STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2025-000338

Harold Cartwright,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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

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

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

STATEMENT OF THE CASE

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

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

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

Summary of Trial Testimony

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

At trial, Victim 1 testified Respondent began making her perform oral sex on him when she was four years old. At age five, she told her mother Melinda Lively about the abuse, but Lively did not contact police because Respondent threatened to kill her, Victim 1, and himself.[2]

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[1] The complete list is provided in the State's Rule 59(e), SCRCP, motion. (App.pp.2574–75).

[2] Lively also testified about Victim 1's disclosure of the abuse. Lively confirmed that she did not contact law enforcement because she was afraid of Respondent, who had held her at gunpoint and

Eventually, Victim 1 spoke with DSS about Respondent's abuse, but Respondent convinced her to tell DSS that she "dreamed it all." Victim 1 testified Respondent would hold guns to her head or to his own head, threatening to kill her and her mother or to commit suicide; then, after abusing her, he would bribe her with money and gifts. Victim 1 testified the abuse continued multiple times every year until she turned ten in 1995, at which time Lively left Respondent and moved to Georgia with the children. Victim 1 did not mention the alleged abuse again until she was contacted by detectives from the Aiken County Sheriff's Department in 2011 as part of an ongoing investigation into the alleged abuse of Victims 2 and 3. She testified that she waited from 1995 until 2011 to disclose the abuse because she was afraid of Respondent. (App.pp.268–90).

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

Victim 3 testified Respondent began abusing her in 2008, when she was thirteen, by coming into her room before school and "humping" her, in the same manner as that described by Victim 2. She testified he occasionally got mad, held a gun up to his head, and threatened to kill all of them and himself. In addition, Victim 3 testified the family began living in a shed on

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threatened to kill her and Victim 1 if she told anybody. (App.p.291, line 7–p.292, line 3).

Respondent's brother's property in 2009 after they lost their house to foreclosure. Respondent was not working at that time, and he arranged for Victim 3 to be "home schooled" by him in the shed when the rest of the family were away; during that time, Respondent continued "humping" her and eventually forced her to have sexual intercourse with him. Victim 3 testified that Respondent made her start taking birth control after she turned fourteen. She testified the family moved to a new house in 2010, and she started going back to school the following year. Victim 3 testified that Respondent stopped having sex with her in 2010, after Hoss Cartwright, Respondent's son, moved into the house, but Respondent continued humping her in her room before school.[3] After Victim 3 began going back to school, Respondent would criticize the appropriateness of her clothing by making her bend over or sit cross-legged on the floor while he tried to see her private parts.[4] When investigators questioned Victim 3, she initially denied being abused by Respondent because she was afraid of him. Later, however, she told investigators Respondent molested her. (App.pp.338–76).

Buffy Brown testified[5] she remembered Respondent would spend ten to twenty minutes waking up Victim 2 every morning before school. She admitted pressuring Victim 2 to recant after Victim 2 initially reported the abuse because Respondent convinced Brown he had done nothing wrong. Brown testified that on February 19, 2011, she came home from work and found

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

[4] Hoss also testified Respondent would tell Victim 3 to adopt "the weirdest positions" to see if her clothes were too exposing; if Respondent decided they were, he would tell Victim 3 "I can see your pussy" or "your tits are hanging out," which Hoss felt was extremely vulgar and inappropriate for a father to say to his daughter. (App.p.435, lines 11–19).

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

Respondent sitting in his truck, drunk. Respondent tearfully confessed to her that "maybe he did molest" Victims 2 and 3, that he "didn't know for sure," and that he was sorry. After law enforcement got involved, Respondent took Brown to his friend's house in Wrens, Georgia, where he attempted to get some money because "he wanted to take off." Respondent also told Brown to wash Victim 3's bedsheets to remove his DNA. Brown, however, did not wash the bedsheets; instead, she consented to a police search of the house and seizure of the bedsheets on February 25, 2011. (App.pp.378–93). DNA recovered from semen found on the bedsheets matched Respondent's DNA. (App.pp.453–64; pp.501–14).

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

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

Respondent took the stand in his own defense. He denied molesting any of the children and claimed the semen found on the bedsheets came from Buffy Brown masturbating him on his son's bed. He explained that he attempted suicide because he had been detained for thirty days, couldn't get a bond, was charged with heinous crimes, and had just learned of new charges based on Victim 1's accusations. He suggested that each of the victims had a motive for lying: Victim 1 bore him a grudge for reporting her husband for statutory rape, Victim 2 had been kicked out of his house, and Victim 3 became angry when Respondent confronted her about a picture he found

on a pornographic website that Respondent claimed was her picture. (App.pp.551–82).

Present Application

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

Ineffective assistance of Counsel

. . .

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

. . .

22. Failure to move to sever Respondent's charges where the three primary complaining witnesses alleged conduct over three distinct periods of time, not arising from a single chain of circumstances, and not proved by the same evidence
23. Failure to object to the trial court's initial jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth, violative of due process, and burden shifting

. . .

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

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

The PCR court convened an evidentiary hearing into the matter on February 2–3, 2022, and February 25, 2022. Following the hearing, the PCR court asked for proposed orders from both parties. On June 6, 2022, the PCR court issued an order granting relief. The State filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCP. In response to that motion, the PCR

court issued a subsequent order granting relief based on twelve of Respondent's fifty-five ineffective assistance claims.

The State filed a notice of appeal and a petition for a writ of certiorari. On September 19, 2024, the South Carolina Court of Appeals filed an order granting the State's petition, dispensing with further briefing, and remanding the case to the PCR court with instructions to issue a new order including individualized analyses of deficiency and prejudice on each allegation of ineffective assistance of counsel.

On December 2, 2024, the PCR court issued a supplemental order granting the application for PCR on five of Respondent's allegations of ineffective assistance of counsel and denying the fifty remaining allegations. The State filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCP, which was denied on February 24, 2025. The State now petitions this Court for a writ of certiorari to review the decision of the PCR court.

STANDARD OF REVIEW

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

ARGUMENT

1. The PCR court erred in finding Counsel was deficient for failing to object to the qualification of an expert in child sexual abuse dynamics, when the transcript reveals that Counsel *did* object, and where the reliability of the field is undisputed.

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

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

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

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

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

The PCR court erred finding that Counsel was ineffective for failing to object to the

qualification of Dr. Benedetto. First of all, Counsel *did* object to Dr. Benedetto's qualification on the ground she failed to show the reliability of the field her opinion was based on. (App.p.477, lines 1–12).[6] The trial court overruled Counsel's objection. (App.p.477, lines 13–18). After the conclusion of direct examination, Counsel again objected to Dr. Benedetto's qualification, and the trial court made the same ruling. (App.p.493, line 21–p.494, line 25). The PCR court did not explain how Counsel's multiple objections were unreasonable or how he could have obtained a different result by raising the issue a third time. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)) ("So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon defense counsel to harass the judge by parading the issue before him again.'").

Second, Respondent utterly failed to prove that the field of child sexual abuse dynamics is *not* a reliable science. Therefore, even if Counsel had more thoroughly objected to the qualification of Dr. Benedetto on reliability grounds, there is no reason to believe his objection would have been successful. In fact, experts are routinely qualified to testify in the field of child sexual abuse dynamics, and our appellate courts have repeatedly emphasized that expert testimony in this field is proper, useful, and admissible. *See, e.g.*, *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 271 (2018) ("[T]he law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized."); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is

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[6] Prior to trial, Counsel also objected to Dr. Benedetto's qualification and made a motion *in limine* to exclude Dr. Benedetto's testimony on the ground that it would constitute an opinion on the credibility of the child witnesses. The trial court denied the motion but permitted Counsel to raise the issue again "when we get to that point." (App.p.210, line 16–p.217, line 17).

such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims."); *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App. 2015) ("The general behavioral characteristics of child sex abuse victims are . . . 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. 631, 817 S.E.2d 268; *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."). Neither Respondent nor the PCR court have even attempted to challenge this consensus. Respondent bears the burden of proving that the outcome of his trial would likely have been different if Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field; by totally failing to even *dispute* the well-established reliability of that field, Respondent has failed to meet his burden.

Furthermore, trial courts may, in their sound discretion, omit unnecessary reliability examination from expert qualification proceedings. *See Kumho Tire Company v. Carmichael*, 526 U.S. 137, 152 (1999) (holding trial judges must be able to exercise "discretionary authority . . . to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted"). As already explained, the use of expert testimony in the field of child sexual abuse dynamics is commonplace in sexual abuse cases, has repeatedly been blessed by this Court, and is not contested by Respondent or by the PCR court. The trial court had no obligation to conduct an unnecessary inquiry into the reliability of this well-accepted and uncontroversial field. *See* John E.B. Meyers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45–46 (2010) ("[F]rom a

psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome."), *quoted with approval in Brown*, 411 S.C. at 342, 768 S.E.2d at 251.

The PCR court's order appears to base its analysis of this allegation on the holding of *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015). In *Chavis*, this Court held the trial court erred in admitting expert testimony regarding a specific forensic interviewing technique, known as the RATAC protocol, in a child sexual abuse case. Unlike the widely accepted field of child sexual abuse dynamics, the Court observed that the RATAC interviewing protocol "is not without its critics." *Id.* at 107 n.6, 771 S.E.2d at 339 n.6 (citing *State v. Kromah*, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013)). The Court held there was insufficient evidence demonstrating the RATAC protocol was reliable, where the expert admitted she had no way to determine the error rate of the protocol and was unable to articulate any quality control procedures. The Court held the mere fact that the expert consistently used the RATAC protocol did not constitute evidence that the RATAC interviewing style led to reliable results. *Id.* at 107–08, 771 S.E.2d at 338–39.

The holding of *Chavis* does not apply to the issue in this case. *Chavis* clearly involved only the reliability of one specific protocol, as applied by a single expert; the *Chavis* decision did not purport to address the reliability of child sexual abuse dynamics as a field. In *State v. Jones*, this Court expressly distinguished *Chavis*, holding that *Chavis* applied only to the RATAC protocol and not to the field of child sexual abuse dynamics. *Jones*, 423 S.C. at 638–40; 817 S.E.2d at 271–72.[7]

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[7] It should be noted that the *Chavis* Court ultimately found the trial court's error was harmless beyond a reasonable doubt due to the "substantial evidence of guilt" in that case. The evidence in Respondent's case is at least as strong as the evidence in *Chavis*, if not stronger: among other things, in addition to the detailed testimony of abuse given by the three victims, multiple witnesses

Finally, the fact that Dr. Benedetto was qualified in the presence of the jury was not objectionable; like other matters of courtroom procedure, holding a qualification examination in the jury's presence is within the sound discretion of the trial judge. *See Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The challenged aspects of the qualification proceeding are not matters of right, but of sound judicial discretion; Respondent's rights, therefore, were not violated by Counsel's alleged failure to object to them.

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

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

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

Dr. Benedetto's statement did not exceed the scope of her expertise. As an expert in child

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confirmed that the three victims made contemporary disclosures of abuse; multiple witnesses confirmed Respondent's habit of entering his stepdaughters' rooms and spending a long time "waking them up" in the mornings before school; Victim 3's account of Respondent's bizarre habit of trying to see her private parts under her clothes was corroborated by Hoss; Respondent's semen was found on the bedsheets taken from Victim 3's bed; Buffy Brown testified Respondent confessed to her that he molested her daughters and asked Brown to wash his DNA off of Victim 3's bedsheets; and multiple witnesses confirmed Respondent's frequent threats to kill the victims and himself. With so much corroborating testimony and physical evidence, there is no reasonable likelihood that Dr. Benedetto's testimony would have made much of a difference in the jurors' evaluation of the victims' credibility.

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

The PCR court cites only two cases in support of its finding of deficiency on this ground: *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001), and *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991). *Ellis* held that a police officer, who was qualified as an expert in "crime scene processing and fingerprint identification," was not thereby qualified to give an opinion on the "ultimate issue" of whether the defendant was acting in self-defense when he shot the victim. Likewise, *Wilkins* held that an expert may give an opinion on the "ultimate issue" in a case, provided that expert is properly qualified. It is not clear what these cases have to do with Dr. Benedetto's testimony, since Dr. Benedetto did not offer an opinion on any ultimate issue in this case, but merely gave a general statement concerning typical qualities of child abusers.

In addition, contrary to the PCR court's finding, Dr. Benedetto's statement could not have prejudiced Respondent. Victims 1, 2, and 3 testified that Respondent began abusing them at ages four, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to

believe that Respondent did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, did nothing to advance the State's theory of the case. Accordingly, Counsel would have had no strategic reason to move to strike it, and his failure to do so did not prejudice Respondent. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

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

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

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

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

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

466 U.S. at 689. Counsel's performance is not deficient unless it falls "outside the wide range of

professionally competent assistance." *Id.* at 690. Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

The PCR court's order repeatedly refers to Counsel's testimony at the PCR hearing, in which he stated that he could not remember whether he considered severing the charges or what his strategy was for not making the motion. However, the mere fact that, years after the trial, Counsel could not specifically articulate the reasons why failed to take a particular action does *not* destroy the strong presumption that Counsel's performance was reasonable. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.") (quoting *Strickland*, 466 U.S. at 690). Where Counsel can no longer recall his strategy, the PCR court must "affirmatively entertain the range of possible reasons" Counsel may have had for proceeding as he did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *see Harrington v. Richter*, 562 U.S. 86, 109–10 (2011) (holding courts must not "insist counsel confirm every aspect of the strategic basis for his or her actions"; the appropriate inquiry concerns "the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

Here, although Counsel could not confirm what his strategy was for failing to move for severance, he *did* articulate his fear that the State would be able to introduce evidence of Respondent's sexual abuse of Victim 2 at any trial on the charges concerning Victim 3, and *vice versa*, based on the strong similarity of the "humping" pattern of abuse that both of those victims reported. (App.p.1653, lines 1–17). In addition, he noted that splitting the charges across multiple trials would have allowed the State to seek life without parole, as Respondent was facing multiple "most serious" charges regarding each victim. (App.p.1838, line 9–p.1839, line 1). *See* S.C. Code

Ann. § 17-25-45(C)(1) (providing all forms of non-consensual criminal sexual conduct with minors constitute "most serious" offenses); *id.* § 17-25-45(A)(1) (providing a person convicted of a "most serious" offense must be sentenced to life without parole if that person already has a prior conviction for one or more "most serious" offenses). There are other factors Counsel may have considered; for example, holding three separate trials would give the State three opportunities to obtain a conviction, as opposed to one.

In its order, the PCR court acknowledged Counsel's fear that multiple trials could result in a longer total term of imprisonment; however, it simply declared this strategic concern was "objectively unreasonable." The order then stated Counsel was deficient for failing to sever the charges because he should have known the State's case would likely appear stronger at a single trial due to the sheer number of indictments and victims presented to the jury. However, the mere fact that Counsel's conduct had some foreseeable risk does not render it unreasonable. Defense attorneys are often called upon to make difficult choices between two strategic options and to weigh one set of risks against another. That is exactly the sort of dilemma Counsel faced in this case: if he allowed Respondent to be tried in a single proceeding, the State's case might be strengthened by the number of victims; on the other hand, if he tried to sever the charges into three trials, he increased the risk that his client might be sentenced to life in prison. Under these circumstances, it was not an "objectively unreasonable" decision to go forward in a single trial; Respondent's first trial—which covered the same charges and victims—had ended in a hung jury, so Counsel had reason to believe Respondent might be acquitted in the second trial, notwithstanding the strength of the State's case. "This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion." *Yarborough*, 540 U.S. at 9. Though it may be tempting to second-guess Counsel's performance with the benefit of hindsight, *Strickland* requires

a more deferential review.

Moreover, if Counsel had moved to sever the charges, the motion would likely not have succeeded. Even where the charges do not arise out of a single, isolated incident, joinder will be allowed when the crimes involve connected transactions closely related in kind, place, and character. *State v. Beekman*, 415 S.C. 632, 637, 785 S.E.2d 202, 205 (2016) (providing examples). In this case, the charged offenses were closely related in numerous ways: the victims were all Respondent's daughters or stepdaughters; the abuse almost always occurred in Respondent's home, typically in the victims' bedrooms before school; Respondent performed the same kinds of acts on multiple victims (oral sex on Victims 1 and 2, "humping" on Victims 2 and 3); Respondent would abuse each victim for years, then move on to the next victim after the previous victim moved away; and Respondent coerced each victim with threats of murder and suicide. Therefore, despite the number of different victims and large time period during which the abuse occurred, for the purposes of joinder, it was all one "chain of circumstances." In addition, overlapping evidence was used to prove multiple charges; for example, Buffy Brown testified regarding Respondent's abuse of Victims 2 and 3, the testimony of Dr. Benedetto was used to explain the delayed disclosure and recantation of Victims 1 and 2, and the evidence of Respondent's suicide attempt in prison was used to prove his guilt regarding all three victims. *See, e.g.*, *State v. McGaha*, 404 S.C. 289, 297, 744 S.E.2d 602, 606 (Ct. App. 2013) (holding severance was not required where "a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other"); *State v. Caldwell*, 378 S.C. 268, 278, 662 S.E.2d 474, 479–80 (Ct. App. 2008) (holding separate trials were not warranted, for crimes committed at different times against multiple different victims, because some evidence pertained to multiple charges). Therefore, the joinder requirements were met in

this case, and Counsel had no ground to seek severance of the charges.

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

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

The PCR court found Counsel deficient for failing to object to a portion of the trial court's preliminary jury instruction in which the trial court told the jury to "decide what the true facts are," to "render a true and just verdict, a verdict that speaks to the truth of the case," and to "pay close attention and decide whose [*sic*] telling the truth." (App.p.255, line 22–p.256, line 13).

However, the trial court's comments were all made in the context of the jury's role in evaluating witness credibility—the court explained that, if witnesses give conflicting testimony, the jury must judge "their believability or their credibility. . . . [Y]ou determine whose [*sic*] telling the truth, the believability of the witnesses, the credibility; . . . [I]t's your civic duty to pay close attention and decide whose [*sic*] telling the truth." (App.p.255, line 12–p.256, line 13). At the time of Respondent's trial, controlling Supreme Court precedent held that such statements were not error, if given in the context of credibility instructions. *State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000) ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses.").

This Court addressed this issue again in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). In that decision, the Court held "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." *Id.* at 34, 813 S.E.2d at 506. However, the Court acknowledged that the general sessions benchbook promulgated by the Court to all circuit judges contained language virtually identical to the disapproved language used in the lower court. *Id.* at 34 n.2, 813 S.E.2d at 506 n.2.[8]

The trial in this case occurred in 2013, many years before *Beaty* was decided. Counsel could not have known that, years afterward, a change in the law would render the trial court's instructions objectionable. PCR courts may not find counsel ineffective for failing to object to a jury instruction in the absence of any case law rendering the instruction improper. *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016); *see Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

The PCR court's order also cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), which held that trial courts are 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." Citing *Aleksey*, however, the majority opinion in *Daniels* held that this improper language was cured by the trial court's "full and adequate instructions on reasonable doubt." *Id.* at 258–59, 737 S.E.2d at 477. Here, just as in *Aleksey* and *Daniels*, the fact that the challenged language appeared in the

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[8] Although it held the trial court's use of "seek the truth" language was improper, the Court in *Beaty* ultimately held the error did not require reversal. *Id.* at 34, 813 S.E.2d at 506.

credibility context, and *not* in the context of the presumption of innocence or the State's burden of proof, defeats any claim that Respondent may have been prejudiced by Counsel's failure to object. *See id.*; *see also Aleksey*, 343 S.C. at 28–29, 538 S.E.2d at 252. The trial transcript reflects that the trial court repeatedly and emphatically instructed the jury that the State bears the burden of proof beyond a reasonable doubt and that Respondent must be presumed innocent and need not offer any proof of his innocence. (App.p.252, lines 2–6; App.p.253, lines 2–11; App.p.622, line 5–p.623, line 24). The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

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

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

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

During direct examination by Counsel, Respondent's testimony often deteriorated into irrelevant tangents. (App.p.551, line 21–p.552, line 10; p.553, line 8–p.554, line 11; p.554, line 25–p.555, line 8; p.555, lines 14–16; p.560, line 24–p.561, line 7; p.567, line 14–p.568, line 3). He also frequently attempted to testify to statements made by third parties. (App.p.558, lines 1–2, 14; p.560, lines 1–2; p.563, lines 15–16; p.566, lines 3–4; p.567, line 25–p.568, line 3; p.572, lines 9–12). The State objected numerous times, requiring the trial court to instruct Respondent several times to give responsive answers to Counsel's questions and to refrain from giving hearsay testimony. (App.p.558, lines 14–17; p.561, lines 8–21; p.572, line 19–p.573, line 5). On other occasions, the trial court admonished Respondent when he tried to testify as to what other people said, and the court attempted to steer Respondent back on track when he appeared to be going off-topic. (App.p.552, lines 11–20; p.555, lines 17–18; p.563, lines 14–25; p.564, lines 8–9; p.568, lines 4–19;). At one point, the court admonished Counsel for asking speculative questions and told the solicitor to "object to those speculation type of questions and answers." (App.p.558, lines 10–11).

The PCR court's order stated that these comments by the trial court amounted to "usurping the role of the prosecutor and giving the improper appearance of partiality before the jury." The PCR court found Counsel was ineffective for failing to object because the trial court's conduct may have "negatively affected the jury's perception of [Respondent] and violated his right to a fair trial."

On the contrary, the trial court's actions were reasonable and necessary under the circumstances. A trial judge's inherent power to maintain order and decorum in the courtroom includes the authority to admonish, rebuke, or warn a witness because of the witness's language or conduct. *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999), *abrogated on other*

grounds by State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). It is not improper for a trial court to interrupt a witness when it is necessary to prevent improper or irrelevant testimony from coming in. In addition, many of the trial court's remonstrances toward Respondent followed objections by the State on grounds of hearsay or relevance; it is not "usurping the role of the prosecutor" for the court to sustain a prosecutor's objections to improper testimony and instruct the witness to give appropriate answers to counsel's questions. Respondent's repeated failures to abide by the rules necessitated the court's repeated warnings.

At the PCR hearing, Counsel admitted he had difficulty controlling Respondent on the stand, and he testified that he did not believe the trial judge's attempts to maintain order were prejudicial to Respondent: "I can't say that I felt like the Court went too far. . . . I did not feel like he crossed any line[.]" (App.p.1818, line 18–p.1819, line 3).

The PCR court's order also suggested that Counsel should have objected to the trial court's alleged "facial expressions" during Respondent's testimony, but Counsel testified he did not remember any specific instances of Judge Early making improper faces during Respondent's trial. (App.p.1820, lines 2–11). Counsel also testified that, based on discussions with jurors, "they've almost always confined themselves to the evidence that was presented, or the demeanor of the witnesses. I've never had any jurors respond to anything about the Court." (App.p.1820, line 21–p.1821, line 2). Counsel's appraisal of the trial judge's facial expressions is entitled to substantial deference, especially since no court has the ability to go back in time and observe the trial judge's demeanor for itself. In addition, Counsel's belief that the trial court's facial expressions did not affect the jury's decision-making is a valid reason not to object. Where Counsel has articulated a valid reason not to object, his decision cannot be deemed deficient.

Finally, any conceivable prejudice would have been cured by the trial court's jury

instruction:

> You're the judges of the facts. So, by being the judges of the facts, that means I cannot have any opinion about the facts. I have to sit up here and have no opinion about the facts. So, if there's been any time during the trial of this case that I rolled my eyes or yawned or whatever, picked up my glasses and chewed on them or stretched or whatever, and you think I'm commenting on the facts, please don't, don't take anything that I've done in the trial to think that I have an opinion about the facts. I can't do that. The law doesn't allow me to do it. I have to sit up here and rule on the law and the evidence and I have no opinion whatsoever about the facts. That is solely, solely your job.

(App.p.624, lines 12–25). "A curative instruction is generally deemed to have cured any alleged error." *State v. Dial*, 405 S.C. 247, 258, 746 S.E.2d 495, 501 (Ct. App. 2013).

Therefore, Respondent failed to establish, by a preponderance of the evidence, either Counsel's deficiency or any resulting prejudice from the alleged error. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. This Court, therefore, should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

CONCLUSION

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

Respectfully submitted,

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