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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
Robert J. Bonds, Post-Conviction Relief Court Judge

Case No. 2019-CP-02-01582

Harold Cartwright, SCDC # 355084.....Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Robert J. Bond's order granting post-conviction relief filed December 2, 2024. The State filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, which was denied by Judge Bonds by written order filed on February 24, 2025, and received by Respondent on February 24, 2025. Copies of the order granting post-conviction relief and the order denying the State's motion to reconsider, alter, or amend are attached hereto.

February 25, 2025

Respectfully submitted,

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By: _____
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Attorney for Respondent

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF **COMMON PLEAS**
COUNTY OF **AIKEN**)	**SECOND** JUDICIAL CIRCUIT
Harold Cartwright,)	Case No.: **2019CP0201582**
Applicant,)	
v.)	**ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND THE SUPPLEMENTAL ORDER GRANTING POST-CONVICTION RELIEF PURSUANT TO RULE 59(e), SCRCP**
State of South Carolina,)	
Respondent.)	

This matter comes before the Court on Harold Cartwright's application for Post-Conviction Relief (PCR). On December 2, 2024, the Court filed a Supplemental Order Granting Applicant Post-Conviction Relief. On December 16, 2024, the State filed Respondent's Motion to Alter or Amend the Supplemental Order Granting Post-Conviction Relief pursuant to Rule 59(e), SCRCP. On February 4, 2025, a hearing was held before the Honorable Robert Bonds via WebEx. Dayne Phillips represented the Applicant, and Assistant Attorney General Zachary Jones appeared on behalf of the State.

Based on the arguments presented by Counsel, this Court denies the State's Motion to Alter or Amend. This Court finds and concludes that Applicant has established constitutional violations and deprivations that require post-conviction relief.

Specifically, this Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*,

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Deputy Clerk

466 U.S. at 642). Therefore, this Court has concluded that Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, SS 3 and 14; S.C. Code S17-27-20(A)(1), (4), and (6). Accordingly, this PCR application must be granted, and Applicant shall receive a new trial.

IT IS HEREBY ORDERED that the Respondent's Motion to Alter or Amend the Supplemental Order Granting Post-Conviction Relief pursuant to Rule 59(e), SCRCP, is hereby **DENIED.**

IT IS SO ORDERED!

Roy Bonds
The Honorable Robert J. Bonds

Walterboro, South Carolina

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF **COMMON PLEAS**
)	
COUNTY OF **AIKEN**)	**SECOND** JUDICIAL CIRCUIT
)	
Harold Cartwright,)	Case No.: **2019CP0201582**
)	
Applicant,)	
)	**SUPPLEMENTAL**
v.)	**ORDER GRANTING APPLICANT**
)	**POST-CONVICTION RELIEF**
State of South Carolina,)	
)	
Respondent.)	
)	

This matter comes before the Court on Harold Cartwright's application for Post-Conviction Relief (PCR). Applicant appeared before the Court on February 3, 2022, for a virtual hearing on the above-captioned PCR action. Dayne Phillips represented Applicant, and Assistant Attorney General Michael Neubauer represented Respondent. Chief Appellate Defender Robert Dudek, Public Defenders David Hayes and Michael Routzong, and Applicant testified at the evidentiary hearing. However, Mr. Routzong was unable to complete his testimony during the February 3 hearing due to technical difficulties with Applicant's internet connection. The hearing was continued to the following day but ended prematurely due to technical issues with the court reporter's internet connection.

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After careful consideration, the Court granted the Applicant's PCR application requesting a new trial based on ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const.

amends. VI,XV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

On June 13, 2022, the State filed a motion to alter or amend the Court's order granting post-conviction relief to Harold Cartwright, pursuant to Rule 59(e) SCRCP. The Court held a hearing on the pending motion via Webex on June 24, 2022. After considering the arguments posed by the parties and weighing the evidence presented at the hearings, this Court respectfully denies the State's Motion to Alter or Amend.

On July 22, 2022, the PCR Court issued an Amended Order granting Respondent Post-Conviction Relief.

On August 8, 2022, Respondent/Petitioner filed a Notice of Appeal in the South Carolina Supreme Court. Respondent filed a Petition for Writ of Certiorari and Appendix on May 19, 2023. Applicant filed a Return to the petition on October 9, 2023. The South Carolina Supreme Court issued an Order transferring the case to the South Carolina Court of Appeals on November 3, 2023.

On September 19, 2024, the South Carolina Court of Appeals issued an Order granting Certiorari and remanding the case to the PCR Court for the issuance of a new order which includes individualized analyses of deficiency and prejudice for each allegation of ineffective assistance and citation to relevant authority supporting the findings of the PCR Court. The Court of Appeals' Order noted that the new order shall be entered within forty-five (45) days of this court's mailing of the remittitur. The Court of Appeals issued the Remittitur on October 15, 2024.

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor (CSCM), first degree; sixteen (16) counts of lewd act with a

minor; two counts (2) CSCM, second degree; one (1) count of criminal sexual conduct (CSC), first degree; and one (1) count of CSC, third degree.

On April 15, 2013, Applicant proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Michael Routzong and David Hayes represented Applicant, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts on all charges on April 18, 2013. The Trial Court sentenced Applicant to *concurrent* sentences of thirty (30) years imprisonment for CSC, first degree, conviction and CSCM, first degree, conviction; twenty (20) years imprisonment for the CSCM, second degree, conviction; and fifteen (15) years imprisonment for the lewd act upon a child conviction. However, the Trial Court imposed a *consecutive* sentence of ten (10) years for the CSC, third-degree, conviction.

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

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

On June 26, 2019, Applicant filed an application requesting PCR, alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. The Respondent filed a Return and Motion for a More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued

an order authorizing discovery on December 19, 2019.

On June 29, 2020, Applicant filed an amended application requesting PCR. Applicant also filed a redacted amended application on July 9, 2020:

> Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and. 14 of the South Carolina Constitution. See S.C. Code S17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there. is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also *Cherry v. State*, 300 S.C. 1 15, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, U.S. at 692):
>
> Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

Specifically, Applicant alleged the following acts or omissions of ineffective assistance of Trial Counsel:

(1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation. of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and

necessary to do so in preparation for trial. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360. (2008); *von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(2) Trial Counsel failed to hire expert witnesses to conduct an independent review of the forensic evidence presented by the State and to testify in rebuttal of the State's evidence and arguments when it was reasonable and necessary to do so in preparation for Applicant's second trial. *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Domen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Specifically, the electronic evidence seized by the police and DNA evidence.

(3) Trial Counsel failed to adequately investigate Victim 1's involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State.

(4) Trial Counsel failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations.

.(5) Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.

(6) Trial Counsel failed to properly cross-examine and impeach the State's witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses' prior inconsistent statements to the police.

(7) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. *See State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

(8) Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.

(9) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and

misstated the law.

(10) Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial.

(11) Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.

(12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. *See State v. Baker*, 41 1 S.C. 583, 769 S.E.2d 860 (2015).

(13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in-camera* hearing). *See* Rule 702, SCRE; *State v. Council* 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

(14) Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. *See* Rules 701 and 702, SCRE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).

(15) Trial Counsel erroneously stipulated to a witness's medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. *See* Rule 804, SCRE; *Dodd v. Berlinsky*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).

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

(17) Trial Counsel failed to move for the Trial Court to conduct follow-up voir dire questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.

(18) Trial Counsel failed to move to quash the jury panel pursuant to Baston where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; *State v. Adams*, 322 S.C. 1 14, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).

(19) Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. See Rule 615, SCRE.

(20) Trial Counsel by failed to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him regarding "similar types of behavior." Notably, Trial Counsel failed to preserve for appellate review the issue and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror's numbers were placed on the record with whom the judge spoke. See U.S. Const. amends. V, VI, XIV.

(21) Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows." Notably, Counsel

sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. See U.S. Const. amends. V, VI, XIV.

(22) Trial Counsel failed to move to sever Applicant's charges where the three (3) primary complaining witnesses alleged conduct over three (3) distinct and large periods of time, did not arise out of a single chain of circumstances, and are not proved by the same evidence. *See State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. smith, 322 S.C 107, 470 S.E.2d 364 (1996).

(23) Trial Counsel failed to object and preserve for appellate review the Trial Court's initial instructions to the jury that were tantamount to instructions to search for the truth, violative of Due Process, and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, "you twelve collectively act as one, decide what the true facts are... 'I , and "you will be in a position then to render a true and just verdict, an verdict that speaks the truth of the case", and "It's your civic responsibility to pay close attention and decide whose telling the truth." *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473. (2012).

(24) Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."

(25) Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Applicant] can't be innocent... ," and where the State used that same quote against the defense in its close, saying, "As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant's guilty," and where use of such a statement could not be considered a reasonable trial strategy.

(26) Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), "Now, sitting here today, telling these events to these 13 strangers, how are you doing?" to which the witness responded, "I would rather be at home with my children, but it's something that needs to be done; I'm glad I finally get to tell what happened." *See State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).

(27) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda Lively (mother of Victim 2) answered in the affirmative to the State's question, "Did you just hear Victim

2 testify?" and later indicated that she did not contact police because of threats from the Applicant "as [Victim 2] stated."

(28) Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by. the Defendant?" to which the witness replied, Yes, when she was four." *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

(29) Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, "My mom told me to lie then...," and Counsel's hearsay objection was sustained by the Trial Court. *See State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).

(30) Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel's objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. *See State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).

(31) Trial counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up.

(32) Trial Counsel provided ineffective assistance by reaffirming the complaining witness's version of events regarding her initial recantation of the allegations by asking her, "[Y]ou're saying it was your mom, Buffy Cartwright that ultimately convinced you to and Victim -1 responded, "Yes." This highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.

(33) Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.

(34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and

lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.

(35) Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright." *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

(36) Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be; the issues will be what they're asking you to look for to keep tuned into what they intend to prove, what the case is about." See U.S. Const. amends. V, VI, XIV.

(37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.

(38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy Brown's prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.

(39) Trial Counsel failed to object during the "acting-out" of Buffy Brown's prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule

801(d)(1)(D).

(40) Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #1 0), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).

(41) Trial Counsel failed to object and move to strike the State's redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed, what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.

(42) Trial Counsel failed to object and move to strike the State's redirect examination of the jailor who purportedly saw Applicant handing in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant's identification on cross examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was hanging in his cell present in the courtroom.

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

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

(45) Trial Counsel failed to object and preserve for appellate review the Trial Court

repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. *See* U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal.

(46) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses. "

(47) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the and "You're to make your decision based solely on what you determine the true facts are in this case." *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

(48) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." *See State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).

(49) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. *See State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); *See State v. Copeland*, 321 S.C. 318, 324 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.C. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted); *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("[b]ecause a jury must make its own assessment on the credibility of

witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.") (quotation omitted); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002) (finding trial counsel's decision not to object to prosecutor's improper vouching for the credibility of the State's witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.).

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

Furthermore, Applicant also alleged the following acts or omissions of ineffective assistance of Appellate Counsel:

(1) Appellate Counsel failed to file a Petition for Writ of Certiorari in the United States Supreme Court on the novel issue in South Carolina of whether evidence of an attempted suicide is admissible as evidence of guilt.

(2) In the event Trial Counsel properly preserved the issue in his pre-trial motions and objections to the Trial Court immediately prior to the witness's testimony, then Appellate Counsel failed to raise and argue the issue of the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness about the reliability and validity of field itself after the witness was deemed "expert" by the court and after the State's direct examination—all of which was held in the presence of the jury rather than in camera? *See* Rule 702, SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010). *See also Staubes v. Folly Beach*, 339 S.C. 406, 529 S.E.2d 543(2000); and *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004).

(3) In the event Trial Counsel properly preserved the issue in his contemporaneous objection ("leading") to the Trial Court, then Appellate Counsel provided failed to raise and argue the issue of whether the expert witness's testimony went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. *See* Rules 701 and 702, SCRE; *State v. Ellis*, 345. S.C. 175, 547 S.E.2d 490 (2001).

(4) Appellate Counsel failed to raise and argue Trial Counsel's objection where the Trial Court refused to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 : "Have you, any member of your family, or friend been impacted in anyway by Sexual Crime or Sexual Assault or Child . Molestation?" and Question 3: "Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?" Notably, the questions sought by Counsel would have elicited the prejudicial bias to disqualify jurors who answer in the affirmative, and thus, depriving Applicant of a fair trial if allowed on the -jury panel.

(5) Appellate Counsel failed to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised and ruled upon by the Trial Court. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004).

On February 3–4, 2022, Respondent appeared before the PCR Court for a virtual evidentiary hearing. Dayne Phillips represented Respondent, and Assistant Attorney General Michael Neubauer represented the State. Chief Appellate Defender Robert Dudek, Public Defender David Hayes, Public Defender Michael Routzong, and Respondent testified at the hearing. However, Mr. Routzong was unable to complete his testimony on February 3 due to technical difficulties with internet connection at the Correctional Institution. The hearing was continued to the following day but ended prematurely due to technical issues with the Court Reporter's internet connection.

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for the Court's review and consideration.

On June 1, 2022, the PCR Court granted Respondent Post-Conviction Relief based on ineffective assistance of counsel after reviewing the proposed orders from the parties and weighing the evidence presented at the hearing.

On June 13, 2022, Respondent filed a motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The parties appeared before the PCR Court on June 24, 2022, for a hearing to address the motion to alter or amend.

On July 22, 2022, the PCR Court issued an Amended Order granting Respondent Post-Conviction Relief.

On August 8, 2022, Respondent/Petitioner filed a Notice of Appeal in the South Carolina Supreme Court. Respondent filed a Petition for Writ of Certiorari and Appendix on May 19, 2023. Applicant filed a Return to the petition on October 9, 2023. The South Carolina Supreme Court issued an Order transferring the case to the South Carolina Court of Appeals on November 3, 2023.

On September 19, 2024, the South Carolina Court of Appeals issued an Order granting Certiorari and remanding the case to the PCR Court for the issuance of a new order which includes individualized analyses of deficiency and prejudice for each allegation of ineffective assistance and citation to relevant authority supporting the findings of the PCR Court. The Court of Appeals' Order noted that the new order shall be entered within forty-five (45) days of this court's mailing of the remittitur. The Court of Appeals issued the Remittitur on October 15, 2024.

EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified that his first trial ended in a mistrial due to a hung jury. Applicant also testified that he originally had private counsel during the first trial but that his original lawyer was subsequently relieved as counsel prior to the second trial. Applicant further testified that his second lawyer and lead counsel, Mr. Routzong, did not review all the photographs with him prior to trial.

Applicant testified that he told Mr. Routzong regarding the following character witnesses: Sammy Morton, Uncle Larry Britt, and his ex-bosses. Applicant also testified that he provided a timeline to Mr. Routzong of when he lived in the home. Applicant further testified that he informed Mr. Routzong of Amanda Rettig's involvement in a drug investigation. Notably, Applicant testified that the testimony related to where critical evidence was collected by police changed from the first trial (in daughter's bedroom) and the second trial (in son's bedroom), and that the identities of the females in the pornographic picture that he found on the internet depicted his daughter and her friends.

Chief Appellate Defender Robert Dudek testified regarding his experience as an appellate defender. Mr. Dudek also testified that the prosecution's use of Applicant's attempted suicide as evidence of guilt was a novel issue in South Carolina. Mr. Dudek further testified that based on his research there was a jurisdictional split. Mr. Dudek maintained that he ultimately decided not to file a Petition for Writ of Certiorari to the United States Supreme Court because he did not believe this was a federal issue. As to the remaining issues raised by Applicant regarding ineffective assistance of Appellate Counsel, Mr. Dudek maintained that he only raised meritorious issues that were preserved for appellate review..

Public Defender David Hayes testified that his role as co-counsel was limited to the State's expert witness, Alicia Benedetto. Specifically, Mr. Hayes admitted that he did not request an *in-camera* hearing or move to proffer his challenge of the witness's testimony despite that the Trial Court had already qualified the witness as an expert and only permitted questioning of the witness on the reliability and validity of the field itself.

Public Defender Michael Routzong maintained that he met with Applicant for hours and reviewed the discovery with him. Mr. Routzong stated that he does not remember whether he reviewed all the photographs with Applicant or the names of any specific witnesses to interview. Mr. Routzong indicated that he discussed trial strategy with Applicant, including the defense strategy of attacking the credibility of the State's witnesses. Mr. Rouzong testified that Applicant embarrassed his daughter by going on the news alleging that she and her friends were posting nude pictures on the internet. Notably, Mr. Routzong testified that he did not remember Applicant's computer being seized.

Mr. Routzong testified that Applicant's first trial was in November of 2012 and the second trial occurred a few months later in 2013. Specifically, he testified that he was appointed on March 5, 2013, and the second trial began on April 15, 2013. Mr. Routzong acknowledged that he did not request documentation regarding the Amanda Rettig's alleged involvement in an unrelated drug investigation, or whether there were any possible deals provide by the police or Prosecutor's office. Mr. Routzong further acknowledged that he did not consult with an expert witness regarding any DNA or digital evidence.

Mr. Routzong maintained that he believed Applicant's timeline of when he lived in the home was too remote to use as a defense. Mr. Routzong admitted that he did not have any specific notes regarding when he received the discovery or his review of the discovery with Applicant. Mr. Routzong stated that he did not recall or have any notes regarding potential character witnesses to testify on Applicant's behalf or his discussion explaining to Applicant the risks of testifying at trial.

Mr. Routzong admitted that he did not request or file a supplemental motion for discovery regarding the DNA evidence that was in the State's possession. Mr. Routzong testified that he did not recall when several jurors noted "similar types of behavior" when addressing the judge during *voir dire* and that he did not know bench conferences were not transcribed. Mr. Routzong also admitted that he had no notes regarding juror number 94's conversation with the Trial Court (particularly when he moved to have the juror struck for cause but was forced to use a peremptory strike on the juror). Mr. Routzong further submitted that he did not believe a Batson issue was appropriate in this case.

Mr. Routzong explained that he did not move to sequester the witnesses because they had already testified in the first trial (despite his strategy to attack each witness's credibility). Mr. Routzong claimed that he did not believe the indictments were overbroad or vague. Notably, Mr. Routzong testified that he had no strategic reason for not moving for severance of the charges and doesn't remember considering to sever the charges.

Mr. Routzong testified that he did not believe the admission of Applicant's consent to search form and buccal swab obtain by the State constituted a statement and was therefore not a Jackson v. Denno issue. Mr. Routzong did not believe the Trial Court's initial instructions to the jury constituted burden shifting. Mr. Routzong also did not

believe that the State's opening statement was prejudicial when the Prosecutor argued that the dates on the indictments were true.

Mr. Routzong admitted that he had not subpoenaed Buffy Brown prior to his stipulation of reading her prior testimony in the record. Mr. Routzong claimed that he did not believe it was improper bolstering or objectionable for the State to have the victim's mother acknowledge her daughter's prior testimony and then confirm what the daughter said was true. Mr. Routzong also claimed that he had no strategic reason for objecting when the Prosecutor referenced alleged prior abuse. Mr. Routzong stated that he had no strategic reason for not moving to strike an improper hearsay statement and other sustained objections by Trial Counsel.

Mr. Routzong acknowledged that he had never heard of a defense attorney helping recreate the testimony of a state's witness. Mr. Routzong testified that, in hindsight, he would not have participated in the recreated testimony. Mr. Routzong admitted that he had no strategic reason and should have objected to Buff Brown's prior testimony that went beyond the scope of time and place and constituted improper bolstering when the Prosecutor asked if the witness and police found out about Applicant allegedly molesting Amanda Rettig.

Mr. Routzong noted that he should have conducted a more thorough cross-examination based on the DSS investigation. Mr. Routzong again noted he had no strategic reason for failing to object to hearsay that went beyond the scope of time and place, constituted improperly bolstering, and hearsay within hearsay regarding the DSS Agent's testimony about receiving a call from her supervisor. Mr. Routzong also maintained that he thought he opened the door when the State's DNA expert went

beyond the scope of cross-examination on redirect regarding the potential destruction of DNA evidence caused by washing and drying sheets.

Mr. Routzong stated he thought that he had referenced Applicant's name during cross-examination of the jailer, James Hettich, who conducted an in-court identification of Applicant. Mr. Routzong testified that he does not believe that the pornographic picture Applicant alleged he found on the internet depicting Victim 3 and her friends was relevant or helpful to the defense. Mr. Routzong admitted that Judge Early would make faces and make it seem to the jury as if the lawyer is not prepared but claimed he could not remember the judge's exact demeanor during this trial. Mr. Routzong further testified that he had no strategic reason for not objecting to the Trial Court's instructions to the jury regarding his comments, "It is your duty to determine what the true facts are and what the truth is and who is telling the truth..." and "You're to make your decision based solely on what you determine the true facts are in this case."

LAW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1 (e) SCRCP. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989)

(internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 18, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State,* 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71." SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses at the hearing, assessed their credibility, and weighed the testimony accordingly based on the evidence and facts of the case. This Court also reviewed the Clerk of Court records regarding the Applicant's convictions and sentences, the trial transcript, the applications for post-conviction relief, and the legal arguments made by the parties. Therefore, the relevant findings of fact and conclusions of law are set forth below as required by Section 17-27-80 of the South Carolina Code of Laws.

ALLEGATIONS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL GRANTING POST-CONVICTION RELIEF

Based on the issues presented in this section, this Court finds that Applicant has established constitutional violations and deprivations that would require postconviction relief. This Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S at 687-88. This Court also finds that Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 642). Therefore, this Court has found that Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code S17-27-20(A)(1), (4), and (6).

Allegation Thirteen: Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics.

Applicant alleged Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics. Specifically, the Trial Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). *See* Rule 702, SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010)..

Before admitting expert testimony, trial courts, as the gatekeepers of evidence, must ensure the proffered evidence is beyond the ordinary knowledge of the jury; the witness has the skill, training, education, and experience required of an expert in his field; and the testimony is reliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 174–75 (2010); Rule 702, SCRE.

In South Carolina, a trial court following Rule 702, SCRE, must assess not only, (1) whether the expert's method is reliable (i.e., valid), but also (2) whether the substance of the expert's testimony is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (trial court must determine whether underlying science is reliable); Watson, 389 S.C. at 446, 699 S.E.2d at 175 ("[T]he trial court must evaluate the

substance of the testimony and determine whether it is reliable."). South Carolina has not adopted *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 594–95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework. Nevertheless, our approach is "extraordinarily similar" to the federal test. *See* Young, *How Do You Know What You Know?*, 15 S.C. Law. 28, 31 (2003); *see also State v. Phillips*, 430 S.C. 319, 343–44, 844 S.E.2d 651, 664 (2020) (Beatty, C.J., concurring).

The substance of an expert's testimony is reliable if it adheres to the rigors of the method. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167 (1999). If the trial court is satisfied that the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened. The correctness of the conclusion reached by an expert's faithful application of a reliable method (and the credibility of the expert who reached it) is for the jury, for the trial judge must remain at the gatepost and not tread on the advocate's or the jury's turf. *See State v. Jones*, 423 S.C. 631, 639–40, 817 S.E.2d 268, 272 (2018) ("There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence.").

The procedure set forth in *State v. White* should apply in qualifying child abuse assessment experts because their testimony is non-scientific. *White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Under *White*, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination

that the expert's testimony will be reliable. *White*, at 273, 676 S.E.2d at 688 (citing Rule 702, SCRE). There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. *Id.* at 274, 676 S.E.2d at 688. However, 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. *See State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial judge has vetted the matters of qualification and reliability and admitted the evidence." (quoting *White*, 382 S.C. at 274, 676 S.E.2d at 689 (2009)))

In *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), our Supreme Court stated, "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." *See also State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015); *Brown*, 411 S.C. at 342, 768 S.E.2d at 251 (concluding "the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror" and, thus, the general behavioral characteristics of child sex abuse victims "are more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony"), *abrogated on other grounds by Jones*, 423 S.C. at 637-38, 817 S.E.2d at 271 (abrogating *Brown* to the extent the court indicated it was appropriate to consider *voir dire* responses when evaluating the need for expert testimony); *see generally State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of

sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.").

In *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015), the defendant appealed his convictions for multiple crimes involving unlawful sexual conduct with a minor, arguing the trial court erred in allowing an expert witness to testify about a forensic interviewer's report because the State failed to demonstrate the expert's reliability. *Chavis*, 412 S.C. at 104, 107, 771 S.E.2d at 337, 339. Our Supreme Court found that, although the expert had "extensive experience and training," the State failed to show the expert's individual reliability because there was no evidence establishing the expert's conclusions were accurate. *Id.* at 107-08, 771 S.E.2d at 339. The *Chavis* court explained that "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." *Id.* at 108, 771 S.E.2d at 339. Thus, the *Chavis* court concluded that the trial court erred in allowing the expert's testimony because the threshold reliability requirement of Rule 702 was not met. *Id.*

This Court finds that Trial Counsel provided ineffective assistance by failing to properly object to the standard and procedure used by the Trial Court to qualify the State's witness, Dr. Alicia Benedetto, as an expert in child sexual abuse dynamics. (ROA. p. 14–21; ROA p. 202–243). Specifically, Trial Counsel's performance was deficient by failing to properly object when the Trial Court (1) limited Trial Counsel to *voir dire* of the witness regarding her qualifications, (2) qualified the witness as an expert, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed an "expert" by the Court. *See* Rule 702, SCRE; *Tapp*, 398 S.C.

376, 728 S.E.2d 468. This occurred in the presence of the jury rather than proffered testimony during an *in camera* hearing.

Trial Counsel's performance was also deficient by failing to properly challenge the reliability of the expert witness's opinion because the Trial Court never addressed that issue. Trai Counsel's deficient performance prejudiced Applicant because the jury's determination of guilt was based on the credibility of the State's witnesses, and the expert witness's testimony bolstered the Accusers' credibility (particularly the delayed disclosure, ages, behavior, and memory issues). Therefore, this Court finds that Trial Counsel provided ineffective assistance of counsel. *See Strickland*, 466 U.S. 668.

Allegation Fourteen: Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise.

The Applicant alleged Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise. Specifically, the Trial Court qualified the Dr. Benedetto as an expert in child sexual abuse dynamics, and the expert witness's testimony was akin to a psychological "profiler" when the Prosecutor asked whether it was typical for an abuser to have a favorite age for sexual abuse, and the witness answered in the affirmative. *See* Rule 702, SCRE.

The Court finds that Trial Counsel provided ineffective assistance by failing to properly object and move to strike the expert witness's testimony that "abusers typically seek victims of a particular age" as beyond the scope of her expertise. *See* Rule 702, SCRE. Dr. Benedetto's expert testimony was limited to the perspective of child victims as an expert in child sexual abuse dynamics. Although Trial Counsel objected to this line of questioning as "leading," he failed to object on the ground that it exceeded the scope

of Dr. Benedetto's expertise. (ROA p. 215–216). *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (opinion may be offered on ultimate issue only where witness is otherwise qualified).

Trial Counsel's performance was deficient by failing to properly object and move to strike the expert witness's testimony that "abusers typically seek victims of a particular age" as beyond the scope of her expertise. *See* Rule 702, SCRE. Trail Counsel's deficient performance prejudiced Applicant because the jury's determination of guilt was based on the credibility of the State's witnesses, and the expert witness's testimony bolstered the Accusers' credibility based on their ages at the time of the alleged abuse. Therefore, this Court finds that Trial Counsel provided ineffective assistance of counsel. *See Strickland*, 466 U.S. 668.

Allegation Twenty-Two: Trial Counsel failed to move for severance of Applicant's charges where the three complaining witnesses alleged abuse over three distinct and large periods of time, the abuse did not arise out of a single chain of circumstances, and the charges are not proved by the same evidence.

The Applicant alleged that Trial Counsel failed to move for severance of Applicant's charges where the three primary complaining witnesses alleged conduct over three distinct and large periods of time, allegations did not arise out of a single chain of circumstances, and allegations are not proved by the same evidence (twenty-eight indictments, covering a total period of over eighteen years). *See State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986); *State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996).

Our Supreme Court has held that criminal charges can be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same

evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. *See Smith*, 322 S.C. 107, 470 S.E.2d 364 (reversing a homicide by child abuse conviction based on the trial court's failure to grant severance of charges). The elements for the consolidation of charges test are conjunctive (i.e., analyzed together, not separately).

Conversely, where the offenses are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. *See Middleton,* 288 S.C. at 23-24, 339 S.E.2d at 693 (holding the trial judge erred in consolidating the charges for a joint trial where the crimes "did not arise out of a single chain of circumstances and required different evidence for proof").

The Court finds that Trial Counsel provided ineffective assistance of counsel for failing to move for severance of the charges. Applicant's twenty-eight (28) charges involved three (3) separate Accusers covering a period of over eighteen (18) years, did not arise out of a single chain of circumstances (alleged offenses occurred at unspecified times over an entire year), and were not proved by the same evidence (different allegations of sexual abuse, at different times and locations, with different witnesses). (ROA 31–85; ROA 100–140). Although Trial Counsel maintained that he was afraid multiple trials could result in a longer total term of imprisonment, this trial strategy was objectively unreasonable. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *see also Stacy v. Solem*,

801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.").

On direct examination, Trial Counsel admitted that he does not remember considering whether to move for severance of the charges. Specifically, Trial Counsel stated the following in response to why he did not move for severance:

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

(App. Vol. IV, p. 1652, line 17 – 1653, line 19) (emphasis added).

Trial Counsel conceded on cross-examination, "I probably would now [move for severance], but then I don't -- I don't recall -- recall all of my thought process." (App. Vol. IV, p. 1777, line 7-25). Trial Counsel also admitted that he had "no strategic reason" for failing to move for severance and noted he should have moved to sever the charges:

> I think that if -- *I think now I probably would want to sever them, yes, sir. There's always a danger that, you know, when you have an extensive amount of indictments like that, that somebody could -- well, a juror might conclude well something -- something had to happen, you've got all these indictments,*

> and so it become -- I think what we were betting on, in part though, was that we could demonstrate to the Jury that these witnesses were not happy with their dad, or stepdad, and that they had reasons to lie.

(App. Vol. IV, p. 1778, line 20 – 1779, line 11) (emphasis added).

This Court finds that having multiple accusers testify before the jury strengthened the State's case because the credibility of those accusers was the central issue of the jury's determination of Applicant's guilt (i.e., having multiple victims bolstered their individual credibility and had the same unfair prejudice created by inadmissible propensity evidence). *See also Smith*, 322 S.C. at 110, 470 S.E.2d at 365-66 (finding the State erroneously argued that the charges would have been admissible in a subsequent trial to show a common plan or scheme even if the charges were severed). Notably, the danger of unfair prejudice is also enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). Accordingly, this Court finds that Trial Counsel's performance was deficient by failing to move for severance because the underlying allegations fail to satisfy the requirements of the consolidation of charges test. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693 (finding "[i]t is evident the charges against appellant did not arise out of the same transaction").

This Court finds that Trial Counsel's deficient performance prejudiced Applicant's right to a fair trial because joinder of those charges was improper, the State was able to bolster the Accuser's credibility by having witnesses corroborate prior testimony presented during the trial, and the State's expert witness testified that the offenders typically seek out victims of a particular age range. Therefore, the Trial Counsel provided ineffective assistance of counsel for failing to move for severance of the charges. *See*

Strickland, 466 U.S. 668.

Allegations Twenty-Three: Trial Counsel's alleged failure to object to the Court's instructions to the jury.

The Applicant alleged that Trial Counsel failed to object and preserve for appellate review the Trial Court's initial instructions to the jury that were tantamount to instructions to search for the truth, violative of Due Process, and burden shifting. Specifically, the Trial Court told the jury prior to opening statements, "you twelve collectively act as one, decide what the true facts are... ", and "you will be in a position then to render a true and just verdict, a verdict that speaks the truth of the case." (April 15–16, 2013, Tr. p. 59–60). *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

In *Aleksey*, 343 S.C. 20, 538 S.E.2d 248, our Supreme Court found that "[j]ury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to a defendant." (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)).

In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 475 (2012), our Supreme Court ordered:

> [T]rial judge[s] to remove any suggestion from [their] general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

Daniels, 401 S.C. at 256, 737 S.E.2d at 475. The Court also noted in *Daniels*:

> Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.

Id., 401 S.C. at 264, 737 S.E.2d at 479; *see also State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (finding "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.").

In this case, Trial Counsel provided ineffective assistance for failing to object to the Trial Court's opening remarks to the jury ("you will be in a position then to render a true and just verdict, a verdict that speaks the truth of the case") and failing to request a curative instruction. (April 15–16, 2013, Tr. p. 59–60). *See Aleksey*, 343 S.C. 20, 538 S.E.2d 248, *Daniels*, 401 S.C. 251, 737 S.E.2d 473.

Trial Counsel's performance was deficient in failing to object to the Trial Court's initial instructions to the jury because those comments improperly shifted the burden of proof. Trial Counsel's deficient performance prejudiced Applicant because this improper comment came from the Trial Court at the beginning of the trial and immediately focused the jury to determine the "truth" of the charges instead of whether the State could prove every element of the offenses beyond a reasonable doubt. Therefore, the Trial Counsel provided ineffective assistance of counsel for failing to object and move for a curative

instruction. *See Strickland*, 466 U.S. 668.

Allegation Forty-Five: Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury.

The Applicant alleged Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury *sua sponte*, admonishing Applicant, and instructing the Prosecutor to object more; thus, usurping the role of the prosecutor and giving the improper appearance partiality before the jury. (ROA 269–291). Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy. *See* U.S. Const. amends. V, VI, XIV; Fundamental Due Process (right to be tried before a fair and detached tribunal).

Trial Counsel provided ineffective assistance for failing to object to the Trial Court's unfairly prejudicial comments and conduct. (ROA 269–291). Trial Counsel claimed that he did not object because he did not want to anger the Trial Court. Trial Counsel explained the Trial Court's general demeanor during trials: "I think, if we're all honest, everybody knows that Judge Early would make facial expressions during testimony that sometimes you would wish he would not", and "I never objected to any of those, and I didn't object this time." (App. Vol. IV, p. 1734, line 9 – 1735, line 3).

Trial Counsel testified that, although he did not remember what the Trial Court did in this case, he "would be amazed if Judge Early did not make faces during this trial[.]"

(App. Vol. IV, p. 1820, lines 2-11). Notably, Trial Counsel acknowledged that it is improper for the Trial Court to *sua sponte* instruct the Prosecutor to object more and to make facial expressions in reaction to testimony. (App. Vol. IV, p. 1818, line 18 – 1820, line 11).

Trial Counsel's performance was deficient based on Counsel's admission that he did not object to the Trial Court's comments and conduct to avoid upsetting the Court. Trial Counsel's fear of the Trial Court and decision not to object when appropriate is an objectively unreasonable trial strategy. *See Jones v. Barnes*, 463 U.S. 745, 758 (1983) (finding defense counsel must function as an advocate for the defendant, as opposed to a friend of the court); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

Trial Counsel's deficient performance prejudiced Applicant because the jury observed the Trial Court's improper comments and conduct without any challenge from Counsel. There is reasonable likelihood that the Trial Court's improper comments and conduct negatively affected the jury's perception of Applicant and violated his right to a fair trial. Therefore, the Trial Counsel provided ineffective assistance of counsel for failing to object to the Trial Court's improper comments and conduct. *See Strickland*, 466 U.S. 668.

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ALLEGATIONS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DENYING POST-CONVICTION RELIEF

Allegation One: Trial Counsel's alleged failure to conduct a reasonable investigation. develop mitigating evidence, and interview critical witnesses to add to the credibility of the Applicant's case.

The Applicant alleged Trial Counsel failed to interview critical witnesses who could have added to the credibility of the applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so while preparing for trial (*See Wiggins v. Smith*, 539 US. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 3661 782 S.E.2d 747 (Ct. App. 2015).)

The Court finds these allegations to be without merit. The testimony provided to the Court during the extensive hearing included references to potentially mitigating evidence or evidence that could reveal a potential bias of a State's witness. *See, e.g., Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279-80 (2019) (holding a PCR applicant who claims trial counsel was ineffective for failing to call certain witnesses must produce those witnesses or their testimony at the PCR hearing); *Taylor v. State*, 258 S.C. 369, 378, 188 S.E.2d 850, 854 (1972) (holding a PCR applicant's allegation that his trial counsel failed to adequately investigate his case was unsupported where the applicant failed to point out any beneficial evidence which could have been discovered by further investigation).

However, this allegation does not explain with particularity what the witnesses may have said to add to the credibility of the Applicant or challenge the credibility of the

State's witnesses. Additionally, no such witnesses were presented during the hearing for the Court's consideration. Therefore, the Applicant has not presented enough information for the Court to determine that the failure to interview and present such witnesses likely prejudiced the Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Two: Trial Counsel's alleged failure to hire an expert witness to conduct an independent review of the forensic evidence and provide rebuttal testimony.

The Applicant alleged Trial Counsel failed to hire an expert witness to review the forensic evidence presented by the State and rebut the State's arguments and evidence, specifically the electronic evidence and DNA evidence. *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

This Court finds these allegations to be without merit. Applicant did not present any expert testimony at the PCR hearing; therefore, any finding of prejudice would be merely speculative. See, e.g., *Dempsey v. State* 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Nor did Applicant make any attempt to show how reviewing SLED's documentation regarding its DNA testing of the bedsheet sample could have led Trial Counsel to discover evidence that would benefit the Applicant's case. *See Taylor,* 258 S.C. at 378, 188 S.E.2d at 854. In fact, Applicant admitted the semen found on the bedsheet was his, explaining

that his then-wife had masturbated him on his son's bed. Since Applicant did not dispute the State's identification of the semen as his, Trial Counsel had no reason to hire an expert to rebut the State's DNA analysis. Finally, Applicant has not identified the "electronic evidence seized by the police" that he claims could have been rebutted by an expert witness. As Trial Counsel testified before this Court, the State did not rely on any electronic evidence; the heart of the State's case was the testimony of Applicant's children. Accordingly, the Court finds Trial Counsel was not ineffective as to Allegation two. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Three: Trial Counsel's alle ed failure to investigation a Victim's potential deal with the State.

The Applicant alleged that trial counsel failed to investigate a Victim's involvement in a drug investigation which could have resulted in a deal from the State and may have prompted a statement implicating the Applicant of sexual abuse.

This Court finds this allegation to be without merit. At the PCR hearing, the Applicant failed to show there was any beneficial evidence that could have been discovered if Trial Counsel had further inquired into the Victim involvement in a drug investigation. *See Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Applicant's suggestion that one of the Victims was offered a deal by the State is not supported by any evidence presented at the PCR hearing. This Court will not find prejudice based on mere speculation that a more searching inquiry into the Victim's past would have been beneficial to Applicant's case. See, e.g., *Martin*, 427 S.C. at 455, 832 S.E.2d at 280 (holding an applicant's "mere speculation" as to what a witness's testimony would have been cannot, by itself, support a finding of prejudice). Therefore, this allegation is denied

and dismissed with prejudice.

Allegation Four: Trial Counsel's alleged failure to investigate the timeline of the allegations.

The Applicant alleged Trial Counsel failed to investigate and compare the timing of the allegations and the timeline of when the Applicant lived in the home.

At the PCR hearing, Applicant testified that he provided Trial Counsel with a timeline of when he was not living in the home, claiming he occasionally spent a few weeks working in Atlanta. However, Applicant has not adequately explained how any purported periods of absence from the home would have been inconsistent with the victims' disclosures of abuse occurring at uncertain times over many years. Trial Counsel testified he believed the timeline was not an effective alibi defense because the alleged abuse occurred so often over such an extended period that Applicant's occasional absence from the home made no difference. The Applicant to show how this information would have been beneficial and the decision to not present the information does not raise the level of deficient performance and representation by Trial Counsel. Therefore, the allegation is denied and dismissed with prejudice.

Allegation Five: Trial Counsel's alleged failure to review all discovery with the Applicant.

The Applicant alleged Trial Counsel failed to obtain and review all discovery with him in preparation for trial. Counsel. Applicant claims this was due in part to the amount of time that Counsel had to prepare for the second trial, which was approximately one month. Applicant alleges Trial Counsel failed to review all the photographs with him prior to trial.

This Court finds this allegation to be without merit. Trial Counsel testified he spent hours going over discovery with Applicant. Without presenting further proof of Trial Counsel's alleged failure to review all the discovery with him, Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814. In addition, Applicant has not presented any new evidence or defenses that could have been discovered by Trial Counsel's further review of the discovery. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by *Smalls*, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an Applicant must also show how the new evidence or defenses would have resulted in a different outcome. Id. (citing *David v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. state, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an Applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Therefore, this allegation is denied and dismissed with prejudice.

Allegation Six: Trial Counsel's alleged failure to cross-examine and impeach witnesses.

The Applicant alleged that Trial Counsel failed to properly cross-examine and impeach the State's witnesses. Specifically, Counsel alleges that Counsel failed to address witnesses' inconsistent testimony from the first trial that ended in a mistrial. This Court finds this allegation to be without merit. Applicant has not explained what prior inconsistent statements Trial Counsel should have used to impeach the State's

witnesses. Without alleging specifically what Trial Counsel should have done to more effectively cross-examine and impeach the State's witnesses, Applicant has failed to overcome the strong presumption of adequate assistance or to prove the result of his trial would likely have been different. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Harrington*, 562 U.S. at 112. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Seven: Trial Counsel's alleged failure to adequately interview witnesses and put forth witnesses to testify to the Applicant's character.

The Applicant alleged Trial Counsel failed to adequately prepare for trial. Specifically, the Applicant alleges that Counsel did not interview witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. *See State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

This Court finds this allegation to be without merit. Although Applicant named Sammy Morton, Larry Britt, and his ex-bosses as potential character witnesses, he failed to present any of them or offer any of their testimony at the PCR hearing. Failure to present purportedly favorable witnesses or evidence at the evidentiary hearing precludes a finding of prejudice. See, e.g., *Mahin*, 427 S.C. at 455, 832 S.E.2d at 279-80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into

Applicant's character at trial. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Eight: erroneous legal advice regarding the Applicant's decision to testify.

Applicant alleged Trial Counsel provided erroneous legal advice regarding Applicant's decision to testify, which was not within the range of competence demanded of attorneys in criminal cases. Specifically, Applicant alleges Counsel failed to explain all the risks involved in testifying as witness.

This Court finds this allegation to be without merit. Trial Counsel admitted he could not recall advising Applicant specifically of the risks involved in testifying; however, he testified that he always explains those risks to his clients, that Applicant would have known about cross-examination after watching the rest of the trial, and that the trial judge always informed defendants of their rights before they testified. In addition, Trial Counsel recalled Applicant wanted to testify, and Trial Counsel believed it would be valuable to have Applicant stand up and tell the jury he was innocent. The Court finds Applicant has not proved Trial Counsel' failed to properly advise him concerning testifying in his own defense by a preponderance of the evidence. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1 (e), SCRCP. Furthermore, Applicant has not explained how he was prejudiced; Applicant never claimed that, but for Trial Counsel's alleged failure to properly advise him, he would not have chosen to testify. Therefore, Applicant has failed to show that, but for Trial Counsel's alleged errors, the result of his proceeding likely would have been different. *See Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nine: Trial Counsel's failure to object to jury instructions.

Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and misstated the law.

This allegation raises the general issue of purportedly improper jury instructions but lacks any specificity as to what language the Applicant alleges with improper, and thus fails to state what language Trial Counsel failed to object to during trial. Thus, the Applicant fails to show deficient performance and prejudice on behalf of Trial Counsel. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Ten: Trial Counsel's alleged failure to object to evidence.

Applicant alleged that Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial. This Court finds this allegation to be without merit. This Allegation does not explain what "inadmissible and unduly prejudicial evidence" Applicant believes Trial Counsel should have objected to. Nor did Applicant clarify this allegation at the evidentiary hearing. To meet his burden, Applicant must assert facts, not mere conclusions. *See Land*, 274 S.C. at 246, 262 S.E.2d at 737. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Eleven: Trial Counsel's alleged failure to object to the State's closing argument.

Applicant alleged that Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.

This Allegation fails to specify which comments the Applicant contends were improper and the Applicant did not clarify the allegation during the evidentiary hearing. Since Applicant has failed to identify with particularity the State's remarks to which he claims Trial Counsel should have objected, this Court finds Applicant has failed to meet his burden of proving those allegations by a preponderance of the evidence. *See Land*, 274 S.C. at 246, 262 S.E.2d at 737. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Twelve: Trial Counsel's alleged failure to move to quash the indictments.

Applicant alleged that Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. *See State v. Baker*, 41 1 S.C. 583, 769 S.E.2d 860 (2015).

This Court finds this allegation to be without merit. The threshold for an indictment to be valid is not high. *State v. Lewis*, 434 S.C. 158, 173, 863 S.E.2d 1, 9 (2021) (citing *United States v. Bates*, 96 F.3d 964, 970 (7th Cir. 1996) ("Indictments need not exhaustively describe the facts surrounding a crime's commission nor provide lengthy explanations of the elements of the offense."). A court must examine the sufficiency of an indictment with a practical eye in view of the surrounding circumstances. *Id.* at 172, 863 S.E.2d at 8. In this case, the indictments each covered one-year time periods and adequately put the Applicant on notice of the charges he was facing and the time period with which the State claimed the incidents took place. *See State v. Tumbleston*, 376 S.C.

90, 101-02, 654 S.E.2d 849, 855 (Ct. App. 2007) (holding indictments that alleged acts of sexual abuse occurring "between 2001 and June 2004" were valid due to the stealth and repetitive nature of the alleged conduct and the fact that the victim was a young child who could not remember exact dates and times).

Applicant argues *State v. Baker*, 41 1 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred "between June 1, 1998 and September 1, 2004." [d. at 586-87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. Id. at 590—92, 769 S.E.2d at 864—65. Applicant alleges the *Baker* holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of *Baker* are significantly different from the facts of this case. Applicant's indictments have not been amended, and Applicant's defense was based on attacking the victims' credibility, not on an alibi. In addition, each of Applicant's indictments alleged offenses occurring within a one-year period, a much more specific time frame than the six-year period alleged in each of Baker's indictments. Finally, the *Baker* Court suggested that the indictments would have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances "with a practical eye, " this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. *See Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). Finally, Trial Counsel testified at the evidentiary hearing that he did not move to quash the indictments because he did not view them as objectionable. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Fifteen: Trial Court's allegedly erroneous stipulation and failure to object to testimony.

The Applicant alleged Trial Counsel erroneously stipulated to a witness, Buffy Brown's medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. *See* Rule 804, SCRE; *Dodd v. Berlinsky*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).

This Court finds these allegations to be without merit. The second trial was conducted approximately six months after the first trial, during which time Brown's stage 4 lung cancer appears to have advanced to the point that she was taken off all treatments but palliative care and pain management. It is not likely the trial court would have ordered Brown to appear in that condition, even if Trial Counsel had not stipulated that she was medically unavailable. *See* Rule 804(a)(4), SCRE. In addition, Trial Counsel testified he

thought Brown's illness would make her a very sympathetic witness for the State. Because Trial Counsel articulated a valid strategic reason for not seeking Brown's presence this Court finds Applicant has not proved Trial Counsel ineffective as to this allegation. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 1 1718, 386 S.E.2d at 625. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Sixteen: Trial Counsel's alleged failure to hire a DNA expert.

The Applicant alleged Trial Counsel failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain. *See McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).

This Court finds these allegations to be without merit. Applicant did not present any expert testimony at the PCR hearing; therefore, any finding of prejudice would be merely speculative. see, e.g., *Dempsey v. State* 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure

to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Nor did Applicant make any attempt to show how reviewing SLED's documentation regarding its DNA testing of the bedsheet sample could have led Trial Counsel to discover evidence that would benefit his case. See Taylor, 258 S.C. at 378, 188 S.E.2d at 854.Thus, this allegation is denied and dismissed with prejudice.

Allegation Seventeen: Trial Counsel's alleged failure to request further *voir dire* of a specific potential juror.

The Applicant alleged that Trial Counsel failed to move for the Trial Court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.

This Court finds this allegation to be without merit. At the PCR hearing, Trial Counsel was questioned about a juror who knew a member of the public defender's office, but no evidence was presented that the juror knew one of the investigating officers. Trial Counsel testified he had no worries about that juror's impartiality because the juror stated in the transcript that he could be fair and impartial. In addition, Trial Counsel believed it might be beneficial to have a juror who knew someone in the public defender's office, which was a valid strategic reason for failing to object to the juror. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. The Court finds Applicant has not met his burden to show that Trial Counsel was ineffective for failing to move for additional *voir dire* of that juror. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Eighteen: Trial Counsel's alleged failure to make a *Batson* motion.

The Applicant alleged Trial Counsel failed to move to quash the jury panel pursuant to Baston where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. *See* U.S. Const. amends. V, VI, XIV; *State v. Adams*, 322 S.C. 1 14, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).

This Court finds this allegation to be without merit. *Batson* held that the purposeful exclusion of jurors on racial grounds violates a defendant's right to equal protection and that a "pattern" of peremptory strikes against potential jurors of the defendant's race "might give rise to an inference of discrimination." *Batson*, 476 U.S. at 96—97. In this case, however, Applicant admits that, despite striking two white jurors, the State ultimately sat eleven white jurors. This is unlike *Batson*, in which the prosecutor struck all jurors of the defendant's race from the venire. *Id.* at 83. The Court finds the composition of the jury in this case is not consistent with a discriminatory pattern of striking jurors of Applicant's race. Trial Counsel had no reason to infer, from only two strikes out of numerous white jurors, that the State was employing its peremptory strikes in a racially discriminatory manner. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nineteen: Trial Counsel failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses.

The Applicant alleged that Trial Counsel failed to move to sequester any of the

witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses. *See* Rule 615, SCRE.

For example, the Prosecutor's second question to Complainant's mother, Melinda Lively, was whether she just heard her daughter's testimony, and Ms. Lively's confirmation and subsequent response, "I was threatened by there father, as [Daughter] stated." (ROA 53–54).

In this case, the Court finds Trial Counsel's performance was deficient in failing to move for sequestration of the witnesses during the second trial. Although these witnesses had testified in the first trial, sequestration during the second trial would have ensured that the witnesses did not have the ability to hear other witnesses, especially, in a trial where the Defense's strategy was to attack the credibility of the State's witnesses. *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ."). The jury's determination of guilt was based on the credibility of the State's witnesses and sequestration of the witnesses was necessary to ensure that Applicant received a fair trial. However, Applicant is unable to prove the necessary prejudice for this allegation.

Allegation Twenty: Trial Counsel failed to move to individually *voir dire* jurors who informed the Trial Court they had experienced sexual abuse and failed to put those jurors' information on the record.

The Applicant alleged Trial Counsel's failure to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him about abuse ("I've had several jurors who have come forward expressing to me some of their past and how it affected them) (April 15-16, 2013, Tr. p.

41). Trial Counsel failed to preserve this issue for appellate review and any resulting prejudice because none of those conversations between the Trial Court and jurors was placed on the record, and none of those juror's numbers were placed on the record with whom the judge spoke. *See* U.S. Const. amends. V, VI, XIV.

Trial Counsel stated during the PCR hearing that having unrecorded conversations during *voir dire* was not his general practice, and he would have asked for the conversations to be on the record. The Court finds it is the responsibility of Trial Counsel to ensure that all aspects of the trial on record for appellate review and it would be obvious if these portions of the trial went undocumented by the court reporter. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." (quoting State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010))); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) ("For an appellate court to review an issue, a contemporaneous objection at the trial level is required.").

Accordingly, the Court finds Trial Counsel's performance was deficient to ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review. However, Applicant is unable to prove the necessary prejudice for this allegation.

Allegation Twenty-One: Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows."

The Applicant alleged that Trial Counsel failed to properly argue and preserve for appellate review that juror number 94's conversation with the Trial Court be placed on the record where, during jury selection, juror number 94 was called up and stated that she had a relative that was a victim "as the court knows." Notably, Counsel sought for this juror to be stricken for cause, which the Court denied, resulting in Counsel being forced to use a strike on this juror. *See* U.S. Const. amends. V, VI, XIV.

Trial Counsel admitted juror number 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. Trial Counsel testified he did not use up all his peremptory strikes, because only nine jurors were struck in total. However, Trial Counsel performance was deficient for failing to have these conversations on record, especially when Counsel moved to have a juror stricken for cause and had to strategically use one of his preemptory strikes on this juror, to preserve this issue for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." (quoting State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010))); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) ("For an appellate court to

review an issue, a contemporaneous objection at the trial level is required."). However, Applicant is unable to prove the necessary prejudice for this allegation.

Allegation Twenty-Four: Trial Counsel's alleged failure to object to the State's opening statement.

The Applicant alleged that Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."

This Court finds there were no grounds for Trial Counsel to object to the State's reference to the indictments during its opening statement. The indictments each alleged the offenses occurred within a one-year period, dated based on the age of the victims; the State simply mentioned that fact in its opening statement to explain why the indictments were dated in that manner. Applicant has not explained how he was prejudiced by the State's brief and innocuous reference to the dates on the indictments. Even if the State's explanation of the indictments' dates was somehow improper, any error would have been cured when the trial court correctly charged the jury that the indictments were not evidence and that nothing should be inferred from the mere fact Applicant was indicted. see, e.g., *State v. Brown* 274 S.C. 48, 51 , 260 S.E.2d 719, 721 (1979) (holding a trial court's "unfortunate" reference to the grand jury's returning a true bill was cured by the court's subsequent instruction that the grand jury proceedings were irrelevant and the State had the burden to prove the defendant guilty). The Court finds Applicant has failed to prove Trial Counsel's assistance was ineffective. Therefore, this

allegation is denied and dismissed with prejudice.

Allegation Twenty-Five: Trial Counsel's alleged improper argument during opening statements.

The Applicant alleged that Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Applicant] can't be innocent. ," and where the State used that same quote against the defense in its close, saying, "As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant's guilty," and where use of such a statement could not be considered a reasonable trial strategy. Trial Counsel was deficient for the comments made to the jury and could not articulate any strategy for these comments. However, Applicant is unable to prove the necessary prejudice for this allegation.

Allegation Twenty-Six: Trial Counsel's alleged failure to object and strike victim impact testimony.

The Applicant alleged that Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim), "Now, sitting here today, telling these events to these 13 strangers, how are you doing?" to which the witness responded, "I would rather be at home with my children, but it's something that needs to be done; I'm glad I finally get to tell what happened." *See State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).

This Court finds this allegation to be without merit. Applicant cites *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), in support of his position. In that case, which involved a DUI car crash resulting in death, the prosecution introduced "poignant"

testimony that the crash victim was recently married and photographs depicting the victim and her husband. *Id.* at 19, 488 S.E.2d at 314. The Supreme Court held the evidence was irrelevant, highly inflammatory, and likely affected the outcome of the trial because the other evidence of guilt was inconclusive. Id. at 20, 488 S.E.2d at 314. In this case, however, the State's brief inquiry into how the Victim was doing, though irrelevant, was not, by itself, likely to arouse the sympathy or prejudice of the jury. Furthermore, the Victim's response to the State's question—that she "would rather be home with [her] children, but it's something that needs to be done"—was not "highly inflammatory" victim impact evidence like the evidence at issue in Livingston. This Court finds Applicant was not prejudiced by the State's brief inquiry or the Victim's response. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Twenty-Seven: Trial Counsel's alleged failure to objection to bolstering.

The Applicant alleged Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda Lively (mother of Victim) answered in the affirmative to the State's question, "Did you just hear [the other Victim] testify?" and later indicated that she did not contact police because of threats from the Applicant "as [the other Victim] stated."

This Court finds this allegation to be without merit. Improper bolstering occurs when a witness conveys to the jury that the witness believes the victim. See, e.g., *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). Here, however, Lively never claimed to believe the Victim; she merely corroborated the Victim's account of

Applicant's threatening behavior. There was, therefore, no ground for Trial Counsel to object to improper bolstering. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Twenty-Eight: Trial Counsel's alleged failure to object to hearsay and bolstering.

The Applicant alleged that Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, had been abused by' the Defendant?" to which the witness replied, Yes, when she was four." *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

This Court finds this allegation to be without merit. Al Lively said was that (1) the Victim did disclose she had been abused by Applicant, and (2) the Victim's alleged the abuse occurred when she was four. The Victim's age when the abuse occurred is clearly relevant to the "time of the assault" and is, therefore, within the scope of time and place. In addition, Rule 801 (d)(1)(B), SCRE, allows the admission of prior consistent statements by a testifying declarant when the declarant is charged with fabricating her testimony; in the trial in this case, Applicant accused the Victim of fabricating abuse allegations against him in 201 1 because she bore a grudge. Therefore, the evidence of the Victim's prior statement would have been admissible even if Trial Counsel had successfully argued it went beyond the time and place of the assault, so Applicant was not prejudiced by Trial Counsel's failure to make that objection. *See Cherry*, 300 S.C. at

1 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Twenty-Nine: Trial Counsel's alleged failure to strike hearsay testimony.

The Applicant alleged that Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim) when the witness said, "My mom told me to lie then..." and Counsel's hearsay objection was sustained by the Trial Court. *See State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).

Trial Counsel's failure to move to strike hearsay after an objection was sustained is not deficient performance. Although Counsel did not articulate a strategy for not striking this testimony, there are many reasons Counsel may choose to not do so. Even if this failure was deficient performance, it would not rise to the level of prejudicing the Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Thirty: Trial Counsel's alleged failure to strike testimony following an objection.

The Applicant alleged that Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim) when Counsel's objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. *See State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).

Again, Trial Counsel's failure to move to strike testimony after an objection was sustained is not deficient performance. Although Counsel did not articulate a strategy for not striking this testimony, there are many reasons Counsel may choose to not do so. Even if this failure was deficient performance, it would not rise to the level of prejudicing

the Applicant as the State continued to ask questions about the same subject matter without leading. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Thirty-One: Trial Counsel's alleged failure to preserve an issue for appellate review.

The Applicant alleged that Trial Counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up."

There is no indication that Trial Counsel's ability to effectively represent Applicant was compromised by this minor inconvenience. The Court finds Applicant has not met his burden of proving, by a preponderance of the evidence, that Trial Counsel was ineffective as to this allegation. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1 SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Two: Trial Counsel's alleged ineffective assistance regarding recanting statements.

The Applicant alleged that Trial Counsel provided ineffective assistance by reaffirming the complaining witness's version of events regarding her initial recantation of the allegations by asking her, "[Y]ou're saying it was your mom, Buffy Cartwright that ultimately convinced you to recant?", and the Victim responded, "Yes." Applicant alleges that this highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. *See* U.S. Const. amends. V, VI, XIV. This Court finds this allegation to be without merit. This Victim had already testified that she

originally recanted because her mother told her to, so allowing her to "reaffirm" that claim was not likely to be prejudicial to Applicant. Trial Counsel's question followed a series of questions suggesting that the Victim had already denied the abuse occurred in private conversations with her mother, which (if believed by the jury) would have rebutted the State's theory that her mother's request for her to recant was made in bad faith. Therefore, asking the Victim about the circumstances of her recantation was not an unreasonable trial strategy. This Court will not nitpick whether Trial Counsel employed the perfect phrasing in pursuing this strategy; the Sixth Amendment does not require perfect advocacy as judged with the benefit of hindsight. *See Yarborough*, 540 U.S. at 6. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Three: Trial Counsel's alleged failure to acquire a transcript of the Applicant's first trial.

The Applicant alleged Trial Counsel failed Applicant alleges Trial Counsel failed to move to sequester the witnesses, which was prejudicial because the State repeatedly referred to prior witness testimony when questioning later witnesses. This Court finds this allegation to be without merit. It appears that Trial Counsel had a transcript of the previous trial and a specific failure to impeach could not be articulated to this Court.

This Court finds Applicant has failed to prove his counsel was deficient or that the result of his trial would likely have been different if the witnesses had been sequestered. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Four: Trial Counsel provided ineffective assistance by failing to object and move to strike the DSS case worker's testimony that DSS only

becomes involved in a case "if it meets the legal statute in the State of South Carolina, we take it as a report and go interview family."

The Applicant alleged that Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". (ROA p. 97). The Applicant alleged that this improper testimony violates Due Process and lowers the State's burden of proof as it appears to indicate the statutory law for such cases has already been satisfied.

At the hearing, Trial Counsel acknowledged the jury may have inferred that DSS had previously made a finding about Applicant's guilt based on the Case Worker's testimony but maintained it was not objectionable (despite that DSS does not need to meet any burden of proof to start an investigation).

The Court finds that Trial Counsel's performance was deficient for failing to object to these comments as they amounted to an improper comment on a legal issue. However, Applicant is unable to prove the necessary prejudice for this allegation.

Allegation Thirty-Five: Trial Counsel's alleged failure to object to the DSS case worker's testimony as hearsay and bolstering.

The Applicant alleged that Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim] and her stepfather Harold Cartwright." *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule

801(d)(1)(D).

This Court finds this allegation to be without merit. Bolstering requires a witness to convey that she believes the victim; merely announcing that the Victim made a report does not imply that Price believed the report. See, e.g., *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717. In addition, prior consistent statements of a testifying declarant may be admitted, notwithstanding the rule against hearsay, to rebut the charge that the declarant fabricated her testimony. Rule 801 SCRE. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Six: Trial Counsel's alleged failure to object to the Court's preliminary instructions to the jury.

The Applicant alleged that Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be, the issues will be what they're asking you to look for to keep tuned into what they intend to prove, what the case is about." *See* U.S. Const. amends. V, VI, XIV.

The Court finds it unlikely that the jury might have misinterpreted this isolated phrase to mean Applicant had some obligation to prove his innocence, the trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice. See Id. at 26—27, 538 S.E.2d at 251. Consequently, Trial Counsel was not ineffective for failing to object to this language. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Seven: Trial Counsel's allegedly ineffective impeach of a witness.

The Applicant alleged that Trial Counsel provided ineffective assistance by attempting to impeach the testimony of one of the Victim's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. *See* U.S. Const. amends. V, VI, XIV.

This Court finds this allegation to be without merit. Trial Counsel was attempting to show inconsistencies between the stories the Victim told various people about Applicant's abuse. In order to pursue that reasonable impeachment strategy, Trial Counsel necessarily had to question the Victim about the multiple reports she made to different people. The Court finds Trial Counsel's questioning of the Victim was part of a valid trial strategy, even though, with the benefit of hindsight, it may seem imperfect. *See Yarborough*, 540 U.S. at 6; *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty-Eight: Trial Counsel's alleged failure to review and object to the admission of prior testimony.

The Applicant alleged that Trial Counsel failed to object and preserve for appellate review the admission of Buffy Brown's prior testimony (ex-wife of Applicant, and mother of two Victims) where the witness was still alive, purportedly had the same disease, and

no foundation was made by the State showing any reasonable efforts to have her present to testify at the second trial. Furthermore, the Applicant alleges the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.

Applicant, however, has not identified which inflections or mannerisms the solicitor is alleged to have improperly adopted. In addition, the solicitor only "acted out" her own role; Trial Counsel portrayed Applicant's defense counsel in the first trial, and Brown was played by Ms. Emma Dicks. The solicitor, therefore, could not have inserted improper inflections and mannerisms into their performances, which greatly limits the scope of potential prejudice.

Trial Counsel testified at the evidentiary hearing that he had the same ability to alter mannerisms. He also testified he could not remember the solicitor making any exaggerated or excessive mannerisms. This Court finds Applicant has not met his burden to prove that the "acting out" of Brown's testimony was harmful to his case. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Allegation Thirty-Nine: Trial Counsel's alleged failure to object to prior testimony on the grounds of presentation, hearsay, and bolstering.

The Applicant alleged that Trial Counsel failed to object during the "acting-out" of Buffy Brown's prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting the Victim, to which she replied in the

affirmative. *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

At the evidentiary hearing, Trial Counsel testified he believed it would be futile to object to portions of Brown's testimony, because it was admitted and presented to the jury as a whole; he also believed the trial judge would not agree to strike the whole thing, because Brown's unavailability made the prior trial transcript admissible. This Court finds Trial Counsel was not ineffective because he articulated a valid strategic reason why he did not object to the question. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22.

Allegation Forty: Trial Counsel's alleged failure to object.

The Applicant alleged Trial Counsel failed to request a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing to challenge the voluntariness of his consent to the buccal swab that was later used to match his DNA to that of the semen on the bedsheet. This Court finds this allegation to be without merit. As discussed above, Applicant admitted the semen was his; he simply denied that it was related to any criminal activity. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. This Court finds Applicant has not proved that, but for the alleged error of Trial Counsel, the result of Applicant's trial would have been different. *See Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty-One: Trial Counsel's alleged failure to object and strike the State's redirect examination of the State's DNA expert.

The Applicant alleged that Trial Counsel failed to object and move to strike the State's redirect examination of its DNA expert as it went beyond the scope of cross-examination. Specifically, the State immediately asked whether DNA can be destroyed,

what effect washing and drying sheets would have on DNA when Counsel never inquired about the destruction of DNA, and where the State alleged through other witnesses that Applicant sought to destroy his DNA on the sheets by having them laundered.

On cross-examination, Trial Counsel asked Gallman whether she detected a mixture of DNA on the bedsheet, and Gallman testified she only found Applicant's DNA. At the PCR hearing, Trial Counsel testified he was attempting to show Applicant's DNA from the bedsheet was not mixed with one of the Victim's DNA, which might have cast doubt on the State's theory that the semen was from Applicant's abuse of the Victim. Trial Counsel believed the State brought up whether laundering the sheets could destroy DNA to explain why the Victim's DNA was not found on them. Trial Counsel perceived that line of redirect questioning as a permissible response to the line of questioning he pursued on cross-examination, which is why he did not object. The Court finds Applicant has failed to prove Trial Counsel's decision not to object to the State's line of questioning fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687—88. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty-Two: Trial Counsel's alleged failure to object to the State's redirect examination of the Corrections Officer.

The Applicant alleged that Trial Counsel failed to object and move to strike the State's redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel asked no questions regarding Applicant's identification on cross-examination, and where on redirect examination, the State immediately asked whether the witness saw the man that was

hanging in his cell present in the courtroom.

This Court finds this allegation to be without merit. There was patently no prejudice from Hettich's identification of Applicant as the hanged man on redirect examination because he had already testified on direct examination that he saw "Inmate Cartwright" hanging by a sheet tied around his neck. Applicant has failed to prove any prejudice. *See Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty-Three: Trial Counsel failed to cross-examine the State's witnesses about alleged discrepancies regarding whose bedroom the semen-stained bed sheets were taken from that had Respondent's DNA on them.

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

Allegation Forty-Four: Trial Counsel's alleged ineffective assistance regarding an impeachment strategy.

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

Trial Counsel testified at the evidentiary hearing that he—like everyone else who testified having seen the photographs, except Applicant—did not believe the model in the photographs was the Victim. In addition, during his closing argument, Trial Counsel argued that this Victim was motivated to retaliate against Applicant for falsely accusing her of posing for pornographic images. Therefore, proving the person in the photographs was actually the Victim was not necessary to Applicant's defense. Therefore, this Court finds Applicant has failed to establish, by a preponderance of the evidence, either Trial Counsel's deficiency or any resulting prejudice from the alleged error. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Cherty, 300 S.C. at 1 17-18, 386 S.E.2d at 625; Rule 71, SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty-Six: Trial Counsel's failure to object to the Court's closing instructions.

The Applicant alleged Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other

witnesses.

To the extent this isolated statement could be interpreted as an improper comment on the facts, this Court finds Applicant has shown no prejudice. In Applicant's testimony and in Trial Counsel's closing argument, the defense expressly claimed the complaining witnesses' accusations of sexual abuse were untrue; in fact, that claim was the heart of Applicant's defense. Trial Counsel had no reason to object to the trial court's express affirmance of a point that was necessary to his own client's theory of the case. In addition, there is no way any juror could have failed to notice that some witnesses gave a "different version of the facts" than others. Therefore, the trial court's statement was so obviously true that, even if Trial Counsel had made an objection on that ground, it could not possibly have changed the result of the proceeding. *Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625. Thus, this allegation is denied and dismissed with prejudice.

Allegation Forty-Eight: Trial Counsel's alleged failure to objection to a jury. instruction.

The Applicant alleged Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." *See State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Trial Counsel was deficient for failing to object to these comments made during jury instructions as a misstatement of the law. Therefore, this allegation is denied and dismissed with prejudice.

Allegation Forty-Nine: Trial Counsel's alleged failure to make comments in the State's closing argument.

The Applicant alleged Trial Counsel failed to object and preserve for appellate

review the Prosecutor's improper comments during closing argument. Specifically, the Applicant alleges that the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. *See State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549} 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); *See State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted); *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.").

The Court finds this allegation without merit, as the Applicant failure to specify which comments the Applicant contends were improper and the Applicant did not clarify during the evidentiary hearing. Since Applicant has failed to identify with particularity the State's remarks to which he claims Trial Counsel should have objected, this Court finds Applicant has failed to meet his burden of proving those allegations by a preponderance of the evidence. *See Land*, 274 S.C. at 246, 262 S.E.2d at 737. Therefore, this allegation

is denied and dismissed with prejudice.

Allegation Fifty: Trial Counsel's alleged failure to prepare for trial and present a reasonable trial strategy.

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

The Applicant does not explain with particularity what aspects of Trial Counsel's preparation or strategy were inadequate or unreasonable; rather, Applicant cites *United States v. Cronic*, 466 U.S. 648 (1984), and claims Trial Counsel "failed to subject the prosecution's case to meaningful adversarial testing." This bare conclusion, devoid of supporting facts, is insufficient to merit a determination by this Court. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980) (holding a PCR applicant must assert facts, as contrasted with conclusions, to meet the burden imposed upon him). Therefore, this allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In analyzing a claim of ineffective assistance of appellate counsel, courts must apply the Strickland test just as they would when analyzing a claim of ineffective

assistance of trial counsel. *Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Therefore, a PCR applicant alleging ineffective assistance of appellate counsel must prove counsel's performance was deficient and the applicant was prejudiced thereby. *Id.*

Allegation One: Appellate Counsel's alleged failure to file a petition for a writ of certiorari in the United States Supreme Court.

Applicant alleged Appellate Counsel should have filed a petition for a writ of certiorari in the United States Supreme Court on the issue of whether evidence of attempted suicide is admissible as evidence of guilt in South Carolina. This Court finds this allegation to be without merit. First, there is no right to discretionary review by the United States Supreme Court. *See Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 543—44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion.") *Cf. Jones v. Barnes*, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). In addition, the admissibility of evidence in a state criminal trial is not generally an issue of federal law, unless it implicates constitutional concerns. Applicant has not explained any basis for seeking review of his direct appeal by the United States Supreme Court on what is facially an issue of state law. Therefore, Applicant has not met his burden of showing Appellate Counsel was deficient for failing to request such review, or that he likely would have obtained review had he requested it. *See* id.; Rule 71.1 (e), SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Two: Appellate Counsel's alleged failure to raise issues related to

Dr. Benedetto's qualification as an expert in child sexual abuse dynamics.

Applicant alleged Appellate Counsel should have raised the issues of Dr. Benedetto's qualification as an expert as set forth above. However, Appellant Counsel had a limited record due to the limitation on Trial Counsel's questions of Dr. Benedetto as an expert. Further, the Applicant failed to provide the Court with evidence to show that the outcome of the appeal would have been different, nor has the Applicant supplied any additional evidence regarding this allegation. This Court finds this allegation to be without merit. Applicant has failed to prove that Appellate Counsel was ineffective for failing to raise this issue on appeal. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Three: Appellate Counsel's alleged failure to raise issue of Dr. Benedetto's testimony that abusers typically seek victims of a particular age.

Applicant alleged Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without merit. Much like the allegation listed above, the Applicant has failed to provide the Court with evidence to support a finding of deficiency. Therefore, the Court finds no deficiency in failing to raise it on appeal. *See Cherry*, 300 S.C. at 1 17-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Four: Appellate Counsel's alleged failure to raise issue of Trial Counsel's objection to the trial court's refusal to question jurors about sexual molestation

Applicant alleged Appellate Counsel should have challenged the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?" and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have elicited potential bias among the jurors. This Court finds this allegation to be without merit. Appellate Counsel testified he raised four issues on appeal; counsel is not required to raise every non-frivolous issue on appeal but may select among them to maximize the likelihood of a favorable outcome. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Thos Court finds Appellate Counsel attempted to raise those issues he believed were most likely to obtain a favorable result. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Five: Appellate Counsel's alleged failure to raise issue of Applicant's motion for directed verdict of acquittal.

This Court finds this allegation to be without merit. On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Here, there was substantial evidence of Applicant's guilt: the three victims' detailed testimony. It would likely have been fruitless for Appellate Counsel to challenge the sufficiency of the State's evidence on appeal, and he was not ineffective for declining to try. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

The Applicant has submitted an extensive list of alleged errors on behalf of Trial Counsel and Appellate Counsel. The Court finds that Trial Counsel provided ineffective assistance of counsel based on the unfair prejudice suffered from the individual allegations identified above. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). Therefore, the Applicant has suffered prejudice warranting a new trial.

"As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (quoting *Delaware v. Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, 89 L. Ed.2d at 684). These prejudicial errors have created a reasonable probability that but for counsel's unprofessional error, the result would have been different.

In determining whether the Applicant has proven prejudice, this Court considered the specific impact Trial Counsel's individual errors had on the outcome of the trial. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). This Court also considered the strength of the State's case considering all the evidence presented to the jury. *See* generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). Applicant's first trial ended in a mistrial, and the analysis of the evidence presented to this Court over the multi-day PCR hearing supports the Court's finding of prejudice.

Based on all the foregoing reasons, this Court finds and concludes that Applicant has established constitutional violations and deprivations that would require post-

conviction relief. This Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S at 687-88. This Court also finds that Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 642).

This Court has concluded that Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, SS 3 and 14; S.C. Code S17-27-20(A)(1), (4), and (6). Therefore, this PCR application must be granted, and Applicant shall receive a new trial.

IT IS HEREBY ORDERED that Applicant's application for Post-Conviction Relief is GRANTED.

IT IS SO ORDERED!

The Honorable Robert J. Bonds

Walterboro, South Carolina