objection with regard to three of the improper comments, no cautionary or curative instruction was given. As to the fourth, the nature of the comment – that the prosecutor personally believed beyond any doubt the defendant was guilty – was such that the prejudice could not be cured by an instruction from the court. The cumulative effect of the multiple improper comments was such that, had proper objections been interposed and had a mistrial motion been made, the trial court would have been compelled to grant the requested relief.

The PCR court found counsel's failure to move for a mistrial was not prejudicial under the standards articulated in *Earley v. State*, 418 S.C. 255, 792 S.E.2d 226 (2016). However, *Earley* is inapplicable here, because it arose out of a prosecutorial failure of a very different nature and a lesser degree of seriousness than that at issue here. In *Earley*, the applicant claimed ineffective assistance based on counsel's failure to seek a mistrial upon learning of the state's non-disclosure of an item of evidence – a post by the accused to the victim's Facebook page – that should have been disclosed under Rule 5, SCRCrimP. The *Earley* Court listed various factors that weighed against seeking a mistrial, as valid strategy. *See Earley*, 418 S.C. at 270, 792 S.E.2d at 234. But assuming counsel's performance was deficient, the Court held the PCR court erred in finding a mistrial was the only remedy available to cure the prejudice resulting from the non-

disclosure. The Court's reversal was based on multiple reasons, including that the PCR court ignored other available sanctions to cure the non-disclosure, that it focused only on the impeachment value of the non-disclosed information and not its probative value, and that the prejudicial impact was the result of the defendant's untruthfulness on the witness stand, not the non-disclosure. The Court found the prejudice attributable to the non-disclosure was merely incremental based on the facts of the case, and it was capable of being cured through less dramatic means than a mistrial, such as a brief recess or a curative instruction. *See id.*, 418 S.C. at 271-73, 792 S.E.2d at 234-36.

Unlike *Earley*, in the context of the multiple improper comments by the assistant solicitor – three separate comments indicating his personal belief in the truthfulness of the State's witnesses and the additional egregious statement that he was ***thoroughly convinced beyond any doubt in his own mind of the defendant's guilt*** – counsel's failure to object and seek a mistrial was indeed prejudicial. No curative instruction was given with respect to the first three remarks stating a personal belief as to truthfulness, because no objection was ever lodged by defense counsel. The fourth remark was so prejudicial as to be incapable of being cured by an instruction to disregard. In combination, the repeated injections of the assistant solicitor's personal opinion was so pervasive and prejudicial that the only adequate remedy was a mistrial.

Under any formulation of the prejudice standard, prejudice has been established. But for counsel's deficient performance, there is a reasonable probability that the outcome of this trial would have been different. *Cf. Tappeiner*, 416 S.C. at 253, 785 S.E.2d at 478. The assistant solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Cf. Tappeiner*, 416 S.C. at 251,

785 S.E.2d at 477. The improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Cf. Fortune*, 428 S.C. at 556-61, 837 S.E.2d at 43-46.

If this Court grants the State's petition for a writ of certiorari, it should also grant Applicant's petition and find that counsel's handling of the assistant solicitor's improper argument was prejudicial deficient performance, warranting a new trial.

II. THE CIRCUIT COURT ERRED IN DENYING POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO MAKE A RECORD OF THE OBJECTIONS, ARGUMENT, AND RULINGS THAT OCCURRED DURING BENCH CONFERENCES.

Applicant raised a claim of ineffective assistance of counsel on the basis of trial counsel's failure to place on the record of the trial proceedings the substance of objections, argument, and rulings contained in numerous bench conferences during the course of the trial. App. pp. 69, 202, 250, 325, 335, 343, 348, 380, 385, 394, 418, 461. During the PCR hearing, trial counsel admitted there is no appellate issue unless what transpired is put on the record. App. p. 633, lines 21-22. The order of dismissal specifically addressed eleven of the bench conferences, surmising and speculating as to what transpired in those bench conferences and finding Applicant failed to meet his burden to establish prejudice. App. pp. 962-78.

This Court has repeatedly recognized that, when a bench conference occurs off the record, trial counsel has a ***duty*** to put the substance of the discussion and the trial court's ruling on the record. *See State v. Washington*, 431 S.C. 394, 405 n.4, 848 S.E.2d 779, 785 n.4 (2020); *Smalls*, 422 S.C. at 182 n.3, 810 S.E.2d at 840 n.3; *Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999). In this case, trial counsel failed repeatedly with respect to this duty, failing on more than eleven separate occasions to place the substance of bench conferences on the record. Counsel's failure to perform this

duty fell below an objective standard of reasonableness, constituting deficient performance. The PCR court recognized counsel had a duty to place the substance of the bench conferences on the record, but further found Applicant failed to establish prejudice and failed to establish he was deprived of a meritorious issue on appeal. App. pp. 962-78, 1086-87.

As Applicant's counsel argued in the hearing on the motion for reconsideration, where there is a standard and the standard is not followed, confidence in the outcome is undermined. App. pp. 1055-56. The very nature of the deficient performance – failure to fulfill the duty to put matters on the record – deprived Applicant of the ability to establish prejudice. It should not have to be a matter of speculation or inference as to what was said in the bench conferences and whether the defendant was deprived of a meritorious issue for appeal. The PCR court's order of dismissal engaged in speculation and surmise as to what was argued and ruled in the bench conferences and found no prejudice was shown. App. pp. 962-78. Because it is impossible to know with certainty what transpired in the bench conferences, under the circumstances of this case prejudice should be presumed.

While ordinarily the burden to establish prejudice rests on the person claiming a Sixth Amendment violation, the United States Supreme Court has recognized that, in certain instances, prejudice will be presumed. *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-61. In *Cronic*, the Court recognized that one area of presumed prejudice involves situations in which counsel fails to act in the role of advocate as required by the adversarial process. See *Cronic*, 466 U.S. at 656-57, 659. Under *Cronic*, when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there is a

denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. *Id.*, 466 U.S. at 659; *see also Nance v. Ozmint*, 367 S.C. 547, 552-53, 626 S.E.2d 878, 880-81 (2006). In the same vein, this Court should recognize that where, as here, there is a large-scale failure by trial counsel to fulfill his duty to create a record of the proceedings in order to facilitate meaningful appellate review, there has been a similar denial of the defendant's Sixth Amendment rights, making the process presumptively unfair. Under the unique circumstances presented here, because counsel repeatedly failed to fulfill the duty of making a record of the off-the-record proceedings, the Court should presume prejudice and grant relief. *Cf. Nance*, 367 S.C. at 558, 626 S.E.2d at 883 (finding counsel's ineffectiveness so pervasive as to render a particularized prejudice inquiry unnecessary); *Frett v. State*, 298 S.C. 54, 56-57, 378 S.E.2d 249, 250-51 (1988) (same).

III. THE CIRCUIT COURT ERRED IN DENYING POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF OTHER ALLEGED BAD ACTS OF APPLICANT.

The sole count of Applicant's indictment was the charge of criminal sexual conduct with a minor in the first degree, stemming from the allegation that he penetrated M.C.'s vagina with his fingers. The other two unrelated events to which M.C. testified were not the subject of the indictment for which he was on trial. During the trial, the State elicited testimony from M.C. concerning a ride on a four-wheeler during which M.C. alleged Applicant put his hands under her shorts and concerning another occasion when she claimed Applicant asked if she wanted to get in bed with him. App. pp. 82-84. The State's intention to introduce this evidence was discussed pre-trial, and the defense stated it was not objecting to the evidence "at this time." App. p. 40, line 10. When the

evidence was introduced, the defense did not object. Counsel's failure to object to these portions of M.C.'s testimony was both deficient performance and prejudicial.

The evidence of the unrelated events was inadmissible under Rules 401, 403, and 404 of the South Carolina Rules of Evidence and the case law applying those rules. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404(b), SCRE. For such evidence to be admissible, it must fall within one of five delineated exceptions. Rule 404(b), SCRE. Under Rule 404(b), "the acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced." *State v. Perry*, 430 S.C. 24, 32, 842 S.E.2d 654, 658 (2020), *quoting State v. Lyle*, 125 S.C. 406, 416-17, 118 S.E. 803, 807 (1923).

Where the other alleged conduct is not the subject of a conviction, the other act evidence also must be clear and convincing. *See State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009); *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). However, even if all the other requirements for admission are met, the evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *see Perry*, 430 S.C. at 31, 842 S.E.2d at 658. Had the defense objected to this evidence, the trial court would have had to exclude it under a proper analysis of the evidence rules and this Court's precedents. Counsel's failure to object to this evidence fell below an objective standard of reasonableness.

In its order of dismissal, the PCR court rejected the claim of ineffective assistance of counsel related to counsel's failure to object to M.C.'s testimony about the two other alleged incidents. The court indicated the common scheme or plan exception "can be shown through 'a pattern of continuous misconduct.'" App. p. 998. The court found this evidence established the defendant's motive and intent of sexual gratification, that the digital penetration alleged to have occurred in the charged offense was no mistake, and that the defendant was grooming the minor for further abuse. App. p. 998. The court erred in these findings. Had counsel objected when the challenged evidence was offered, the reasons set out in the PCR court's order of dismissal would not have allowed for admission of this evidence, under any Rule 404(b) exception. Furthermore, the evidence would have been inadmissible under all the additional evidentiary principles governing admission of such evidence.

The PCR court clearly erred in finding the evidence was admissible under the absence of mistake or accident exception. That exception comes into play where the defense claims mistake or accident, and the state offers evidence of other conduct between the defendant and the alleged victim to rebut the claim of mistake or accident. *See, e.g., State v. Smith*, 337 S.C. 27, 31-34, 522 S.E.2d 598, 600-01 (1999) (evidence of four prior criminal domestic violence convictions admitted to rebut claim of accident in defense to murder charge). In this case, the defense denied that the penetration occurred. There was no claim that it occurred by "mistake" or "accident." There was no basis whatsoever for a finding by the PCR court that the other acts evidence would have been admissible to prove the "penetration was no mistake." App. p. 998.

The evidence was also not admissible under the common scheme or plan exception. The separate two instances – the alleged conduct during the ride on the four-wheeler and the alleged inquiry about getting into bed – did not have the necessary logical relevancy or connection to the charged conduct – an allegation that the defendant penetrated the minor with his fingers – for admission under the common scheme or plan exception. *See Perry*, 430 S.C. at 34, 842 S.E.2d at 659. Even under the broader "close degree of similarity" standard of *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), which was overruled in *Perry* in 2020 but was a valid precedent at the time of this trial in 2016, the extraneous acts would not have been admissible as evidence of common scheme or plan. The two extraneous acts bore no similarity, and certainly not a close degree of similarity, to the alleged conduct for which the defendant was on trial. Nor was the evidence admissible under the exceptions for motive and intent, as found by the PCR court, because the evidence as to the two separate instances was devoid of any claim or inference that the conduct in those instances was in pursuit of sexual gratification.

The PCR court's finding that the evidence was admissible because it showed the defendant was "grooming" the minor for abuse is also erroneous. The extraneous acts occurred ***after*** the incident charged in the indictment. That alleged conduct was significantly different from the charged conduct, both in nature and in a lesser degree of severity. There was no allegation of any later sexual misconduct for which these extraneous acts could have been grooming the minor. In fact, M.C. affirmatively testified there were no other incidents. App. p. 97. This case is unlike the Court's previous decisions that have affirmed admission of evidence of ***prior*** incidents between a perpetrator and his victim because "the incidents established a pattern of escalating abuse

which ultimately culminated in [the defendant's] digital penetration of [the child]." *See Clasby*, 385 S.C. at 156, 682 S.E.2d at 896, and the cases cited in *Clasby*, 385 S.C. at 157-58, 682 S.E.2d at 897.

The justifications articulated in the PCR court's order of dismissal are unsound, because this evidence does not qualify for admission under any of the Rule 404(b) exceptions. The alleged extraneous acts bore no logical relevancy to the crime charged. They did not make any aspect of the charged offense more probable, as required under Rule 401, therefore the alleged extraneous acts had no probative value. But the prejudicial effect – inviting the jury to convict based on other alleged wrongful behavior rather than on the basis of guilt of the actual crime charged – was significant. Thus, Rule 403 also precluded admission of this evidence.

The PCR court further justified the admission of this evidence on the basis that the defense made the defendant's character an issue at trial. App. p. 998. This justification is also unfounded. The other acts evidence was admitted in the State's case-in-chief. At that juncture, the defense had not presented any evidence and had not called the witnesses who later provided character evidence. Had the defense objected when the other acts evidence was offered, the court could not have ruled that it was in response to the defendant's having placed his character in issue, because the defense had not done so at that point in the trial.

Finally, the PCR court found counsel's performance in failing to object was not deficient because counsel thereafter used the admitted other acts evidence in its attempts to impeach the minor, using her prior disclosures and inconsistencies. Such use ***after*** admission of the evidence does not have any bearing on whether the evidence should

have been admitted when offered by the State. Counsel's deficient performance in failing to object to the improper evidence both pre-trial and at the time it was admitted is not negated by his later use of the same evidence, ***after*** it had been admitted in the State's case, in an effort to discredit the witness. If fact, the manner in which counsel cross-examined M.C. about these two alleged incidents was also deficient performance and compounded the prejudice, giving her the opportunity to reiterate several times and even amplify what the State elicited from her on direct, and giving the State an additional opportunity to question her further on the alleged other acts. App. pp. 101-08, 128-30.

Counsel's performance in choosing not to object to the other acts evidence fell below an objective standard of reasonableness and was therefore deficient performance under the *Strickland* test. It was also prejudicial, given the "he said/she said" nature of this case and the lack of any medical or forensic evidence to corroborate M.C.'s claim of penetration. Based on the totality of the evidence, there is a reasonable probability that the admission of the testimony about the other alleged acts affected the outcome of this trial, convincing the jury to convict because of a perception the defendant had a propensity for misconduct. Counsel's failure to seek exclusion of this harmful evidence was both deficient and prejudicial. If the Court grants the State's petition for a writ of certiorari, it should also grant Applicant's petition on this claim of ineffective assistance, and grant Applicant a new trial.

CONCLUSION

For the foregoing reasons, if this Court grants the State's petition for a writ of certiorari, Respondent-Petitioner Styla also asks the Court to grant his petition for a writ of certiorari, review the issues set forth above, and grant him a new trial on the basis of counsel's prejudicial deficient performance.

Respectfully submitted,

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