THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED
May 02 2025
S.C. SUPREME COURT

Appellate Case No: 2025-000338

HAROLD CARTWRIGHT, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

APPENDIX

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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 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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 alleges 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 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).)

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 alleges 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 alleged failure to investigation a Victim's potential deal with the State.

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges 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., *Martin*, 427 S.C. at 455, 832 S.E.2d at 279–80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into Applicant's character at trial. See *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nine: Trial Counsel's alleged 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 without prejudice.

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

Applicant alleges 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 alleges 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 alleges 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*, 411 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*, 411 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred "between June 1, 1998 and September 1, 2004." *Id.* at 586–87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. *Id.* at 590–92, 769 S.E.2d at 864–65. Applicant alleges the Baker holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of Baker are significantly different from the facts of this case. Applicant's indictments have not been amended, and Applicant's defense was based on attacking the victims' credibility, not on an alibi. In addition, each of Applicant's indictments alleged offenses occurring within a one-year period, a much more specific

time frame than the six-year period alleged in each of Baker's indictments. Finally, the Baker Court suggested that the indictments would have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances "with a practical eye," this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. See *Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). 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 Thirteen: Trial Counsel's alleged failure to object to the legal standard used for qualifying the State's expert witness.

Applicant alleges Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to voir dire of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702,

SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White,* 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

The Court finds that Trial Counsel's failure to object to the standard used to qualify the State's expert witness, and the fact that this circumstances described above occurred in the presence of the jury amounted to deficient performance by Trial Counsel.

Allegation Fourteen: Trial Court's alleged failure to object and move to strike part of the testimony of the State's expert witness.

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

The Court finds that Trial Counsel's failure to object and move to strike the expert witness's testimony amounted to deficient performance by Trial Counsel. Dr. Benedetto's testimony that abusers are often interested in victims of a particular age went beyond the scope of her expertise, which was limited to the perspective of child victims. Although Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise.

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

The Applicant alleges Trial Counsel erroneously stipulated to a witness, Buffy [redacted] 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 [redacted] stage 4 lung cancer appears to have advanced to the point that she was taken off all treatments but palliative care and pain management. It is not likely the trial court would have ordered [redacted] to appear in that condition, even if Trial Counsel had not stipulated that she was medically unavailable. See Rule 804(a)(4), *SCRE*. In addition, Trial Counsel testified he thought [redacted] illness would make her a very sympathetic witness for the State. Because Trial Counsel articulated a valid strategic reason for not seeking [redacted] presence 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 117-18, 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 alleges 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 alleges 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 alleges Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See *U.S. Const. amends.* V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748

S.E.2d 247 (Ct. App. 2013).

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's alleged failure to sequester witnesses.

The Applicant alleges 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.*

All the witnesses had been present at the prior trial and had already heard one another's testimony. Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would have achieved nothing. However, the Court believes that Trial Counsel was deficient in failing to sequester 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.

Allegation Twenty: Trial Counsel's alleged failure to object during voir dire and move for further voir dire.

The Applicant alleges 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.

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 if he had been made aware. The Court believes it is the clear 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. The Court believes that Trial Counsel was deficient for failing to ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review.

Allegation Twenty One: Trial Counsel's alleged failure to preserve a juror's conversation with the Court.

The Applicant alleges 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 of his peremptory strikes, because only nine jurors were struck in total, and he had ten strikes. However, Trial Counsel 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.

Allegation Twenty Two: Trial Counsel's alleged failure to sever the Applicant charges.

The Applicant alleges that 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).

The Court finds that Trial Counsel was deficient for failing to sever the charges.

The Applicant's charges involved three separate victims over an extended period of time. Although at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a longer total term of imprisonment, the State's case was strengthened with the amount of victims presented to the jury at one time, especially when the credibility of the victims was a central issue of the Defense's case. The charges did not arise out of a single chain of circumstances and were not proved by the same evidence, however the State's case was potentially improperly bolstered by the testimony of these Victims together coupled with the State's expert witness commenting that the offenders typically seek out victims in a particular age range.

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

The Applicant alleges 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, 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).

Trial Counsel was deficient for failing to object to this language regarding 'true" and "just" verdicts. At the time of this trial the South Carolina Supreme Court issued clear language in *Daniels*, that any reference to the word "true" must be removed from the

Court's comments to the jury.

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

The Applicant alleges 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 alleges 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.

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

The Applicant alleges 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 alleges 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 alleges 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. All 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 2011 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 117-18, 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 alleges 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 alleges 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 alleges 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(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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.

Trial Counsel was deficient if failing to obtain the transcript of the Applicant's first trial. The Applicant's second trial had the same witnesses and the credibility of the complaining witnesses was central to the Applicant's defense. Trial Counsel's failure to obtain this transcript amounted to a failure to impeach these witnesses

Allegation Thirty Four: Trial Counsel's alleged failure to object to the DSS case worker's allegedly prejudicial testimony.

The Applicant alleges 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". The Applicant alleges that 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*.

At the evidentiary hearing, Trial Counsel admitted the possibility that the jury may have inferred DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. However, the Court disagrees and finds that Trial Counsel was deficient for failing to object these comments as they amounted to a comment on a legal issue and was prejudicial to the Applicant because it lowers the State's burden in the eyes of the jury.

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

The Applicant alleges 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 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).

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(d)(1)(B), *SCRE*. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 alleges that Trial Counsel failed to object and preserve for appellate review the admission of Buffy [redacted] 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 [redacted] was played by Ms. Emma Dicks. The solicitor, therefore, could not have inserted improper inflections and mannerisms into their performances, which greatly limits the scope of potential prejudice.

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

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

The Applicant alleges that Trial Counsel failed to object during the "acting-out" of Buffy [redacted] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting 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 [redacted] testimony, because it was admitted and presented to the jury as a whole; he also believed the trial judge would not agree to strike the whole thing, because [redacted] unavailability made the prior trial transcript admissible. This Court finds Trial Counsel was not ineffective because he articulated a valid strategic reason why he did not object to the question. See Underwood, 309 S.C. at 562, 425 S.E.2d at 22.

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

The Applicant alleges that Trial Counsel failed to object and preserve for appellate review pursuant to Due Process andto the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See *U.S. Const. amends.* IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S.

368 (1964).

The Court finds that Trial Counsel was deficient for failing to object to the admission of this evidence under *Jackson v. Denno*. Counsel's only explanation for this was that he did not think a hearing was needed because the evidence at issue was not a statement.

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 alleges 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 in order 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Three: Trial Counsel's alleged ineffective assistance for failing to inquire about a discrepancy between the first trial and the second trial.

The Applicant alleges 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 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.

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

The Applicant alleges 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; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; Rule 71.1(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Five: Trial Counsel's alleged failure to object to the Court stopping the Applicant's testimony.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury suasponte, 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

Trial Counsel was deficient for failing to object the Court's comments and the only reason articulated to the Court to explain this deficiency was Counsel's perception that if he objected he would fall out of favor with the trial judge. This fear of objecting to avoid what Counsel deemed as upsetting the trial judge was referenced multiple times in the PCR hearing and is not an objectively reasonable strategic choice to explain Counsel's failure to object on behalf of his client.

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

The Applicant alleges 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 117-18, 386 S.E.2d at 625. Thus this allegation is denied and dismissed with prejudice.

Allegation Forty Seven: Trial Counsel's alleged to object to the Court's closing instructions.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions

to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...," and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). The Court believes that Trial Court was deficient in failing to object to the reference to the truth language despite the clear case law on these type of comments.

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

The Applicant alleges 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.

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

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

Allegation Two: Appellate Counsel's alleged failure to raise issues related to Dr. Benedetto's qualification as an expert I child sexual abuse dynamics.

Applicant alleges Appellate Counsel should have raised the issues of Dr. Benedetto's qualification as an expert as set forth in Allegation 13 discussed above. This Court finds this allegation to be without merit. As discussed in response to Applicant's Allegation 13, the trial court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge. *See Fields*, 363 S.C. at 25, 609 S.E.2d at 509. In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until later, so any error in holding the qualification procedure in the jury's presence was harmless. *See State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013). Applicant has failed to prove that Appellate Counsel was ineffective for failing to raise this issue on appeal. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without

merit. As discussed in response to Applicant's Allegation 14, Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case, and any deficiency in failing to raise it on appeal did not prejudice Applicant. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

those issues he believed were most likely to obtain a favorable result. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 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 cumulative error. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); See *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect

the outcome of the trial). Here, the Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified fourteen (14) errors that individually and cumulatively create prejudice against the Applicant. "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 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, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See *Strickland,* 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). The Applicants first trial ending 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*, 466U.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). The 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, §§ 3 and 14; *S.C. Code* § 17-27-20(A)(1), (4), and (6). Therefore this PCR application must be granted and Applicant shall receive a new trial.

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

IT IS SO ORDERED!

The Honorable Robert J. Bonds
Presiding Judge

June 1, 2022

Walterboro, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Harold Cartwright, #355084	)	Case No.: 2019-CP-02-01582
Applicant,	)	
v.	)	**RESPONDENT'S MOTION TO ALTER OR AMEND THE ORDER GRANTING POST-CONVICTION RELIEF PURUSANT TO RULE 59(e), SCRCP**
State of South Carolina,	)	
Respondent.	)	

FILED 6-13 20 22 1:15 SA

C.C.P. & G.S.

Shadell Parks
Deputy Clerk

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Harold Cartwright ("Applicant") on June 26, 2019. Respondent made its return on October 3, 2019. The Court convened an evidentiary hearing into the matter on February 2–3, 2022, and February 25, 2022, via the WebEx Virtual Courtroom of the Honorable Robert J. Bonds. Applicant was present at the hearing and represented by Dayne C. Phillips, Esq. Michael J. Neubauer, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Michael Routzong, Esq., and David Hayes, Esq. ("Trial Counsel"), and Applicant's Appellate Counsel Robert Dudek, Esq. ("Appellate Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, and the pleadings.

Following the hearing, this Court asked for proposed orders from both parties. Following submission and review of these orders, this Court granted post-conviction relief to Applicant. The Court found Trial Counsel deficient as to fifteen of the allegations raised in Applicant's PCR

application and found that Applicant was prejudiced by the cumulative effect of Trial Counsel's errors. As relief, the Court ordered that Applicant receive a new trial.

Respondent respectfully submits that the Court has overlooked or misapprehended material points of law and fact that necessitate the opposite result. Accordingly, pursuant to Rule 59(e), SCRCP, Respondent now makes the following motion to alter or amend this order and requests this Court issue a revised or amended order denying relief and finding that Trial Counsel was not ineffective.

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. During its February 2012 term, the Aiken County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2012-GS-02-00304), eight counts of criminal sexual conduct with a minor, first degree (2012-GS-02-00306, 319, 321, 323, 325, 327, 329, 331), nineteen counts of lewd act upon a child (2012-GS-02-00307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 320, 322, 324, 326, 328, 330, 332), and criminal sexual conduct, third-degree (2012-GS-02-01682). On November 12–13, 2012, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. Applicant was represented by Robert J. Harte, Esq. The case was prosecuted by Assistant Solicitors Kevin N. Molony and John W. Weeks of the Second Circuit Solicitor's Office. A new trial was ordered due to a hung jury.

On April 15–18, 2013, Applicant proceeded to a second jury trial before the Honorable Doyet A. Early, III. Applicant was represented by Michael Routzong and David Hayes. The case was prosecuted by Assistant Solicitors Kevin N. Molony and Ashley Agnew of the Second Circuit Solicitor's Office. Following trial, the jury found Applicant guilty as indicted. Judge Early

sentenced Applicant to concurrent sentences of thirty years for criminal sexual conduct, first degree, and each count of criminal sexual conduct with a minor, first degree, and a concurrent term of fifteen years for each count of lewd act upon a minor, along with a consecutive ten-year sentence for criminal sexual conduct, third degree.

Applicant subsequently filed a Notice of Appeal. On appeal, Applicant was represented by Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett of the South Carolina Commission of Indigent Defense, Appellate Division. In an unpublished opinion, the South Carolina Court of Appeals affirmed Applicant's conviction and sentences following oral arguments. *State v. Harold Cartwright III*, No. 2013-UP-000894 (Ct. App. filed September 30, 2015). Applicant filed a petition for a writ of certiorari with the South Carolina Supreme Court, which was granted. On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright III*, Op. No. 278842 (S.C. Sup. Ct. filed September 26, 2018).

Summary of Trial Testimony

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

At trial, Victim 1 testified Applicant began making her perform oral sex on him when she was four years old. At age five, she told Lively about the abuse, but Lively did not contact police because Applicant threatened to kill her, Victim 1, and himself.[1] Eventually, Victim 1 spoke with DSS about Applicant's abuse, but Applicant convinced her to recant. Applicant testified the abuse

[1] Lively recalled Victim 1 mentioning the abuse and corroborated her testimony that Lively did not contact law enforcement because she was too afraid of Applicant. (April 15–16, 2013, Trial Tr. p.95, line 7–p.96, line 3).

continued multiple times every year until 1995, when she was ten. Applicant did not mention the alleged abuse again until she was contacted by detectives from the Aiken County Sheriff's Department in 2011 as part of an ongoing investigation into the alleged abuse of Victims 2 and 3. She testified that she waited from 1995 until 2011 to disclose the abuse because she was afraid of Applicant. (April 15–16, 2013, Trial Tr. pp.72–94).

Victim 2 testified Applicant began abusing her in 2000, when she was nine, by making her perform oral sex on him. The abuse continued until 2001, when Victim 2 disclosed the abuse to DSS. As a result of her disclosure, Applicant was arrested. However, Victim 2 testified she recanted at the urging of her mother, Buffy [redacted]. Victim 2 testified that, beginning in 2002, Applicant started going into her room and "humping" her, rubbing his penis on her legs; this abuse occurred several times a week until 2006. In addition, Victim 2 testified Applicant sometimes bribed or forced her to agree to have sexual intercourse with him and threatened to kill her, her mother, Victim 3, and himself. (April 15–16, 2013, Trial Tr. pp.104–35).

Victim 3 testified Applicant began abusing her in 2008, when she was thirteen, by coming into her room before school and "humping" her. She testified he threatened to kill all of them and himself. In addition, Victim 3 testified Applicant began forcing her to have sexual intercourse with him when she was fourteen. She testified Applicant stopped having sex with her in 2010, when Hoss Cartwright, Applicant's son, moved into the house, but continued humping her in her room before school.[2] When investigators questioned Victim 3, she initially denied being abused by Applicant because she was afraid of him. Later, however, she told investigators Applicant molested her. (April 15–16, 2013, Trial Tr. pp.141–80).

[2] Hoss testified he could hear Applicant enter Victim 3's room every morning and stay for an extended period of time. (April 17–18, 2013, Trial Tr. p.11, lines 18–24).

The State and Trial Counsel stipulated that Buffy [redacted] was medically unavailable due to stage 4 cancer. The State introduced her prior testimony from Applicant's first trial without objection. In that testimony, [redacted] stated she remembered Applicant would spend ten to twenty minutes waking up Victim 2 every morning before school. She admitted pressuring Victim 2 to recant after Victim 2 initially reported the abuse because Applicant convinced [redacted] he had done nothing wrong. [redacted] testified Applicant confessed to her on February 19, 2011, that he might have molested Victims 2 and 3. She claimed he told her to wash Victim 3's bedsheets to remove his DNA. [redacted] however, did not wash the bedsheets; instead, she consented to a police search of the house and seizure of the bedsheets on February 25, 2011. (April 15–16, 2013, Trial Tr. pp.182–97). DNA recovered from semen found on the bedsheets matched Applicant's DNA. (April 17–18, 2013, Trial Tr. pp.31–42; pp.79–92).

The State also called clinical psychologist Dr. Alicia Benedetto. Over Trial Counsel's objection, the trial court qualified Dr. Benedetto as an expert in child sexual abuse dynamics. She acknowledged that she had not spoken to any witnesses or victims in the case. She explained that "Child Sexual Abuse Accommodation Syndrome" could cause abused children to exhibit behaviors that may not make sense to adults, such as delaying or falsely recanting allegations of abuse because of bribes, manipulation, and fear. (April 17–18, 2013, Trial Tr. pp.47–79).

Finally, the State called James Hettich, a guard at the Aiken County Detention Center. He testified Applicant attempted to commit suicide while detained prior to trial. (April 17–18, 2013, Trial Tr. pp.100–04).

Applicant took the stand in his own defense. He denied molesting any of the children and claimed the semen found on the bedsheets came from Buffy [redacted] masturbating him on his son's bed. He explained that he attempted suicide because he had been detained for thirty days, couldn't

get a bond, was charged with heinous crimes, and had just learned of new charges based on Victim 1's accusations. He suggested that each of the victims had a motive for lying: Victim 1 bore him a grudge for reporting her husband for statutory rape, Victim 2 had been kicked out of his house, and Victim 3 became angry when Applicant confronted her about finding her picture on a pornographic website. (April 17–18, 2013, Trial Tr. pp.129–60).

Present Application

In his PCR application, Applicant alleges he is being held unlawfully for the following reasons:

a. Ineffective assistance of Trial Counsel
    1. Failure to interview critical witnesses and to challenge the credibility of the State's witnesses
    2. Failure to hire expert witnesses to rebut the State's arguments based on an independent review of the forensic evidence
    3. Failure to adequately investigate Victim 2's involvement in a drug investigation and any deals or offers possibly made to her by the State
    4. Failure to adequately compare the timeline of when Applicant lived in the home to the timing of the allegations
    5. Failure to obtain and review discovery with Applicant
    6. Failure to properly impeach the State's witnesses based on inconsistencies between their statements at Applicant's second trial and their testimony at his first trial or their statements to police
    7. Failure to interview witnesses regarding Applicant's good character and reputation and to request a jury instruction on good character and reputation
    8. Providing erroneous advice regarding Applicant's decision to testify and failing to explain the risks involved in testifying as a witness
    9. Failure to object to the trial court's erroneous and burden-shifting jury instructions
    10. Failure to object to object to the admission of inadmissible and unduly prejudicial evidence
    11. Failure to object to the State's improper closing argument that misstated the evidence and was unduly prejudicial
    12. Failure to move to quash the twenty-eight indictments as unconstitutionally overbroad and vague because, apart from giving the year, they did not specify the dates on which the alleged offenses occurred, and the combined indictments covered a period of over eighteen years
    13. Failure to object to improper qualification of the State's expert witness in the field of child sexual abuse dynamics where the trial court (1) limited counsel to *voir dire* of the witness regarding qualifications, (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and

validity of the field itself after the witness was deemed an "expert" by the court and directly examined by the State, all of which occurred in the jury's presence

14. Failure to object to and move to strike the expert's testimony that went beyond the scope of her expertise, which was focused on the perspectives of abused children, when the expert testified abusers typically seek victims of a particular age
15. Erroneous stipulation to a witness's medical unavailability due to stage 4 cancer and failure to object to admission of the witness's testimony from the previous trial
16. Failure to hire an expert to perform independent DNA testing of a bedsheet with a purported semen stain or to obtain documents from SLED regarding its policies, procedures, qualification, laboratory bench notes, and overall testing of the purported semen stain in order that the documents could be reviewed by such an expert
17. Failure to move for the trial court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could be fair to Applicant, and the potential juror's number
18. Failure to move to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), when the State struck two white female jurors from the petit jury but sat eleven white jurors, six of whom were female
19. Failure to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses
20. Failure to object and move for individual *voir dire* when the trial court told Trial Counsel several jurors had approached him about "similar types of behavior," none of the conversations between the trial court and those jurors were placed on the record, and none of those jurors' number were placed on the record
21. Failure to properly argue that juror number 94's prior conversation with the trial court be placed on the record where juror number 94 indicated the court knew she had a relative who was a victim and the court denied Trial Counsel's motion to strike the juror for cause
22. Failure to move to sever Applicant's charges where the three primary complaining witnesses alleged conduct over three distinct periods of time, not arising from a single chain of circumstances, and not proved by the same evidence
23. Failure to object to the trial court's initial jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth, violative of due process, and burden shifting
24. Failure to object to the State's opening statement inviting the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations
25. Arguing to the jury that Applicant couldn't be innocent if the victims were telling the truth, where that statement could not be considered a reasonable trial strategy
26. Failure to object and move to strike when the State delved into victim impact on direct examination by asking Victim 1 how she was doing
27. Failure to object to improper bolstering when Melinda Lively affirmed she had heard Victim 1 testify and later referred to Victim 1's statement when testifying she did not contact police due to Applicant's threats

28. Failure to object to hearsay when the prosecutor asked Melinda Lively whether she had learned that her daughter, Victim 1, had been abused by the Applicant and the witness replied, "Yes, when she was four"
29. Failure to move to strike Victim 2's hearsay testimony after the trial court sustained Trial Counsel's hearsay objection
30. Failure to move to strike Victim 2's testimony in response to a leading question after the trial court sustained Trial Counsel's objection
31. Failure to properly argue and preserve for appellate review Trial Counsel's objection to the quietness of a complaining witness's testimony
32. Prejudicial questioning of Victim 2 by phrasing a question in such a way as to reaffirm her version of events and strengthen the State's case against Applicant
33. Failure to adequately prepare for trial by bringing a copy of a complaining witness's prior testimony at the first trial to support his attempt to impeach the witness, causing the trial court to order Trial Counsel to move on to a new line of questioning
34. Failure to object to and move to strike a DSS case worker's testimony that DSS only becomes involved in a case if it "meets the legal statute," lowering the State's burden to prove Applicant's conduct satisfied the statutory elements of the charged offense
35. Failure to object to and move to strike the DSS agent's hearsay testimony that she received a call from her supervisor saying DSS had received a report of sexual abuse concerning Applicant and one of the alleged victims
36. Failure to object to the trial court's burden-shifting initial jury instruction that Counsel's opening statement would include "what they intend to prove"
37. Unreasonably attempting to impeach Victim 3 by questioning her about her various disclosures of abuse, reinforcing the State's theory that the victim previously disclosed the abuse to several people
38. Failure to object to the admission of Buffy [redacted] testimony from Applicant's first trial where Buffy [redacted] was alive and the State had not shown that it made reasonable efforts to obtain her presence at the second trial and where the testimony was admitted, not by a portion of the prior trial transcript, but by "acting out" the testimony, permitting the prosecution to add inflections and mannerisms that may not have occurred at the previous trial
39. Failure to object to hearsay testimony during the "acting out" of Buffy [redacted] prior trial testimony where she affirmed she and the police had found out Applicant was molesting Victim 2
40. Failure to object to admission of Applicant's consent to search form, buccal swab, and DNA evidence derived therefrom, where no hearing was requested or held regarding the voluntariness of Applicant's waiver as required by *Jackson v. Denno*, 378 U.S. 368 (1964)
41. Failure to object to and move to strike redirect testimony of the State's DNA expert as beyond the scope of cross-examination where the State asked if DNA evidence could be destroyed or affected by washing and drying sheets, despite Counsel never inquiring about the destruction of DNA
42. Failure to object to and move to strike redirect testimony of the jailer who purportedly saw Applicant hanging in his cell where the State failed to have the

witness identify Applicant during direct examination and Trial Counsel never asked about Applicant's identification on cross-examination

43. Failure to cross-examine the State's witnesses regarding the discrepancy between the testimony given at the first trial that the DNA evidence was taken from Victim 3's room and the testimony at the second trial that the DNA evidence was taken from the victim's stepbrother's room
44. Failure to proffer pornographic photographs discovered by Applicant to support the defense's theory that Victim 3 lied because Applicant publicly accused her of appearing in those photographs and to rebut the testimony of the State's witnesses that Victim 3 did not appear in any of the photographs
45. Failure to object to the trial court's repeated interruption and admonishment of Applicant during his testimony and request that the prosecutor object more often, which gave the impression of partiality before the jury
46. Failure to object to the trial court's comment, during closing jury instruction, that "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses"
47. Failure to object to the trial court's closing jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth and violative of due process
48. Failure to object to the trial court's jury instruction that testimony of the victim did not need to be corroborated
49. Failure to object to the prosecutor's improper comments during closing argument that vouched for and bolstered the credibility of the State's witnesses
50. Failure to subject the State's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy

b. Ineffective assistance of Appellate Counsel

1. Failure to file a petition for a writ of certiorari in the United States Supreme Court on the issue of whether evidence of attempted suicide is admissible as evidence of guilt
2. Failure to raise and argue the issue of the improper qualification of the State's expert witness in the field of child sexual abuse dynamics where the trial court (1) limited counsel to *voir dire* of the witness regarding qualifications, (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of the field itself after the witness was deemed an "expert" by the court and directly examined by the State, all of which occurred in the jury's presence
3. Failure to raise and argue the issue of whether the expert's testimony went beyond the scope of her expertise, which was focused on the perspectives of abused children, when the expert testified abusers typically seek victims of a particular age
4. Failure to raise and argue the issue of the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?") and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have potentially disqualified biased jurors

5. Failure to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised to and ruled on by the trial court.

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

II. ARGUMENT IN SUPPORT OF MOTION TO ALTER OR AMEND THE ORDER GRANTING POST-CONVICTION RELIEF

In its order granting post-conviction relief, this Court found Trial Counsel was deficient on fifteen grounds: Allegations 13, 14, 19, 20, 21, 22, 23, 25, 33, 34, 40, 43, 45, 47, and 48. The Court made specific findings of prejudice on only two of those allegations: Allegations 34 and 45. The order concludes with a general finding of prejudice based on "cumulative error." The remaining thirty-five allegations of ineffective assistance of Trial Counsel, as well as all five allegations of ineffective assistance of Appellate Counsel, were denied and dismissed as meritless. Each dismissal was with prejudice, except for Allegation 9, which was dismissed without prejudice.

The Court's reliance on "cumulative error" was improper. The appellate courts of South Carolina have never recognized "cumulative error" as a substitute for individualized, specific findings of prejudice as to each act or omission of counsel challenged in a PCR application. A majority of federal appellate courts, including the Fourth Circuit Court of Appeals, have expressly *rejected* the application of "cumulative error" to ineffective assistance claims. In addition, Applicant failed to prove both deficiency and prejudice resulting from Trial Counsel's conduct as to each allegation on which this Court granted relief. Finally, the Court's order contains internal inconsistencies that undermine its findings of ineffective assistance. Accordingly, Respondent respectfully asks this Court to issue an amended order denying and dismissing each and every allegation with prejudice.

Improper "Cumulative Error" Analysis

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. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). When counsel articulates a valid reason for

employing a certain trial strategy, such conduct will not be deemed ineffective. *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *See Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117–18, 386 S.E.2d at 625. "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 United States Supreme Court has clearly held that, before any individual act or omission of counsel may be deemed a constitutional error, it must satisfy both the "deficiency" and "prejudice" prongs of the *Strickland* analysis. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("[U]nder *Strickland v. Washington*, . . . an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."). Therefore, unless the acts and omissions of counsel are *individually* shown to be both

deficient and prejudicial, they do not constitute "errors," no matter how many of them are added together. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that, regarding ineffective assistance claims, the "cumulative error" doctrine is no longer good law after *Strickland* because "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation"); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (holding "cumulative error" analysis evaluates only the effect of matters determined to be errors, not the cumulative effect of non-errors); *Hunt v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) ("[T]he fact that many claims of counsel error are pressed does not alter fundamental math—a string of zeros still adds up to zero."), *aff'd*, 57 F.3d 1327 (4th Cir. 1995). For these reasons, a majority of federal appellate courts have expressly rejected "cumulative error" analysis for ineffective assistance claims. *E.g. Fisher v. Angelone*, 163 F.3d 835, 852–53 (4th Cir. 1998) (collecting cases and holding, "in agreement with the majority of our sister circuits that have considered the issue," that "ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively.").

The "cumulative error" doctrine is at odds with *Strickland* in other ways as well. First, *Strickland* expressly permits a judge to deny an allegation of ineffective assistance merely for failing to prove prejudice, without even reaching the deficiency prong. *Strickland*, 466 U.S. at 697. A "cumulative error" analysis, however, requires deficiency to be adjudicated as to all allegations of ineffective assistance—regardless of whether the alleged deficiency, by itself, had any prejudicial effect on Applicant's rights—because the judge must still assess the *cumulative* effect of all deficient acts or omissions combined.

Second, one reason the *Strickland* court required proof of prejudice was "to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* The court cautioned that "intrusive post-trial inquiry into

attorney performance . . . would encourage the proliferation of ineffectiveness challenges. . . . Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* at 690. By requiring applicants to show deficiency *and* prejudice as to each allegation of ineffective assistance, the *Strickland* court intended that post-trial review of counsel's conduct would encompass only those errors that jeopardized an applicant's right to a fair trial. As this Court's order acknowledges, however, "cumulative error" analysis requires courts to scrutinize even "errors that are insignificant by themselves" in order to determine if their cumulative effect is prejudicial. The "cumulative error" requirement to cavil even the *insignificant* missteps of defense counsel runs directly contrary to the United States Supreme Court's public policy rationale articulated in *Strickland*: protecting "the entire criminal justice system" from the burdensome impact of unlimited allegations that counsel's performance was deficient. *Id.* at 697.

That burdensome impact is evident in this very case: Applicant raised a staggering *fifty-five* total allegations of ineffective assistance in his amended PCR application. For most of his allegations, Applicant did not even attempt to articulate a prejudice argument, relying instead on the "cumulative error" doctrine. Responding to this glut of claims required Respondent, Trial Counsel, Appellate Counsel, and this Court to endure multiple days of hearings. Ultimately, the overwhelming majority of Applicant's claims were correctly dismissed as meritless. However, by finding prejudice based on the "cumulative error" doctrine—which our appellate courts have never approved in the ineffective assistance context—this Court rewards Applicant's vexatious behavior. As long as PCR courts allow applicants to substitute "cumulative error" arguments for the prejudice analysis required by *Strickland*, PCR applicants will be incentivized to multiply claims

against defense counsel based on insignificant defects in performance, wasting judicial resources and burdening the courts with frivolous allegations. This is exactly what the United States Supreme Court warned of in *Strickland*: that unless courts required particularized showings of prejudice, ineffectiveness claims would "become so burdensome . . . that the entire criminal justice system suffers as a result." *Id.*

The Court's order cites only two cases—*State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), and *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995)—for the proposition that "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." Neither case supports the application of "cumulative error" doctrine to claims of ineffective assistance of counsel in PCR actions. *Johnson* concerned a direct appeal alleging error in the trial court's admission of evidence, while *Tennant*, a West Virginia case, concerned a direct appeal in a medical malpractice case. Furthermore, both opinions held that a party seeking to invoke the doctrine must still show *how* the combination of alleged errors affected his trial. *Johnson* held that, although the trial court committed multiple errors, a defendant "must demonstrate more than error in order to qualify for reversal under this ground. Instead, the errors must adversely affect his right to a fair trial." *Johnson*, 334 S.C. at 93. *Tennant* declined to apply the doctrine, clarifying that "the doctrine should be used sparingly" and is not appropriate when the alleged errors "are insignificant and inconsequential." *Tennant*, 194 W.Va. at 118, 459 S.E.2d at 395.

Except as to Allegations 34 and 45, the Court's order does not specifically find prejudice as to any of the allegations upon which it grants relief. In the order's conclusion, however, the Court finds that "Applicant has suffered prejudice warranting a new trial based on cumulative trial

error." The Court's general finding of prejudice lacks the necessary analysis of how Trial Counsel's alleged deficiencies, individually or in combination, adversely affected Applicant's right to a fair trial. Absent any individualized analysis of how each purportedly deficient act prejudiced Applicant, there is no support for the Court's finding that Trial Counsel was ineffective under *Strickland*.[3]

Respondent respectfully asks the Court to amend its order to replace its improper "cumulative error" analysis with specific analysis of prejudice as to Allegations 13, 14, 19, 20, 21, 22, 23, 25, 33, 40, 43, 47, and 48. To the extent the Court finds Applicant has failed to make a specific showing of prejudice as to any of those allegations,[4] Respondent requests the Court amend its order to reflect that those allegations are denied and dismissed with prejudice.

Allegation 9: Improper jury instructions

The Court correctly found Applicant's Allegation 9 was meritless; however, the Court dismissed the allegation "without prejudice." A PCR applicant receives only "one bite at the apple"; successive PCR applications are generally precluded. *See Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999); S.C. Code Ann. § 17-27-90. Applicant is barred by statute from raising, in a successive PCR application, any grounds that were or could have been raised in his initial application. Therefore, Applicant is not entitled to re-raise Allegation 9 in a future PCR

[3] Despite making no specific, individualized findings of prejudice, the Court goes on in the very next paragraph to acknowledge that *Strickland* requires PCR courts to "consider the *specific* impact counsel's error had on the outcome of the trial" and to "analyze how *individual* errors of counsel affect the important factual findings in a particular case" (emphasis added). This language is inconsistent with the generalized nature of the Court's "cumulative error" prejudice analysis.

[4] Respondent submits that Applicant has failed to show both prejudice and deficiency as to every allegation in his PCR application, as discussed in subsequent sections of this Motion. Therefore, Respondent argues that none of Applicant's allegations merit relief. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

proceeding. Respondent respectfully asks that the Court amend its order to deny and dismiss Allegation 9 with prejudice.

Allegation 13: Alleged failure to object to the qualification of the State's expert in child sexual abuse dynamics

This Court found Trial Counsel failed to object to the trial court's qualification of Dr. Benedetto as an expert in child sexual abuse dynamics. The Court's order states the qualification procedure was improper because the court limited Trial Counsel to questioning the witness about her qualifications, rather than the reliability and validity of the field itself, and because the qualification procedure occurred in the presence of the jury. The Court found Trial Counsel's performance was deficient, but it did not specifically find prejudice or explain how the result of Applicant's trial would likely have been different but for Trial Counsel's conduct.

Respondent submits this allegation is without merit. First of all, Trial Counsel *did* object to Dr. Benedetto's qualification on the ground she failed to show the reliability of the field her opinion was based on. (April 17–18, 2013, Trial Tr. p.55, lines 1–12). The trial court overruled Trial Counsel's objection. (April 17–18, 2013, Trial Tr. p.55, lines 13–18). The Court has not explained how Trial Counsel's objection was unreasonable or how he could have obtained a different result by raising the issue again. *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, "the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474

(2012).[5] 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"). Even if Trial Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field,[6] the trial court would have had no obligation to conduct one. Likewise, 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).[7] The challenged aspects of the qualification proceeding are not matters of right, but of sound judicial

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[5] The Court's order cites *Tapp*, among other cases, in support of its finding that Trial Counsel was deficient for failing to adequately raise this issue. However, *Tapp* clarifies that reliability is relevant to the *admissibility* of expert testimony, not to whether the witness may be *qualified* as an expert. *See Tapp*, 398 S.C. at 388–89, 728 S.E.2d at 474–75; *see also State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding scientific evidence is admissible if "the expert is qualified" *and* "the underlying science is reliable," implying that qualification and reliability are separate inquiries). The Court's finding that Trial Counsel should have challenged Dr. Benedetto's qualification proceeding—as opposed to the admissibility of her subsequent testimony—on reliability grounds, therefore, is contrary to the express holding of *Tapp*.

[6] Despite claiming Trial Counsel should have attacked the reliability of this field during the qualification proceeding, Applicant has not introduced any evidence or argument that would support such an attack. Therefore, Applicant has failed to prove he was prejudiced by Trial Counsel's failure to challenge the reliability of child sexual abuse dynamics.

[7] In the portion of its order denying and dismissing Applicant's Allegation 2 of ineffective assistance of Appellate Counsel, this Court stated, "As discussed in response to Applicant's Allegation 13, the trial court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge," citing *Fields*. However, the Court's discussion of Allegation 13 did *not* mention the discretion of the trial judge.

discretion; Applicant's rights, therefore, were not violated by Trial Counsel's alleged failure to object to them.

In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until *after* she was qualified. Therefore, no prejudice could possibly have resulted from conducting the qualification examination in the presence of the jury.

Because Applicant failed to prove either deficiency or prejudice as to this allegation, Respondent respectfully asks this Court to reconsider its order granting relief on this ground.

Allegation 14: Failure to object to and move to strike Dr. Benedetto's statement that abusers typically seek victims of a particular age

The 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 Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise. The court's order does not explain how Applicant was prejudiced by this alleged error.

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

In addition, Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case. Accordingly, Trial Counsel would have had no strategic reason to move to strike it, and his failure to do so did not prejudice Applicant. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.[8]

Because Applicant failed to prove either deficiency or prejudice as to this allegation, Respondent respectfully asks this Court to reconsider its order granting relief on this ground.

Allegation 19: Failure to move to sequester witnesses

The Court found Trial Counsel was deficient for failing to move to sequester the witnesses, because sequestration was necessary to ensure that the witnesses did not have the ability to hear one another's testimony. *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ."); *see also State v. Huckabee*, 388 S.C. 232,

[8] In the portion of its order denying and dismissing Applicant's Allegation 2 of ineffective assistance of Appellate Counsel, this Court stated, "As discussed in response to Applicant's Allegation 14, Dr. Benedetto's statement could not have prejudiced Applicant" because the victims testified they were abused at different ages. However, the Court's discussion of Allegation 14 does not mention prejudice or acknowledge that the three victims were allegedly targeted for abuse at different ages. The Court's express finding that Dr. Benedetto's statement could not have prejudiced Applicant is completely inconsistent with its granting of relief on Allegation 14.

241, 694 S.E.2d 781, 785 (Ct. App. 2010) (holding the purpose of Rule 615, SCRE, is to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at trial). However, in that same paragraph, the Court acknowledges that "[a]ll the witnesses had been present at the prior trial and had *already* heard one another's testimony" (emphasis added). The Court does not explain why Trial Counsel was deficient for failing to seek a sequestration order that the Court itself concedes would have been futile.

Moreover, a party is not entitled to the sequestration of witnesses as a matter of right. *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). The trial court, therefore, had no obligation to order sequestration even if Trial Counsel had requested it.

In addition, "[a] person must not be sequestered from a proceeding adjudicating an offense of which he was a victim." S.C. Code Ann. § 16-3-1550. Therefore, Trial Counsel would not have been able to sequester the three victims even if he had made a motion to sequester the witnesses. Since those victims were the State's chief witnesses, there is no "reasonable probability" that the result of Applicant's trial would have been different but for Trial Counsel's alleged error.

Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would achieve nothing. As Trial Counsel has articulated a valid reason for not moving to sequester the witnesses, and as sequestration would not have prevented the witnesses from knowing each other's testimony anyway, this Court should find Applicant has failed to prove his counsel was deficient or that the result of his trial would likely have been different if the witnesses had been sequestered. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Accordingly, Respondent requests this Court issue an amended order reflecting that this allegation is denied and dismissed with prejudice.

Allegation 20: Failure to move to individually question jurors after the trial judge noted some jurors had approached him about "similar types of behavior"

The Court found Trial Counsel was deficient for failing to move to individually *voir dire* jurors whom the trial court noted had approached him about "similar types of behavior" or to preserve the issue by putting those jurors' numbers and their conversations with the trial court on the record. The Court does not explain how Applicant was prejudiced by Trial Counsel's alleged omission.

Prior to jury selection, the trial court asked if any member of the jury panel "has been a victim or subjected to similar types of behavior, i.e. sexual misconduct or abuse." (April 15–16, 2013, Trial Tr. p.41, lines 5–7). The court went on to state, "Now, I've had several jurors who have come forward expressing to me some of their past and how it affected them. I don't need you to come back forward, but do I have anyone else who has not come forward that has been a victim or experienced this type of behavior in your family? . . . Anyone else other than the ladies who have come forward?" (April 15–16, 2013, Trial Tr. p.41, lines 9–15). Later, during jury selection, Trial Counsel moved to strike Juror No. 94 for cause, arguing that "[s]he has a relative that was a victim, as the court knows." (April 15–16, 2013, Trial Tr. p.48, lines 4–7). The trial court stated, "And she did advise us of that and I asked her could she be fair and impartial and try the case based solely on what she heard in the courtroom. She adequately said she could, respectfully denied." (April 15–16, 2013, Trial Tr. p.48, lines 8–11). Trial Counsel then used a peremptory strike to have Juror No. 94 excused. (April 15–16, 2013, Trial Tr. p.48, lines 12–14).

Although the trial transcript indicates that some jurors had informed the trial court, outside the record, about "their past and how it affected them," it also shows that Trial Counsel was aware of those jurors and took appropriate action to have them removed from the jury pool. In addition, it shows that the trial court had examined the jurors to ensure they could try the case "fairly and impartially." The mere fact that those jurors' interactions with the court and Trial Counsel were not included in the record is not sufficient to establish prejudice; the jury is presumed to act according to law. *See Strickland*, 466 U.S. at 694–95 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). Applicant still bears the burden to show that, but for Trial Counsel's failure to record those interactions, the result of his trial would likely have been different. Absent such a showing, it will not be presumed that the interactions were harmful to Applicant's case or that the jury acted improperly. Applicant presented no evidence to overcome the presumption that the jury was fair and impartial; therefore, he has failed to meet his burden. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP. Accordingly, Respondent requests the Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 21: Failure to properly argue and preserve issues related to Juror No. 94

This Court found Trial Counsel failed to properly argue and preserve his request that Juror No. 94's conversation with the trial court be placed on the record after that juror revealed she had "a relative that was a victim, as the court knows." However, the Court acknowledges that Juror No. 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. The Court also acknowledges that Trial Counsel did not even use up all of his

peremptory strikes; only nine jurors were struck in total, and Trial Counsel had ten strikes. Nevertheless, the Court found Trial Counsel was deficient for failing to put Juror No. 94's conversation on the record because Trial Counsel "had to strategically use one of his peremptory strikes on this juror."

Respondent submits Applicant could not possibly have been prejudiced by Trial Counsel's alleged error because Trial Counsel still had peremptory strikes left over after all the jurors were selected. In other words, Trial Counsel struck every juror he wanted to strike, including Juror No. 94. Since the use of a peremptory strike on Juror No. 94 manifestly did not prevent Trial Counsel from striking any other juror, there is no possibility that the ultimate composition of the jury would have been different had Trial Counsel more vigorously argued for Juror No. 94 to be struck for cause. Therefore, Applicant was not prejudiced. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Respondent respectfully asks that the Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 22: Failure to move to sever Applicant's charges

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

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 Court found Trial Counsel was deficient for failing to sever the charges because the State's case was strengthened by the number of victims presented to the jury. However, the Court's order acknowledges that Trial Counsel articulated a strategic reason for not moving to sever the charges: at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a life without parole sentence. Trial Counsel faced a serious dilemma: if he allowed Applicant 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. Trial Counsel made the difficult choice to go forward in a single trial. This was not an objectively unreasonable decision: Applicant's first trial—which covered the same charges and victims—had ended in a hung jury, so Trial Counsel had reason to believe Applicant 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 Trial Counsel's performance with the benefit of hindsight, *Strickland* requires a more deferential review. The mere fact that this Court might have reached a different decision in those same circumstances does not, by itself, render Trial Counsel's decision deficient.

Moreover, if Trial 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 Applicant's daughters or stepdaughters; the abuse almost always occurred in Applicant's home, typically in the victims' bedrooms before school; Applicant performed the same kinds of acts on multiple victims (oral sex on Victims 1 and 2, "humping" on Victims 2 and 3); Applicant would abuse each victim for years, then move on to the next victim after the previous victim moved away; and Applicant coerced each victim with threats of murder and suicide. Therefore, despite the number of different victims and large time period during which the abuse occurred, for the purposes of joinder, it was all one "chain of circumstances." In addition, overlapping evidence was used to prove multiple charges; for example, Buffy [redacted] testified regarding Applicant's abuse of Victims 2 and 3, the testimony of Dr. Benedetto was used to explain the delayed disclosure and recantation of Victims 1 and 2, and the evidence of Applicant's suicide attempt in prison was used to prove his guilt regarding all three victims. *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 Trial Counsel had no ground to seek severance of the charges.

Because Trial Counsel articulated a valid reason for not moving to sever the charges and because he would not have succeeded if he did so move, Applicant has not proved Trial Counsel was ineffective. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Consequently, Respondent asks that this Court amend its order to deny Allegation 22 and dismiss it with prejudice.

Allegation 23: Failure to object to truth-seeking language in trial court's preliminary instructions to the jury

The Court found Trial Counsel deficient for failing to object to a portion of the trial court's preliminary jury instruction in which the 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." (April 15–16, 2013, Trial Tr. p.59, line 22–p.60, line 13). The Court's order cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), for the proposition that "any references to the word 'true' must be removed from the Court's comments to the jury."

However, that proposition does not appear anywhere in *State v. Daniels*, even in paraphrase. Respondent submits the Court may have intended to refer to *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). In that decision, the Supreme Court of South Carolina 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.

The trial in this case occurred in 2013, many years before *Beaty* was decided. Trial Counsel would 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 per se. *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).

In addition, 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." (April 15–16, 2013, Trial Tr. p.59, line 12–p.60, line 13). At the time of Applicant's trial, references to "truth" were permitted by the Supreme Court in the context of instructions on witness credibility. *See State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000).

In addition, the fact that the challenged language appeared in the credibility context, and *not* in the context of the presumption of innocence or the State's burden of proof, defeats any claim that Applicant may have been prejudiced by Trial Counsel's failure to object. *See id.* at 28–29, 538 S.E.2d at 252 ("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."). Furthermore, if the jury instructions, considered as a whole, are

correct, isolated portions that may be misleading do not constitute reversible error. *Id.* at 27, 538 S.E.2d at 251. The trial transcript reflects that the trial court repeatedly and emphatically instructed the jury that the State bears the burden of proof beyond a reasonable doubt and that Applicant must be presumed innocent and need not offer any proof of his innocence. The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice.

For these reasons, Applicant has not met his burden of proving that Trial 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 Trial 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, Respondent requests this Court amend its order to reflect that Allegation 23 is denied and dismissed with prejudice.

Allegation 25: Improper argument in Trial Counsel's opening statement

The Court found Trial Counsel was deficient for arguing, in his opening statement, that Applicant could not be innocent if the victims were telling the truth. The Court's order points out that the State used that quote against the defense in its closing argument, stating, "As Mr. Routzong said in his opening statement, if you believe the victims, the defendant's guilty." The order does not explain specifically why Trial Counsel's argument was deficient or how Applicant was prejudiced by it.

Trial Counsel began his opening argument by emphasizing the presumption of innocence. He stated "the presumption of innocence means . . . that the accusers in this case are either mistaken or untruthful. That's the position you have to take as you're sitting all the way through this trial because that's what the presumption of innocence means. If they're telling the truth, he can't be innocent. If he's innocent, they can't be telling the truth . . . ." (April 15–16, 2013, Trial Tr. p.68,

lines 19–25). He concluded by attacking the credibility of the victims, claiming they had "axes to grind" and were "either mistaken or telling untruths." (April 15–16, 2013, Trial Tr. p.69, lines 9–13). In context, it is clear that Trial Counsel was urging the jury *not* to believe the victims, but to start from the presumption that the victims were either mistaken or lying in order to get revenge on Applicant.

Clearly, if the jury believed the victims—who testified in detail about the crimes perpetrated by Applicant—it would also have to believe Applicant was guilty of those crimes. The heart of the case, for both sides, was the credibility battle between the victims and Applicant. Focusing the jury's attention on the fact that the State's case depended on the credibility of the victims was an integral part of Trial Counsel's defense strategy.

The mere fact that the solicitor was able to use Trial Counsel's words in his own closing argument does not mean Trial Counsel was deficient for making the argument in the first place. The solicitor would have been able to argue that the victims' testimony implied Applicant's guilt even if Trial Counsel had never brought it up; the victims' testimony was the crux of the State's case. Therefore, there is no reasonable probability that the result of the trial would have been more favorable to Applicant if Trial Counsel had not made the challenged statement. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Furthermore, the fact that the victims' testimony was inconsistent with Applicant's innocence was so obvious that no prejudice could have resulted from either Trial Counsel or the State pointing it out to the jury. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Accordingly, Respondent respectfully asks this Court to amend its order to reflect that this allegation is denied and dismissed with prejudice.

Allegation 33: Alleged failure to properly impeach a complaining witness with the transcript of the witness's prior testimony

The Court found Trial Counsel failed to have a copy of the first trial transcript with him when he attempted to impeach a complaining witness with her prior testimony, causing the trial court to order him to move on when he was unable to point to inconsistencies in the witness's testimony. The Court's order does not identify which witness Trial Counsel allegedly failed to impeach or what portion of the prior trial transcript was allegedly inconsistent with the witness's testimony.

Respondent assumes the Court is referring to Trial Counsel's questioning of Victim 2.[9] At the prior trial, Victim 2 testified she would stay "at a friend's house" to avoid having to come home to Applicant. Defense counsel asked her if that friend "was Tim Bowman who was the person you were involved with drugs with?" Victim 2 responded "Yes sir. Well" before being cut off by defense counsel's next question. (Nov. 13–14, 2012, Trial Tr. p.47, line 3–p.48, line 3).

At the second trial, Trial Counsel asked Victim 2 if she was ever involved with drugs, which she denied, claiming her boyfriend was the one involved with drugs. (April 15–16, 2013, Trial Tr. p.130, lines 10–18). Trial Counsel stated, "But you actually testified in the other proceeding that you were involved," and then showed Victim 2 a document.[10] (April 15–16, 2013, Trial Tr. p.130, lines 19–25). The trial court told Trial Counsel to show Victim 2 the "line and verse," and Trial Counsel stated he had neglected to mark it. (April 15–16, 2013, Trial Tr. p.131,

[9] Applicant's amended PCR application identifies this victim as the subject of Allegation 33.

[10] Trial Counsel's reference to Victim 2's testimony from "the other proceeding" implies that this document was the transcript of the prior trial. Therefore, the Court's finding that Trial Counsel "fail[ed] to obtain the transcript of the Applicant's first trial" is not supported by the record.

lines 1–4). The trial court then told Trial Counsel to move on to his next question. (April 15–16, 2013, Trial Tr. p.131, lines 8–15).

Although Trial Counsel was unsuccessful in his attempt to confront Victim 2 with her testimony from the prior trial, Applicant suffered no prejudice. Victim 2's statement at the prior trial was given in response to a complex leading question and was cut off before she could clarify it. (Nov. 13–14, 2012, Trial Tr. p.48, line 3). If she had been able to respond to Trial Counsel's insinuation, she likely would have given the same explanation she gave elsewhere in the trial: that Tim Bowman was her boyfriend, that he was involved with drugs, but that she was not involved in his drug-related activities. (April 15–16, 2013, Trial Tr. p.130, lines 10–18; p.131, lines 22–24; p.135, lines 10–13; Nov. 13–14 Trial Tr. p.38, lines 14–18). Absent any indication that Victim 2 would have been caught in a lie had Trial Counsel properly confronted her with her prior testimony, Applicant has failed to meet his burden to prove the result of his trial likely would have been different but for Trial Counsel's inadequate preparation. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Respondent requests the Court issue an amended order denying and dismissing Allegation 33 with prejudice.

Allegation 34: Failure to object and to move to strike Michelle Price's testimony that implied the statutory elements of Applicant's offense had already been proved

The Court found Trial Counsel should have objected when Michelle Price testified DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina." (April 15–16, 2013, Trial Tr. p.138, lines 15–16). The Court stated this language was prejudicial because it lowered the State's burden of proof in the eyes of the jury by suggesting the statutory elements of the offense have already been proved.

At the evidentiary hearing, Trial Counsel acknowledged that the jury might conceivably have misinterpreted the statement to mean DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. The Court has not explained why Trial Counsel's explanation for not objecting was unreasonable.

However, even if Trial Counsel's stated reason for failing to object was deficient, Applicant suffered no prejudice. The test for prejudice is whether an error "undermines the reliability of the result of the proceeding," not whether it "conceivably could have influenced the outcome." *Strickland*, 466 U.S. at 693. Applicant must show a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome"—that the result of his trial would have been different but for Trial Counsel's alleged error. *Id.* at 694.

Although it is perhaps "conceivable" that the jury misinterpreted Price's statement, it is more likely that the jury correctly interpreted her statement to mean that DSS is required to initiate investigations based only on statutory parameters—*not* based on some belief in the strength of the evidence against the accused or the credibility of the accuser. Price also clarified that the next step would be to "interview the family," which would have alerted the jury that DSS had not yet investigated the report or made any determination of guilt. Far from being prejudicial to Applicant, therefore, Price's statement would likely have conveyed to the jury that the mere fact DSS opened an investigation did not mean DSS believed Applicant was guilty.

In addition, Price's statement was brief and was not specifically related to Applicant's case, and the solicitor did not dwell on it. Even an unusually attentive jury would be unlikely to assign any importance to such a statement. Finally, the trial court's thorough instruction on the State's

burden of proof, the presumption of innocence, and the reasonable doubt standard would have cured any possible confusion before the jury began its deliberations. Accordingly, Applicant has failed to show a probability "sufficient to undermine confidence in the outcome" that, but for the alleged error of Trial Counsel in failing to object to Price's statement, the result of his trial would likely have been different. *See id.*; *see also Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Therefore, Respondent respectfully asks this Court to issue an amended order reflecting that this allegation is denied and dismissed with prejudice.

Allegation 40: Failure to request a *Jackson v. Denno* hearing to challenge the voluntariness of Applicant's consent to the buccal DNA swab

The Court found Trial Counsel was deficient for failing 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 or to object to the admission of that evidence. The Court's order notes Trial Counsel's stated reason for failing to object was that he did not think a *Jackson v. Denno* hearing was necessary because the evidence at issue was not a statement.

The Court has not explained why Trial Counsel's stated reason for not objecting was improper. *Jackson v. Denno* requires a hearing only to determine the admissibility of a defendant's confession. *Id.* at 380 ("A defendant objecting to the *admission of a confession* is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his *confession* are actually and reliably determined.") (emphasis added). Respondent is unaware of any precedent suggesting that a *Jackson v. Denno* hearing may be held when the challenged evidence is not a confession or similarly self-incriminating statement. The only legal authorities cited in this portion of the Court's order are *Jackson v. Denno* and various provisions of the United States Constitution,

none of which support the Court's conclusion that Trial Counsel was professionally obligated to request a hearing on the admissibility of DNA evidence.

In addition, the Court's order does not explain how Applicant was prejudiced by Trial Counsel's conduct. At trial, Applicant admitted the semen found on the bedsheet was his, explaining that his then-wife had masturbated him on his son's bed. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. Moreover, Applicant has not even asserted, much less proved, that his consent to the buccal swab was obtained involuntarily. Applicant, therefore, has not met his burden to show that, but for Trial Counsel's failure to request a *Jackson v. Denno* hearing, the result of Applicant's trial would have been different. *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. Accordingly, Respondent requests the Court issue an amended order denying and dismissing Allegation 40 with prejudice.

Allegation 43: Failure to cross-examine the State's witnesses about discrepancies as to whose bedroom the bedsheets were taken from

The Court found Trial Counsel should have cross-examined the State's witnesses about whose bedroom the bedsheets were taken from that had Applicant's DNA on them. Applicant alleged that the State claimed the sheets were taken from Victim 3's room at the first trial but claimed they were taken from Hoss's room at the second trial. The Court found Trial Counsel deficient for failing to expose this discrepancy because the location of the sheets was critical to the State's case. However, the Court's order does not explain why this evidence was "critical."

Courts give great deference to counsel's decisions concerning the cross-examination of witnesses. *See, e.g., Brown v. Uttecht*, 530 F.3d 1031, 1036–37 (9th Cir. 2008) (holding counsel was not ineffective for failing to cross-examine an expert witness); *Skeen v. State*, 325 S.C. 210,

216–17, 481 S.E.2d 129, 132–33 (1997) ("We see no ineffectiveness in counsel's failure to cross-examine [the State's witness] about the supposed discrepancy in her testimony and her statement to the police. . . . [O]ne could only speculate whether a 'better' cross examination would have helped Skeen.").

The heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Applicant's semen on the bedsheets (for which Applicant was able to offer an innocent explanation). In addition, Victim 3 testified Applicant continued abusing her after she had started sleeping in Hoss's bedroom when Hoss moved out, so the presence of Applicant's semen on the sheets of Hoss's bed was not inconsistent with Victim 3's testimony. (April 15–16, 2013, Trial Tr. p.158, line 6–p.159, line 13). Since both Hoss and Victim 3 used the bedroom at different times, whether that room is characterized as "Hoss's bedroom" or "Victim 3's bedroom" is a semantic quibble, not a material factual discrepancy. *See Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding counsel was not ineffective for failing to cross-examine witnesses based on "meaningless inconsistencies," such as whether a particular incident of sexual abuse occurred in the living room or the bathroom), *abrogated on other grounds by State v. Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).[11]

In addition, Applicant bases this allegation on alleged differences in the photographs introduced in his two trials, claiming the State introduced photographs of Victim 3's bedroom in

[11] In fact, attempting to refute the State's claim that the bedsheets were found in Hoss's room could easily have backfired against the defense: Applicant offered a potentially innocent explanation for how his semen ended up on Hoss's bedsheets but did not offer any explanation for how it might have ended up in Victim 3's room. Trial Counsel cannot be found ineffective for failing to conduct a cross-examination that might have negated an aspect of Applicant's defense. *See, e.g., Brown*, 530 F.3d at 1036–37 (holding counsel was not ineffective for failing to cross-examine the State's expert because doing so could have "backfired" and hurt the defendant's mitigation case).

the first trial but then introduced a photograph of Hoss's bedroom in the second trial. (April 17–18, 2013, Trial Tr. pp.116–18). However, Applicant did not present either photograph to this Court at the evidentiary hearing to substantiate this claim. *See Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (holding, in a case where a PCR applicant received a second trial after his first trial ended in a mistrial, the applicant was required to present a copy of the first trial transcript to substantiate his allegation that trial counsel was ineffective for failing to point out discrepancies in the testimony given at the two trials), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Applicant has failed to prove, by a preponderance of the evidence, that Trial Counsel was ineffective for failing to further develop this line of inquiry. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Accordingly, Respondent respectfully asks this Court to amend its order and deny and dismiss Allegation 43 with prejudice.

Allegation 45: Failure to object to the trial court's interruptions of Applicant's testimony

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

During direct examination by Trial Counsel, Applicant's testimony often deteriorated into irrelevant tangents. (April 17–18, 2013, Trial Tr. p.129, line 21–p.130, line 10; p.131, line 8–p.132, line 11; p.132, line 25–p.133, line 8; p.133, lines 14–16; p.138, line 24–p.139, line 7; p.145, line 14–p.146, line 3). He also frequently attempted to testify to statements made by third parties. (April 17–18, 2013, Trial Tr. p.136, lines 1–2, 14; p.138, lines 1–2; p.141, lines 15–16; p.144, lines

3–4; p.145, line 25–p.146, line 3; p.150, lines 9–12). The trial court admonished him multiple times to give responsive answers to Trial Counsel's questions and to refrain from testifying as to what other people said. (April 17–18, 2013, Trial Tr. p.130, lines 11–15; p.133, lines 17–18; p.136, lines 16–18; p.139, lines 10–21; p.141, lines 14–24; p.142, lines 8–9; p.143, line 7; p.144, line 5; p.146, lines 4–19; p.150, line 19–p.151, line 5). At one point, the court admonished Trial Counsel for asking speculative questions and told the solicitor to "object to those speculation type of questions and answers." (April 17–18, 2013, Trial Tr. p.136, lines 10–11).

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). Applicant's repeated failures to abide by the rules necessitated the court's increasingly emphatic remonstrances. At the PCR hearing, Trial Counsel admitted he had difficulty controlling Applicant on the stand, and he testified that he did not believe the trial judge's attempts to maintain order were prejudicial to Applicant. Therefore, Applicant failed to establish, by a preponderance of the evidence, either Trial Counsel's deficiency or any resulting prejudice from the alleged error. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Respondent requests that this Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 47: Failure to object to "truth-seeking" language in the trial court's jury charge

The Court found that Trial Counsel was deficient for failing to object to two of the trial court's jury instructions: "[I]t 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."[12]

As discussed in response to Allegation 23, "truth-seeking" language in jury instructions was promulgated by the Supreme Court of South Carolina in the general sessions benchbook and was not condemned until *State v. Beaty*, many years after Applicant's trial concluded. *See Beaty*, 423 S.C. at 34 n.2, 813 S.E.2d at 506 n.2. Trial Counsel was not deficient for failing to anticipate a future change in the law. *See Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456. In addition, the trial court's statement that, "[I]t is your duty to determine what the true facts are and what the truth is and who is telling the truth," appeared in the middle of an extended discussion on the jury's role in determining witness credibility. (April 17–18, 2013, Trial Tr. p.203, line 3–p.204, line 13). At the time of Applicant's trial, "truth-seeking" language was permissible in the context of witness credibility instructions. *See Aleksey*, 343 S.C. at 27–29, 538 S.E.2d at 251–53.

Furthermore, these isolated statements, in the context of the entire jury charge, were not objectionable. *See id.* at 27, 538 S.E.2d at 251 (holding if the jury instructions, considered as a whole, are correct, isolated portions that may be misleading do not constitute reversible error).

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[12] The full paragraph in which this statement appears is as follows:

> Obviously you have no friends to reward, no enemies to punish. You're to make your decision based solely on what you determine the true facts are in the case and determine and apply those facts to the law as I give it to you, and from those facts, if you determine that the State has proven each of the elements that I gave to you beyond a reasonable doubt, then the verdict would be guilty. If not, it would be not guilty.

(April 17–18, 2013, Trial Tr. p.212, line 23–p.213, line 5). In context, therefore, it is clear that the trial court was instructing the jury to set aside passions and prejudices and decide the case objectively, bearing in mind the State's burden of proof and the reasonable doubt standard. This instruction correctly conveyed the appropriate standard of proof to the jury, notwithstanding its references to the "true facts" in the case. Therefore, Trial Counsel was not deficient for failing to object to it, and Applicant suffered no prejudice.

The remainder of the trial court's jury charge adequately instructed the jury on the presumption of innocence, the State's burden of proof, and the reasonable doubt standard. Any possible confusion based on the court's isolated "truth-seeking" statements was cured by the court's thorough instruction on the correct standard, so there is no reasonable probability that the result of Applicant's trial would have been different had Trial Counsel objected to the statements.

For these reasons, Applicant has not met his burden of proving that Trial Counsel's failure to object to the trial court's "truth" language during its closing jury instruction was deficient, nor has he proved any prejudice resulting from Trial Counsel's conduct. *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, Respondent requests this Court amend its order to reflect that Allegation 47 is denied and dismissed with prejudice.

Allegation 48: Failure to object to the trial court's jury instruction that the testimony of a victim need not be corroborated

The Court found Trial Counsel was deficient for failing to object to the trial court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." (April 17–18, 2013, Trial Tr. p.210, lines 23–24). Although that proposition is correct as a statement of law, its use as a jury instruction has been condemned by the South Carolina Supreme Court. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (holding jury instructions that victims' testimony need not be corroborated in prosecutions for criminal sexual conduct should no longer be given). However, at the time of Applicant's trial in 2013, that instruction was expressly permitted by Supreme Court precedent. *See, e.g.*, *State v. Rayfield*, 369 S.C. 106, 115–18, 631 S.E.2d 244, 249–50 (2006) (holding the trial court did not err in charging that a victim's testimony need not be corroborated), *abrogated by Stukes*, 416 S.C. 493, 787 S.E.2d

480. Trial Counsel is not required to be clairvoyant and was not deficient for failing to anticipate a change in the law. *See Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (holding trial counsel cannot be found ineffective for failing to object to a jury instruction at a time when no case law rendered the instruction improper per se); *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456 ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765)), *overruled on other grounds by Brightman*, 336 S.C. 348, 520 S.E.2d 614. In addition, the *Stukes* opinion expressly states that its holding does not apply to PCR cases. *Stukes*, 416 S.C. at 500 n.5, 787 S.E.2d at 483 n.5. Accordingly, Trial Counsel was not deficient for failing to object to this instruction, and Respondent respectfully asks this Court to amend its order and deny and dismiss Allegation 48 with prejudice.

III. CONCLUSION

Based on all the foregoing, Respondent respectfully requests this Court issue a revised or amended order denying and dismissing every allegation in Applicant's amended post-conviction relief application with prejudice.

Respectfully submitted,

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Attorney General

W. JEFFREY YOUNG
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By: _____
Attorneys for Respondent
Post Office Box 11549
Columbia, South Carolina 29211

June 10, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2019-CP-02-1582
	)	
HAROLD CARTWRIGHT, #355084	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

FILED 6-13 2022 1:15 SP
C.C.P. & G.S.
Shadell Parks
Deputy Clerk

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Motion to Alter or Amend Judgment the order granting post-conviction relief in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable Robert J. Bonds
14th Circuit Judge
Post Office Box 2120
Walterboro, SC 29488

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

DATED this 10th day of June, 2022.

Joshua Osborne, Legal Assistant for
Respondent

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Harold Cartwright, #355084

Applicant,

v.

Transcript of Record
Case No.: 2019-CP-02-01582

State of South Carolina,

Respondent.

June 24, 2022
Aiken, South Carolina

B E F O R E:

The HONORABLE ROBERT BONDS

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

Zachary Jones, Representing the State of South Carolina

Dwayne C. Phillips, Representing the respondent

SHARON G. HARDOON, CSR
Official Circuit Court Reporter, III

THE COURT: All right, Counsel. Good morning.

MR. CARTWRIGHT: Good morning.

THE COURT: Mr. Cartwright, good morning, sir.

We are here today on respondent's motion to alter or amend the order granting post-conviction relief pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. So let me do this, for the record, could I get my attorneys to introduce themselves, please, beginning with the attorney for the respondent?

MR. JONES: Thank you, Your Honor. My name is Zachary Jones. I'm an assistant attorney general with the Attorney General's Office, PCR Division.

THE COURT: Yes, sir. Thank you very much. And for Mr. Cartwright?

THE COURT: His mic may not be working. Mr. Phillips?

MR. PHILLIPS: Can you hear me now?

THE COURT: All right, great. Mr. Phillips, could you introduce yourself, sir, for the record.

MR. PHILLIPS: Yes, Your Honor. Good

morning. It's Attorney Dwayne Phillips for the petitioner -- or the applicant, Mr. Cartwright, Harold Cartwright.

THE COURT: All right. Attorney General, since this is your motion, sir, I have -- for the record, I want you to know I have reviewed your brief and I'm happy to hear from you, sir.

MR. JONES: Thank you, Your Honor.

Before I begin, I was wondering how Your Honor would like us to conduct this hearing, if you'd want me to go through each of the 15 issues I addressed in the brief one by one? I tried to be as thorough as possible in the brief. But we can do that, or if Your Honor had any specific questions.

THE COURT: No. I'll tell you, let's just go through them one by one. I think that's the best way to knock this out because you were thorough, and I appreciate that. Because, quite frankly, there are a lot of different issues that I think that we need to address. A lot of issues were raised, and I think we're under an obligation to address each one.

MR. JONES: Yes, sir.

THE COURT: So I'm happy to hear from

you, sir. We'll discuss one issue at a time. You want to address that issue and then have Mr. Phillips respond to that issue, sir?

MR. JONES: Whatever Your Honor would prefer.

THE COURT: Mr. Phillips, is that satisfactory, sir?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Honestly, I think that would -- yeah, I really think that's going to be easiest for me as we go through it. It will help me with my notes that I may be taking. So let's go ahead and do that, Attorney General, if that's all right. When you finish with that argument, just let us know. And then I will allow Mr. Phillips to respond, sir. Okay?

MR. JONES: Okay.

THE COURT: Yes, sir. Go right ahead.

MR. JONES: Thank you, Your Honor.

The first general overarching issue that I'd like to address is the applicant's cumulative error doctrine arguments. As I pointed out, the -- this case involved 55 total allegations of ineffective assistance of counsel. And for many of them, there were no specific findings of

prejudice made in the order, including in the 15, and I believe 13 out of the 15 issues on which this Court actually granted relief.

And then the Court's order concludes with a general finding of cumulative prejudice based on the total number of errors alleged. So, of course, I'm going to go through each of those 15 issues and try to explain why they were not errors.

But, just in general, I wanted to point out that our State has not recognized cumulative error as grounds for post-conviction relief. And, are -- and, in fact, that doctrine has been rejected expressly by the Fourth Circuit and by the majority of Federal Circuits who have dealt with the Federal equivalence of ineffective assistance claims.

I also further believe that -- and submit that the -- that the cumulative error standard is, in fact, contrary to the policy rationale of *Strickland* and to the straightforward reading of *Strickland*, which requires for each allegation of ineffective assistance of counsel a showing of both deficiency and prejudice individualized to that allegation.

So the idea that one -- one general finding of cumulative prejudice based on multiple alleged deficiencies can substitute for that as no basis in *Strickland,* or in any other precedence relied on by the State Supreme Court or the State Appellate Courts or the Federal Courts.

So with that out of the way, that alone, I believe, merits at least a new order setting forth specific findings of prejudice. However, I don't believe that any of the issues merit that treatment in the first place.

First of all, we have the allegation of the failure to object to the qualification of the State's expert in child sexual abuse dynamics.

Now, this Court's order found that a -- that the failure to object to the qualification of Dr. Benedetto as an expert in child sexual abuse dynamics was deficient because the trial court limited Trial Counsel to questioning the witness about her qualifications rather than about the reliability and validity of the field itself.

First of all, it's worth pointing out that Trial Counsel did object to the qualification of the expert witness on the grounds that she had not shown the reliability of the field, and then

the trial court overruled that objection.

So raising the issue again, I submit, would not likely have resulted in a different result, which is, of course, the test for prejudice under *Strickland*.

Second, it's -- the difference between the qualification of an expert and the admissibility of an expert's testimony is -- that distinction is important in this case because the reliability questioning goes to the admissibility of the expert's statement rather than the qualification.

So to the extent Mr. Cartwright is arguing that the expert should not have been qualified because she failed to show her -- the reliability of her field, that's erroneous because of the precedent regarding the reliability issue. It goes to admissibility, and I rely on the basis I've cited in my brief for that.

Furthermore, there was no -- Mr. Cartwright stills bears the burden of showing in his PCR proceeding that there could be some evidentiary basis to attack the reliability of child sexual abuse dynamics as a field. And I submit that there is no such basis. It's

routinely -- these kind of experts are routinely called in child sexual abuse cases and CSE cases of all kinds.

And so, presumptively, again, at the PCR stage, there's a presumption that Trial Counsel's performance was not ineffective and it's up to the applicants to produce evidence rebutting that presumption.

So, in this case, without evidence that the field could have been shown to be unreliable, there was no ground to grant PCR in this -- as to this allegation.

THE COURT: All right.

MR. JONES: I'll let Mr. Phillips respond to that.

THE COURT: Hold on one second, Mr. Jones.

What was the last -- without evidence to show the field was not unreliable, what was the last statement, sir? Because that -- actually, that kind of resonated with me, and I was writing that down and I didn't get the rest of it.

MR. JONES: Okay. Yes, Your Honor.

Generally, of course, anytime in any allegation of ineffective assistance of counsel, the burden is on the applicant to show, again,

both the deficiency and the prejudice and to introduce any necessary evidence to suggest that, as in this case, an objection would be successful.

So in order to show that an objection in this case to the reliability of Dr. Benedetto's testimony would be successful, the applicant would have to introduce at the PCR evidentiary hearing some evidence that child sexual abuse dynamics is not a valid or reliable field, and the applicant failed to do that.

THE COURT: I understand. I've got it down. Thank you.

All right. Mr. Phillips, sir, I'm happy to hear from you in response to the information -- the argument of the attorney general.

MR. PHILLIPS: Thank you, Your Honor.

I'll deal with the cumulative error analysis first. Specifically as to the individual specific findings of deficient performance that were there, the main argument, obviously, is the second part that those counsels' errors were so serious as to deprive the defendant of a fair trial, which affected the reliability of the ultimate result.

Now, we don't have the specific findings

of fact for each specific one of those allegations that were raised with that, quote/unquote, "cumulative error analysis." Part of that would be argued, I would say, as a *United States vs. Cronic*, that's 466 U.S. 648, which has the presumption of prejudice. The companion case to *Strickland* is *United States vs. Cronic*, which identifies three distinct situations that you have the presumption of prejudice. And arguably, we would say per se prejudice occurred when there's been a constructive denial of counsel.

The opposition would be, one, although South Carolina hasn't officially recognized based on what the attorney general has submitted, the cumulative error doctrine, they haven't not applied it. It is not controlling -- other jurisdictions are not controlling case law that dictate how this order would be crafted from a cumulative error analysis. There's nothing that says that that is wholly improper as controlling the law in South Carolina.

With that being said, under *Cronic*, a presumption analysis, per se prejudice analysis, I believe when you add up all of these things, you have a constructive denial of counsel, which is

akin to a cumulative error analysis.

So whether it's maybe improperly worded on my part when I drafted the order, however, specifically I still think that each individual allegation -- or each finding of deficient performance still crosses the threshold and meets that burden of proving that there was actual prejudice that the counsels' errors were so serious as to deprive the defendant of a fair trial, what's required to prove prejudice.

But also, in addition to there not being any controlling case law, a cumulative error analysis could be presented into the order. It's nothing that's controlling that says it's not.

Now, again, a backstop to that would that under that *United States vs. Cronic*, the per se prejudice analysis, it could be also argued that under the same rationale, that the prejudice was presumed.

THE COURT: All right.

MR. PHILLIPS: As to -- I believe it was Allegation 13, the failure to object to the legal standard used for qualifying a State's expert witness, the specific argument was that Trial Counsel failed to object to the trial court's

application of an incorrect legal standard, not so much on the actual basis of whether the child abuse dynamics is appropriate.

Yes, there are plenty of experts who have been qualified as that. But as far as the legal standard for which -- that were used that the judge made his determination to qualify that expert witness in that field, where the court -- and this is a unique situation, a case-by-case basis based on this specific trial, where the court limited counsel's voir dire of the witness regarding the qualifications improperly, qualified the witness as an expert in the given field without having gone through that correct proper analysis, and only permitting questioning of the witness, it limited -- and this is an opportunity to question the witness on the reliability and validity after the witness was already deemed an expert improperly, as far as the order of how this is supposed to be done, and the State's direct examination, all of which was held in the presence of the jury instead of in an in camera hearing.

Highly prejudicial situation where an incorrect legal standard was presented. The proper procedure wasn't followed in any way,

shape, or form. It was done all in front of the jury without any objection from Trial Counsel as to that specific issue.

Not whether they could qualify that person as an expert in child abuse dynamics, but from the legal standard itself and the procedure that it was used in qualifying that expert. We're not arguing that as an absolute bar, that you can't have child abuse dynamic experts from being qualified or having them being -- a witness being qualified as a child abuse dynamic witness.

But in this specific case, what occurred, the procedure and everything -- counsel's failure to object to that incorrect standard and the overall procedure was deficient performance and was highly prejudicial and ultimately would affect the outcome of the case.

THE COURT: All right.

MR. JONES: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. JONES: Did you want to have a brief rebuttal by the State?

THE COURT: Yes, sir. I'll give you a brief rebuttal, of course. Yes.

MR. JONES: Thank you.

I would just point out that the United States Supreme Court precedent, and that's the Compo (ph) Tire Company case that I cited stating the trial courts may, in their discretion, omit unnecessary reliability examination from expert qualification proceedings.

And again, that's because qualification and admissibility are different inquiries, and the qualification hearing -- or proceeding does not have -- reliability does not have to be addressed at that stage. It can be addressed at the admissibility stage. So I would submit there was no error in the trial court's conduct of the qualification proceeding.

THE COURT: All right.

MR. JONES: I'll move on now to allegation 14 which is Trial Counsel's failure to object and move to strike Dr. Benedetto's statement that abusers typically seek victims of a particular age.

Your Honor, first of all, the -- the applicant objects -- or raises that issue based on the scope of Dr. Benedetto's expertise. I would submit that it is within the scope of Dr. Benedetto's expertise to testify about the

characteristics typical of child abusers.

Again, the mere fact that her subfield does not specialize in the profiling of child abusers doesn't mean that she lacks the necessary expertise to qualify about the characteristics of child abusers. As an expert in child sexual abuse dynamics, she certainly would be familiar with that to a greater degree than the average juror, which is the test for qualification as an expert.

However, I would say that even if there was some impropriety in that statement, it could not have prejudiced Mr. Cartwright because the testimony in this case did not suggest that he sought victims of one particular age. It's -- the different victims in this case testified that he began abusing them at ages 5, 9 and 13, respectively.

So I fail to see how Mr. Cartwright could have been prejudiced by the State's introduction of a statement that child abusers typically target victims of a particular age.

For that reason, I would suggest there's no ineffective assistance of counsel here.

Furthermore -- and this goes to both allegation 14 and 13 -- the court's order later in

discussing the ineffectiveness of appellate counsel rejects the -- Mr. Cartwright's ineffectiveness claims for appellate counsel on these same issues by stating that there was no prejudice as to either of them. That, of course, is -- and, therefore, no reason to appeal them.

That, of course, is inconsistent with this court's grant of relief on Allegations 13 and 14.

So, if nothing else, the order would have to be amended to resolve that inconsistency, I submit.

That's my position as to allegation number 14.

THE COURT: Mr. Phillips?

MR. PHILLIPS: Yes, sir, Your Honor. One moment.

Yes, Your Honor. Specifically addressing the issue was whether the witness's amended area of expertise focused on the perspective of a child experiencing abuse. But when you have that extra layer, when you go beyond the expertise that's provided, it is necessary for Trial Counsel to object.

I guess I maybe need to clarify

whether -- it the State's position that they believe there's deficient performance and failure to object, but they don't believe it's prejudiced -- or prejudicial?

MR. JONES: No, Your Honor. The State's position is that there was not deficient performance because this was within the scope of Dr. Benedetto's expertise.

Second of all, there was no prejudice even if there had been deficiency because the substance of her testimony was not harmful to Mr. Cartwright.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: So, specifically, certainly the applicant's position is that it was improper testimony as a psychological -- you know, what we would refer to as a profiler when asking about is it typical for an abuser to have a favorite age to sexually abuse when -- and it is -- we argue it's outside the scope of the expertise and has an influential -- as an expert witness, you know, that higher level of influential persuasion on a jury by having that.

Obviously, the case from the specific victims themselves have different ages. However,

with providing that testimony that's outside the expertise of the specific witness, as well as with that profiler type of language, our position is that not only is it deficient performance due to failure to object and move to strike that testimony, but it's also prejudicial that it would deprive him of ultimately the defendant's right to a fair trial.

THE COURT: So, Mr. Phillips, the -- what is the statement -- or what was the testimony that the doctor made that you contend exceeded the scope of her expertise, sir? Remind me of that, sir.

MR. PHILLIPS: Specifically, if you'll give me a second, Your Honor, it's when she essentially testifies that -- the prosecutor asked the question, What was the typical -- What was typical for an abuser to have -- *Is it typical for an abuser to have a favorite age for sexual abuse?*

THE COURT: Right.

MR. PHILLIPS: I think that's -- and then the testimony -- the witness answers in the affirmative. I think that specific set of -- if you need me to pull up the transcript real quick, I can --

THE COURT: No, no. And so just tell me, sir, so why is it your contention that that is outside her scope of expertise? Because what I'm hearing from the State is, as I understand, Attorney General, you would submit that that's not -- initially, I think you would submit that's not outside her scope of expertise.

Am I understand that correctly, sir?

MR. JONES: Yes, Your Honor.

THE COURT: So, Mr. Phillips, explain to me why -- or remind me why you believe this is outside the doctor's scope of her expertise, sir.

MR. PHILLIPS: So, based on the qualification of child abuse dynamics, there is a specific range -- at least what our contention is, there's a specific range of things that are proper for them to testify about when you have specifically the blind experts that think that it's improper to testify about.

When you go into the profiler-type questions that doesn't deal specifically with any -- especially in this case, even relevance to this case, which is why Rule 701 was cited, specifically that it goes beyond the scope of the

testimony that's allowed by a child abuse dynamics to be talking about what a typical abuser is to have a favorite age to sexually abuse when, again, you probably should actually include it in a Rule 403 as well as far as being improperly prejudicial or unduly prejudicial.

With that being said, that -- in that situation, it's not about whether -- specifically, again, they're not testifying as to the specifics of the evidence in the case, but it's beyond the scope of what she was qualified as an expert to do.

I guess it somewhat goes back to the limited qualifications and the basic of when the -- this specific witness was qualified on child abuse dynamics, what was the range of what this witness was limited to testify about in child abuse dynamics.

That essentially testifying about a typical -- what's, quote/unquote, a "typical abuser to have a favorite age," our position is that it's outside the scope of the expertise or at least the qualification of the expertise in this case and that it was improper for it.

Again, we would argue that -- you know, now that I'm fleshing it out, I would also say

that it's unduly prejudicial, that any probative value of that -- the answer to that question is substantially outweighed by the danger of its unfair prejudice to the jury.

So not only is it not relevant and not proper under Rule 701 and 702 as far as the qualification of the expertise, but also under Rule 403 of the rules of evidence.

THE COURT: Mr. Phillips, thank you.

Counsel?

MR. JONES: Thank you, Your Honor.

Just to briefly respond to that, once again, there was no express limitation preventing Dr. Benedetto from testifying as to the characteristics of child abusers. And because that would necessarily be something she would have special training and experience in due to being an expert in child sexual abuse dynamics, once again, we submit that there was no reason for Trial Counsel to object to that statement.

Second of all, Mr. Phillips has argued that the statement was unduly prejudicial. Again, I fail to see how it could be prejudicial to Mr. Cartwright since it was actually inconsistent with part of the State's theory of the case, which

was that these children had been targeted at different ages.

MR. PHILLIPS: Your Honor -- I apologize. I thought he was done.

I was just going to clarify the Rule 403.

THE COURT: Hold on one second. Hold on one second.

Attorney General, what else do you want to tell me in reply, sir?

MR. JONES: That's all, sir. Thank you.

THE COURT: Okay, thank you.

All right. Mr. Phillips, very briefly, sir.

MR. PHILLIPS: Yes, sir. I apologize if the State was not done.

Just that under Rule 403, it also includes confusion of issues to the jury. If it's not relevant, as the State's conceded, then it was improperly presented and prejudicial by being asked by the prosecutor to try to present that into the trial. It's not relevant, as the State's just said.

THE COURT: What is next, Attorney General?

MR. JONES: Next is allegation number 19

on Trial Counsel's failure to sequester -- or to move to sequester the witnesses.

THE COURT: Right.

MR. JONES: The State's position there is that, first of all, moving to sequester the witnesses would not have accomplished anything because there had already been a trial. The witnesses had already heard each other testify.

So, again, the purpose of sequestration is to prevent witnesses from hearing each other so that there can't be any coordination of their testimony. But that ship had sailed by this point. This was the second trial, and all the witnesses had already heard everything every other witness was going to say.

Second of all --

THE COURT: Yeah. But, I mean, my experience over the years has been, Lord, have mercy, just because one witness said something in the first trial, I mean, it's no indication that that witness is going to say it in the second trial, or they can add something to a question.

I mean, how many times do you go in a deposition and take a deposition from somebody and they then go and come to court and they say

something -- I mean, my point is that a sworn statement where someone's making a statement and then they come and they change their statement -- I don't know if they were specifically -- I don't know if they were specifically -- I don't know if they said exactly the same thing, you know, in both trials.

But, I mean, my experience as an attorney -- do we know whether or not the witnesses were sequestered in the first trial?

MR. JONES: I believe they were not. However, I'm not a hundred percent sure on that, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: Your Honor, I don't have the answer for that.

THE COURT: I mean, that certainly is an issue. If they were sequestered, then it's possible that they may not have heard what was said, and then maybe they could have then asked or had conversations with attorneys or transcripts, or whatever the case may be.

But go ahead, sir. I'm just thinking to myself. Go ahead.

MR. JONES: And, again, Your Honor, there

were different defense attorneys at the first trial versus the second trial. So Trial Counsel in this case inherited the case. If there was no sequestration in the first case, our position is that the damage would already have been done, if there was any damage.

However, it's also true that the -- it should also be borne in mind that, first of all, sequestration of witnesses is not a matter of right. It's in the discretion of the Court.

And, in fact, there is State statute that says in cases where one of the witnesses is a victim, the -- that victim may not be sequestered from the proceedings.

In this case, the State's three chief witnesses were the three purported victims. So there is a State statute preventing them from being sequestered. Moving to sequester them would not have been successful as a matter of law.

For that reason, the State suggests that there was no -- there could not have been any prejudice even if, perhaps, the best -- the ideal course of action might have been to seek sequestration, it wouldn't have been granted as to the State's three chief witnesses whose testimony

was the most damning.

THE COURT: All right. Thank you, Attorney General.

Mr. Phillips, what about that? They get to stay in.

MR. PHILLIPS: Not to put the cart before the horse, but I think this only enhances the prejudice of the -- our severance issue. So one of the more reasons why this -- defense counsel should have moved to sever the charges.

Now, again, staying on task to this specific one, there are many additional witnesses that testified in this case. Credibility is the linchpin of this case. It's the key as to whether -- based on the first trial being a hung jury due to a mistrial, ultimately a mistrial.

With that being said, because credibility is the key in the case, although those three individuals were victims, there are family members who, you know, you could make the assumption that they were able to speak. However, there are many additional witnesses beyond those three who testified whose testimony is key to hearing all the other people testify and be consistent with that and taking away that ability from the defense

side -- well, the opportunity through cross-examination to prove inconsistencies and biases and motives that otherwise would be able to be hopefully fleshed out where the defense can -- unfortunately, you'll never know because they weren't sequestered.

With that being said, again, with there being two different defense attorneys in a very short amount of time that the second lawyer had to prepare for the case and coming off the heels of a mistrial due to a hung jury, and credibility being the real key issue in the case, sequestration, in my opinion, although it is generally -- it is a judge's discretion. In this case, I feel if the lawyer would have made the motion, then it would have been granted had that argument been made. And if not, that would have been an issue that would have been reserved for appellate review. It could have been reviewed on direct appeal.

However, because that argument was not made, that failure to object ultimately deprives him of his right to a fair trial by having these witnesses being able to stay in the courtroom.

MR. JONES: Once again, Your Honor, I would just -- I would just suggest that the

existence of the statute -- of that victim protection statute negates any possible prejudice as to this allegation.

The other victim -- or, sorry, the other witnesses in this case, most of their testimony was very minor and not nearly as harmful to Mr. Cartwright as the testimony of the three victims. None of them could have been excluded or sequestered even had Trial Counsel made such a motion.

THE COURT: Let me ask you, Mr. Phillips, any time a lawyer does not or forgets to ask that witnesses be sequestered, then would it be your position that that's --

MR. PHILLIPS: I think I can answer this directly.

THE COURT: That the individual has been prejudiced? Because, I mean, you think about it, that could happen lots of times.

MR. PHILLIPS: Sure. But this case specifically -- again, we're doing everything on a case-by-case basis with discretion. This case is a highly volatile credibility case.

Again, you obviously know that credibility is an issue when you couldn't have a

unanimous jury either way decide the first trial. That shows and proves and illustrates how credibility was. Because you couldn't have a unanimous jury in the first trial. You ultimately had a hung jury.

So coming off the heels of a hung jury --

THE COURT: Well, I think credibility -- I think you're right. Credibility is the issue here. Because one of the attorneys basically said in either opening or closing, If you believe her -- *If you believe them, he's guilty.*

MR. PHILLIPS: I think there's an ineffective assistance issue that was kind of --

THE COURT: Right. But it was done in that fashion. Someone, I don't know who -- said -- I remember Mr. Cartwright's attorney did got and basically created this or couched this case as a complete credibility argument by saying that to the jury. That's -- I think that's my recollection.

Is there any hard evidence in this case -- let me just ask the attorney general. When I say "hard evidence," what I mean is beyond a he said/she said. I don't remember --

MR. JONES: Your Honor --

THE COURT: -- it being an issue with these types of things.

MR. JONES: Your Honor, the only evidence -- hard evidence beyond the witness testimony was the evidence of the -- of Mr. Cartwright's semen found on one of the bed sheets taken from one of the children's rooms.

THE COURT: Right, right, right. Which they got into another issue about what room, as I recollect.

All right. Thank you. Is there anything else, Attorney General, that you want to say as it relates to this one, sir, this matter? Or are we ready to move to the next?

MR. JONES: Your Honor, I'm ready to move to the next issue.

THE COURT: That would be great, sir.

MR. JONES: So the next is allegation 20, which is the failure to move to individually question jurors after the trial judge noted some jurors had approached him about experiencing similar types of allegations in their past.

Again, that was where the trial court asked if any -- in jury collection whether any

member of the jury panel had been a victim or had been subjected to sexual misconduct of some kind.

And then the Court suggested that some number of the jurors had already disclosed that they were -- that they were so affected.

Then later in the trial -- later in the jury selection process, Trial Counsel pointed out one of the jurors, Juror Number 94, and said, Your Honor, we move to strike this juror because this is one of the ones who approached you about having experienced that sort of behavior in the past.

And that's its own issue, what happened to Juror Number 94. But I would submit that it proves Trial Counsel was aware of which jurors were affected or had approached the Court and did take the appropriate steps to have them removed.

Similarly -- however, even if there was some sort of impropriety there, or in failing to have those jurors' numbers and their statements to the Court put on the record, I would submit that it wasn't -- that it can't be presumed to be prejudicial just because we don't have it in the transcript.

Strickland says that jurors are presumed to act according to the law and not to be -- not

to act with bias or prejudice. It's -- as it always is in the case -- in these PCR cases, it's the burden on the applicant to establish that the result of his trial would have been different had -- had Trial Counsel acted differently.

And I -- there is no evidence in here that the -- that any of the those jurors who approached the trial court were subsequently sat on the jury pool or that they allowed those experiences to color their appreciation of the evidence in the case or that they were prejudiced against Mr. Cartwright or in favor of Mr. Cartwright or any kind of -- any kind of proof of their impropriety at all.

So again, with the presumption of lawfulness that's established by *Strickland*, the State submits that the applicant has not met his burden as to this allegation.

THE COURT: Thank you.

Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor.

Being specific with it, under the State's rationale, the Trial Counsel's failure to make these arguments and to make these motions has deprived us with having the very evidence that the

State's saying that we can't prove prejudice with.

In other words, the deficient performance is the very thing that causes us not to have any evidence related to these issues. Had Trial Counsel properly made the motions to do this and proffered the testimony, made sure that this specific -- all the specific answers and questioning -- individual questioning by the judge that was done of these potential jurors, then we would have the very evidence that the State is saying we don't have to prove prejudice.

So the deficient performance in this very nature is ultimately what would, under the State's theory, prevent us from being able to prove prejudice.

So our argument, again, to me in that specific, it's impossible because of the deficient performance. Because the Trial Counsel failed to move to do those things, we don't have that evidence. It makes it impossible to prove the prejudice on that specific issue because of Trial Counsel's failure.

And based on that, it was serious enough to deprive the defendant of his right to a fair

trial and challenge that the result of that trial as being reliable.

THE COURT: All right. Attorney General, anything you want to reply, sir?

MR. JONES: I'd just, once again, point out that in addition to the presumption that the jurors acted appropriately, there's the presumption that Trial Counsel -- Trial Counsel's performance was adequate. Trial counsel moved to strike several jurors and was successful in striking several jurors and did not give his reasons as to all of them.

However, it can be presumed and, in fact, according to *Strickland* should be presumed that if there was any legitimate reason to suspect the impartiality or the partiality of any jurors, that those were the jurors that Trial Counsel struck.

And I believe that's borne out by the fact that we'll get to in the next allegation as to Juror Number 94 where Trial Counsel did explain that he was moving to strike that juror for cause for having approached the trial court in response to the trial court's earlier questioning.

So again, it's -- it can be tough if it's not on the record, but we have -- that's what we

have the presumptions in *Strickland* for.

THE COURT: All right. So do you want to move then to -- or does that address your issues concerning allegation 21, or is there anything else you want to say about allegation 21, sir?

MR. JONES: Your Honor, the only other thing I would say about allegation 21 is that Juror Number 94 was, in fact, struck. The only problem that Mr. Phillips has pointed out with it is that the counsel had to use a peremptory strike rather than -- and did not succeed on the motion to strike for cause.

Your Honor, Trial Counsel did not even use up all of his peremptory strikes. He had ten, and only nine jurors were struck in total. So it's impossible that he could have been prejudiced. He still had peremptory strikes left over and did not move to strike -- did not move to use any of them in the rest of the jury selection process.

So the State submits that even if there was a problem in his failure to properly preserve and argue the issues related to Juror Number 94, it couldn't have prejudiced Mr. Cartwright because he was able to strike Juror Number 94 and he still

had peremptory strikes left over at the end of the jury selection.

THE COURT: All right, thank you.

Mr. Phillips?

MR. PHILLIPS: Specifically to that, our primary issue was, I believe -- pretty much as far as the applicant's position's been pretty well fleshed out. I mean, it's in the order that Trial Counsel testified that he didn't use up all his peremptory strikes because only nine jurors were struck in total and he had some strikes.

The specific issue was that Trial Counsel was deficient for having -- for failing to have those conversations on the record for the argument that Juror Number 94 should have been struck with cause. Obviously, that still has the issue of there being an additional peremptory strike available.

I have nothing else to add to that, Your Honor.

THE COURT: All right. Attorney General, you ready to move to your next contention, sir?

MR. JONES: Yes, Your Honor. That would be Allegation 22. This court found Trial Counsel should have moved to sever the charges in two

separate trials involving the separate victims.

Your Honor, I would submit that these -- all these incidents arose out of a single chain of circumstances, the -- for the reasons set forth in my brief.

However, before I get to that, I would like to point out that the main reason to deny relief on this issue is because it was an exercise of a valid trial strategy by Trial Counsel.

There was -- again, the first trial had ended in a hung jury. So it was far from a sure thing that any subsequent trial would result in a conviction even if it proceeded according to mostly the same -- in the same way with the charges not being severed.

So, first of all, there was no guarantee that Mr. Cartwright would be convicted on the second trial since, like the first trial, all the charges were held in the same proceeding.

Second of all, the Trial Counsel was faced with this dilemma that if he moved to sever the charges and Mr. Cartwright was convicted on multiple -- in multiple trials, that that wouldn't lead to a longer total prison sentence, including potentially life without parole.

So Trial Counsel was put in a very difficult position where on the one hand, again, he could have moved and, perhaps, there was an argument to be made that this was not a single chain of circumstances. Mr. Phillips is making that argument.

However, on the other hand, if he was successful in that, he could expose his client to a greater total prison term, which would have, of course -- you know, we might be sitting here in an alternate universe where Mr. Phillips is arguing that that was deficient performance.

So the -- so I would suggest that it's not the Court's -- it's not proper for the Court to second-guess with the benefit of hindsight the reasonableness of trial counsel's valid trial strategy. All trial strategies involve some degree of risk, and this one was no different.

He was put in a difficult position, and he took a calculated risk that, well, if I go forward with all the charges in this one proceeding, maybe -- you know, there's no guarantee it will result in a conviction because it resulted in a hung jury last time. So, perhaps, this jury will acquit my client and that

he'd be acquitted on all the charges. Or if he was not acquitted on all the charges, he would at least be -- at least escape the harshest possible sentence.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. Well, being direct, not arguing any other -- again, one of the main things that the State has presented here is that we're not speculating on certain things as far as the alternate universe part of it.

But Under *Roseboro v. State*, 317 S.C. 292, it's a 1995 case finding that counsel must articulate a valid reason for employing a certain strategy to avoid finding ineffectiveness where counsel articulates a strategy is measured under objective standard of reasonableness.

Our argument is that when looking at this under objective standard of reasonableness, that it is unreasonable not to move to sever these charges given the significant nature of, one, the number of charges -- really, just walking through the test itself, but just the sheer number of charges in looking at the indictments spanning -- to have three different victims, in this case

three primary complaining witnesses that allege conduct -- there were three distinct large periods of time. Distinct and large periods of time that did not arise out of a single chain of circumstances, that are not proved by the same evidence. It just doesn't fit the test.

And I think when looking at the problem of prejudicial standpoint, how it would affect the outcome of the case, because that's the prejudice standard. There's no way under the standard of reasonableness that it would be reasonable for a defense lawyer not to make a motion to sever given the facts that we have in this case.

As far as saying that he could have been LWOP'd, I mean, he got a 40-year sentence. I mean, that's essentially a life sentence for him as is. Given the very nature of the number of charges, they could have practically LWOP'd him -- in fact, they LWOP'd him on just having one set of charges if he went to trial. Again, it just does not fit the test.

There were two -- two of the main issues that we presented in this PCR that really for me -- personally I felt were incredibly strong, this is certainly one of them, the severance

motion now that -- I think one that Your Honor actually didn't agree with, the B[redacted] indictment issue. But this specific one, Trial Counsel's alleged failure to sever the charges, I believe it's just -- in my opinion, does not fit the test.

When it comes to specifically prejudice in itself, this issue alone is enough of ineffective assistance of counsel that would ultimately result in the requirement of a new trial as far as deprivation of the defendant's right to a fair trial.

Again, I mean, by failing to move, we have the three primary complaining witnesses -- and again, it's not as if it's a small amount of time. There's three distinct large periods of time. They're not all happening at the same time.

They did not arise out of a single chain of circumstances. They're not proved by the same evidence. That's just based on the testimony that was presented at trial by witnesses that were necessary to -- again, when you look over this, I know Trial Counsel said he was afraid about a long term of imprisonment. But, ultimately, any -- if you had the motion to sever, he's facing a long term of imprisonment if it was just for one

alleged victim's case by itself, especially given the very nature and the number of charges, you can't -- where there's smoke, there's fire. The whole argument for propensity evidence --

THE COURT: I would -- Mr. Phillips, I'll tell you, I've just got to agree with you on that one, sir.

Attorney General, I understand your argument. I appreciate your argument. But, I mean, I just -- it's just beyond me why -- to me, of course -- like you said, I'm sitting here in this nice office, and I have to be able to go back and look at everything that took place. I understand that.

But I've also practiced law a long time. You've got three children at the same trial saying -- I don't want to say essentially the same thing, but basically alleging six allegations that the jury ultimately ends up finding Mr. Cartwright guilty beyond a reasonable doubt.

I -- in fairness, Attorney General, you know, I haven't given a whole lot of thought to your whole LWOP argument, sir. And, you know, that -- I haven't really -- I haven't really given a lot of thought to that as part of a trial

strategy, sir, which is I think one of your arguments, or, perhaps, a main argument as it relates to this matter, that that was a potentially valid strategy. But that's a tough one for me. I'll have to do some more thinking on that.

But anything else you want to say, Attorney General, concerning this?

Mr. Phillips, I think I understand your position, sir.

MR. JONES: The only thing I'd like to add, Your Honor, is that there's no guarantee that all -- that even if there had been a motion to sever these charges, there's no guarantee that all three of the victims would have -- it would have been severed into three separate trials, if it was severed at all, if the motion was granted at all, especially as to, I would say, Victims 2 and 3, the second and third chronological victims, who they lived in the same household. They were both stepdaughters of Mr. Cartwright. They both alleged a very similar and rather idiosyncratic form of abuse. These -- that was proved by the same evidence in the case.

You had the testimony of the mother and

testimony of the various investigators who handled both cases at the same time.

I'm sorry, sir.

THE COURT: No, that's all right. Listen, I appreciate you addressing my question.

But in one of them, didn't we have some crazy stuff about photographs and all this evidence about somebody being nude and pornographic stuff on the Internet?

To me, you know -- you know, to me, that one is so completely different than the other two. Not necessarily the abuse, but these other things that are just swirling around out there, they're so different than the other two, aren't they?

MR. JONES: I would submit -- I think, Your Honor, those -- that evidence was only -- was not admitted, but those allegations of pornographic images were brought up by Mr. Cartwright's to explain -- by Mr. Cartwright's attorney to basically explain why he believed his -- I believe that was Victim -- the third chronological victim, fabricated these accusations against him.

THE COURT: I thought he went to the police about that. There was something in the

police -- I can't remember --

Mr. Phillips, did he go to the police about that?

MR. PHILLIPS: He also went on the news in that specific one. It became a very -- that was obviously one of the big arguments by defense counsel as to why the allegation occurred, the motive.

Mr. JONES: Yes, Your Honor. But it was not relied on by the State as proving any element of the charged conduct. Again, it was offered by the defense to explain his theory that that victim was fabricating her allegation.

But as far as, you know, proving the similar elements of the offenses by similar evidence, that was accomplished by overlapping evidence, especially as to Victim's 2 and 3, but I would submit also as to the first victim. And there are other similarities and the timing of the -- of when different periods of abuse began and ended, which suggest that this was one single chain of circumstances. This was just how the -- how the applicant proceeded in this overarching scheme over many years to abuse his daughters and stepdaughters. That's what the evidence

suggested.

THE COURT: All right. Anything else concerning this one, Attorney General?

MR. JONES: No, Your Honor. If everyone's happy, I can move on the next one.

MR. PHILLIPS: I just want to be able to say that the last -- just as far as from the applicant's position, that that goes to the unreasonableness. That it's not trial strategy. That the defense's -- the defense's arguments in presenting that specific -- with that one, again, it's very case-specific or to that one specific alleged victim, making that a big part of their defense only highlights, again, the prejudice which would make it unreasonable to have -- to not move to sever and try these individually.

THE COURT: All right. What's next, Attorney General?

MR. JONES: The next is allegation 23, Trial Counsel's failure to object to truth-seeking language in the Trial Court's preliminary instructions to the jury.

Your Honor, the main thrust of this argument is that those statements were not rejected by the Supreme Court until the case of

State v. Beaty. And, in fact, they were a part of the Supreme Court's bench book charging instructions for Circuit Court judges -- for general sessions judges at the time of Mr. Cartwright's trial.

State v. Beaty was not decided until after Mr. Cartwright's trial. There's no requirement that Trial Counsel has to be clairvoyant or anticipate future changes in the law to appropriately represent their client.

And *State v. Beaty was not -- was not decided. This Court doesn't cite State v. Beaty in its order. It cites State v. Daniels*. However, *State v. Daniels* does not say -- I mean, I looked through *State v. Daniels*. The Court says that *State v. Daniels* stands for the proposition that any references to the word "true" must be removed from the Court's comments to the jury.

That does not appear in *State v. Daniels* anywhere that I could find. So -- and forgive me if I just missed something.

In fairness to Mr. Phillips, there was the case of *State v. Aleksey*, which called into question general statements about the jury's role in the search for the truth in the burden of proof

context.

However, that case expressly held that it was not improper to charge the jury on their role to determine who's telling the truth in the context of witness credibility. And, of course, how can you instruct the jury on what credibility even means if you're not allowed to use the word "truth" or talk about who's telling the truth?

So in that limited context, *State v. Aleksey* said there was error in the trial court instructing the jury about determining who's telling the truth. And that's exactly the context in which the trial judge made these statements.

The general context was saying that, *The jury must judge the believability or credibility of the witnesses. You determine who's telling the truth, the believability of the witnesses, their credibility. It's your civic duty to pay close attention and decide who's telling the truth.*

Again, those are the truth-seeking statements that Mr. Phillips pointed out, and this Court's order, I believe, addressed in the trial court's preliminary instructions. Those, I submit, are clearly within the context of witness credibility, which was expressly permitted by

State v. Aleksey, which was the controlling law at the time of the trial.

THE COURT: All right. Thank you, sir.

Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor. I'll go back and check whether I got the quotation from *Beaty* and *Daniels* mixed up, but I've got *State v. Daniels* pulled up here.

In the conclusion, our Court -- again, that's 401 S.C. 251, *State v. Daniels*. And the conclusion said -- the Court says, judicial instructions to the jury in a criminal case, *Whatever verdict you reach will represent the truth and justice for all parties, that we must see to it that the trial is fair and the verdict is just verdict, that you and I are 'in it together,' that may seem at first blush to be simply harmless phrase 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's inappropriate to jeopardize the constitutionality of the trial by*

instructing the jury this way.

So again, with *whatever verdict you reach will represent the truth and justice for all parties*, in 2012, our State Supreme Court made it clear that, *It's inappropriate to jeopardize the constitutionality of the trial by instructing the jury this way.*

And I'm reading it directly from the "Conclusions" section: *It is critical that jurors understand the proper application of reasonable doubt standard. The standard does not change with ensuring justice for all parties.*

And, of course, it goes into Justice Pleicones's -- his -- essentially at the end of it, it's essentially, "Justice Pleicones correctly notes that this language" --

THE COURT: Hold on. Slow down a little bit for the court reporter.

MR. PHILLIPS: I apologize.

THE COURT: That's all right.

MR. PHILLIPS: "Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt.

"Thus, I join Justice Pleicones's admonition to the Trial Court to restrict the jury's instructions to the matters of law and from issuing instructions which run the risk of depriving defendants of their right to a fair trial."

So I apologize if I -- I must have put the quote from *State v. Beaty* and had *State v. Daniels*, because I state *State v. Beaty,* I think, after that potentially in my proposed order.

But I think it's pretty clear that the law in 2012 from State v. Daniels was clear that the standard is -- when you're doing jury instructions for the judge not to shift the burden of proof in any way, that the burden must stay on the State the entire time.

And any references that the jury's verdict will be based on anything other than the evidence presented at trial, such as representing the truth and justice for parties, ultimately is an improper burden-shifting argument.

THE COURT: All right.

MR. JONES: Again, Your Honor, I would just repeat that this statement was not made in the context of telling the jury that their verdict

had to be true and just. The Court here was telling the jury that in determining witness credibility, they had to decide who's telling the truth, which is just the definition of witness credibility. And that's why *State v. Aleksey* said that's fine. Asking -- telling the jury -- mentioning the word "truth" when talking about what credibility actually means is appropriate in judicial instructions.

THE COURT: Just to let you gentlemen know, the bench book that I received still has truth throughout the charges. And they just hand it to you and say, "Here." So what happens is you've got to go through it. And every time I see the t-word, that's like a four-letter word. I just etch it out.

So I've done that numerous times. So it's 2020 -- was it this year? 2022, they're still handing out stuff loaded with "truth." But that's another story for another day.

What are we ready to move on to now, Attorney General?

MR. JONES: I'm ready to move on to allegation 25, improper arguments in the Trial Counsel's opening statement. And this is where

the Trial Counsel said in his opening statement that, "If the victims are telling the truth, then the applicant cannot be innocent."

Again, that was Trial Counsel framing the issue in terms of the -- in term so of, again, what the State was going to try to prove and what the applicant's theory of the defense was going to be, which is that the victims were not credible, they all had motivations to lie. Their allegations did not match up with the other evidence.

And so, of course, the Trial Counsel could not have established those defenses without pointing out that the victims' testimony was inconsistent with applicant's innocence and vice versa. Applicant's guilt -- or applicant's innocence was not consistent with the victims' testimony.

So you had to set out at the beginning of trial that the jury should not believe these victims. They were motivated to fabricate their accusations and he set out different motivations for each of them in the course of the trial.

And, again, that's proof by -- his whole statement of -- the small statement that appeared

in Mr. Phillips's proposed order, I submit, was taken somewhat out of context. His whole statement is, "The presumption of innocence means that the accusers in this case are either mistaken or untruthful. That's the position you have to take as you're sitting all the way through this trial, because that's what the presumption of innocence means. If they're telling the truth, he can't be innocent. If he's innocent, they can't be telling the truth."

Again, so he's stating that because of the presumption of innocence, the jury has to approach these victims critically and reject anything they say that doesn't prove beyond a reasonable doubt Mr. Cartwright's guilt.

I submit that that was a perfectly appropriate argument to make. And the mere fact that the solicitor made the same statement, basically, that if these victims are believed, then Mr. Cartwright isn't innocent. I mean, that's just the -- that was the State's theory of the case and the State was going to make that argument anyway.

So I would suggest there was neither deficiency, nor prejudice, as with regard to

allegation 25. It should have been dismissed.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. The specific here was that -- his quote was, *If they're telling the truth, then Mr. Cartwright can't be innocent*, is I believe the quote.

The whole point of raising the issue, although it does play in context with some of the other issues that are raised, was essentially that there are things that the complaining witnesses could say that are true that do not go to proving any of the elements of the offense for which he is charged.

So for defense counsel in his opening to say "If they're telling the truth," clearly, I mean, I understand what defense counsel was trying to mean in that whether specifically to the -- whether there's evidence to satisfy each and every element. But, ultimately, that statement, in and of itself, all the credibility is absolutely at issue.

And the key to me, it's a very reckless statement without him providing the additional context with it. And that's why it was raised.

THE COURT: I'm sorry, but the additional

context being what?

MR. PHILLIPS: Again, specifically the lack of evidence. And again, just because there are other things that they can prove to be as true of things that the girls are saying, but not specifically as to there being no evidence of the actual allegations themselves, I guess that's --

THE COURT: To me it's certainly saying, You've got to believe them in whole. If they're telling the truth, there's only one truth.

And so, I mean, you know, the first thing I tell a jury, they can believe all, some, any, or none. And so I don't know. That kind of -- that's one of the things that concerned me about this is because it sets up these dueling -- I mean, that's it. It sets up one or the other.

MR. JONES: Right.

THE COURT: And my -- you know, that's what struck me, Attorney General, is that it sets up this dynamic that they have to accept one or the other. And I understand what you're doing when you're finding somebody guilty, or a jury is sitting there, guilty or not guilty.

But as it relates to the truth of a particular witness, I mean, they can believe some

of what the witness is saying. They can believe that the witness is lying about certain things.

And so, I don't know, that concerned me about the -- just -- you know, he just -- he laid it out, it's one or the other, and I think -- I don't know -- that's one of the things that concerned me.

I'll let you answer anything in rebuttal to what Mr. Phillips said, sir.

Mr. JONES: Yes, Your Honor. And I would just -- I would say, his position -- Trial Counsel's position that the argument he made was based on the presumption of innocence saying that you have to assume that all of what they're saying, that could implicate my -- that could implicate my client. To the extent it implicates my client is false under the presumption of innocence. Or, In other words -- so, you know, to the extent that he did not say, you have to find that it's all false in order to find my client not guilty. He simply said that, you should start from the presumption that it is all false, and then the State will have, you know, its opportunity to prove it.

But that has to be how you start this

examination, is viewing it with a critical eye and not automatically assuming any of it is true.

So it's a negative version of, I believe -- it's the inverse of what Your Honor was complaining about.

He's not saying, *You have to find it all false in order to find my client innocent*. He's saying, *You should not -- the State has to prove it all true in order for you to find my client guilty*, which I submit would -- is -- and again, as we all know, jurors can find this or that witness truthful or false or individual statements true or false. That's their prerogative.

But I don't think it's an improper argument for Trial Counsel to make to say that, *The witnesses who are testifying against my client, don't automatically believe anything they say. Let the State -- the burden is on the State to prove that everything they say that could implicate my client is true. It's not my client's burden to show anything that they say is false. That just has to be your starting assumption*.

That's all I believe he said.

MR. PHILLIPS: I'll be brief, Your Honor. I think we had three -- each one of us articulated

it a different way I think shows how, again, potentially prejudicial this comment is where you have three lawyers who didn't see it exactly the same way.

And based on, again, Your Honor's position that it's really -- could be almost be akin to a misstatement of law in the sense that a jury does have the ability under the law to believe some of the testimony and disregard some and believe some and not the entire testimony as a whole.

To have all three of us kind of articulate a little bit different shows the confusion that would have been created in a layperson juror's mind right out of the gate in the opening statement.

THE COURT: All right. Attorney General, what you got next?

MR. JONES: Next, I have allegation 33, Trial Counsel's alleged failure to properly impeach a complaining witness with a transcript of the witness's prior testimony.

THE COURT: Yes, sir.

MR. JONES: So this instance occurred when -- I believe the witness was Victim 2, the

second chronological victim. Trial Counsel -- again, the order doesn't specify which -- what part of the trial this took place in. I'm assuming -- and Mr. Phillips can correct me if I'm wrong -- that this refers to when the Court -- when Trial Counsel was questioning Victim 2.

At the prior trial, Victim 2 was testifying about staying at a friend's house, and there was questions about whether this friend was her boyfriend who was involved in drugs.

And then in the second trial, Trial Counsel again tried to question her about whether her boyfriend was involved in drugs and whether she was involved in drugs.

At some point, he brought up a document which was not identified, as far as I could tell, in the record and said, "You see this document?" And was -- I believe, being as charitable as possible to Mr. Phillips, was trying to indicate that there was some sort of inconsistency with what she was testifying at that trial and whatever appeared in this document, but he was unsuccessful in pointing that out.

Again, I'll let Mr. Phillips say what exactly he believed was inconsistent with that

victim's testimony. It was not clear to me, at least from reading -- from reading Mr. Phillips's proposed order or this Court's order. So if nothing else, I would suggest an amendment to clarify what exactly that issue was.

However, again, it's -- as with all these allegations, it's Mr. Cartwright's burden to prove that he was prejudiced by it. And without showing what the inconsistency was alleged to be, the State submits he hasn't met that burden.

So even if there was some deficiency, which could be -- which I don't know see how there was, if there was no actual inconsistency, then there couldn't be any prejudice. Or at least none was proved by the applicant.

I'll turn it over to Mr. Phillips and I'll try to address anything he says in any particular area.

THE COURT: Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor. I was just reading the State's response.

So specifically, I think here is the situation where -- unfortunately, I don't see in my notes where I questioned Trial Counsel exactly what he had in his hand. I believe he did say he

had the first trial transcript with him, but didn't drill down into the specifics as to what exactly in his -- what was the specifics he was trying to impeach as far as that specific issue.

As far as not being able to identify the specific failure as to the inconsistency, I don't have, as the State noted, anything specific to add to that. There is no that this was a direct inconsistency, which clearly Trial Counsel believed he had because of the way the questioning occurred and obviously the document that he had.

And ultimately, the Court basically hurries him up and says he needs to move on.

But unfortunately, as far as having the specifics to show what his intent was as far as the impeachment of an inconsistency, I don't that specific information.

Now, again, deficient performance on the failure to properly impeach in the sense that he started to initiate it, that he had the -- at least with the first trial transcript, that's exactly what he had in his hand at the time. The document that's referenced would have put him in a position to properly cross-examine and impeach and point out any inconsistencies in the witness's

testimony -- prior testimony.

But as the State pointed out, there's nothing specific that we have that would show exactly what that inconsistency was. I believe that's fair to say.

THE COURT: All right. Attorney General, anything else, sir?

MR. JONES: Your Honor, I would just reiterate that without knowing specifically what the alleged inconsistency was, the allegation cannot support a finding of a grant of relief under *Strickland* because there's no clear establishment of prejudice or even of deficiency.

I mean, I grant that Trial Counsel got up there, started to ask a question, and then was told to move on by the Court when he didn't get the response he wanted. But that on its own, Your Honor, without more, there just can't be a finding of ineffective assistance based on that.

THE COURT: What about that, Mr. Phillips?

MR. PHILLIPS: You know, as far as, you know, not having the silver bullet specifically, as pointed out by the State, because we don't know directly what Trial Counsel's intent was on the

impeachment, the actual content of the inconsistency, I -- I don't have any additional response, Your Honor.

THE COURT: All right. I may be leaning toward reconsidering that matter.

All right. What's next, sir?

MR. JONES: Thank you, Your Honor.

The next allegation is allegation 34, which is the Trial Counsel's failure to object and move to strike the DSS caseworker Michelle Price's statement. This was her statement where she said -- where she said that DSS only becomes involved a case --

THE COURT: Oh, yeah. Yeah, yeah. Breaks the law, or the statute, yeah, yeah.

MR. JONES: *If it meets the legal statute*, were her exact words. So -- and the Court found that this language was prejudicial because it lowered the State's burden of proof in the eyes of the jury by suggesting the statutory elements of the offense have already been proved.

Of course, the Trial Counsel maintained he found nothing objectionable in that. And we -- the State would submit that even if there was some deficiency, there couldn't have been prejudice

from just this statement.

The -- there has to be a reasonable probability, of course, that Trial Counsel's failure to object actually caused a different result than what would have happened if he hadn't objected.

The mere possibility -- Trial Counsel admits that it's conceivable that the jury could have misunderstood what the DSS caseworker was saying as suggesting that there had been some independent investigation when there hadn't been.

A merely conceivable possibility that the jury misinterpreted some testimony is not enough to find that Trial Counsel was ineffective for not moving to strike it.

THE COURT: How do you know what weight the jury put on this? I mean, a jury sitting there can hear this, it makes it sound like the box has been checked by a State agency. So, I mean, you're basically saying that maybe the jury could have conceived this having heard that, right?

MR. JONES: Again, like anything could have happened. The fact that something could have happened does not mean it's reasonably likely that

it did happen.

THE COURT: On this one, short of a special interrogatory, you don't know what's going to happen. I mean, this one -- I mean, you've got somebody working for a State agency basically saying something along the lines of they're complying with the statute. I don't know.

MR. JONES: In my --

THE COURT: Go ahead. I'm listening, sir.

MR. JONES: All right. In my motion, I tried to set out that, in the alternative, if the -- the jury could have been moved by the statement more in favor of Mr. Cartwright because the statement essentially says, we don't start an investigation based on any proof of these -- of these claims. We start an investigation just based on whether it meets statutory criteria.

That's the correct way that statement should have been interpreted, and we would submit is the most natural way to interpret the statement, and that, of course, would have been beneficial to Mr. Cartwright because it would have suggested that the mere fact DSS opened an investigation has nothing to do with whether he was actually guilty or not. It could not support

that inference.

So our position is that this statement was just as likely, if not more likely, to help Mr. Cartwright by dispelling what might otherwise be an improper inference, that just because DSS investigated him meant he had some sort of -- meant there was some sort of finding of guilt by DSS.

According to this case worker's testimony, that's not the case. It was based on the statutory criteria only, not based on the investigation. And she goes on to explain that then we began interviewing the families and then we began our investigation.

So in this case -- so that would have clarified -- that would have clinched it that the investigation had not taken place. There was no independent evidence of this. It was just based on the statutory criteria.

THE COURT: Okay, sir.

Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

The applicant's position is that anytime you have a criminal sexual conduct with a minor -- or a criminal sexual conduct case, that certainly in this

type of context with children and DSS is involved, that it is inherently prejudicial by having DSS there. It's -- again, it's, in itself, almost propensity evidence that's being brought in that can either help bolster the State's case, or -- again, depending on the facts of each case. In this case, we have the quote of, "If it meets the legal statute in the State of South Carolina, we take a report to benefit the family.

In other words, what was presented to the DSS worker was enough that they believed it met the elements of the offense and that they were going to start the full investigation.

Which, again, we agreed with Your Honor's assessment in what we presented, that it violated due process and improperly shifted the burden based on the fact that you had a DSS worker, who in itself is, although in a limited context, able to testify in a CSC trial. There are limitations to that testimony.

And this specific testimony not only goes beyond that, adds additional to the charge itself. As Your Honor pointed out, it's impossible to know how the jury understood or tried to, but if you just take it from the plain language, what the

jury heard was that the DSS case worker believed, like an improper bolstering or vouching almost, but it's bolstering of believing -- that they believed there was sufficient evidence to initiate an investigation. It met the statute.

They don't understand what statute is being referenced or what that even means. So in and of itself, Trial Counsel's failure to object and move to strike is not only deficient performance, but certainly highly prejudicial that could deprive Mr. Cartwright of his fair -- of a fair trial.

THE COURT: All right. Anything else, Attorney General, on this one, sir?

MR. JONES: Your Honor, I would just rely on the arguments set forth in my motion.

THE COURT: Yes, sir. What else?

MR. JONES: As to allegation 40, which is Trial Counsel's failure to request a *Jackson v. Denno* hearing to challenge the voluntariness of applicant's consent to the buccal DNA swab, that, I submit, fails for multiple reasons.

THE COURT: Okay. First of all, there's is no evidence that applicant did not consent to the buccal DNA swab, which could have -- again,

we've had the evidentiary hearing. We had the opportunity to introduce some additional evidence. And no evidence was introduced that a *Jackson v. Denno* hearing or equivalent proceeding would even have resulted in the suppression of this evidence.

Second, the Court's order does not explain -- and perhaps I'm missing something -- Trial Counsel's stated reason for failing to request as *Jackson v. Denno* hearing was that he did not believe it was appropriate when it was -- when dealing with physical evidence rather than a confession or an incriminating statement.

And, Your Honor, I've researched this and I cannot find any precedent that suggests *Jackson v. Denno* hearings apply to non-statements.

Again, this was the DNA evidence that was later used to connect the semen found on the bed sheets with Mr. Cartwright. It was not an incriminating statement or a confession. So it should not -- I would submit there's no reason for a *Jackson v. Denno* hearing to consider the issue at all, and Trial Counsel could not have been deficient for failing to request something that there was no precedent suggesting it would be appropriate.

THE COURT: Right.

MR. JONES: Finally, at the trial Mr. Cartwright admitted that the semen found on the bed sheets was his. So the DNA evidence was clearly harmless and could not have prejudiced him even if it could have been excluded, which, again, there's no indication based on precedent or any other law that it would have been excluded. Or, based on any evidence presented at the evidentiary hearing, that it was not obtained consensually.

That's about all I have to say on that one, Your Honor.

THE COURT: Thank you, sir.

Mr. Phillips?

MR. PHILLIPS: On this specific issue, Your Honor, we would rest on what was presented in the proposed order.

THE COURT: All right. Let's take ten minutes.

MR. JONES: Yes, Your Honor. Thank you.

THE COURT: It's 11:38. We'll be back on at about ten to 12:00, okay?

MR. JONES: Yes, Your Honor.

MR. PHILLIPS: Thank you, Your Honor.

(A break was taken at 11:38 a.m. to 11:55 a.m.)

THE COURT: All right. Attorney General, are we going to move on to allegation 43, sir?

MR. JONES: Yes, Your Honor.

THE COURT: I'm happy to hear from you, sir.

MR. JONES: Thank you, Your Honor.

Allegation 43 is Trial Counsel's failure to cross-examination the State's witnesses about alleged discrepancies as to whose bedroom the bed sheets were taken from.

First of all, the -- as with every other allegation, the applicant has the burden in PCR to provide proof of what these discrepancies actually were. And, you know, there's a reference to different photographs taken of the different bedrooms. None of those were presented to the -- at the PCR evidentiary hearing to establish that there was, in fact, a discrepancy.

All we have is that in one trial, it was referred to as the daughter's room. And in the subsequent trial, it was referred to as the son's room.

In reality, according to the testimony of the victims, it was at different times both the son's room and the daughter's room. It was the

son's room while he was staying at the house, and then the daughter claimed in her testimony that she moved into it and that the abuse continued while she was staying in that room.

So the State submits that it's not material whether it's semantically identified as his room versus her room. The point is, it's a room in which she was staying, according to her testimony, and in which she was abused, and that's the room that the bed sheets were taken from that had Mr. Cartwright's DNA on them.

So the State's position is that Mr. Cartwright has not established any -- first of all, the existence of any discrepancy through the alleged photographs. And, second of all, the existence of any prejudice from not pointing out the discrepancy since it does not appear to have been disputed that the bed sheets were taken from a room in which Victim 3 claimed to have been abused.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor. Just to make sure I provide the proper response, just to try to make sure -- I mean, the applicant's position is that Trial Counsel had the duty to

conduct a thorough in- -- excuse me -- a thorough cross-examination of these witnesses when the State presented in the first trial one -- essentially one theory in regards to this evidence, and then in the second trial elicited, again, as the attorney general is pointing out, there's testimony that goes that there's two different times.

But, ultimately, the way it was presented from the first trial to the second trial, the applicant's position was that the cross-examination was not adequate in showing, again, essentially the discrepancy of the location of evidence that was credible to the State.

And I guess as far as being specific as to what was presented, again, even at the evidentiary hearing, I know there was a considerable amount of time on this issue, some discussion, obviously, that I remember with Your Honor regarding that specific -- that specific --

THE COURT: Yes, sir.

(Sound interruption.)

THE COURT: Mr. Phillips, I'm waiting on you.

MR. PHILLIPS: Yes, Your Honor.

So, specifically, our argument as far as what was presented in the proposed order, we're going to certainly rely on that and how it was presented going, again, as far as the discussions -- actually, I have to try and remember exactly what Your Honor's specific comments were about this exact issue during the evidentiary hearing. I think that would, obviously, provide additional context as to Your Honor's ultimate ruling in deciding the deficient performance and prejudice in this very nature.

But our specific position is that defense counsel -- Trial Counsel had obviously the duty to conduct a proper cross-examination and failed to do so in pointing out the discrepancies of this evidence.

Now, as far as having properly outlined everything -- because I understand what the State's position is in regards to that. I certainly understand that. That's why I'm trying to be very specific in how I provide my response. Because I don't want to be -- unfortunately, what I'm being now, generalizing everything as far as what was presented, as far as what his position

is.

THE COURT: Well, exactly, Mr. Phillips.

MR. PHILLIPS: I know. I had to candid about it. I understand what his position is. I'm trying not to entirely, obviously, ignore that. I want to specifically address it.

THE COURT: To be honest, the bed sheets were important, as I recollect. But now I did not recall this issue about the two-bedroom deal that the attorney general just brought up. When I say "just brought up," I don't mean that he just dumped this on me now. It's just that I didn't -- I just don't remember that.

MR. PHILLIPS: The Attorney General's Office can correct me if I'm wrong, if he has a different recollection of it. But essentially, in the first trial, the State presents evidence regarding, again, the bedroom. And then in this -- basically, in the second trial, they're saying it's not the same bedroom, the difference between one being the daughter versus the son -- in other words, that the rooms were entirely different between the first trial and the second trial.

And I think what the State's arguing is

that that's not what occurred.

Is that -- and if he clarify that and I'll try to --

MR. JONES: Yes. The State's argument is -- I mean, again, I wasn't at the first trial. I've been going off the transcript. And, of course, the transcript is what controls. So Your Honor is entitled to rely on that.

But my recollection is that in the first trial, the sheets were characterized as coming from the daughter's room. And in the second trial, they were characterized as coming from the son's room.

The problem is that the room in which the daughter claimed she was being abused, one of the rooms, was what used to be son's room before he moved out, and then she started sleeping in there.

So according to that, it could be characterized either as the son's room or as the daughter's room. I don't see that there's a material discrepancy in characterizing it one way or the other.

Now, maybe there might be a discrepancy if there was an actual -- if we had the actual photographs of the different rooms and had some

proof that these different photographs were shown and indicated, that might establish a discrepancy. I still submit it wouldn't be a material discrepancy because, again, the daughter testified she was being abused in both rooms.

However, we don't have those photographs. So even if -- so we don't even need to go that far. As with every other issue, it's applicant's burden to provide any evidence substantiating that there was an actual discrepancy that would have come out on cross-examination if his attorney had more vigorously cross-examined.

So without that proof of discrepancy, I don't see how he can prevail on this issue.

THE COURT: All right. Anything else, Mr. Phillips?

MR. PHILLIPS: No, Your Honor, other than just that I believe the specific response from our position is that Trial Counsel had the duty to try to make sure he drilled down through his cross-examination the fact that the State presented essentially inconsistent evidence the way it was presented.

Obviously, there's testimony saying that it happened in the same bedroom, but with different

individuals; one being the daughter in the first trial, the son being in the second. And that Trial Counsel's failure to properly cross-examine to, at least, extract that fact is the crux of the argument.

THE COURT: Okay.

All right. Attorney General, how about number 45, sir?

MR. JONES: Thank you, Your Honor. As to allegation 45, that's the Trial Counsel's alleged failure to object to the Trial Court's interruptions of applicant's testimony.

The transcript of the trial indicates that there were frequent cases where Mr. Cartwright, on his direct examination, would either go off on a tangent or attempt to testify to something that someone else had told him.

And the Court in those -- in a few of those instances, at least, admonished him to get back on track or to not testify to what other people were saying. I couldn't find any instances in which the Court sort of went beyond that limited role of just correcting this irrelevant or inadmissible testimony.

Mr. Phillips pointed out in his proposed

order that there was one point where the -- after that, kind of, exchange had already occurred, the judge turned to -- or actually, it might have been a leading question by Trial Counsel. The judge said to the solicitor to object more often when you hear leading questions like this.

Again, Your Honor, the State's position is that this was all a valid exercise of the trial judge's inherent power to maintain order and decorum in the courtroom. The -- that includes, and I've got cases cited in my motion for that, the authority to admonish or rebuke or warn a witness because of the witness's language or conduct or to control -- in other words, control the witness if the witness needs to be controlled.

Trial counsel admitted that Mr. Cartwright was not being -- was being rather uncontrollable in terms of giving these non-responsive answers to the questioning or trying to testify as to what someone else had told him, which would be inadmissible.

So in order to keep the trial back on track, the judge had to admonish the -- admonish Mr. Cartwright several times. That might have been -- that might have gone a certain distance

towards giving an impression of what the judge thought of his testimony, but it was unavoidable. I mean, it was just -- there was no -- there was no other way to keep Mr. Cartwright on track. And that's what I submit from -- is evident from the transcript.

Of course, when we're reading the transcript, we don't know the inflection in which these admonishments were given. We don't know the volume at which they were given. I would just, again, submit that -- the presumption that everything was proper, that the judge was not acting improperly, and that Trial Counsel was not inadequate for failing to object to it.

So, for that reason, we would submit that there was no grounds for relief on this allegation.

THE COURT: All right. Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor.

In fairness to the attorney general who wasn't there for the hearing, the testimony that was presented provided by Trial Counsel addressing these issues explained, I think, in terms of how specifically the trial judge and his demeanor and --

THE COURT: Mr. Phillips, is this where the witness got into basically describing his dealings with Judge Early and went and, basically, was trying to explain, for lack of better words, why he did not want to object to things? Is that where that came up? There was a bunch of conversation about that, sir.

MR. PHILLIPS: That's where my recollection of it occurred. Because that was part of it when we were asking, you know, as far as failing to object. And then, of course, it got brought up again. Because you had -- we had two different defense counsels in this case, and we addressed the issue with both of them.

Initially, the first -- and both lawyers said similar things about -- I think one of the -- I can't -- this is a paraphrase, not a direct quote, you know, of Judge Early. It's just the way Judge Early was. That's how he ran his courtroom. You knew not to basically object any further or make certain arguments or motions or say certain things because of the way it would come across to the jury, and how he would basically treat you for the remaining portion of the trial.

And again, none of that makes it proper. And given -- just walking through that set of the scenario where a jury sees a judge interjecting -- instead of being a neutral and detached gatekeeper, but asserting himself into the trial and telling the prosecutor to object more, and specifically, you know, challenging or -- again, no doubt judges have a responsibility to maintain order and decorum.

However, applicant's argument is that this went far beyond that, that it exceeded that inherent power and it ultimately became highly prejudicial in such that Trial Counsel had a duty to object and to try to -- again, failure to object to stop the Court from conducting this type of inherently prejudicial conduct with the defendant directly as well as with counsel himself.

THE COURT: Attorney General?

MR. JONES: Your Honor, I would just submit that there is no -- that the only possible -- that any potential inference of impartiality is purely speculative based on all of this.

Again, we don't know -- first of all, the

judge never said or make any suggestion he didn't believe Mr. Cartwright or he didn't think Mr. Cartwright was innocent, or anything like that. It was simply trying to keep him on track.

And the fact that he had to do it a bunch of times and had to admonish Mr. Cartwright and the solicitor to try and keep Mr. Cartwright's testimony on track, that was necessitated by -- in pursuance of the Court's responsibility to maintain decorum in the courtroom.

Without further evidence that there was some egregious violation of that, of the judge's partiality or appearance of violation, again, we submit that the record simply establishes there was a breach of decorum. The Trial Court corrected the breach of decorum. And that's -- that was within the Trial Court's authority and was not objectionable.

THE COURT: All right. What's next, Attorney General?

MR. JONES: Next, I believe this is the last one, Your Honor, allegation 48, the failure to object to the Trial Court's jury instruction that the testimony of a victim need not be corroborated.

THE COURT: Yes, sir.

MR. JONES: That instruction was recently rejected in *State vs. Stukes.* I say recently, but 2016. But the point is, it was rejected after the close of the case, after the end of Mr. Cartwright's trial.

So, once again, Trial Counsel has no responsibility to foresee future changes in the law and object on that basis even if he could.

But, again, at the time of applicant's trial, the instruction was expressly permitted by Supreme Court precedent, and that case is *State v. Rayfield*, which expressly held that jurors may be instructed that a victim's testimony need not be corroborated.

So again, Trial Counsel had no basis to object on the express precedent that was available to him at the time. The fact that that has later been rethought is simply not enough to establish defense --

THE COURT: I understand your argument.

What about that, Mr. Phillips?

MR. PHILLIPS: Going directly to the responses, although Trial Counsel does not have to be clairvoyant or have to anticipate, I think they

do have a reasonable duty to anticipate reasonable changes in the law, challenges that -- clearly in the law that are based -- that are inherently -- that are unconstitutional based on a review on the standard or reasonableness if that's what we would say, touched on many things on the law as reasonableness.

Many lawyers back at that point were challenging that statute for many years. I know even myself. But under a standard of reasonableness, clearly the lawyers in *State v. Stukes* didn't have to be clairvoyant to make the argument to challenge that instruction as being unconstitutional. And they were successful in doing so, and ultimately that changed the law.

So although the -- Trial Counsel doesn't have to be clairvoyant, I think Trial Counsel has a duty to have a reasonable anticipation of potential changes in the law and identifying things that are unconstitutional in the law in making those arguments. This was unconstitutional -- held later unconstitutional, and a reasonable attorney would have made that objection.

THE COURT: All right.

MR. JONES: Your Honor, just to rebut that, I would suggest that if Your Honor adopted that, that would totally abrogate the clairvoyance doctrine in every case. It's very common for, you know, this or that instruction or this or that action of the Trial Court to, from time to time, be declared unconstitutional. And it's true that that is the result of enterprising attorneys who raise those issues.

However, if we adopt Mr. Phillips's version of the clairvoyance doctrine, it would just impose a duty on every attorney to object every time there is -- like there is any conceivable argument even if it has been -- even if there's been a case like this one where what he's objecting to was expressly permitted by binding Supreme Court precedent. We submit that that's taking the doctrine much too far and essentially abrogating it completely.

THE COURT: All right.

MR. JONES: Your Honor, I want to apologize. I skipped right over allegation 47. That's just another objection to the truth-seeking language in the Court's jury instructions. This time the closing jury instructions. It's very

similar to the earlier one, and most of the same law applies.

THE COURT: All right. Anything else you want to tell me, Attorney General?

MR. JONES: There were some minor issues. One was in regards to Allegation 9, which was a very general objection, I believe, to closing -- to jury instructions.

This Court dismissed that allegation without prejudice in its order. And I would submit that any allegation that's denied and dismissed should be dismissed with prejudice because a PCR applicant only gets one bite at the apple. So...

THE COURT: I think that would be correct, Mr. Phillips.

MR. PHILLIPS: Understood.

THE COURT: All right. That's fine.

Yes, sir. What else?

MR. JONES: The only other things are the inconsistencies in, again, Your Honor's disposition of Mr. Cartwright's claims of ineffective assistance of appellate counsel. I believe the first and second argument -- or allegation alleged, Your Honor correctly, in my

view, denied and dismissed those.

But in the order, Your Honor states that the -- that as discussed in Allegations 13 and 14, there was no deficiency shown from either of these statements of Dr. Benedetto or problems with Dr. Benedetto's testimony. That's inconsistent with Your Honor's actual disposition of Allegations 13 and 14, which did not address the prejudice. And, in fact, found that Mr. Cartwright was entitled to relief based on those grounds.

So I would suggest that if Your Honor submits an amended order that that inconsistency be resolved.

THE COURT: Mr. Phillips, let me hear from you on that.

MR. PHILLIPS: I really specifically want to make sure -- could he clarify that one time? I apologize. I want to make sure I'm -- I don't want to go off a tangent myself.

MR. JONES: Forgive me if I'm getting the numbers wrong, but I believe it's ineffective of appellate counsel, Allegations 1 and 2. Your Honor's order states -- I'm mistaken. I'm sorry. It's Allegations 2 and 3. Your Honor's order

states, and I quote, "As discussed in response to applicant's allegation 13, the Trial Court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge." And, therefore, there could not have been -- the jury could not have been improperly influenced, et cetera.

So that discussion does not actually appear in the Court's disposition of Allegation 13. It's possible that this is just a clerical error where the Court copied and pasted perhaps from the State's proposed order as to these appellate allegations and without addressing the --

THE COURT: Are you saying in the appellate I said one thing, and on the trial I said the other? There's an inconsistency of those two?

MR. JONES: Yes, Your Honor.

THE COURT: I should be consistent one way or the other? Is that what you're telling me, sir?

MR. JONES: Yes, Your Honor. And I would prefer it if it was consistently in favor of the State, but, of course, that's up to you.

THE COURT: Good one. Good one.

All right. Mr. Phillips, what about the position that he states that the order is inconsistent and that, basically, if I find that the appellate lawyer, for lack of better words, didn't mess up, then the same type of thing and I would be found to show that the trial lawyer didn't mess up? Is that correct, Attorney General?

MR. JONES: Well, specifically, I think the glaring problem from our perspective is that each of those allegations in the appellate section expressly reference the earlier allegations and say that there was no problem with it. That's the inconsistency. There might be some reason to distinguish the appellate performance from the trial performance. That's up to Your Honor.

THE COURT: All right.

MR. JONES: But those sections there, of course, are --

THE COURT: What about that, Mr. Phillips? What about between the appellate and the trial?

MR. PHILLIPS: We have no issue in resolving the inconsistency. Now, as a whole, the

issues of ineffective assistance of appellate counsel are not outcome determinative on ineffective assistance of Trial Counsel. The way they were couched, at least the allegations, were in the event Trial Counsel had properly preserved those issues where they would have been able to be appealed.

Whether the issues were preserved for appellate review is really kind of step one. And then the next step was if they were preserved for appellate review, then it was ineffective assistance of counsel not to raise those issues.

So I certainly have no issue with the State's argument as far as resolving any inconsistency in the order regarding that. However, the issues themselves, outside of the inconsistency -- just because, again, that you have ineffective assistance of appellate counsel issue that directly relates to an ineffective assistance of Trial Counsel issue, in and of itself, does not automatically render the other one improper other than to clarify any inconsistency that directly cuts at, you know, at the ineffective assistance of trial.

But the specific allegation was whether

if it was preserved, then the appellate counsel had a duty to raise it.

And obviously, the standard -- the case law is different for ineffective assistance of appellate counsel, definitely much more latitude in deciding what issues to raise than basically the burden that's on Trial Counsel.

THE COURT: All right. What else, gentlemen?

MR. JONES: I believe that's all from the State. In fairness to Mr. Phillips, I would agree broadly that it could be possible to have consistent findings in the appellate section and in the trial section of this order. The only I would say facial inconsistency is the explicit references to Allegations 13 and 14 in the appellate section of the order.

THE COURT: All right. Mr. Phillips, anything else?

MR. PHILLIPS: Yes, Your Honor. In closing, the applicant doesn't waive any of the issues raised and argued at the evidentiary hearing and raised in the proposed order. I wanted to preserve that for appellate review as well. All the other issues that were raised, and,

obviously, that the Court decided differently on, if it was raised in the applicant's proposed order, that we're not waiving any of those issues and that we stand fast, obviously, with those issues.

The other issue that Your Honor -- one of the issues that Your Honor disagreed with the applicant on that -- as I noted earlier, that I feel is a very strong issue related to ineffective assistance of counsel is the indictment issue arguing under *State v. Baker*.

If Your Honor gives me one moment, I'll get it.

The argument was that the Trial Counsel failed to move to quash the 28 indictments against the applicant is unconstitutionally over broad and vague, specifically arguing that Trial Counsel was ineffective in failing to make those allegations to -- or failing to make the motion to quash the indictments because each indictment for the alleged offenses occurred at unspecified times over an entire year. The combined indictments covered a total period of over 18 years. And our argument was that in looking at *State v. Baker*, that did occur after that case -- that specific

case. There's certainly case law that goes prior to *State v. Baker*. But *State v. Baker* is a good case to, kind of, outline the law from 2015 that counsel was ineffective for failing to move to quash.

Personally, again not waiving any of the other issues, the two issues that applicant's counsel believes to be very strong issues was one that Your Honor agreed with, the motion for severance, that Trial Counsel failed in moving to sever. And then, of course, this other issue on the failure to move to quash the indictments.

THE COURT: All right. Attorney General?

MR. JONES: Your Honor, just, you know, Mr. Phillips had the same opportunity to file a Rule 59 motion addressing that specific issue, that the State had to address the other 15 issues that we addressed, and is bringing it up for the first time here on this motion for reconsideration.

Well, I suppose not for the first time since it was addressed earlier. But we still have not had notice that this would be considered at the -- at this hearing.

However, I would just submit that this

Court's order considered the *State v. Baker* issue very thoroughly in its discussion of the indictments and rejected that allegation and denied it -- dismissed it with prejudice I believe correctly, and I believe that the Court's analysis was proper.

THE COURT: All right. Thank you-all. You-all did a very thorough job of this case for and against Mr. Cartwright on that. And the State's done a great job. And Mr. Phillips, you've done a good job. It's been interesting. I've enjoyed it.

What I'm going to do is, I'm going to probably for the next two weeks -- I'm on vacation next week, but I'll be in chambers the following week. I'll try to put together -- I may supplement my order and just address the matters that came up today in a supplement. I'll decide how I'm going to deal with that. I'll work with Monica and we'll come up with something. But I hope to have the answer to you-all in the near future. Okay?

MR. PHILLIPS: Yes, Your Honor.

MR. JONES: Thank you, Your Honor.

(End of hearing.)

CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in General Sessions, Richard County, South Carolina.

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

February 15, 2023

_____
Sharon G. Hardoon, CSR
Official Circuit Court Reporter, II

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

IN THE COURT OF **COMMON PLEAS**

SECOND JUDICIAL CIRCUIT

Case No.: **2019CP0201582**

AMENDED
ORDER GRANTING APPLICANT POST-CONVICTION RELIEF

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

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After 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, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). . In June 2022, the State filed a Rule 59(e) SCRCP, motion to alter or amend the

Court's order granting post-conviction relief to Harold Cartwright. On June 24th, 2022 the Court has a hearing on the matter via Webex. 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, however the Court has made several clarifications and modifications to its previous order.

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor, first degree; sixteen (16) counts of lewd act with a minor; two counts (2) criminal sexual conduct with a minor, second degree; one (1) count of criminal sexual conduct, first degree; and one (1) count of criminal sexual conduct, third degree.

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

On September 30, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App.

filed September 30, 2015). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Applicant, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

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

On June 26, 2019, Applicant filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

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

> Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).
>
> Appellate Counsel denied Applicant's right to effective

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

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

(1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

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

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

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

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

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

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

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

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

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

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

(12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. *See State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).

(13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in camera* hearing). *See* Rule 702, 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).

(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 701and 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. 114,

470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).

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

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

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

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

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

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

important to see how we grouped these indictments together."

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

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

(27) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda [redacted] (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 [redacted] that ultimately convinced you to recant?", and Victim 1 responded, "Yes." This highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. *See* U.S. Const. amends. V, VI, XIV.

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

(34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.

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

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

(37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked

a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. *See* U.S. Const. amends. V, VI, XIV.

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

(39) Trial Counsel failed to object during the "acting-out" of Buffy [redacted] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. *See State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).

(40) Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. *See* U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).

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

(42) Trial Counsel failed to object and move to strike the State's redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel

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

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

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

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

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

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

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

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

(50) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. 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 701and 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).

EVIDENTIARY HEARING

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

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

Chief Appellate Defender Robert Dudek testified regarding his experience as an appellate defender. Mr. Dudek also testified that the prosecution's use of Applicant's attempted suicide as evidence of guilt was a novel issue in South Carolina. Mr. Dudek further testified that based on his research there was a jurisdictional split. Mr. Dudek maintained that he ultimately decided not to file a Petition for Writ of Certiorari to the

United States Supreme Court because he did not believe this was a federal issue. As to the remaining issues raised by Applicant regarding ineffective assistance of Appellate Counsel, Mr. Dudek maintained that he only raised meritorious issues that were preserved for appellate review.

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

Public Defender Michael Routzong maintained that he met with Applicant for hours and reviewed the discovery with him. Mr. Routzong stated that he does not remember whether he reviewed all the photographs with Applicant or the names of any specific witnesses to interview. Mr. Routzong indicated that he discussed trial strategy with Applicant, including the defense strategy of attacking the credibility of the State's witnesses. Mr. 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 [redacted] alleged involvement in an unrelated drug investigation, or whether there were any

possible deals provide by the police or Prosecutor's office. Mr. Routzong further acknowledged that he did not consult with an expert witness regarding any DNA or digital evidence.

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

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

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

Mr. Routzong testified that he did not believe the admission of Applicant's consent

to search form and buccal swab obtain by the State constituted a statement and was therefore not a *Jackson v. Denno* issue. Mr. Routzong did not believe the Trial Court's initial instructions to the jury constituted burden shifting. Mr. Routzong also did not believe that the State's opening statement was prejudicial when the Prosecutor argued that the dates on the indictments were true.

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

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

Mr. Routzong noted that he should 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 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had

a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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 alleges 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 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).)

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 alleges 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 alleged failure to investigation a Victim's potential deal with the State.

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges 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., *Martin*, 427 S.C. at 455, 832 S.E.2d at 279–80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into Applicant's character at trial. See *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nine: Trial Counsel's alleged 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 alleges 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 alleges 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 alleges 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*, 411 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*, 411 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred "between June 1, 1998 and September 1, 2004." *Id.* at 586–87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. *Id.* at 590–92, 769 S.E.2d at 864–65. Applicant alleges the Baker holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of Baker are significantly different from the facts of this case. Applicant's indictments have not been amended, and Applicant's defense was based on attacking the victims' credibility, not on an alibi. In addition, each of Applicant's indictments alleged offenses occurring within a one-year period, a much more specific

time frame than the six-year period alleged in each of Baker's indictments. Finally, the Baker Court suggested that the indictments would have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances "with a practical eye," this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. See *Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). 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 Thirteen: Trial Counsel's alleged failure to object to the legal standard used for qualifying the State's expert witness.

Applicant alleges Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to voir dire of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702,

SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White,* 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

The Court finds that Trial Counsel's failure to object to the standard used to qualify the State's expert witness, and the fact that this circumstances described above occurred in the presence of the jury amounted to deficient performance by Trial Counsel.

Allegation Fourteen: Trial Court's alleged failure to object and move to strike part of the testimony of the State's expert witness.

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

The Court finds that Trial Counsel's failure to object and move to strike the expert witness's testimony amounted to deficient performance by Trial Counsel. Dr. Benedetto's testimony that abusers are often interested in victims of a particular age went beyond the scope of her expertise, which was limited to the perspective of child victims. Although Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise.

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

The Applicant alleges Trial Counsel erroneously stipulated to a witness, Buffy [redacted] 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 [redacted] stage 4 lung cancer appears to have advanced to the point that she was taken off all treatments but palliative care and pain management. It is not likely the trial court would have ordered [redacted] to appear in that condition, even if Trial Counsel had not stipulated that she was medically unavailable. See Rule 804(a)(4), *SCRE*. In addition, Trial Counsel testified he thought [redacted] illness would make her a very sympathetic witness for the State. Because Trial Counsel articulated a valid strategic reason for not seeking [redacted] presence 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 117-18, 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 alleges 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 alleges 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 alleges Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See *U.S. Const. amends.* V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748

S.E.2d 247 (Ct. App. 2013).

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's alleged failure to sequester witnesses.

The Applicant alleges 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.*

All the witnesses had participated in the prior trial but counsel could not tell the Court if the witnesses had the opportunity to hear each other's testimony during the first trial. Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would have achieved nothing. However, the Court believes that Trial Counsel was deficient in

failing to sequester 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.

Allegation Twenty: Trial Counsel's alleged failure to object during voir dire and move for further voir dire.

The Applicant alleges Trial Counsel by failed to obje requesting a new trial based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

ct 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.

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 if he had been made aware. The Court believes it is the clear 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. The Court believes that Trial Counsel was deficient for failing to

ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review.

Allegation Twenty One: Trial Counsel's alleged failure to preserve a juror's conversation with the Court.

The Applicant alleges 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 of his peremptory strikes, because only nine jurors were struck in total, and he had ten strikes. However, Trial Counsel 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.

Allegation Twenty Two: Trial Counsel's alleged failure to sever the Applicant charges.

The Applicant alleges that 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).

The Court finds that Trial Counsel was deficient for failing to sever the charges. The Applicant's charges involved three separate victims over an extended period of time. Although at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a longer total term of imprisonment, the State's case was strengthened with the amount of victims presented to the jury at one time, especially when the credibility of the victims was a central issue of the Defense's case. The charges did not arise out of a single chain of circumstances and were not proved by the same evidence, however the State's case was potentially improperly bolstered by the testimony of these Victims together coupled with the State's expert witness commenting that the offenders typically seek out victims in a particular age range.

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

The Applicant alleges 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, 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).

Trial Counsel was deficient for failing to object to this language regarding 'true" and "just" verdicts. At the time of this trial the South Carolina Supreme Court issued clear language in *Daniels*, that any reference to the word "true" must be removed from the Court's comments to the jury.

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

The Applicant alleges 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 alleges 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.

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

The Applicant alleges 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 alleges 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 alleges 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. All 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 2011 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 117-18, 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 alleges 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 alleges 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 alleges 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(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty Four: Trial Counsel's alleged failure to object to the DSS case worker's allegedly prejudicial testimony.

The Applicant alleges 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". The Applicant alleges that 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*.

At the evidentiary hearing, Trial Counsel admitted the possibility that the jury may have inferred DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. However, the Court disagrees and finds that Trial Counsel was deficient for failing to object these comments as they amounted to a comment on a legal issue and was prejudicial to the Applicant because it lowers the State's burden in the eyes of the jury.

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

The Applicant alleges 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 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).

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(d)(1)(B), *SCRE*. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 alleges that Trial Counsel failed to object and preserve for appellate review the admission of Buffy [redacted] 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 [redacted] was played by Ms. Emma Dicks. The solicitor, therefore, could not have inserted improper inflections and mannerisms into their performances, which greatly limits the scope of potential prejudice.

Trial Counsel testified at the evidentiary hearing that he had the same ability to alter mannerisms. He also testified he could not remember the solicitor making any

exaggerated or excessive mannerisms. This Court finds Applicant has not met his burden to prove that the "acting out" of [redacted] testimony was harmful to his case. See *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

The Applicant alleges that Trial Counsel failed to object during the "acting-out" of Buffy [redacted] prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting 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 [redacted] testimony, because it was admitted and presented to the jury as a whole; he also believed the trial judge would not agree to strike the whole thing, because [redacted] unavailability made the prior trial transcript admissible. This Court finds Trial Counsel was not ineffective because he articulated a valid strategic reason why he did not object to the question. See Underwood, 309 S.C. at 562, 425 S.E.2d at 22.

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

The Applicant alleges Trial Counsel failed to request a Jackson v. Denno, 378 U.S. 368 (1964), hearing to challenge the voluntariness of his consent to the buccal swab that was later used to match his DNA to that of the semen on the bedsheet. This Court finds

this allegation to be without merit. As discussed above, Applicant admitted the semen was his; he simply denied that it was related to any criminal activity. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. This Court finds Applicant has not proved that, but for the alleged error of Trial Counsel, the result of Applicant's trial would have been different. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 in order 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Three: Trial Counsel's alleged ineffective assistance for failing to inquire about a discrepancy between the first trial and the second trial.

The Applicant alleges 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 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.

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

The Applicant alleges 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; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; Rule 71.1(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Five: Trial Counsel's alleged failure to object to the Court stopping the Applicant's testimony.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury suasponte, 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

Trial Counsel was deficient for failing to object the Court's comments and the only reason articulated to the Court to explain this deficiency was Counsel's perception that if he objected he would fall out of favor with the trial judge. This fear of objecting to avoid what Counsel deemed as upsetting the trial judge was referenced multiple times in the PCR hearing and is not an objectively reasonable strategic choice to explain Counsel's

failure to object on behalf of his client.

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

The Applicant alleges 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 117-18, 386 S.E.2d at 625. Thus this allegation is denied and dismissed with prejudice.

Allegation Forty Seven: Trial Counsel's alleged to object to the Court's closing instructions.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...," and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). The Court followed the language that was provided at the time and cannot be expected to predict all possible changes in the law. Therefore the Court denies and dismisses the allegation with prejudice.

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

The Applicant alleges 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.

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

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

Appellate Counsel was deficient for failing to request such review, or that he likely would have obtained review had he requested it. *See id.*; Rule 71.1(e), SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Two: Appellate Counsel's alleged failure to raise issues related to Dr. Benedetto's qualification as an expert in child sexual abuse dynamics.

Applicant alleges 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 alleges Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without merit. 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 117-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

Allegation 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 cumulative error and the prejudice suffered from the individual allegations that were found by this Court. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); See *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Here, the Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified eleven (11) errors that

individually and cumulatively create prejudice against the Applicant. "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 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, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See *Strickland,* 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). The Applicants first trial ending 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*, 466U.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). The 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, §§ 3 and 14; *S.C. Code* § 17-27-20(A)(1), (4), and (6). Therefore this PCR application must be granted and Applicant shall receive a new trial.

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

IT IS SO ORDERED!

The Honorable Robert J. Bonds
Presiding Judge

July 11, 2022

Walterboro, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Case No. 2019-CP-02-1582

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

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Robert J. Bonds' Order granting post-conviction relief, filed June 6, 2022. The State's subsequent motion to alter or amend was denied by written order filed on July 27, 2022, and received by the State on August 2, 2022. Copies of both orders are attached hereto.

August 8, 2022,

Respectfully submitted,

ALAN WILSON
Attorney General

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By: _____
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FILED August 12 20 22
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Case No. 2019-CP-02-1582

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

v.

State of South Carolina,.....Petitioner.

PROOF OF SERVICE

I, Zachary W. Jones, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon Respondent Harold Cartwright by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Dayne C. Phillips, Esquire
Price Benowitz, LLP
1614 Taylor Street, Suite D
Columbia, South Carolina 29201
(803) 272-4503

I further certify that all parties required by Rule to be served have been served this 8th day of August, 2022.

ZACHARY W. JONES
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Transcript Request Form

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Full Name Joshua Osborne	**Phone Number** 803-734-7217	**Email Address** secondcircuitpcr@scag.gov	
Mailing Address Post Office Box 11549	**City** Columbia	**State** SC	**Zip Code** 29211

Transcript Information		
Docket Number 2019-CP-02-1582	**Case Caption** (i.e. State v. John Doe or Smith v. Smith) Harold Cartwright V. State of South Carolina	
Date(s) of Proceeding 06/24/2022	**Circuit** ☒ **Family** ☐	**County** Aiken
Presiding Judge Robert J. Bonds	**Expedited** **Yes** ☐ **No** ☒	
Court Reporter(s) Sharon Hardoon	**Opposing Counsel** Dayne C. Phillips	

Requestor's Signature: Joshua Osborne **Date:** 08/08/2022
(Typed name will serve as signature)

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Transcript Information		
Docket Number 2019-CP-02-1582	**Case Caption** (i.e. State v. John Doe or Smith v. Smith) Harold Cartwright V. State of South Carolina	
Date(s) of Proceeding 02/03/2022	**Circuit** ☒ **Family** ☐	**County** Aiken
Presiding Judge Robert Bonds	**Expedited** **Yes** ☒ **No** ☐	
Court Reporter(s) Stacy S. Johnson	**Opposing Counsel** Dayne C. Phillips	

Requestor's Signature: Joshua Osborne **Date:** 06/06/2022
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THE STATE OF SOUTH CAROLINA	IN THE COURT OF **COMMON PLEAS**
COUNTY OF **AIKEN**	**SECOND** JUDICIAL CIRCUIT
Harold Cartwright,	Case No.: **2019CP0201582**
Applicant,	
v.	**ORDER GRANTING APPLICANT POST-CONVICTION RELIEF**
State of South Carolina,	
Respondent.	

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

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After reviewing the proposed orders from the parties and weighing the evidence presented at the hearing, this Court grants the PCR application requesting a new trial based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor, first degree; sixteen (16) counts of lewd act with a minor; two counts (2) criminal sexual conduct with a minor, second degree; one (1) count of criminal sexual conduct, first degree; and one (1) count of criminal sexual conduct, third degree.

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

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

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

filed September 26, 2018).

On June 26, 2019, Applicant filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

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

> Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).
>
> Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

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

(1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

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

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

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

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

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

(7) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and

reputation. *See State v.* Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

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

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

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

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

(12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. *See State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).

(13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in camera* hearing). *See* Rule 702, 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).

(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 701and 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. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).

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

(20) Trial Counsel by failed to object and move for individual *voir dire* when the Trial Court indicated to Counsel during the *voir dire* process that several jurors approached him regarding "similar types of behavior." Notably, Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.

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

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

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

(38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy 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 #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. *See* U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).

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

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

(43) Trial Counsel provided ineffective assistance where Applicant stated *in camera* at the end of the State's case that in the first trial, the State proffered evidence and pictures of the sheets that tested for DNA were taken from Victim 3's actual room, yet in this trial, the State elicited testimony based on different pictures that the same sheets were taken from a different bedroom

(victim's brother's old bedroom), where Counsel failed to cross-examine the State's witnesses regarding this discrepancy (the location of evidence critical to the State's case, and it is unknown whether Trial Counsel obtained a complete copy of the prior trial transcript before the second trial. However, it true, then failing to examine this area cannot be a valid trial strategy).

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

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

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

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

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

(49) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. *See State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881

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

(50) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. 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 701and 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).

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 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 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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 alleges 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 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).)

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 alleges 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 alleged failure to investigation a Victim's potential deal with the State.

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges 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., *Martin*, 427 S.C. at 455, 832 S.E.2d at 279–80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into Applicant's character at trial. See *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nine: Trial Counsel's alleged 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 without prejudice.

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

Applicant alleges 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 alleges 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 alleges 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*, 411 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*, 411 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred "between June 1, 1998 and September 1, 2004." *Id.* at 586–87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. *Id.* at 590–92, 769 S.E.2d at 864–65. Applicant alleges the Baker holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of Baker are significantly different from the facts of this case. Applicant's indictments have not been amended, and Applicant's defense was based on attacking the victims' credibility, not on an alibi. In addition, each of Applicant's indictments alleged offenses occurring within a one-year period, a much more specific

time frame than the six-year period alleged in each of Baker's indictments. Finally, the Baker Court suggested that the indictments would have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances "with a practical eye," this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. See *Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). 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 Thirteen: Trial Counsel's alleged failure to object to the legal standard used for qualifying the State's expert witness.

Applicant alleges Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to voir dire of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702,

SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

The Court finds that Trial Counsel's failure to object to the standard used to qualify the State's expert witness, and the fact that this circumstances described above occurred in the presence of the jury amounted to deficient performance by Trial Counsel.

Allegation Fourteen: Trial Court's alleged failure to object and move to strike part of the testimony of the State's expert witness.

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

The Court finds that Trial Counsel's failure to object and move to strike the expert witness's testimony amounted to deficient performance by Trial Counsel. Dr. Benedetto's testimony that abusers are often interested in victims of a particular age went beyond the scope of her expertise, which was limited to the perspective of child victims. Although Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise.

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

The Applicant alleges 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 117-18, 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 alleges 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 alleges 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 alleges Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See *U.S. Const. amends.* V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748

S.E.2d 247 (Ct. App. 2013).

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's alleged failure to sequester witnesses.

The Applicant alleges 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*.

All the witnesses had been present at the prior trial and had already heard one another's testimony. Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would have achieved nothing. However, the Court believes that Trial Counsel was deficient in failing to sequester 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.

Allegation Twenty: Trial Counsel's alleged failure to object during voir dire and move for further voir dire.

The Applicant alleges 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.

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 if he had been made aware. The Court believes it is the clear 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. The Court believes that Trial Counsel was deficient for failing to ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review.

Allegation Twenty One: Trial Counsel's alleged failure to preserve a juror's conversation with the Court.

The Applicant alleges 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 of his peremptory strikes, because only nine jurors were struck in total, and he had ten strikes. However, Trial Counsel 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.

Allegation Twenty Two: Trial Counsel's alleged failure to sever the Applicant charges.

The Applicant alleges that 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).

The Court finds that Trial Counsel was deficient for failing to sever the charges.

The Applicant's charges involved three separate victims over an extended period of time. Although at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a longer total term of imprisonment, the State's case was strengthened with the amount of victims presented to the jury at one time, especially when the credibility of the victims was a central issue of the Defense's case. The charges did not arise out of a single chain of circumstances and were not proved by the same evidence, however the State's case was potentially improperly bolstered by the testimony of these Victims together coupled with the State's expert witness commenting that the offenders typically seek out victims in a particular age range.

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

The Applicant alleges 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, 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).

Trial Counsel was deficient for failing to object to this language regarding 'true" and "just" verdicts. At the time of this trial the South Carolina Supreme Court issued clear language in *Daniels*, that any reference to the word "true" must be removed from the

Court's comments to the jury.

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

The Applicant alleges 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 alleges 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.

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

The Applicant alleges 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 alleges 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 alleges 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. All 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 2011 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 117-18, 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 alleges 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 alleges 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 alleges 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(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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.

Trial Counsel was deficient if failing to obtain the transcript of the Applicant's first trial. The Applicant's second trial had the same witnesses and the credibility of the complaining witnesses was central to the Applicant's defense. Trial Counsel's failure to obtain this transcript amounted to a failure to impeach these witnesses

Allegation Thirty Four: Trial Counsel's alleged failure to object to the DSS case worker's allegedly prejudicial testimony.

The Applicant alleges 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". The Applicant alleges that 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*.

At the evidentiary hearing, Trial Counsel admitted the possibility that the jury may have inferred DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. However, the Court disagrees and finds that Trial Counsel was deficient for failing to object these comments as they amounted to a comment on a legal issue and was prejudicial to the Applicant because it lowers the State's burden in the eyes of the jury.

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

The Applicant alleges 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 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).

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(d)(1)(B), *SCRE*. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges that Trial Counsel failed to object and preserve for appellate review pursuant to Due Process andto the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. See *U.S. Const. amends.* IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S.

368 (1964).

The Court finds that Trial Counsel was deficient for failing to object to the admission of this evidence under *Jackson v. Denno*. Counsel's only explanation for this was that he did not think a hearing was needed because the evidence at issue was not a statement.

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 alleges 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 in order 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Three: Trial Counsel's alleged ineffective assistance for failing to inquire about a discrepancy between the first trial and the second trial.

The Applicant alleges 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 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.

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

The Applicant alleges 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; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; Rule 71.1(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Five: Trial Counsel's alleged failure to object to the Court stopping the Applicant's testimony.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury suasponte, 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

Trial Counsel was deficient for failing to object the Court's comments and the only reason articulated to the Court to explain this deficiency was Counsel's perception that if he objected he would fall out of favor with the trial judge. This fear of objecting to avoid what Counsel deemed as upsetting the trial judge was referenced multiple times in the PCR hearing and is not an objectively reasonable strategic choice to explain Counsel's failure to object on behalf of his client.

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

The Applicant alleges 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 117-18, 386 S.E.2d at 625. Thus this allegation is denied and dismissed with prejudice.

Allegation Forty Seven: Trial Counsel's alleged to object to the Court's closing instructions.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions

to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...," and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). The Court believes that Trial Court was deficient in failing to object to the reference to the truth language despite the clear case law on these type of comments.

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

The Applicant alleges 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.

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

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

Allegation Two: Appellate Counsel's alleged failure to raise issues related to Dr. Benedetto's qualification as an expert / child sexual abuse dynamics.

Applicant alleges Appellate Counsel should have raised the issues of Dr. Benedetto's qualification as an expert as set forth in Allegation 13 discussed above. This Court finds this allegation to be without merit. As discussed in response to Applicant's Allegation 13, the trial court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge. *See Fields*, 363 S.C. at 25, 609 S.E.2d at 509. In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until later, so any error in holding the qualification procedure in the jury's presence was harmless. *See State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013). Applicant has failed to prove that Appellate Counsel was ineffective for failing to raise this issue on appeal. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without

merit. As discussed in response to Applicant's Allegation 14, Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case, and any deficiency in failing to raise it on appeal did not prejudice Applicant. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

those issues he believed were most likely to obtain a favorable result. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation 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 cumulative error. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); See *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect

the outcome of the trial). Here, the Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified fourteen (14) errors that individually and cumulatively create prejudice against the Applicant. "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 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, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See *Strickland,* 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). The Applicants first trial ending 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*, 466U.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). The 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, §§ 3 and 14; *S.C. Code* § 17-27-20(A)(1), (4), and (6). Therefore this PCR application must be granted and Applicant shall receive a new trial.

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

IT IS SO ORDERED!

The Honorable Robert J. Bonds
Presiding Judge

June 1, 2022

Walterboro, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Harold Cartwright, #355084	)	Case No.: 2019-CP-02-01582
Applicant,	)	
v.	)	**RESPONDENT'S MOTION TO ALTER OR AMEND THE ORDER GRANTING POST-CONVICTION RELIEF PURUSANT TO RULE 59(e), SCRCP**
State of South Carolina,	)	
Respondent.	)	

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C.C.P. & G.S.

Shadell Parks
Deputy Clerk

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Harold Cartwright ("Applicant") on June 26, 2019. Respondent made its return on October 3, 2019. The Court convened an evidentiary hearing into the matter on February 2–3, 2022, and February 25, 2022, via the WebEx Virtual Courtroom of the Honorable Robert J. Bonds. Applicant was present at the hearing and represented by Dayne C. Phillips, Esq. Michael J. Neubauer, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Michael Routzong, Esq., and David Hayes, Esq. ("Trial Counsel"), and Applicant's Appellate Counsel Robert Dudek, Esq. ("Appellate Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, and the pleadings.

Following the hearing, this Court asked for proposed orders from both parties. Following submission and review of these orders, this Court granted post-conviction relief to Applicant. The Court found Trial Counsel deficient as to fifteen of the allegations raised in Applicant's PCR

application and found that Applicant was prejudiced by the cumulative effect of Trial Counsel's errors. As relief, the Court ordered that Applicant receive a new trial.

Respondent respectfully submits that the Court has overlooked or misapprehended material points of law and fact that necessitate the opposite result. Accordingly, pursuant to Rule 59(e), SCRCP, Respondent now makes the following motion to alter or amend this order and requests this Court issue a revised or amended order denying relief and finding that Trial Counsel was not ineffective.

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. During its February 2012 term, the Aiken County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2012-GS-02-00304), eight counts of criminal sexual conduct with a minor, first degree (2012-GS-02-00306, 319, 321, 323, 325, 327, 329, 331), nineteen counts of lewd act upon a child (2012-GS-02-00307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 320, 322, 324, 326, 328, 330, 332), and criminal sexual conduct, third-degree (2012-GS-02-01682). On November 12–13, 2012, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. Applicant was represented by Robert J. Harte, Esq. The case was prosecuted by Assistant Solicitors Kevin N. Molony and John W. Weeks of the Second Circuit Solicitor's Office. A new trial was ordered due to a hung jury.

On April 15–18, 2013, Applicant proceeded to a second jury trial before the Honorable Doyet A. Early, III. Applicant was represented by Michael Routzong and David Hayes. The case was prosecuted by Assistant Solicitors Kevin N. Molony and Ashley Agnew of the Second Circuit Solicitor's Office. Following trial, the jury found Applicant guilty as indicted. Judge Early

sentenced Applicant to concurrent sentences of thirty years for criminal sexual conduct, first degree, and each count of criminal sexual conduct with a minor, first degree, and a concurrent term of fifteen years for each count of lewd act upon a minor, along with a consecutive ten-year sentence for criminal sexual conduct, third degree.

Applicant subsequently filed a Notice of Appeal. On appeal, Applicant was represented by Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett of the South Carolina Commission of Indigent Defense, Appellate Division. In an unpublished opinion, the South Carolina Court of Appeals affirmed Applicant's conviction and sentences following oral arguments. *State v. Harold Cartwright III*, No. 2013-UP-000894 (Ct. App. filed September 30, 2015). Applicant filed a petition for a writ of certiorari with the South Carolina Supreme Court, which was granted. On September 26, 2018, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Harold Cartwright III*, Op. No. 278842 (S.C. Sup. Ct. filed September 26, 2018).

Summary of Trial Testimony

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

At trial, Victim 1 testified Applicant began making her perform oral sex on him when she was four years old. At age five, she told Lively about the abuse, but Lively did not contact police because Applicant threatened to kill her, Victim 1, and himself.[1] Eventually, Victim 1 spoke with DSS about Applicant's abuse, but Applicant convinced her to recant. Applicant testified the abuse

[1] Lively recalled Victim 1 mentioning the abuse and corroborated her testimony that Lively did not contact law enforcement because she was too afraid of Applicant. (April 15–16, 2013, Trial Tr. p.95, line 7–p.96, line 3).

continued multiple times every year until 1995, when she was ten. Applicant did not mention the alleged abuse again until she was contacted by detectives from the Aiken County Sheriff's Department in 2011 as part of an ongoing investigation into the alleged abuse of Victims 2 and 3. She testified that she waited from 1995 until 2011 to disclose the abuse because she was afraid of Applicant. (April 15–16, 2013, Trial Tr. pp.72–94).

Victim 2 testified Applicant began abusing her in 2000, when she was nine, by making her perform oral sex on him. The abuse continued until 2001, when Victim 2 disclosed the abuse to DSS. As a result of her disclosure, Applicant was arrested. However, Victim 2 testified she recanted at the urging of her mother, Buffy Brown. Victim 2 testified that, beginning in 2002, Applicant started going into her room and "humping" her, rubbing his penis on her legs; this abuse occurred several times a week until 2006. In addition, Victim 2 testified Applicant sometimes bribed or forced her to agree to have sexual intercourse with him and threatened to kill her, her mother, Victim 3, and himself. (April 15–16, 2013, Trial Tr. pp.104–35).

Victim 3 testified Applicant began abusing her in 2008, when she was thirteen, by coming into her room before school and "humping" her. She testified he threatened to kill all of them and himself. In addition, Victim 3 testified Applicant began forcing her to have sexual intercourse with him when she was fourteen. She testified Applicant stopped having sex with her in 2010, when Hoss Cartwright, Applicant's son, moved into the house, but continued humping her in her room before school.[2] When investigators questioned Victim 3, she initially denied being abused by Applicant because she was afraid of him. Later, however, she told investigators Applicant molested her. (April 15–16, 2013, Trial Tr. pp.141–80).

[2] Hoss testified he could hear Applicant enter Victim 3's room every morning and stay for an extended period of time. (April 17–18, 2013, Trial Tr. p.11, lines 18–24).

The State and Trial Counsel stipulated that Buffy Brown was medically unavailable due to stage 4 cancer. The State introduced her prior testimony from Applicant's first trial without objection. In that testimony, Brown stated she remembered Applicant would spend ten to twenty minutes waking up Victim 2 every morning before school. She admitted pressuring Victim 2 to recant after Victim 2 initially reported the abuse because Applicant convinced Brown he had done nothing wrong. Brown testified Applicant confessed to her on February 19, 2011, that he might have molested Victims 2 and 3. She claimed he told her to wash Victim 3's bedsheets to remove his DNA. 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. (April 15–16, 2013, Trial Tr. pp.182–97). DNA recovered from semen found on the bedsheets matched Applicant's DNA. (April 17–18, 2013, Trial Tr. pp.31–42; pp.79–92).

The State also called clinical psychologist Dr. Alicia Benedetto. Over Trial Counsel's objection, the trial court qualified Dr. Benedetto as an expert in child sexual abuse dynamics. She acknowledged that she had not spoken to any witnesses or victims in the case. She explained that "Child Sexual Abuse Accommodation Syndrome" could cause abused children to exhibit behaviors that may not make sense to adults, such as delaying or falsely recanting allegations of abuse because of bribes, manipulation, and fear. (April 17–18, 2013, Trial Tr. pp.47–79).

Finally, the State called James Hettich, a guard at the Aiken County Detention Center. He testified Applicant attempted to commit suicide while detained prior to trial. (April 17–18, 2013, Trial Tr. pp.100–04).

Applicant took the stand in his own defense. He denied molesting any of the children and claimed the semen found on the bedsheets came from Buffy 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 Applicant confronted her about finding her picture on a pornographic website. (April 17–18, 2013, Trial Tr. pp.129–60).

Present Application

In his PCR application, Applicant alleges he is being held unlawfully for the following reasons:

a. Ineffective assistance of Trial Counsel
    1. Failure to interview critical witnesses and to challenge the credibility of the State's witnesses
    2. Failure to hire expert witnesses to rebut the State's arguments based on an independent review of the forensic evidence
    3. Failure to adequately investigate Victim 2's involvement in a drug investigation and any deals or offers possibly made to her by the State
    4. Failure to adequately compare the timeline of when Applicant lived in the home to the timing of the allegations
    5. Failure to obtain and review discovery with Applicant
    6. Failure to properly impeach the State's witnesses based on inconsistencies between their statements at Applicant's second trial and their testimony at his first trial or their statements to police
    7. Failure to interview witnesses regarding Applicant's good character and reputation and to request a jury instruction on good character and reputation
    8. Providing erroneous advice regarding Applicant's decision to testify and failing to explain the risks involved in testifying as a witness
    9. Failure to object to the trial court's erroneous and burden-shifting jury instructions
    10. Failure to object to object to the admission of inadmissible and unduly prejudicial evidence
    11. Failure to object to the State's improper closing argument that misstated the evidence and was unduly prejudicial
    12. Failure to move to quash the twenty-eight indictments as unconstitutionally overbroad and vague because, apart from giving the year, they did not specify the dates on which the alleged offenses occurred, and the combined indictments covered a period of over eighteen years
    13. Failure to object to improper qualification of the State's expert witness in the field of child sexual abuse dynamics where the trial court (1) limited counsel to *voir dire* of the witness regarding qualifications, (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and

validity of the field itself after the witness was deemed an "expert" by the court and directly examined by the State, all of which occurred in the jury's presence

14. Failure to object to and move to strike the expert's testimony that went beyond the scope of her expertise, which was focused on the perspectives of abused children, when the expert testified abusers typically seek victims of a particular age
15. Erroneous stipulation to a witness's medical unavailability due to stage 4 cancer and failure to object to admission of the witness's testimony from the previous trial
16. Failure to hire an expert to perform independent DNA testing of a bedsheet with a purported semen stain or to obtain documents from SLED regarding its policies, procedures, qualification, laboratory bench notes, and overall testing of the purported semen stain in order that the documents could be reviewed by such an expert
17. Failure to move for the trial court to conduct follow-up *voir dire* questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could be fair to Applicant, and the potential juror's number
18. Failure to move to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), when the State struck two white female jurors from the petit jury but sat eleven white jurors, six of whom were female
19. Failure to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses
20. Failure to object and move for individual *voir dire* when the trial court told Trial Counsel several jurors had approached him about "similar types of behavior," none of the conversations between the trial court and those jurors were placed on the record, and none of those jurors' number were placed on the record
21. Failure to properly argue that juror number 94's prior conversation with the trial court be placed on the record where juror number 94 indicated the court knew she had a relative who was a victim and the court denied Trial Counsel's motion to strike the juror for cause
22. Failure to move to sever Applicant's charges where the three primary complaining witnesses alleged conduct over three distinct periods of time, not arising from a single chain of circumstances, and not proved by the same evidence
23. Failure to object to the trial court's initial jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth, violative of due process, and burden shifting
24. Failure to object to the State's opening statement inviting the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations
25. Arguing to the jury that Applicant couldn't be innocent if the victims were telling the truth, where that statement could not be considered a reasonable trial strategy
26. Failure to object and move to strike when the State delved into victim impact on direct examination by asking Victim 1 how she was doing
27. Failure to object to improper bolstering when Melinda Lively affirmed she had heard Victim 1 testify and later referred to Victim 1's statement when testifying she did not contact police due to Applicant's threats

28. Failure to object to hearsay when the prosecutor asked Melinda Lively whether she had learned that her daughter, Victim 1, had been abused by the Applicant and the witness replied, "Yes, when she was four"
29. Failure to move to strike Victim 2's hearsay testimony after the trial court sustained Trial Counsel's hearsay objection
30. Failure to move to strike Victim 2's testimony in response to a leading question after the trial court sustained Trial Counsel's objection
31. Failure to properly argue and preserve for appellate review Trial Counsel's objection to the quietness of a complaining witness's testimony
32. Prejudicial questioning of Victim 2 by phrasing a question in such a way as to reaffirm her version of events and strengthen the State's case against Applicant
33. Failure to adequately prepare for trial by bringing a copy of a complaining witness's prior testimony at the first trial to support his attempt to impeach the witness, causing the trial court to order Trial Counsel to move on to a new line of questioning
34. Failure to object to and move to strike a DSS case worker's testimony that DSS only becomes involved in a case if it "meets the legal statute," lowering the State's burden to prove Applicant's conduct satisfied the statutory elements of the charged offense
35. Failure to object to and move to strike the DSS agent's hearsay testimony that she received a call from her supervisor saying DSS had received a report of sexual abuse concerning Applicant and one of the alleged victims
36. Failure to object to the trial court's burden-shifting initial jury instruction that Counsel's opening statement would include "what they intend to prove"
37. Unreasonably attempting to impeach Victim 3 by questioning her about her various disclosures of abuse, reinforcing the State's theory that the victim previously disclosed the abuse to several people
38. Failure to object to the admission of Buffy Brown's testimony from Applicant's first trial where Buffy Brown was alive and the State had not shown that it made reasonable efforts to obtain her presence at the second trial and where the testimony was admitted, not by a portion of the prior trial transcript, but by "acting out" the testimony, permitting the prosecution to add inflections and mannerisms that may not have occurred at the previous trial
39. Failure to object to hearsay testimony during the "acting out" of Buffy Brown's prior trial testimony where she affirmed she and the police had found out Applicant was molesting Victim 2
40. Failure to object to admission of Applicant's consent to search form, buccal swab, and DNA evidence derived therefrom, where no hearing was requested or held regarding the voluntariness of Applicant's waiver as required by *Jackson v. Denno*, 378 U.S. 368 (1964)
41. Failure to object to and move to strike redirect testimony of the State's DNA expert as beyond the scope of cross-examination where the State asked if DNA evidence could be destroyed or affected by washing and drying sheets, despite Counsel never inquiring about the destruction of DNA
42. Failure to object to and move to strike redirect testimony of the jailer who purportedly saw Applicant hanging in his cell where the State failed to have the

witness identify Applicant during direct examination and Trial Counsel never asked about Applicant's identification on cross-examination

43. Failure to cross-examine the State's witnesses regarding the discrepancy between the testimony given at the first trial that the DNA evidence was taken from Victim 3's room and the testimony at the second trial that the DNA evidence was taken from the victim's stepbrother's room
44. Failure to proffer pornographic photographs discovered by Applicant to support the defense's theory that Victim 3 lied because Applicant publicly accused her of appearing in those photographs and to rebut the testimony of the State's witnesses that Victim 3 did not appear in any of the photographs
45. Failure to object to the trial court's repeated interruption and admonishment of Applicant during his testimony and request that the prosecutor object more often, which gave the impression of partiality before the jury
46. Failure to object to the trial court's comment, during closing jury instruction, that "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses"
47. Failure to object to the trial court's closing jury instructions that frequently mentioned "truth" and were, therefore, tantamount to instructions to search for the truth and violative of due process
48. Failure to object to the trial court's jury instruction that testimony of the victim did not need to be corroborated
49. Failure to object to the prosecutor's improper comments during closing argument that vouched for and bolstered the credibility of the State's witnesses
50. Failure to subject the State's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy

b. Ineffective assistance of Appellate Counsel

1. Failure to file a petition for a writ of certiorari in the United States Supreme Court on the issue of whether evidence of attempted suicide is admissible as evidence of guilt
2. Failure to raise and argue the issue of the improper qualification of the State's expert witness in the field of child sexual abuse dynamics where the trial court (1) limited counsel to *voir dire* of the witness regarding qualifications, (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of the field itself after the witness was deemed an "expert" by the court and directly examined by the State, all of which occurred in the jury's presence
3. Failure to raise and argue the issue of whether the expert's testimony went beyond the scope of her expertise, which was focused on the perspectives of abused children, when the expert testified abusers typically seek victims of a particular age
4. Failure to raise and argue the issue of the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?") and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have potentially disqualified biased jurors

5. Failure to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised to and ruled on by the trial court.

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

II. ARGUMENT IN SUPPORT OF MOTION TO ALTER OR AMEND THE ORDER GRANTING POST-CONVICTION RELIEF

In its order granting post-conviction relief, this Court found Trial Counsel was deficient on fifteen grounds: Allegations 13, 14, 19, 20, 21, 22, 23, 25, 33, 34, 40, 43, 45, 47, and 48. The Court made specific findings of prejudice on only two of those allegations: Allegations 34 and 45. The order concludes with a general finding of prejudice based on "cumulative error." The remaining thirty-five allegations of ineffective assistance of Trial Counsel, as well as all five allegations of ineffective assistance of Appellate Counsel, were denied and dismissed as meritless. Each dismissal was with prejudice, except for Allegation 9, which was dismissed without prejudice.

The Court's reliance on "cumulative error" was improper. The appellate courts of South Carolina have never recognized "cumulative error" as a substitute for individualized, specific findings of prejudice as to each act or omission of counsel challenged in a PCR application. A majority of federal appellate courts, including the Fourth Circuit Court of Appeals, have expressly *rejected* the application of "cumulative error" to ineffective assistance claims. In addition, Applicant failed to prove both deficiency and prejudice resulting from Trial Counsel's conduct as to each allegation on which this Court granted relief. Finally, the Court's order contains internal inconsistencies that undermine its findings of ineffective assistance. Accordingly, Respondent respectfully asks this Court to issue an amended order denying and dismissing each and every allegation with prejudice.

Improper "Cumulative Error" Analysis

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. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). When counsel articulates a valid reason for

employing a certain trial strategy, such conduct will not be deemed ineffective. *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *See Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117–18, 386 S.E.2d at 625. "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 United States Supreme Court has clearly held that, before any individual act or omission of counsel may be deemed a constitutional error, it must satisfy both the "deficiency" and "prejudice" prongs of the *Strickland* analysis. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("[U]nder *Strickland v. Washington*, . . . an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."). Therefore, unless the acts and omissions of counsel are *individually* shown to be both

deficient and prejudicial, they do not constitute "errors," no matter how many of them are added together. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that, regarding ineffective assistance claims, the "cumulative error" doctrine is no longer good law after *Strickland* because "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation"); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (holding "cumulative error" analysis evaluates only the effect of matters determined to be errors, not the cumulative effect of non-errors); *Hunt v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) ("[T]he fact that many claims of counsel error are pressed does not alter fundamental math—a string of zeros still adds up to zero."), *aff'd*, 57 F.3d 1327 (4th Cir. 1995). For these reasons, a majority of federal appellate courts have expressly rejected "cumulative error" analysis for ineffective assistance claims. *E.g. Fisher v. Angelone*, 163 F.3d 835, 852–53 (4th Cir. 1998) (collecting cases and holding, "in agreement with the majority of our sister circuits that have considered the issue," that "ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively.").

The "cumulative error" doctrine is at odds with *Strickland* in other ways as well. First, *Strickland* expressly permits a judge to deny an allegation of ineffective assistance merely for failing to prove prejudice, without even reaching the deficiency prong. *Strickland*, 466 U.S. at 697. A "cumulative error" analysis, however, requires deficiency to be adjudicated as to all allegations of ineffective assistance—regardless of whether the alleged deficiency, by itself, had any prejudicial effect on Applicant's rights—because the judge must still assess the *cumulative* effect of all deficient acts or omissions combined.

Second, one reason the *Strickland* court required proof of prejudice was "to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* The court cautioned that "intrusive post-trial inquiry into

attorney performance . . . would encourage the proliferation of ineffectiveness challenges. . . . Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* at 690. By requiring applicants to show deficiency *and* prejudice as to each allegation of ineffective assistance, the *Strickland* court intended that post-trial review of counsel's conduct would encompass only those errors that jeopardized an applicant's right to a fair trial. As this Court's order acknowledges, however, "cumulative error" analysis requires courts to scrutinize even "errors that are insignificant by themselves" in order to determine if their cumulative effect is prejudicial. The "cumulative error" requirement to cavil even the *insignificant* missteps of defense counsel runs directly contrary to the United States Supreme Court's public policy rationale articulated in *Strickland*: protecting "the entire criminal justice system" from the burdensome impact of unlimited allegations that counsel's performance was deficient. *Id.* at 697.

That burdensome impact is evident in this very case: Applicant raised a staggering *fifty-five* total allegations of ineffective assistance in his amended PCR application. For most of his allegations, Applicant did not even attempt to articulate a prejudice argument, relying instead on the "cumulative error" doctrine. Responding to this glut of claims required Respondent, Trial Counsel, Appellate Counsel, and this Court to endure multiple days of hearings. Ultimately, the overwhelming majority of Applicant's claims were correctly dismissed as meritless. However, by finding prejudice based on the "cumulative error" doctrine—which our appellate courts have never approved in the ineffective assistance context—this Court rewards Applicant's vexatious behavior. As long as PCR courts allow applicants to substitute "cumulative error" arguments for the prejudice analysis required by *Strickland*, PCR applicants will be incentivized to multiply claims

against defense counsel based on insignificant defects in performance, wasting judicial resources and burdening the courts with frivolous allegations. This is exactly what the United States Supreme Court warned of in *Strickland*: that unless courts required particularized showings of prejudice, ineffectiveness claims would "become so burdensome . . . that the entire criminal justice system suffers as a result." *Id.*

The Court's order cites only two cases—*State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), and *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995)—for the proposition that "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." Neither case supports the application of "cumulative error" doctrine to claims of ineffective assistance of counsel in PCR actions. *Johnson* concerned a direct appeal alleging error in the trial court's admission of evidence, while *Tennant*, a West Virginia case, concerned a direct appeal in a medical malpractice case. Furthermore, both opinions held that a party seeking to invoke the doctrine must still show *how* the combination of alleged errors affected his trial. *Johnson* held that, although the trial court committed multiple errors, a defendant "must demonstrate more than error in order to qualify for reversal under this ground. Instead, the errors must adversely affect his right to a fair trial." *Johnson*, 334 S.C. at 93. *Tennant* declined to apply the doctrine, clarifying that "the doctrine should be used sparingly" and is not appropriate when the alleged errors "are insignificant and inconsequential." *Tennant*, 194 W.Va. at 118, 459 S.E.2d at 395.

Except as to Allegations 34 and 45, the Court's order does not specifically find prejudice as to any of the allegations upon which it grants relief. In the order's conclusion, however, the Court finds that "Applicant has suffered prejudice warranting a new trial based on cumulative trial

error." The Court's general finding of prejudice lacks the necessary analysis of how Trial Counsel's alleged deficiencies, individually or in combination, adversely affected Applicant's right to a fair trial. Absent any individualized analysis of how each purportedly deficient act prejudiced Applicant, there is no support for the Court's finding that Trial Counsel was ineffective under *Strickland*.[3]

Respondent respectfully asks the Court to amend its order to replace its improper "cumulative error" analysis with specific analysis of prejudice as to Allegations 13, 14, 19, 20, 21, 22, 23, 25, 33, 40, 43, 47, and 48. To the extent the Court finds Applicant has failed to make a specific showing of prejudice as to any of those allegations,[4] Respondent requests the Court amend its order to reflect that those allegations are denied and dismissed with prejudice.

Allegation 9: Improper jury instructions

The Court correctly found Applicant's Allegation 9 was meritless; however, the Court dismissed the allegation "without prejudice." A PCR applicant receives only "one bite at the apple"; successive PCR applications are generally precluded. *See Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999); S.C. Code Ann. § 17-27-90. Applicant is barred by statute from raising, in a successive PCR application, any grounds that were or could have been raised in his initial application. Therefore, Applicant is not entitled to re-raise Allegation 9 in a future PCR

[3] Despite making no specific, individualized findings of prejudice, the Court goes on in the very next paragraph to acknowledge that *Strickland* requires PCR courts to "consider the *specific* impact counsel's error had on the outcome of the trial" and to "analyze how *individual* errors of counsel affect the important factual findings in a particular case" (emphasis added). This language is inconsistent with the generalized nature of the Court's "cumulative error" prejudice analysis.

[4] Respondent submits that Applicant has failed to show both prejudice and deficiency as to every allegation in his PCR application, as discussed in subsequent sections of this Motion. Therefore, Respondent argues that none of Applicant's allegations merit relief. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

proceeding. Respondent respectfully asks that the Court amend its order to deny and dismiss Allegation 9 with prejudice.

Allegation 13: Alleged failure to object to the qualification of the State's expert in child sexual abuse dynamics

This Court found Trial Counsel failed to object to the trial court's qualification of Dr. Benedetto as an expert in child sexual abuse dynamics. The Court's order states the qualification procedure was improper because the court limited Trial Counsel to questioning the witness about her qualifications, rather than the reliability and validity of the field itself, and because the qualification procedure occurred in the presence of the jury. The Court found Trial Counsel's performance was deficient, but it did not specifically find prejudice or explain how the result of Applicant's trial would likely have been different but for Trial Counsel's conduct.

Respondent submits this allegation is without merit. First of all, Trial Counsel *did* object to Dr. Benedetto's qualification on the ground she failed to show the reliability of the field her opinion was based on. (April 17–18, 2013, Trial Tr. p.55, lines 1–12). The trial court overruled Trial Counsel's objection. (April 17–18, 2013, Trial Tr. p.55, lines 13–18). The Court has not explained how Trial Counsel's objection was unreasonable or how he could have obtained a different result by raising the issue again. *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, "the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474

(2012).[5] 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"). Even if Trial Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field,[6] the trial court would have had no obligation to conduct one. Likewise, 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).[7] The challenged aspects of the qualification proceeding are not matters of right, but of sound judicial

[5] The Court's order cites *Tapp*, among other cases, in support of its finding that Trial Counsel was deficient for failing to adequately raise this issue. However, *Tapp* clarifies that reliability is relevant to the *admissibility* of expert testimony, not to whether the witness may be *qualified* as an expert. *See Tapp*, 398 S.C. at 388–89, 728 S.E.2d at 474–75; *see also State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding scientific evidence is admissible if "the expert is qualified" *and* "the underlying science is reliable," implying that qualification and reliability are separate inquiries). The Court's finding that Trial Counsel should have challenged Dr. Benedetto's qualification proceeding—as opposed to the admissibility of her subsequent testimony—on reliability grounds, therefore, is contrary to the express holding of *Tapp*.

[6] Despite claiming Trial Counsel should have attacked the reliability of this field during the qualification proceeding, Applicant has not introduced any evidence or argument that would support such an attack. Therefore, Applicant has failed to prove he was prejudiced by Trial Counsel's failure to challenge the reliability of child sexual abuse dynamics.

[7] In the portion of its order denying and dismissing Applicant's Allegation 2 of ineffective assistance of Appellate Counsel, this Court stated, "As discussed in response to Applicant's Allegation 13, the trial court's decision to conduct Dr. Benedetto's qualification in the presence of the jury was within the sound discretion of the trial judge," citing *Fields*. However, the Court's discussion of Allegation 13 did *not* mention the discretion of the trial judge.

discretion; Applicant's rights, therefore, were not violated by Trial Counsel's alleged failure to object to them.

In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until *after* she was qualified. Therefore, no prejudice could possibly have resulted from conducting the qualification examination in the presence of the jury.

Because Applicant failed to prove either deficiency or prejudice as to this allegation, Respondent respectfully asks this Court to reconsider its order granting relief on this ground.

Allegation 14: Failure to object to and move to strike Dr. Benedetto's statement that abusers typically seek victims of a particular age

The 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 Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise. The court's order does not explain how Applicant was prejudiced by this alleged error.

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

In addition, Dr. Benedetto's statement could not have prejudiced Applicant. Victims 1, 2, and 3 testified that Applicant began abusing them at ages five, nine, and thirteen, respectively. Therefore, the State's theory of the case required the jury to believe that Applicant did *not* target victims of a similar age. Dr. Benedetto's statement, therefore, was not consistent with the State's theory of the case. Accordingly, Trial Counsel would have had no strategic reason to move to strike it, and his failure to do so did not prejudice Applicant. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.[8]

Because Applicant failed to prove either deficiency or prejudice as to this allegation, Respondent respectfully asks this Court to reconsider its order granting relief on this ground.

Allegation 19: Failure to move to sequester witnesses

The Court found Trial Counsel was deficient for failing to move to sequester the witnesses, because sequestration was necessary to ensure that the witnesses did not have the ability to hear one another's testimony. *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ."); *see also State v. Huckabee*, 388 S.C. 232,

[8] In the portion of its order denying and dismissing Applicant's Allegation 2 of ineffective assistance of Appellate Counsel, this Court stated, "As discussed in response to Applicant's Allegation 14, Dr. Benedetto's statement could not have prejudiced Applicant" because the victims testified they were abused at different ages. However, the Court's discussion of Allegation 14 does not mention prejudice or acknowledge that the three victims were allegedly targeted for abuse at different ages. The Court's express finding that Dr. Benedetto's statement could not have prejudiced Applicant is completely inconsistent with its granting of relief on Allegation 14.

241, 694 S.E.2d 781, 785 (Ct. App. 2010) (holding the purpose of Rule 615, SCRE, is to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at trial). However, in that same paragraph, the Court acknowledges that "[a]ll the witnesses had been present at the prior trial and had *already* heard one another's testimony" (emphasis added). The Court does not explain why Trial Counsel was deficient for failing to seek a sequestration order that the Court itself concedes would have been futile.

Moreover, a party is not entitled to the sequestration of witnesses as a matter of right. *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). The trial court, therefore, had no obligation to order sequestration even if Trial Counsel had requested it.

In addition, "[a] person must not be sequestered from a proceeding adjudicating an offense of which he was a victim." S.C. Code Ann. § 16-3-1550. Therefore, Trial Counsel would not have been able to sequester the three victims even if he had made a motion to sequester the witnesses. Since those victims were the State's chief witnesses, there is no "reasonable probability" that the result of Applicant's trial would have been different but for Trial Counsel's alleged error.

Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would achieve nothing. As Trial Counsel has articulated a valid reason for not moving to sequester the witnesses, and as sequestration would not have prevented the witnesses from knowing each other's testimony anyway, this Court should find Applicant has failed to prove his counsel was deficient or that the result of his trial would likely have been different if the witnesses had been sequestered. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Accordingly, Respondent requests this Court issue an amended order reflecting that this allegation is denied and dismissed with prejudice.

Allegation 20: Failure to move to individually question jurors after the trial judge noted some jurors had approached him about "similar types of behavior"

The Court found Trial Counsel was deficient for failing to move to individually *voir dire* jurors whom the trial court noted had approached him about "similar types of behavior" or to preserve the issue by putting those jurors' numbers and their conversations with the trial court on the record. The Court does not explain how Applicant was prejudiced by Trial Counsel's alleged omission.

Prior to jury selection, the trial court asked if any member of the jury panel "has been a victim or subjected to similar types of behavior, i.e. sexual misconduct or abuse." (April 15–16, 2013, Trial Tr. p.41, lines 5–7). The court went on to state, "Now, I've had several jurors who have come forward expressing to me some of their past and how it affected them. I don't need you to come back forward, but do I have anyone else who has not come forward that has been a victim or experienced this type of behavior in your family? . . . Anyone else other than the ladies who have come forward?" (April 15–16, 2013, Trial Tr. p.41, lines 9–15). Later, during jury selection, Trial Counsel moved to strike Juror No. 94 for cause, arguing that "[s]he has a relative that was a victim, as the court knows." (April 15–16, 2013, Trial Tr. p.48, lines 4–7). The trial court stated, "And she did advise us of that and I asked her could she be fair and impartial and try the case based solely on what she heard in the courtroom. She adequately said she could, respectfully denied." (April 15–16, 2013, Trial Tr. p.48, lines 8–11). Trial Counsel then used a peremptory strike to have Juror No. 94 excused. (April 15–16, 2013, Trial Tr. p.48, lines 12–14).

Although the trial transcript indicates that some jurors had informed the trial court, outside the record, about "their past and how it affected them," it also shows that Trial Counsel was aware of those jurors and took appropriate action to have them removed from the jury pool. In addition, it shows that the trial court had examined the jurors to ensure they could try the case "fairly and impartially." The mere fact that those jurors' interactions with the court and Trial Counsel were not included in the record is not sufficient to establish prejudice; the jury is presumed to act according to law. *See Strickland*, 466 U.S. at 694–95 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). Applicant still bears the burden to show that, but for Trial Counsel's failure to record those interactions, the result of his trial would likely have been different. Absent such a showing, it will not be presumed that the interactions were harmful to Applicant's case or that the jury acted improperly. Applicant presented no evidence to overcome the presumption that the jury was fair and impartial; therefore, he has failed to meet his burden. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP. Accordingly, Respondent requests the Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 21: Failure to properly argue and preserve issues related to Juror No. 94

This Court found Trial Counsel failed to properly argue and preserve his request that Juror No. 94's conversation with the trial court be placed on the record after that juror revealed she had "a relative that was a victim, as the court knows." However, the Court acknowledges that Juror No. 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. The Court also acknowledges that Trial Counsel did not even use up all of his

peremptory strikes; only nine jurors were struck in total, and Trial Counsel had ten strikes. Nevertheless, the Court found Trial Counsel was deficient for failing to put Juror No. 94's conversation on the record because Trial Counsel "had to strategically use one of his peremptory strikes on this juror."

Respondent submits Applicant could not possibly have been prejudiced by Trial Counsel's alleged error because Trial Counsel still had peremptory strikes left over after all the jurors were selected. In other words, Trial Counsel struck every juror he wanted to strike, including Juror No. 94. Since the use of a peremptory strike on Juror No. 94 manifestly did not prevent Trial Counsel from striking any other juror, there is no possibility that the ultimate composition of the jury would have been different had Trial Counsel more vigorously argued for Juror No. 94 to be struck for cause. Therefore, Applicant was not prejudiced. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Respondent respectfully asks that the Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 22: Failure to move to sever Applicant's charges

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

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 Court found Trial Counsel was deficient for failing to sever the charges because the State's case was strengthened by the number of victims presented to the jury. However, the Court's order acknowledges that Trial Counsel articulated a strategic reason for not moving to sever the charges: at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a life without parole sentence. Trial Counsel faced a serious dilemma: if he allowed Applicant 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. Trial Counsel made the difficult choice to go forward in a single trial. This was not an objectively unreasonable decision: Applicant's first trial—which covered the same charges and victims—had ended in a hung jury, so Trial Counsel had reason to believe Applicant 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 Trial Counsel's performance with the benefit of hindsight, *Strickland* requires a more deferential review. The mere fact that this Court might have reached a different decision in those same circumstances does not, by itself, render Trial Counsel's decision deficient.

Moreover, if Trial 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 Applicant's daughters or stepdaughters; the abuse almost always occurred in Applicant's home, typically in the victims' bedrooms before school; Applicant performed the same kinds of acts on multiple victims (oral sex on Victims 1 and 2, "humping" on Victims 2 and 3); Applicant would abuse each victim for years, then move on to the next victim after the previous victim moved away; and Applicant coerced each victim with threats of murder and suicide. Therefore, despite the number of different victims and large time period during which the abuse occurred, for the purposes of joinder, it was all one "chain of circumstances." In addition, overlapping evidence was used to prove multiple charges; for example, Buffy Brown testified regarding Applicant's abuse of Victims 2 and 3, the testimony of Dr. Benedetto was used to explain the delayed disclosure and recantation of Victims 1 and 2, and the evidence of Applicant's suicide attempt in prison was used to prove his guilt regarding all three victims. *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 Trial Counsel had no ground to seek severance of the charges.

Because Trial Counsel articulated a valid reason for not moving to sever the charges and because he would not have succeeded if he did so move, Applicant has not proved Trial Counsel was ineffective. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Consequently, Respondent asks that this Court amend its order to deny Allegation 22 and dismiss it with prejudice.

Allegation 23: Failure to object to truth-seeking language in trial court's preliminary instructions to the jury

The Court found Trial Counsel deficient for failing to object to a portion of the trial court's preliminary jury instruction in which the 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." (April 15–16, 2013, Trial Tr. p.59, line 22–p.60, line 13). The Court's order cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), for the proposition that "any references to the word 'true' must be removed from the Court's comments to the jury."

However, that proposition does not appear anywhere in *State v. Daniels*, even in paraphrase. Respondent submits the Court may have intended to refer to *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). In that decision, the Supreme Court of South Carolina 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.

The trial in this case occurred in 2013, many years before *Beaty* was decided. Trial Counsel would 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 per se. *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).

In addition, 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." (April 15–16, 2013, Trial Tr. p.59, line 12–p.60, line 13). At the time of Applicant's trial, references to "truth" were permitted by the Supreme Court in the context of instructions on witness credibility. *See State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000).

In addition, the fact that the challenged language appeared in the credibility context, and *not* in the context of the presumption of innocence or the State's burden of proof, defeats any claim that Applicant may have been prejudiced by Trial Counsel's failure to object. *See id.* at 28–29, 538 S.E.2d at 252 ("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."). Furthermore, if the jury instructions, considered as a whole, are

correct, isolated portions that may be misleading do not constitute reversible error. *Id.* at 27, 538 S.E.2d at 251. The trial transcript reflects that the trial court repeatedly and emphatically instructed the jury that the State bears the burden of proof beyond a reasonable doubt and that Applicant must be presumed innocent and need not offer any proof of his innocence. The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice.

For these reasons, Applicant has not met his burden of proving that Trial 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 Trial 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, Respondent requests this Court amend its order to reflect that Allegation 23 is denied and dismissed with prejudice.

Allegation 25: Improper argument in Trial Counsel's opening statement

The Court found Trial Counsel was deficient for arguing, in his opening statement, that Applicant could not be innocent if the victims were telling the truth. The Court's order points out that the State used that quote against the defense in its closing argument, stating, "As Mr. Routzong said in his opening statement, if you believe the victims, the defendant's guilty." The order does not explain specifically why Trial Counsel's argument was deficient or how Applicant was prejudiced by it.

Trial Counsel began his opening argument by emphasizing the presumption of innocence. He stated "the presumption of innocence means . . . that the accusers in this case are either mistaken or untruthful. That's the position you have to take as you're sitting all the way through this trial because that's what the presumption of innocence means. If they're telling the truth, he can't be innocent. If he's innocent, they can't be telling the truth . . . ." (April 15–16, 2013, Trial Tr. p.68,

lines 19–25). He concluded by attacking the credibility of the victims, claiming they had "axes to grind" and were "either mistaken or telling untruths." (April 15–16, 2013, Trial Tr. p.69, lines 9–13). In context, it is clear that Trial Counsel was urging the jury *not* to believe the victims, but to start from the presumption that the victims were either mistaken or lying in order to get revenge on Applicant.

Clearly, if the jury believed the victims—who testified in detail about the crimes perpetrated by Applicant—it would also have to believe Applicant was guilty of those crimes. The heart of the case, for both sides, was the credibility battle between the victims and Applicant. Focusing the jury's attention on the fact that the State's case depended on the credibility of the victims was an integral part of Trial Counsel's defense strategy.

The mere fact that the solicitor was able to use Trial Counsel's words in his own closing argument does not mean Trial Counsel was deficient for making the argument in the first place. The solicitor would have been able to argue that the victims' testimony implied Applicant's guilt even if Trial Counsel had never brought it up; the victims' testimony was the crux of the State's case. Therefore, there is no reasonable probability that the result of the trial would have been more favorable to Applicant if Trial Counsel had not made the challenged statement. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Furthermore, the fact that the victims' testimony was inconsistent with Applicant's innocence was so obvious that no prejudice could have resulted from either Trial Counsel or the State pointing it out to the jury. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Accordingly, Respondent respectfully asks this Court to amend its order to reflect that this allegation is denied and dismissed with prejudice.

Allegation 33: Alleged failure to properly impeach a complaining witness with the transcript of the witness's prior testimony

The Court found Trial Counsel failed to have a copy of the first trial transcript with him when he attempted to impeach a complaining witness with her prior testimony, causing the trial court to order him to move on when he was unable to point to inconsistencies in the witness's testimony. The Court's order does not identify which witness Trial Counsel allegedly failed to impeach or what portion of the prior trial transcript was allegedly inconsistent with the witness's testimony.

Respondent assumes the Court is referring to Trial Counsel's questioning of Victim 2.[9] At the prior trial, Victim 2 testified she would stay "at a friend's house" to avoid having to come home to Applicant. Defense counsel asked her if that friend "was Tim Bowman who was the person you were involved with drugs with?" Victim 2 responded "Yes sir. Well" before being cut off by defense counsel's next question. (Nov. 13–14, 2012, Trial Tr. p.47, line 3–p.48, line 3).

At the second trial, Trial Counsel asked Victim 2 if she was ever involved with drugs, which she denied, claiming her boyfriend was the one involved with drugs. (April 15–16, 2013, Trial Tr. p.130, lines 10–18). Trial Counsel stated, "But you actually testified in the other proceeding that you were involved," and then showed Victim 2 a document.[10] (April 15–16, 2013, Trial Tr. p.130, lines 19–25). The trial court told Trial Counsel to show Victim 2 the "line and verse," and Trial Counsel stated he had neglected to mark it. (April 15–16, 2013, Trial Tr. p.131,

[9] Applicant's amended PCR application identifies this victim as the subject of Allegation 33.

[10] Trial Counsel's reference to Victim 2's testimony from "the other proceeding" implies that this document was the transcript of the prior trial. Therefore, the Court's finding that Trial Counsel "fail[ed] to obtain the transcript of the Applicant's first trial" is not supported by the record.

lines 1–4). The trial court then told Trial Counsel to move on to his next question. (April 15–16, 2013, Trial Tr. p.131, lines 8–15).

Although Trial Counsel was unsuccessful in his attempt to confront Victim 2 with her testimony from the prior trial, Applicant suffered no prejudice. Victim 2's statement at the prior trial was given in response to a complex leading question and was cut off before she could clarify it. (Nov. 13–14, 2012, Trial Tr. p.48, line 3). If she had been able to respond to Trial Counsel's insinuation, she likely would have given the same explanation she gave elsewhere in the trial: that Tim Bowman was her boyfriend, that he was involved with drugs, but that she was not involved in his drug-related activities. (April 15–16, 2013, Trial Tr. p.130, lines 10–18; p.131, lines 22–24; p.135, lines 10–13; Nov. 13–14 Trial Tr. p.38, lines 14–18). Absent any indication that Victim 2 would have been caught in a lie had Trial Counsel properly confronted her with her prior testimony, Applicant has failed to meet his burden to prove the result of his trial likely would have been different but for Trial Counsel's inadequate preparation. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Respondent requests the Court issue an amended order denying and dismissing Allegation 33 with prejudice.

Allegation 34: Failure to object and to move to strike Michelle Price's testimony that implied the statutory elements of Applicant's offense had already been proved

The Court found Trial Counsel should have objected when Michelle Price testified DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina." (April 15–16, 2013, Trial Tr. p.138, lines 15–16). The Court stated this language was prejudicial because it lowered the State's burden of proof in the eyes of the jury by suggesting the statutory elements of the offense have already been proved.

At the evidentiary hearing, Trial Counsel acknowledged that the jury might conceivably have misinterpreted the statement to mean DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. The Court has not explained why Trial Counsel's explanation for not objecting was unreasonable.

However, even if Trial Counsel's stated reason for failing to object was deficient, Applicant suffered no prejudice. The test for prejudice is whether an error "undermines the reliability of the result of the proceeding," not whether it "conceivably could have influenced the outcome." *Strickland*, 466 U.S. at 693. Applicant must show a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome"—that the result of his trial would have been different but for Trial Counsel's alleged error. *Id.* at 694.

Although it is perhaps "conceivable" that the jury misinterpreted Price's statement, it is more likely that the jury correctly interpreted her statement to mean that DSS is required to initiate investigations based only on statutory parameters—*not* based on some belief in the strength of the evidence against the accused or the credibility of the accuser. Price also clarified that the next step would be to "interview the family," which would have alerted the jury that DSS had not yet investigated the report or made any determination of guilt. Far from being prejudicial to Applicant, therefore, Price's statement would likely have conveyed to the jury that the mere fact DSS opened an investigation did not mean DSS believed Applicant was guilty.

In addition, Price's statement was brief and was not specifically related to Applicant's case, and the solicitor did not dwell on it. Even an unusually attentive jury would be unlikely to assign any importance to such a statement. Finally, the trial court's thorough instruction on the State's

burden of proof, the presumption of innocence, and the reasonable doubt standard would have cured any possible confusion before the jury began its deliberations. Accordingly, Applicant has failed to show a probability "sufficient to undermine confidence in the outcome" that, but for the alleged error of Trial Counsel in failing to object to Price's statement, the result of his trial would likely have been different. *See id.*; *see also Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Therefore, Respondent respectfully asks this Court to issue an amended order reflecting that this allegation is denied and dismissed with prejudice.

Allegation 40: Failure to request a *Jackson v. Denno* hearing to challenge the voluntariness of Applicant's consent to the buccal DNA swab

The Court found Trial Counsel was deficient for failing 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 or to object to the admission of that evidence. The Court's order notes Trial Counsel's stated reason for failing to object was that he did not think a *Jackson v. Denno* hearing was necessary because the evidence at issue was not a statement.

The Court has not explained why Trial Counsel's stated reason for not objecting was improper. *Jackson v. Denno* requires a hearing only to determine the admissibility of a defendant's confession. *Id.* at 380 ("A defendant objecting to the *admission of a confession* is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his *confession* are actually and reliably determined.") (emphasis added). Respondent is unaware of any precedent suggesting that a *Jackson v. Denno* hearing may be held when the challenged evidence is not a confession or similarly self-incriminating statement. The only legal authorities cited in this portion of the Court's order are *Jackson v. Denno* and various provisions of the United States Constitution,

none of which support the Court's conclusion that Trial Counsel was professionally obligated to request a hearing on the admissibility of DNA evidence.

In addition, the Court's order does not explain how Applicant was prejudiced by Trial Counsel's conduct. At trial, Applicant admitted the semen found on the bedsheet was his, explaining that his then-wife had masturbated him on his son's bed. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. Moreover, Applicant has not even asserted, much less proved, that his consent to the buccal swab was obtained involuntarily. Applicant, therefore, has not met his burden to show that, but for Trial Counsel's failure to request a *Jackson v. Denno* hearing, the result of Applicant's trial would have been different. *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. Accordingly, Respondent requests the Court issue an amended order denying and dismissing Allegation 40 with prejudice.

Allegation 43: Failure to cross-examine the State's witnesses about discrepancies as to whose bedroom the bedsheets were taken from

The Court found Trial Counsel should have cross-examined the State's witnesses about whose bedroom the bedsheets were taken from that had Applicant's DNA on them. Applicant alleged that the State claimed the sheets were taken from Victim 3's room at the first trial but claimed they were taken from Hoss's room at the second trial. The Court found Trial Counsel deficient for failing to expose this discrepancy because the location of the sheets was critical to the State's case. However, the Court's order does not explain why this evidence was "critical."

Courts give great deference to counsel's decisions concerning the cross-examination of witnesses. *See, e.g., Brown v. Uttecht*, 530 F.3d 1031, 1036–37 (9th Cir. 2008) (holding counsel was not ineffective for failing to cross-examine an expert witness); *Skeen v. State*, 325 S.C. 210,

216–17, 481 S.E.2d 129, 132–33 (1997) ("We see no ineffectiveness in counsel's failure to cross-examine [the State's witness] about the supposed discrepancy in her testimony and her statement to the police. . . . [O]ne could only speculate whether a 'better' cross examination would have helped Skeen.").

The heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Applicant's semen on the bedsheets (for which Applicant was able to offer an innocent explanation). In addition, Victim 3 testified Applicant continued abusing her after she had started sleeping in Hoss's bedroom when Hoss moved out, so the presence of Applicant's semen on the sheets of Hoss's bed was not inconsistent with Victim 3's testimony. (April 15–16, 2013, Trial Tr. p.158, line 6–p.159, line 13). Since both Hoss and Victim 3 used the bedroom at different times, whether that room is characterized as "Hoss's bedroom" or "Victim 3's bedroom" is a semantic quibble, not a material factual discrepancy. *See Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding counsel was not ineffective for failing to cross-examine witnesses based on "meaningless inconsistencies," such as whether a particular incident of sexual abuse occurred in the living room or the bathroom), *abrogated on other grounds by State v. Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).[11]

In addition, Applicant bases this allegation on alleged differences in the photographs introduced in his two trials, claiming the State introduced photographs of Victim 3's bedroom in

[11] In fact, attempting to refute the State's claim that the bedsheets were found in Hoss's room could easily have backfired against the defense: Applicant offered a potentially innocent explanation for how his semen ended up on Hoss's bedsheets but did not offer any explanation for how it might have ended up in Victim 3's room. Trial Counsel cannot be found ineffective for failing to conduct a cross-examination that might have negated an aspect of Applicant's defense. *See, e.g., Brown*, 530 F.3d at 1036–37 (holding counsel was not ineffective for failing to cross-examine the State's expert because doing so could have "backfired" and hurt the defendant's mitigation case).

the first trial but then introduced a photograph of Hoss's bedroom in the second trial. (April 17–18, 2013, Trial Tr. pp.116–18). However, Applicant did not present either photograph to this Court at the evidentiary hearing to substantiate this claim. *See Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (holding, in a case where a PCR applicant received a second trial after his first trial ended in a mistrial, the applicant was required to present a copy of the first trial transcript to substantiate his allegation that trial counsel was ineffective for failing to point out discrepancies in the testimony given at the two trials), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Applicant has failed to prove, by a preponderance of the evidence, that Trial Counsel was ineffective for failing to further develop this line of inquiry. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Accordingly, Respondent respectfully asks this Court to amend its order and deny and dismiss Allegation 43 with prejudice.

Allegation 45: Failure to object to the trial court's interruptions of Applicant's testimony

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

During direct examination by Trial Counsel, Applicant's testimony often deteriorated into irrelevant tangents. (April 17–18, 2013, Trial Tr. p.129, line 21–p.130, line 10; p.131, line 8–p.132, line 11; p.132, line 25–p.133, line 8; p.133, lines 14–16; p.138, line 24–p.139, line 7; p.145, line 14–p.146, line 3). He also frequently attempted to testify to statements made by third parties. (April 17–18, 2013, Trial Tr. p.136, lines 1–2, 14; p.138, lines 1–2; p.141, lines 15–16; p.144, lines

3–4; p.145, line 25–p.146, line 3; p.150, lines 9–12). The trial court admonished him multiple times to give responsive answers to Trial Counsel's questions and to refrain from testifying as to what other people said. (April 17–18, 2013, Trial Tr. p.130, lines 11–15; p.133, lines 17–18; p.136, lines 16–18; p.139, lines 10–21; p.141, lines 14–24; p.142, lines 8–9; p.143, line 7; p.144, line 5; p.146, lines 4–19; p.150, line 19–p.151, line 5). At one point, the court admonished Trial Counsel for asking speculative questions and told the solicitor to "object to those speculation type of questions and answers." (April 17–18, 2013, Trial Tr. p.136, lines 10–11).

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). Applicant's repeated failures to abide by the rules necessitated the court's increasingly emphatic remonstrances. At the PCR hearing, Trial Counsel admitted he had difficulty controlling Applicant on the stand, and he testified that he did not believe the trial judge's attempts to maintain order were prejudicial to Applicant. Therefore, Applicant failed to establish, by a preponderance of the evidence, either Trial Counsel's deficiency or any resulting prejudice from the alleged error. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Respondent requests that this Court issue an amended order denying and dismissing this allegation with prejudice.

Allegation 47: Failure to object to "truth-seeking" language in the trial court's jury charge

The Court found that Trial Counsel was deficient for failing to object to two of the trial court's jury instructions: "[I]t 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."[12]

As discussed in response to Allegation 23, "truth-seeking" language in jury instructions was promulgated by the Supreme Court of South Carolina in the general sessions benchbook and was not condemned until *State v. Beaty*, many years after Applicant's trial concluded. *See Beaty*, 423 S.C. at 34 n.2, 813 S.E.2d at 506 n.2. Trial Counsel was not deficient for failing to anticipate a future change in the law. *See Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456. In addition, the trial court's statement that, "[I]t is your duty to determine what the true facts are and what the truth is and who is telling the truth," appeared in the middle of an extended discussion on the jury's role in determining witness credibility. (April 17–18, 2013, Trial Tr. p.203, line 3–p.204, line 13). At the time of Applicant's trial, "truth-seeking" language was permissible in the context of witness credibility instructions. *See Aleksey*, 343 S.C. at 27–29, 538 S.E.2d at 251–53.

Furthermore, these isolated statements, in the context of the entire jury charge, were not objectionable. *See id.* at 27, 538 S.E.2d at 251 (holding if the jury instructions, considered as a whole, are correct, isolated portions that may be misleading do not constitute reversible error).

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[12] The full paragraph in which this statement appears is as follows:

> Obviously you have no friends to reward, no enemies to punish. You're to make your decision based solely on what you determine the true facts are in the case and determine and apply those facts to the law as I give it to you, and from those facts, if you determine that the State has proven each of the elements that I gave to you beyond a reasonable doubt, then the verdict would be guilty. If not, it would be not guilty.

(April 17–18, 2013, Trial Tr. p.212, line 23–p.213, line 5). In context, therefore, it is clear that the trial court was instructing the jury to set aside passions and prejudices and decide the case objectively, bearing in mind the State's burden of proof and the reasonable doubt standard. This instruction correctly conveyed the appropriate standard of proof to the jury, notwithstanding its references to the "true facts" in the case. Therefore, Trial Counsel was not deficient for failing to object to it, and Applicant suffered no prejudice.

The remainder of the trial court's jury charge adequately instructed the jury on the presumption of innocence, the State's burden of proof, and the reasonable doubt standard. Any possible confusion based on the court's isolated "truth-seeking" statements was cured by the court's thorough instruction on the correct standard, so there is no reasonable probability that the result of Applicant's trial would have been different had Trial Counsel objected to the statements.

For these reasons, Applicant has not met his burden of proving that Trial Counsel's failure to object to the trial court's "truth" language during its closing jury instruction was deficient, nor has he proved any prejudice resulting from Trial Counsel's conduct. *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, Respondent requests this Court amend its order to reflect that Allegation 47 is denied and dismissed with prejudice.

Allegation 48: Failure to object to the trial court's jury instruction that the testimony of a victim need not be corroborated

The Court found Trial Counsel was deficient for failing to object to the trial court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." (April 17–18, 2013, Trial Tr. p.210, lines 23–24). Although that proposition is correct as a statement of law, its use as a jury instruction has been condemned by the South Carolina Supreme Court. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (holding jury instructions that victims' testimony need not be corroborated in prosecutions for criminal sexual conduct should no longer be given). However, at the time of Applicant's trial in 2013, that instruction was expressly permitted by Supreme Court precedent. *See, e.g., State v. Rayfield*, 369 S.C. 106, 115–18, 631 S.E.2d 244, 249–50 (2006) (holding the trial court did not err in charging that a victim's testimony need not be corroborated), *abrogated by Stukes*, 416 S.C. 493, 787 S.E.2d

480. Trial Counsel is not required to be clairvoyant and was not deficient for failing to anticipate a change in the law. *See Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (holding trial counsel cannot be found ineffective for failing to object to a jury instruction at a time when no case law rendered the instruction improper per se); *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456 ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765)), *overruled on other grounds by Brightman*, 336 S.C. 348, 520 S.E.2d 614. In addition, the *Stukes* opinion expressly states that its holding does not apply to PCR cases. *Stukes*, 416 S.C. at 500 n.5, 787 S.E.2d at 483 n.5. Accordingly, Trial Counsel was not deficient for failing to object to this instruction, and Respondent respectfully asks this Court to amend its order and deny and dismiss Allegation 48 with prejudice.

III. CONCLUSION

Based on all the foregoing, Respondent respectfully requests this Court issue a revised or amended order denying and dismissing every allegation in Applicant's amended post-conviction relief application with prejudice.

Respectfully submitted,

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Attorney General

W. JEFFREY YOUNG
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By: _____
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June 10, 2022

STATE OF SOUTH CAROLINA COUNTY OF AIKEN HAROLD CARTWRIGHT, #355084 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	)	IN THE COURT OF COMMON PLEAS 2019-CP-02-1582 AFFIDAVIT OF SERVICE BY MAIL FILED 6-13 2022 1:15 SP C.C.P. & G.S. Deputy Clerk

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Motion to Alter or Amend Judgment the order granting post-conviction relief in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable Robert J. Bonds
14th Circuit Judge
Post Office Box 2120
Walterboro, SC 29488

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

DATED this 10th day of June, 2022.

Joshua Osborne, Legal Assistant for
Respondent

THE STATE OF SOUTH CAROLINA COUNTY OF **AIKEN** **Harold Cartwright,** Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF **COMMON PLEAS** **SECOND** JUDICIAL CIRCUIT Case No.: **2019CP0201580** **AMENDED ORDER GRANTING APPLICANT POST-CONVICTION RELIEF**

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert L. Clark, Clerk of Court & Common Pleas & General Sessions for Aiken County, South Carolina, do hereby certify that the foregoing consitutes a true and correct copy of the original documents which have been filed in my office.

JUL 27 2022

C.C.P. & G.S., Aiken County, S.C.
Deputy Clerk

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

On February 25, 2022, Mr. Routzong finished his testimony. At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After 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, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). . In June 2022, the State filed a Rule 59(e) SCRCP, motion to alter or amend the

FILED July 27 2022
C.C.P. & G.S.
Deputy Clerk

Court's order granting post-conviction relief to Harold Cartwright. On June 24th, 2022 the Court has a hearing on the matter via Webex. 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, however the Court has made several clarifications and modifications to its previous order.

PROCEDURAL HISTORY

The Aiken County Grand Jury indicted Applicant for eight (8) counts of criminal sexual conduct with a minor, first degree; sixteen (16) counts of lewd act with a minor; two counts (2) criminal sexual conduct with a minor, second degree; one (1) count of criminal sexual conduct, first degree; and one (1) count of criminal sexual conduct, third degree.

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

On September 30, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App.

filed September 30, 2015). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Applicant, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

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

On June 26, 2019, Applicant filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. Applicant also filed a motion for leave to obtain a discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

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

> Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).
>
> Appellate Counsel denied Applicant's right to effective

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

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

(1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed interview critical witnesses who could have added to the credibility of Applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

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

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

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

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

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

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

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

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

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

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

(12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. *See State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015).

(13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in camera* hearing). *See* Rule 702, 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).

(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 701and 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. 114,

470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013).

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

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

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

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

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

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

important to see how we grouped these indictments together."

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

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

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

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

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

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

(31) Trial Counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your

honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up.

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

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

(34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and lowers the State's burden in the eyes of the jury as it appears to indicate the statutory law for such cases has already been satisfied. *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001); Rules 701 and 702, SCRE.

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

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

(37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions reinforced the State's theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked

a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. *See* U.S. Const. amends. V, VI, XIV.

(38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy 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 #10), and the DNA testing derived from the same where no *Denno* hearing was requested or held regarding the voluntariness of the Applicant's waiver, which if involuntarily made would render the subsequent buccal swab and DNA testing fruits of the poisonous tree. *See* U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).

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

(42) Trial Counsel failed to object and move to strike the State's redirect examination of the jailer who purportedly saw Applicant hanging in his cell as beyond the scope of cross-examination where the State failed to have the witness identify Applicant during direct examination, and where Counsel

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

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

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

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

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

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

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

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

(50) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. 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 701and 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).

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 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 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had

a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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 alleges 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 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).)

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 alleges 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 alleged failure to investigation a Victim's potential deal with the State.

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges 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., *Martin*, 427 S.C. at 455, 832 S.E.2d at 279–80; *Taylor*, 258 S.C. at 378, 188 S.E.2d at 854. In addition, Trial Counsel testified he was wary of calling character and reputation witnesses because putting Applicant's character at issue would have opened the door for the State to introduce Applicant's prior convictions. The Court finds Trial Counsel articulated a valid strategic reason for not inquiring further into Applicant's character at trial. See *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22. Accordingly, this allegation is denied and dismissed with prejudice.

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

Applicant alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Nine: Trial Counsel's alleged 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 alleges 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 alleges 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 alleges 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*, 411 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*, 411 S.C. 583, 769 S.E.2d 860 (2015) compels a different result. In that case, Baker was initially indicted for committing lewd acts upon a minor during three specific summers; two weeks before trial, however, the State amended the indictments to allege the lewd acts occurred "between June 1, 1998 and September 1, 2004." *Id.* at 586–87, 769 S.E.2d at 862. The South Carolina Supreme Court held the amended indictments were unconstitutionally overbroad, noting Baker had spent a year preparing an alibi defense and suddenly had only two weeks to prepare a new defense to the greatly expanded period alleged in the new indictments. *Id.* at 590–92, 769 S.E.2d at 864–65. Applicant alleges the Baker holding necessitates finding the indictments in his case unconstitutional.

This Court finds the facts of Baker are significantly different from the facts of this case. Applicant's indictments have not been amended, and Applicant's defense was based on attacking the victims' credibility, not on an alibi. In addition, each of Applicant's indictments alleged offenses occurring within a one-year period, a much more specific

time frame than the six-year period alleged in each of Baker's indictments. Finally, the Baker Court suggested that the indictments would have been sufficient if limited to just the summer months during those six years—a total of eighteen months per indictment, which would still have been broader than the twelve months alleged in each indictment against Applicant. *Id.* at 592 n.5, 769 S.E.2d at 865 n.5.

Viewing all the circumstances "with a practical eye," this Court finds the indictments were sufficiently certain and particular to put Applicant on notice of the charges against him and, therefore, were not constitutionally defective. See *Lewis*, 434 S.C. at 172, 863 S.E.2d at 8 (holding the primary purpose of an indictment includes putting the defendant on notice of the elements of the offense and allowing him to decide whether to stand trial or plead guilty). 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 Thirteen: Trial Counsel's alleged failure to object to the legal standard used for qualifying the State's expert witness.

Applicant alleges Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to voir dire of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an in camera hearing). See Rule 702,

SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728 S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).

The Court finds that Trial Counsel's failure to object to the standard used to qualify the State's expert witness, and the fact that this circumstances described above occurred in the presence of the jury amounted to deficient performance by Trial Counsel.

Allegation Fourteen: Trial Court's alleged failure to object and move to strike part of the testimony of the State's expert witness.

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

The Court finds that Trial Counsel's failure to object and move to strike the expert witness's testimony amounted to deficient performance by Trial Counsel. Dr. Benedetto's testimony that abusers are often interested in victims of a particular age went beyond the scope of her expertise, which was limited to the perspective of child victims. Although Trial Counsel objected to this line of questioning as "leading," he did not object on the ground that it exceeded the scope of Dr. Benedetto's expertise.

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

The Applicant alleges 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 117-18, 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 alleges 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 alleges 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 alleges Trial Counsel failed to move to quash the jury panel pursuant to *Baston* where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See *U.S. Const. amends.* V, VI, XIV; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996); *State v. Schuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *State v. Rogers*, 405 S.C. 520, 748

S.E.2d 247 (Ct. App. 2013).

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's alleged failure to sequester witnesses.

The Applicant alleges 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*.

All the witnesses had participated in the prior trial but counsel could not tell the Court if the witnesses had the opportunity to hear each other's testimony during the first trial. Trial Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with the testimony from the previous trial, he believed sequestration would have achieved nothing. However, the Court believes that Trial Counsel was deficient in

failing to sequester 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.

Allegation Twenty: Trial Counsel's alleged failure to object during voir dire and move for further voir dire.

The Applicant alleges Trial Counsel by failed to obje requesting a new trial based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

ct 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.

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 if he had been made aware. The Court believes it is the clear 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. The Court believes that Trial Counsel was deficient for failing to

ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review.

Allegation Twenty One: Trial Counsel's alleged failure to preserve a juror's conversation with the Court.

The Applicant alleges 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 of his peremptory strikes, because only nine jurors were struck in total, and he had ten strikes. However, Trial Counsel 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.

Allegation Twenty Two: Trial Counsel's alleged failure to sever the Applicant charges.

The Applicant alleges that 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).

The Court finds that Trial Counsel was deficient for failing to sever the charges. The Applicant's charges involved three separate victims over an extended period of time. Although at the evidentiary hearing, Trial Counsel testified that he was afraid multiple trials could result in a longer total term of imprisonment, the State's case was strengthened with the amount of victims presented to the jury at one time, especially when the credibility of the victims was a central issue of the Defense's case. The charges did not arise out of a single chain of circumstances and were not proved by the same evidence, however the State's case was potentially improperly bolstered by the testimony of these Victims together coupled with the State's expert witness commenting that the offenders typically seek out victims in a particular age range.

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

The Applicant alleges 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, 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).

Trial Counsel was deficient for failing to object to this language regarding 'true" and "just" verdicts. At the time of this trial the South Carolina Supreme Court issued clear language in *Daniels*, that any reference to the word "true" must be removed from the Court's comments to the jury.

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

The Applicant alleges 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 alleges 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.

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

The Applicant alleges 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 alleges 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 alleges 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. All 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 2011 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 117-18, 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 alleges 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 alleges 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 alleges 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(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Thirty Four: Trial Counsel's alleged failure to object to the DSS case worker's allegedly prejudicial testimony.

The Applicant alleges 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". The Applicant alleges that 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.*

At the evidentiary hearing, Trial Counsel admitted the possibility that the jury may have inferred DSS made a determination of guilt, although DSS does not need to meet any burden of proof to start an investigation. He maintained he found nothing objectionable in Price's phrasing because there are not many ways to say what Price was trying to say. However, the Court disagrees and finds that Trial Counsel was deficient for failing to object these comments as they amounted to a comment on a legal issue and was prejudicial to the Applicant because it lowers the State's burden in the eyes of the jury.

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

The Applicant alleges 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 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).

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(d)(1)(B), *SCRE*. The Court, therefore, finds Trial Counsel had no grounds to object to this statement by Price. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 alleges 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 alleges 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 alleges 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 alleges Trial Counsel failed to request a Jackson v. Denno, 378 U.S. 368 (1964), hearing to challenge the voluntariness of his consent to the buccal swab that was later used to match his DNA to that of the semen on the bedsheet. This Court finds

this allegation to be without merit. As discussed above, Applicant admitted the semen was his; he simply denied that it was related to any criminal activity. Therefore, even if all the DNA evidence was excluded, the semen would still have been identified as his. This Court finds Applicant has not proved that, but for the alleged error of Trial Counsel, the result of Applicant's trial would have been different. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

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

The Applicant alleges 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 in order 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 alleges 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 117-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Three: Trial Counsel's alleged ineffective assistance for failing to inquire about a discrepancy between the first trial and the second trial.

The Applicant alleges 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 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.

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

The Applicant alleges 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; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; Rule 71.1(e), *SCRCP*. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Forty Five: Trial Counsel's alleged failure to object to the Court stopping the Applicant's testimony.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court repeatedly stopping Applicant's testimony before the jury suasponte, 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

Trial Counsel was deficient for failing to object the Court's comments and the only reason articulated to the Court to explain this deficiency was Counsel's perception that if he objected he would fall out of favor with the trial judge. This fear of objecting to avoid what Counsel deemed as upsetting the trial judge was referenced multiple times in the PCR hearing and is not an objectively reasonable strategic choice to explain Counsel's

failure to object on behalf of his client.

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

The Applicant alleges 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 117-18, 386 S.E.2d at 625. Thus this allegation is denied and dismissed with prejudice.

Allegation Forty Seven: Trial Counsel's alleged to object to the Court's closing instructions.

The Applicant alleges Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the truth...," and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). The Court followed the language that was provided at the time and cannot be expected to predict all possible changes in the law. Therefore the Court denies and dismisses the allegation with prejudice.

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

The Applicant alleges 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.

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

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

Appellate Counsel was deficient for failing to request such review, or that he likely would have obtained review had he requested it. *See id.*; Rule 71.1(e), SCRCP. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation Two: Appellate Counsel's alleged failure to raise issues related to Dr. Benedetto's qualification as an expert in child sexual abuse dynamics.

Applicant alleges 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 alleges Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without merit. 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 117-18, 386 S.E.2d at 625; *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Accordingly, this allegation is denied and dismissed with prejudice.

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

Allegation 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 cumulative error and the prejudice suffered from the individual allegations that were found by this Court. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); See *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Here, the Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified eleven (11) errors that

individually and cumulatively create prejudice against the Applicant. "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 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, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See *Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). The Applicants first trial ending 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*, 466U.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). The 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, §§ 3 and 14; *S.C. Code* § 17-27-20(A)(1), (4), and (6). Therefore this PCR application must be granted and Applicant shall receive a new trial.

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

IT IS SO ORDERED!

The Honorable Robert J. Bonds
Presiding Judge

July 14, 2022
Walterboro, South Carolina

ALAN WILSON
ATTORNEY GENERAL

August 8, 2022

The Honorable Patricia A. Howard
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211
(by e-filing only - supctfilings@sccourts.org)

Re: Harold Cartwright, #355084 v. State of South Carolina
Case No. 2019-CP-02-1582

Dear Ms. Howard:

Enclosed for filing is a notice of appeal in the above-referenced post-conviction relief case. Enclosed are the following:

1. A copy of the orders which are to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. The transcript request for any necessary transcripts that are not already in possession of Petitioner.

Please let me know if anything additional is needed at this time.

Sincerely,

Zachary W. Jones
Assistant Attorney General

ZWJ/jmo

cc: Dayne C. Phillips, Esquire (by email and U.S. Mail)
South Carolina Department of Corrections (by email only)
Aiken County Clerk of Court (by U.S. Mail)
Victim Advocacy Division (by email only)

RECEIVED

May 19 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2022-001088

Harold Cartwright,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
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ATTORNEYS FOR PETITIONER

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3. Did the PCR court err 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?
4. Did the PCR court err in finding Counsel was deficient for failing to move to sequester witnesses, when the witnesses had already testified at Respondent's previous trial and there was no substantial difference in the witnesses' testimony between the two trials?
5. Did the PCR court err in finding Counsel was deficient for not moving to individually *voir dire* jurors who informed the court they had experienced sexual misconduct or abuse or to put those jurors' information on the record?
6. Did the PCR court err in finding Counsel was deficient for not putting on the record Juror No. 94's revelation that she had "a relative that was a victim," when Counsel successfully struck the juror using a peremptory challenge and still had a strike left over at the end of jury selection?
7. 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?
8. 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?
9. Did the PCR court err in finding Counsel was deficient for arguing that, if the victims were telling the truth, Respondent could not be innocent?
10. Did the PCR court err in finding Counsel was ineffective for failing to object to testimony that DSS only becomes involved in a case if it "meets the legal statute"?
11. Did the PCR court err in finding Counsel was deficient for failing to cross-examine the State's witnesses about alleged discrepancies regarding whose bedroom the semen-stained bedsheets were taken from?
12. 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?
13. Did the PCR court err in finding Counsel was deficient for not objecting to the trial court's instruction that the testimony of the victim need not be corroborated, when that instruction was expressly permitted at the time of Respondent's trial?

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 B[redacted] in 1999. Prior to marrying Respondent, B[redacted] 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 Lively about the abuse, but Lively did not contact police because Respondent threatened to kill her, Victim 1, and himself. Eventually, Victim 1 spoke with DSS about Respondent's abuse, but Respondent convinced her to recant. Victim 1

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[1] The complete list is provided in the State's Rule 59(e), SCRCP, motion. (App.p.2050–51).

testified the abuse continued multiple times every year until 1995, when she was ten. 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).[2]

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 B[redacted]. 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. She testified he threatened to kill all of them and himself. In addition, Victim 3 testified Respondent began forcing her to have sexual intercourse with him when she was fourteen. She testified Respondent stopped having sex with her in 2010, when Hoss Cartwright, Respondent's son, moved into the house, but continued humping her in her room before school.[3] When investigators questioned Victim 3, she initially

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[2] Lively recalled Victim 1 mentioning the abuse and corroborated her testimony that Lively did not contact law enforcement because she was too afraid of Respondent. (App.p.291, line 7–p.292, line 3).

[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).

denied being abused by Respondent because she was afraid of him. Later, however, she told investigators Respondent molested her. (App.pp.338–76).

Buffy B[redacted] testified[4] 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 B[redacted] he had done nothing wrong. B[redacted] testified Respondent confessed to her on February 19, 2011, that he might have molested Victims 2 and 3. She claimed he told her to wash Victim 3's bedsheets to remove his DNA. B[redacted], however, did not wash the bedsheets; instead, she consented to a police search of the house and seizure of the bedsheets on February 25, 2011. (App.p.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 B[redacted] masturbating him on his son's bed. He explained that he attempted suicide because he had been detained for thirty days,

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

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 finding her picture on a pornographic website. (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

. . .

19. Failure to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses
20. Failure to object and move for individual voir dire when the trial court told Trial Counsel several jurors had approached him about "similar types of behavior," none of the conversations between the trial court and those jurors were placed on the record, and none of those jurors' number were placed on the record
21. Failure to properly argue that juror number 94's prior conversation with the trial court be placed on the record where juror number 94 indicated the court knew she had a relative who was a victim and the court denied Trial Counsel's motion to strike the juror for cause
22. Failure to move to sever 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

. . .

25. Arguing to the jury that Respondent couldn't be innocent if the victims were telling the truth, where that statement could not be considered a reasonable trial strategy

. . .

34. Failure to object to and move to strike a DSS case worker's testimony that DSS only becomes involved in a case if it "meets the legal statute," lowering the State's burden to prove Respondent's conduct satisfied the statutory elements of the charged offense

. . .

43. Failure to cross-examine the State's witnesses regarding the discrepancy between the testimony given at the first trial that the DNA evidence was taken from Victim 3's room and the testimony at the second trial that the DNA evidence was taken from the victim's stepbrother's room

. . .

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

. . .

48. Failure to object to the trial court's jury instruction that testimony of the victim did not need to be corroborated.

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. 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 the claims enumerated above and denying and dismissing all other claims. The State now petitions this Court for a writ of certiorari to review the decision of the PCR court.[5]

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[5] The regrettable length of this petition is necessitated by the fact the PCR court found twelve separate grounds of ineffective assistance of counsel. Any one of these twelve, if left unchallenged, would become "the law of the case" and doom the State's appeal.

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 prejudice based on "cumulative error," rather than making specific, individualized findings of prejudice as to each allegation of Counsel's deficient performance.

The PCR court ultimately granted relief based on twelve grounds of ineffective assistance of counsel: Allegations 13, 14, 19, 20, 21, 22, 23, 25, 34, 43, 45, and 48. However, the court made specific findings of prejudice on only two of those allegations: Allegations 34 and 45. The remaining thirty-eight allegations of ineffective assistance of Trial Counsel, as well as all five allegations of ineffective assistance of Appellate Counsel, were denied and dismissed as meritless. At the conclusion of its order, the PCR court states "Trial Counsel provided ineffective assistance of counsel based on cumulative error and the prejudice suffered from the individual allegations that were found by this Court." (App.p.2251).[6] The order goes on to state that "[h]ere, the

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[6] The PCR court's initial order merely stated, "Trial Counsel provided ineffective assistance of counsel based on cumulative error." (App.p.2046). The State challenged the PCR court's invocation of "cumulative error" in its Rule 59(e), SCRCP, motion, arguing that ineffective assistance must be based on individualized analysis of prejudice. Apparently in response to the

Applicant has suffered prejudice warranting a new trial based on cumulative trial error. The Court has identified eleven (11) [*sic*] errors that individually and cumulatively create prejudice against the Applicant." (App.pp.2251–52). The PCR court's conclusory finding of prejudice based on "cumulative error" was improper.

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 assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

State's argument, the PCR court's revised order appended "and the prejudice suffered from the individual allegations that were found by this Court." The addition of this conclusory language is not a substitute for a proper, individualized prejudice analysis.

(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.

In this case, the PCR court found Counsel was deficient as to twelve of Respondent's allegations. However, the PCR court did not make any express finding of prejudice as to ten of

those allegations, opting instead to adopt a conclusory finding that Counsel's errors "individually and cumulatively create prejudice against the Applicant" at the end of the order. (App.p.2252). This cursory "cumulative error" analysis is insufficient as a matter of law to sustain a finding of ineffective assistance.

The United States Supreme Court has clearly held that, before any individual act or omission of counsel may be deemed a constitutional error, it must satisfy both the "deficiency" and "prejudice" prongs of the *Strickland* analysis. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("[U]nder *Strickland v. Washington*, . . . an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."). Therefore, unless the acts and omissions of counsel are *individually* shown to be both deficient and prejudicial, they do not constitute "errors," no matter how many of them are added together. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that, regarding ineffective assistance claims, the "cumulative error" doctrine is no longer good law after *Strickland* because "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation."). For these reasons, a majority of federal appellate courts have expressly rejected "cumulative error" analysis for ineffective assistance claims. *See, e.g., Fisher v. Angelone*, 163 F.3d 835, 852–53 (4th Cir. 1998) (collecting cases and holding, "in agreement with the majority of our sister circuits that have considered the issue," that "ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively.").

The "cumulative error" doctrine is at odds with *Strickland* in other ways as well. First, *Strickland* expressly permits a judge to deny an allegation of ineffective assistance merely for failing to prove prejudice, without even reaching the deficiency prong. *Strickland*, 466 U.S. at 697. A "cumulative error" analysis, however, requires deficiency to be adjudicated as to all

allegations of ineffective assistance—regardless of whether the alleged deficiency, by itself, had any prejudicial effect on the applicant's rights—because the judge must still assess the *cumulative* effect of all deficient acts or omissions combined.

Second, one reason the *Strickland* court required proof of prejudice was "to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* The court cautioned that "intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges. . . . Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* at 690. By requiring applicants to show deficiency *and* prejudice as to each allegation of ineffective assistance, the *Strickland* court intended that post-trial review of counsel's conduct would encompass only those errors that jeopardized an applicant's right to a fair trial. "Cumulative error" analysis, however, requires courts to scrutinize even (in the PCR court's words) "errors that are insignificant by themselves" in order to determine if their cumulative effect is prejudicial. (App.p.2251). The "cumulative error" requirement to cavil even the *insignificant* missteps of defense counsel runs directly contrary to the public policy rationale articulated in *Strickland*: protecting "the entire criminal justice system" from the burdensome impact of unlimited allegations that counsel's performance was deficient. *Id.* at 697.

That burdensome impact is evident in this very case: Respondent raised a staggering *fifty-five* total allegations of ineffective assistance in his amended PCR application. For most of his allegations, Respondent did not even attempt to articulate a prejudice argument, relying instead on the "cumulative error" doctrine. Responding to this glut of claims required the State, Trial

Counsel, Appellate Counsel, and the PCR court to endure multiple days of hearings. Ultimately, the majority of Respondent's claims were correctly dismissed as meritless. However, by finding prejudice based on the "cumulative error" doctrine—which has never been approved in the ineffective assistance context—the PCR court's order rewards Respondent's vexatious behavior. As long as PCR courts allow applicants to substitute "cumulative error" arguments for the prejudice analysis required by *Strickland*, PCR applicants will be incentivized to multiply claims against defense counsel based on insignificant defects in performance, wasting judicial resources and burdening the courts with frivolous allegations. This is exactly what the United States Supreme Court warned of in *Strickland*: that unless courts required particularized showings of prejudice, ineffectiveness claims would "become so burdensome . . . that the entire criminal justice system suffers as a result." *Id.*

The PCR court cites only two cases—*State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), and *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995)—for the proposition that "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." Neither case supports the application of "cumulative error" doctrine to claims of ineffective assistance of counsel in PCR actions. *Johnson* concerned a direct appeal alleging error in the trial court's admission of evidence, while *Tennant*, a West Virginia case, concerned a direct appeal in a medical malpractice case. Furthermore, both opinions held that a party seeking to invoke the doctrine must still show *how* the combination of alleged errors affected his trial. *Johnson* held that, although the trial court committed multiple errors, a defendant "must demonstrate more than error in order to qualify for reversal under this ground. Instead, the errors must adversely affect his right to a fair trial." *Johnson*, 334 S.C. at 93. *Tennant* declined to apply

the doctrine, clarifying that "the doctrine should be used sparingly" and is not appropriate when the alleged errors "are insignificant and inconsequential." *Tennant*, 194 W.Va. at 118, 459 S.E.2d at 395.

The PCR court's general finding of prejudice lacks the necessary analysis of how Counsel's alleged deficiencies, individually or in combination, adversely affected Respondent's right to a fair trial. Absent any individualized analysis of how each purportedly deficient act prejudiced Respondent, there is no support for the PCR court's finding that Counsel was ineffective under *Strickland*.[7]

The State asks this Court to issue a writ of certiorari and to reverse the decision of the PCR court. This Court should take this opportunity to clarify, once and for all, that the "cumulative error doctrine" is not a substitute for specific, individualized findings of prejudice in PCR cases.

2. 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.

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's order states 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. The PCR court found

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[7] Despite making no specific, individualized findings of prejudice, the PCR court acknowledges that *Strickland* requires courts to "consider the *specific* impact counsel's error had on the outcome of the trial" and to "analyze how *individual* errors of counsel affect the important factual findings in a particular case." (App.p.2252) (emphasis added). This language is inconsistent with the generalized nature of the PCR court's "cumulative error" prejudice analysis.

Counsel's performance was deficient, but it did not specifically find prejudice or explain how the result of Respondent's trial would likely have been different but for Counsel's conduct.

This Court should reverse the PCR court's finding. 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). The trial court overruled Counsel's objection. (App.p.477, lines 13–18). The PCR court does not explain how Counsel's objection was unreasonable or how he could have obtained a different result by raising the issue again. *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, "the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012).[8] 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

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[8] The PCR court's order cites *Tapp*, among other cases, in support of its finding that Counsel was deficient for failing to adequately raise this issue. However, *Tapp* clarifies that reliability is relevant to the *admissibility* of expert testimony, not to whether the witness may be *qualified* as an expert. *See Tapp*, 398 S.C. at 388–89, 728 S.E.2d at 474–75; *see also State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding scientific evidence is admissible if "the expert is qualified" *and* "the underlying science is reliable," implying that qualification and reliability are separate inquiries). The court's finding that Counsel should have challenged Dr. Benedetto's qualification proceeding—as opposed to the admissibility of her subsequent testimony—on reliability grounds, therefore, is contrary to the express holding of *Tapp*.

is properly taken for granted"). Even if Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field,[9] the trial court would have had no obligation to conduct one. Likewise, 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.

In addition, the jury could not have been improperly influenced by Dr. Benedetto's pre-qualification testimony because the trial court refused to allow the attorneys to question her about the substance of her testimony until *after* she was qualified. Therefore, no prejudice could possibly have resulted from conducting the qualification examination in the presence of the jury.

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 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.

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[9] Despite claiming Counsel should have attacked the reliability of this field during the qualification proceeding, Respondent has not introduced any evidence or argument that would support such an attack. Therefore, Respondent has failed to prove he was prejudiced by Counsel's failure to challenge the reliability of child sexual abuse dynamics.

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. The court's order does not explain how Respondent was prejudiced by this alleged error.

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

In addition, 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, was not consistent with 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.

4. The PCR court erred in finding Counsel was deficient for failing to move to sequester witnesses, when the witnesses had already testified at Respondent's previous trial and there was no substantial difference in the witnesses' testimony between the two trials.

The PCR court found Counsel was deficient for failing to move to sequester the witnesses because sequestration was necessary to ensure that the witnesses did not have the ability to hear one another's testimony. *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ."); *see also State v. Huckabee*, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010) (holding the purpose of Rule 615, SCRE, is to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at trial). However, the PCR court acknowledges that "[a]ll the witnesses had participated in the prior trial."

A party is not entitled to the sequestration of witnesses as a matter of right. *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). The trial court, therefore, had no obligation to order sequestration even if Counsel had requested it.

In addition, "[a] person must not be sequestered from a proceeding adjudicating an offense of which he was a victim." S.C. Code Ann. § 16-3-1550. Therefore, Counsel would not have been able to sequester the three victims even if he had made a motion to sequester the witnesses. Since those victims were the State's chief witnesses, there is no "reasonable probability" that the result of Respondent's trial would have been different but for Counsel's alleged error.

Furthermore, Respondent was unable to point to any specific testimony that was

purportedly "shaped . . . to match that given by other witnesses at trial." *Huckabee*, 388 S.C. at 241, 694 S.E.2d at 785. If any of the witnesses had abused the lack of sequestration at the second trial to match the testimony of other witnesses, there would be a noticeable discrepancy between that witness's statements at the first trial and his or her statements at the second trial. Respondent has not shown that any such discrepancy exists.

Finally, Counsel testified at the evidentiary hearing that, because the witnesses were already familiar with each others' testimony from the previous trial, he believed sequestration would achieve nothing. (App.p.1652, lines 1–7). As Counsel has articulated a valid reason for not moving to sequester the witnesses, and as sequestration would not have prevented the witnesses from knowing each other's testimony anyway, Respondent has failed to prove his counsel was deficient or that the result of his trial would likely have been different if the witnesses had been sequestered. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

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.

5. The PCR court erred in finding Counsel was deficient for not moving to individually *voir dire* jurors who informed the trial court they had experienced sexual misconduct or abuse or to put those jurors' information on the record.

The PCR court found Counsel was deficient for failing to move to individually *voir dire* jurors whom the trial court noted had approached him about "similar types of behavior" or to preserve the issue by putting those jurors' numbers and their conversations with the trial court on the record. The PCR court's order does not explain how Respondent was prejudiced by Counsel's alleged omission.

Prior to jury selection, the trial court asked if any member of the jury panel "has been a victim or subjected to similar types of behavior, i.e. sexual misconduct or abuse." (App.p.237, lines 5–7). The court went on to state, "Now, I've had several jurors who have come forward expressing to me some of their past and how it affected them. I don't need you to come back forward, but do I have anyone else who has not come forward that has been a victim or experienced this type of behavior in your family? . . . Anyone else other than the ladies who have come forward?" (App.p.237, lines 9–15). Later, during jury selection, Counsel moved to strike Juror No. 94 for cause, arguing that "[s]he has a relative that was a victim, as the court knows." (App.p.244, lines 4–7). The trial court stated, "And she did advise us of that and I asked her could she be fair and impartial and try the case based solely on what she heard in the courtroom. She adequately said she could, respectfully denied." (App.p.244, lines 8–11). Counsel then used a peremptory strike to have Juror No. 94 excused. (App.p.244, lines 12–14).

Although the trial transcript indicates that some jurors had informed the trial court, outside the record, about "their past and how it affected them," it also shows that Counsel was aware of those jurors and took appropriate action to have them removed from the jury pool. In addition, it shows that the trial court had examined the jurors to ensure they could try the case "fairly and impartially." The mere fact that those jurors' interactions with the court and Counsel were not included in the record is not sufficient to establish prejudice; the jury is presumed to act according to law. *See Strickland*, 466 U.S. at 694–95 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). Respondent still bears the burden to show that, but for Counsel's failure to record

those interactions, the result of his trial would likely have been different. Absent such a showing, it should not be presumed that the interactions were harmful to Respondent's case or that the jury acted improperly. Respondent presented no evidence to overcome the presumption that the jury was fair and impartial; therefore, he has failed to meet his burden. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP

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.

6. The PCR court erred in finding Counsel was deficient for not putting on the record Juror No. 94's revelation that she had "a relative that was a victim," when Counsel successfully struck the juror using a peremptory challenge and still had a strike left over at the end of jury selection.

The PCR court found Counsel failed to properly argue and preserve his request that Juror No. 94's conversation with the trial court be placed on the record after that juror revealed she had "a relative that was a victim, as the court knows." However, the PCR court acknowledges that Juror No. 94 was struck using a peremptory challenge after the trial court denied the motion to strike her for cause. The PCR court also acknowledges that Counsel did not even use up all of his peremptory strikes; only nine jurors were struck in total, and Counsel had ten strikes. Nevertheless, the PCR court found Counsel was deficient for failing to put Juror No. 94's conversation on the record because Counsel "had to strategically use one of his peremptory strikes on this juror."

Respondent could not possibly have been prejudiced by Counsel's alleged error because Counsel still had peremptory strikes left over after all the jurors were selected. In other words, Counsel struck every juror he wanted to strike, including Juror No. 94. Since the use of a peremptory strike on Juror No. 94 manifestly did not prevent Counsel from striking any other juror, there is no possibility that the ultimate composition of the jury would have been different

had Counsel more vigorously argued for Juror No. 94 to be struck for cause. Therefore, Respondent was not prejudiced. *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.

7. 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 found Counsel was deficient for failing to sever the charges because the State's case was strengthened by the number of victims presented to the jury. However, the court's order acknowledges that Counsel articulated a strategic reason for not moving to sever the charges: at the evidentiary hearing, Counsel testified that he was afraid multiple trials could result in a life without parole sentence. (App.p.1838, lines 17–22). Counsel faced a serious dilemma: 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. Counsel made the difficult choice to go forward in a single trial. This was not an objectively unreasonable decision; 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 B[redacted] 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.

8. 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). The order cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), for the proposition that "any references to the word 'true' must be removed from the Court's comments to the jury."

However, that proposition does not appear anywhere in *State v. Daniels*, even in paraphrase. The trial court's "truth-seeking" language was not held improper until *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). In that decision, this 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.

The trial in this case occurred in 2013, many years before *Beaty* was decided. Counsel would 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).[10]

In addition, 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, references to "truth" were permitted by the Supreme Court in the context of instructions on witness credibility. *See State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000).

In addition, the fact that the challenged language appeared in the 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.* at 28–29, 538 S.E.2d at 252 ("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."). Furthermore, if the jury instructions, considered as a whole, are correct, isolated portions that may be misleading do not constitute reversible error. *Id.* at 27, 538 S.E.2d at 251. 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

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[10] Bizarrely, the PCR court denied and dismissed Respondent's Allegation 47, which raised an almost identical issue of failure to object to "truth-seeking" language in the trial court's *closing* instruction. Responding to that allegation, the PCR court acknowledged that the trial court was employing "the language that was provided at the time" and that Counsel "cannot be expected to predict all possible changes in the law." The PCR court's disposition of Allegation 47 is totally inconsistent with its disposition of this virtually identical claim.

must be presumed innocent and need not offer any proof of his innocence. The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice.

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.

9. The PCR court erred in finding Counsel was deficient for arguing that, if the victims were telling the truth, Respondent could not be innocent.

The PCR court found Counsel was deficient for arguing, in his opening statement, that Respondent could not be innocent if the victims were telling the truth. The court's order points out that the State used that quote against the defense in its closing argument, stating, "As Mr. Routzong said in his opening statement, if you believe the victims, the defendant's guilty." The order does not explain specifically why Counsel's argument was deficient or how Respondent was prejudiced by it.

Counsel began his opening argument by emphasizing the presumption of innocence. He stated "the presumption of innocence means . . . that the accusers in this case are either mistaken or untruthful. That's the position you have to take as you're sitting all the way through this trial because that's what the presumption of innocence means. If they're telling the truth, he can't be innocent. If he's innocent, they can't be telling the truth . . . ." (App.p.264, lines 19–25). He concluded by attacking the credibility of the victims, claiming they had "axes to grind" and were "either mistaken or telling untruths." (App.p.265, lines 9–13). In context, it is clear that Counsel was urging the jury *not* to believe the victims, but to start from the presumption that the victims

were either mistaken or lying in order to get revenge on Respondent.

Clearly, if the jury believed the victims—who testified in detail about the crimes perpetrated by Respondent—it would also have to believe Respondent was guilty of those crimes. The heart of the case, for both sides, was the credibility battle between the victims and Respondent. Focusing the jury's attention on the fact that the State's case depended on the credibility of the victims was an integral part of Counsel's defense strategy.

The mere fact that the solicitor was able to use Counsel's words in his own closing argument does not mean Counsel was deficient for making the argument in the first place. The solicitor would have been able to argue that the victims' testimony implied Respondent's guilt even if Counsel had never brought it up; the victims' testimony was the crux of the State's case. Therefore, there is no reasonable probability that the result of the trial would have been more favorable to Respondent if Counsel had not made the challenged statement. *See Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Furthermore, the fact that the victims' testimony was inconsistent with Respondent's innocence was so obvious that no prejudice could have resulted from either Counsel or the State pointing it out to the jury. *See Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

10. The PCR court erred in finding Counsel was ineffective for failing to object to testimony that DSS only becomes involved in a case if it "meets the legal statute."

The PCR court found Counsel should have objected when Michelle Price, a caseworker for the South Carolina Department of Social Services (DSS), testified that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina." (App.p.334, lines 15–16). The court stated this language was prejudicial because it lowered the State's burden of proof in the

eyes of the jury by suggesting the statutory elements of the offense have already been proved.

At the evidentiary hearing, Counsel testified he did not believe Price's statement lowered the State's burden of proof. (App.pp.1686–87). Although he acknowledged that "there could have been questions asked in hindsight," he maintained he found nothing objectionable in Price's phrasing, and he did not believe the jury would have incorrectly inferred that DSS possessed some evidence of Respondent's guilt just because they opened a case. (App.p.1804–1806). The PCR court's order does not explain why Counsel's explanation for not objecting was unreasonable.

However, even if Counsel's stated reason for failing to object was deficient, Respondent suffered no prejudice. The test for prejudice is whether an error "undermines the reliability of the result of the proceeding," not whether it "conceivably could have influenced the outcome." *Strickland*, 466 U.S. at 693. Respondent must show a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome"—that the result of his trial would have been different but for Counsel's alleged error. *Id.* at 694.

Even if it were "conceivable" that the jury misinterpreted Price's statement, it is more likely that the jury correctly interpreted her statement to mean that DSS is required to initiate investigations based only on statutory parameters—*not* based on some belief in the strength of the evidence against the accused or the credibility of the accuser. Price also clarified that the next step would be to "interview the family," which would have alerted the jury that DSS had not yet investigated the report or made any determination of guilt. Far from being prejudicial to Respondent, therefore, Price's statement would likely have conveyed to the jury that the mere fact DSS opened an investigation did not mean DSS believed Respondent was guilty.

In addition, Price's statement was brief and was not specifically related to Respondent's case, and the solicitor did not dwell on it. Even an unusually attentive jury would be unlikely to

assign any importance to such a statement. Finally, the trial court's thorough instruction on the State's burden of proof, the presumption of innocence, and the reasonable doubt standard would have cured any possible confusion before the jury began its deliberations. Accordingly, Respondent has failed to show a probability "sufficient to undermine confidence in the outcome" that, but for the alleged error of Counsel in failing to object to Price's statement, the result of his trial would likely have been different. *See id.*; *see also 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.

11. The PCR court erred in finding Counsel was deficient for failing to cross-examine the State's witnesses about alleged discrepancies regarding whose bedroom the semen-stained bedsheets were taken from.

The PCR court found Counsel should have cross-examined the State's witnesses about whose bedroom the bedsheets were taken from that had Respondent's DNA on them. Respondent alleged that the State claimed the sheets were taken from Victim 3's room at the first trial but claimed they were taken from Hoss's room at the second trial. The court found Counsel deficient for failing to expose this discrepancy because the location of the sheets was critical to the State's case. However, the court's order does not explain why this evidence was "critical."

Courts give great deference to counsel's decisions concerning the cross-examination of witnesses. *See, e.g.*, *Brown v. Uttecht*, 530 F.3d 1031, 1036–37 (9th Cir. 2008) (holding counsel was not ineffective for failing to cross-examine an expert witness); *Skeen v. State*, 325 S.C. 210, 216–17, 481 S.E.2d 129, 132–33 (1997) ("We see no ineffectiveness in counsel's failure to cross-examine [the State's witness] about the supposed discrepancy in her testimony and her statement to the police. . . . [O]ne could only speculate whether a 'better' cross examination would have helped Skeen.").

The heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Respondent's semen on the bedsheets (for which Respondent was able to offer an innocent explanation). In addition, Victim 3 testified Respondent continued abusing her after she had started sleeping in Hoss's bedroom when Hoss moved out, so the presence of Respondent's semen on the sheets of Hoss's bed was not inconsistent with Victim 3's testimony. (App.p.354, line 6–p.355, line 13). Since both Hoss and Victim 3 used the bedroom at different times, whether that room is characterized as "Hoss's bedroom" or "Victim 3's bedroom" is a semantic quibble, not a material factual discrepancy. *See Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding counsel was not ineffective for failing to cross-examine witnesses based on "meaningless inconsistencies," such as whether a particular incident of sexual abuse occurred in the living room or the bathroom), *abrogated on other grounds by State v. Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).[11]

In addition, Respondent bases this allegation on alleged differences in the photographs introduced in his two trials, claiming the State introduced photographs of Victim 3's bedroom in the first trial but then introduced a photograph of Hoss's bedroom in the second trial. (App.pp.538–40). However, Respondent did not present either photograph to this Court at the evidentiary hearing to substantiate this claim. *See Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (holding, in a case where a PCR applicant received a second trial after his first

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[11] In fact, attempting to refute the State's claim that the bedsheets were found in Hoss's room could easily have backfired against the defense: Respondent offered a potentially innocent explanation for how his semen ended up on Hoss's bedsheets but did not offer any explanation for how it might have ended up in Victim 3's room. Counsel cannot be found ineffective for failing to conduct a cross-examination that might have negated an aspect of Respondent's defense. *See, e.g.*, *Brown*, 530 F.3d at 1036–37 (holding counsel was not ineffective for failing to cross-examine the State's expert because doing so could have "backfired" and hurt the defendant's mitigation case).

trial ended in a mistrial, the applicant was required to present a copy of the first trial transcript to substantiate his allegation that trial counsel was ineffective for failing to point out discrepancies in the testimony given at the two trials), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Respondent has failed to prove, by a preponderance of the evidence, that Counsel was ineffective for failing to further develop this line of inquiry. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; Rule 71.1(e), SCRCP. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

12. 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 trial court admonished him multiple times to give responsive answers to Counsel's questions and to refrain from testifying as to what other people said. (App.p.552, lines 11–15; p.555, lines 17–18; p.558, lines 16–18; p.561, lines 10–21; p.563, lines 14–24; p.564, lines

8–9; p.565, line 7; p.566, line 5; p.568, lines 4–19; p.572, line 19–p.573, line 5). 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).

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). Respondent's repeated failures to abide by the rules necessitated the court's remonstrances. At the PCR hearing, Counsel testified that he did not believe the trial judge crossed a line in his attempts to maintain order. (App.p.1817, lines 16–19). He also testified that, in his experience, jurors base their decisions on the evidence presented and the demeanor of the witnesses, not on the actions of the court. (App.p.1820, line 19–p.1821, line 2). 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.

13. The PCR court erred in finding Counsel was deficient for not objecting to the trial court's instruction that the testimony of the victim need not be corroborated, when that instruction was expressly permitted at the time of Respondent's trial.

The PCR court found Counsel was deficient for failing to object to the trial court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." (App.p.632, lines 23–24). Although that proposition is correct as a statement of law, its use as a jury instruction has since been condemned by this Court. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (holding jury instructions that victims' testimony need not

be corroborated in prosecutions for criminal sexual conduct should no longer be given). However, at the time of Respondent's trial in 2013, that instruction was expressly permitted by Supreme Court precedent. *See, e.g.*, *State v. Rayfield*, 369 S.C. 106, 115–18, 631 S.E.2d 244, 249–50 (2006) (holding the trial court did not err in charging that a victim's testimony need not be corroborated), *abrogated by Stukes*, 416 S.C. 493, 787 S.E.2d 480. Counsel is not required to be clairvoyant and was not deficient for failing to anticipate a change in the law. *See Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (holding trial counsel cannot be found ineffective for failing to object to a jury instruction at a time when no case law rendered the instruction improper per se); *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456 ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765)), *overruled on other grounds by Brightman*, 336 S.C. 348, 520 S.E.2d 614. In addition, the *Stukes* opinion expressly states that its holding does not apply to PCR cases. *Stukes*, 416 S.C. at 500 n.5, 787 S.E.2d at 483 n.5. Accordingly, this Court 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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By: _____
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May 19, 2023

RECEIVED

May 19 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2022-001088

Harold Cartwright,

Respondent,

v.

State of South Carolina,

Petitioner.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix have been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Dayne C. Phillips, Esquire
dayne@pricebenowitz.com

This 19th day of May, 2023.

Caroline Collins
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RECEIVED
Oct 09 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

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Harold Cartwright,

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v.

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Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

INDEX

QUESTIONS PRESENTED

1. Did the PCR Court properly find Counsel ineffective based on the Court's specific findings of prejudice and the per se prejudice of Counsel's cumulative failure to subject the prosecution's case to meaningful adversarial testing?

2. Did the PCR Court properly find Counsel deficient for failing to object when the Trial Court applied an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics?

3. Did the PCR Court properly find Counsel deficient for failing to object and move to strike Dr. Benedetto's statement that "abusers typically seek victims of a particular age" as beyond the scope of her expertise?

4. Did the PCR Court properly find Counsel deficient for failing to move for sequestration of witnesses where the State repeatedly referred to prior testimony when questioning witnesses during its case in chief?

5. Did the PCR Court properly find Counsel deficient for not moving 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?

6. Did the PCR Court properly find Counsel deficient for failing to preserve on the record juror no. 94's revelation that she had "a relative that was a victim"?

7. Did the PCR Court properly find Counsel deficient for failing to move for severance of Respondent's charges?

8. Did the PCR Court properly find Counsel deficient for not objecting to "truth-seeking" language in the Trial Court's preliminary instructions to the jury?

9. Did the PCR Court properly find Counsel deficient for presenting improper comments during opening statement?

10. Did the PCR Court properly find Counsel ineffective for failing to object when the DSS case worker testified 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"?

11. Did the PCR Court properly find Counsel deficient for failing to cross-examine the State's witnesses about alleged discrepancies regarding whose bedroom the semen-stained bedsheets were taken from for testing?

12. Did the PCR Court properly find Counsel ineffective for failing to object when the Trial Court *sua sponte* repeatedly stopped Respondent's testimony in the jury's presence, admonished Respondent, and instructed the Prosecutor to object, giving the improper appearance of partiality?

13. Did the PCR Court properly find Counsel deficient for not objecting to the Trial Court's instruction that the testimony of the victim need not be corroborated?

STATEMENT OF THE CASE

The Aiken County Grand Jury indicted Respondent 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 November 12, 2012, Respondent proceeded to trial before the Honorable Thomas A. Russo and a jury. Robert Harte represented Respondent, and the Court ultimately granted a mistrial due to a hung jury on November 14, 2012. (App. Vol. I, p. 1–196).

On April 15, 2013, Respondent proceeded to trial before the Honorable Doyet A. Early, III, and a jury. (App. Vol. I, p. 197 – Vol. II, p. 660). Michael Routzong and David Hayes represented Respondent, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts for all charges on April 18, 2013. The Trial Court sentenced Respondent 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 convictions. However, the Trial Court also 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 Respondent's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App. filed September 30, 2015) (App. Vol. II, p. 661 – Vol. III, p. 1180). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Respondent, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On September 26, 2018, the South Carolina Supreme Court affirmed Respondent's

convictions and sentences. *State v. Harold Cartwright, III*, Op. No. 27842 (S.C. Sup. Ct. filed September 26, 2018). (App. Vol. III, p. 1180–1354).

On June 26, 2019, Respondent filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. (App. Vol. III, p. 1355). Respondent also filed a motion for leave to obtain discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. (App. Vol. III, p. 1490). The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

On June 29, 2020, Respondent filed an amended PCR application, and subsequently filed a redacted amended application on July 9, 2020. (App. Vol. IV, p. 1506–1531).

On February 3–4, 2022, Respondent appeared before the PCR Court for a virtual evidentiary hearing. (App. Vol. IV, p. 1532 –1714). 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. (App. Vol. IV, p. 1715–1902). 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. (App. Vol. IV, p. 1984).

On June 13, 2022, Petitioner filed a motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. Vol. V, p. 2049–2091). The parties appeared before the PCR Court on June 24, 2022, for a hearing to address the motion to alter or amend. (App. Vol. V, p. 2092–2188).

On July 22, 2022, the PCR Court issued an Amended Order granting Respondent Post-Conviction Relief. (App. Vol. V, p. 2189–2253).

STANDARD OF REVIEW

This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *See Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law. *See Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

1. THE PCR COURT PROPERLY FOUND COUNSEL INEFFECTIVE BASED ON THE COURT'S SPECIFIC FINDINGS OF PREJUDICE AND THE PER SE PREJUDICE OF COUNSEL'S CUMULATIVE FAILURE TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING.

The PCR Court properly found Trial Counsel ineffective "based on cumulative error and the prejudice suffered from the *individual allegations*". (App. Vol. V, p. 2251) (emphasis added). Specifically, the PCR Court "identified eleven (11) errors that *individually* and cumulatively create prejudice against the [Respondent]." (App. Vol. V, p. 2251–2252) (emphasis added). The PCR Court held, "Respondent[']s first trial ending 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." (App. Vol. V, p. 2252). Therefore, the PCR Court correctly held that "[t]hese errors have created a reasonable probability that but for counsel's unprofessional error, the result would have been different." (App. Vol. V, p. 2252).

Petitioner conceded in the petition that the PCR Court made specific findings of prejudice for "[a]llegations 34 and 45." Notably, even if this Court agrees with Petitioner on the issue of the PCR Court's application of the cumulative error doctrine, the PCR Court properly found Trial Counsel ineffective for (allegation 34) failing to object when the DSS case worker testified 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"; and (allegation 45) failing to object when the Trial Court *sua sponte* repeatedly stopped Respondent's testimony in the jury's presence, admonished Respondent, and instructed the Prosecutor to object, giving the improper appearance of partiality.

Accordingly, the PCR Court properly found Counsel ineffective based on the Court's specific findings of prejudice and the per se prejudice of Counsel's cumulative failure to subject the prosecution's case to meaningful adversarial testing.

A. Trial Counsel provided ineffective assistance of counsel by failing to object when the DSS case worker testified 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."

At the hearing, Trial Counsel admitted there was no strategic reason for failing to object when the DSS case worker testified 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." (App. Vol. IV, p. 1803, line 19 – 1807, line 12).

Trial Counsel acknowledged the jury may have inferred that DSS had previously made a finding about Respondent's guilt based on the Case Worker's testimony but maintained it was not objectionable. (App. Vol. IV, p. 1805, line 21 – 1806, line 16). Accordingly, the PCR Court properly found "that Trial Counsel was deficient for failing to object [to] these comments as they amounted to a comment on a legal issue and was prejudicial to the [Respondent] because it lower[ed] the State's burden in the eyes of the jury." (App. Vol. V, p. 2030).

B. Trial Counsel provided ineffective assistance of counsel by failing to object when the Trial Court *sua sponte* repeatedly stopped Respondent's testimony in the jury's presence, admonished Respondent, and instructed the Prosecutor to object, giving the improper appearance of partiality.

The PCR Court correctly found that "Trial Counsel was deficient for failing to object [to] the Court's comments and the only reason articulated to the Court to explain this deficiency was Counsel's perception that if he objected[,] he would fall out of favor with the trial judge." (App. Vol. V, p. 2038; 2043–2044). The PCR Court held that "[t]his fear of objecting to avoid what Counsel deemed as upsetting the trial judge was referenced multiple times in the PCR hearing and is not an objectively reasonable strategic choice to explain Counsel's failure to object on behalf of his client." (App. Vol. V, p. 2038).

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 noted 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 conceded 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).

Accordingly, the PCR Court properly found that "Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed a valid trial strategy." (App. Vol. V, p. 2038). *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.").

Additional Sustaining Grounds

C. Trial Counsel provided ineffective assistance of counsel for failing to move for severance of Respondent's charges.

The PCR Court properly found Trial Counsel deficient for failing to move for severance of Respondent's charges. Specifically, the three complaining witnesses alleged conduct that occurred

over three distinct and unspecified periods of time, which did not arise out of a single chain of circumstances and could not be proven by the same evidence (twenty-eight indictments, which covered 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).

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).

On cross-examination, Trial Counsel conceded, "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).

Accordingly, the PCR Court found "the State's case was strengthened with the amount of victims presented to the jury at one time, especially when the credibility of the victims was a central issue of the Defense's case." (App. Vol. V, p. 2022). The PCR Court also noted the additional prejudice to Respondent, "the State's case was potentially improperly bolstered by the testimony of these Victims together coupled with the State's expert witness commenting that the offenders typically seek out victims in a particular age range." (App. Vol. V, p. 2022).

D. The PCR Court incorrectly found Trial Counsel provided effective assistance of counsel despite failing to move to quash the twenty-eight indictments against Respondent as unconstitutionally overbroad and vague.

The PCR Court incorrectly found Trial Counsel effective despite failing to move to quash the twenty-eight indictments against Respondent as unconstitutionally overbroad and vague because each indictment for the alleged offenses occurred at *unspecified times over an entire year*, and the combined indictments covered a *total period of over eighteen years*. (App. Vol. V, p. 2217 –2219). *See State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015). Trial Counsel admitted that he had no strategic reason for failing to move to quash the indictments and that he would now make the motion to quash the indictment. (App. Vol. IV, p. 1775, line 19 – 1777, line 3).

E. Prejudice is presumed based on Trial Counsel's cumulative failure to subject the prosecution's case to meaningful adversarial testing.

Based on the significant number of allegations that the PCR Court properly found Trial Counsel provided deficient performance and incorrectly denied despite evidence supporting deficient performance, the prejudice to Respondent is presumed. *See United States v. Cronic*, 466

U.S. 648, 659 (1984) (finding "prejudice is presumed" when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing.").

Specifically, Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing. *See Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "per-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary"); *see also Herring v. New York*, 422 U.S. 853, 862 (provides that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free").

However, even if this Court does not apply per se prejudice, the PCR Court properly found counsel ineffective "based on . . . the prejudice suffered from the *individual allegations*". (App. Vol. V, p. 2251) (emphasis added). Therefore, the PCR Court properly found Trial Counsel provided effective assistance of counsel because "[t]hese errors have created a reasonable probability that but for counsel's unprofessional error, the result would have been different." (App. Vol. V, p. 2252).

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2. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR FAILING TO OBJECT WHEN THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD FOR QUALIFYING THE STATE'S EXPERT WITNESS IN THE FIELD OF CHILD SEXUAL ABUSE DYNAMICS.

The PCR Court properly found Trial Counsel's performance deficient for failing to object when the Trial Court applied an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics. (App. Vol. V, p. 2219–2220). 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.

3. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR FAILING TO OBJECT AND MOVE TO STRIKE DR. BENEDETTO'S STATEMENT THAT "ABUSERS TYPICALLY SEEK VICTIMS OF A PARTICULAR AGE" AS BEYOND THE SCOPE OF HER EXPERTISE.

The PCR Court properly found Trial Counsel's performance deficient for failing to object and move to strike Dr. Benedetto's statement that "abusers typically seek victims of a particular age" as beyond the scope of her expertise. (App. Vol. V, p. 2220). Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. *See* Rules 701and 702, SCRE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).

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4. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR FAILING TO MOVE FOR SEQUESTRATION OF WITNESSES WHERE THE STATE REPEATEDLY REFERRED TO PRIOR TESTIMONY WHEN QUESTIONING WITNESSES DURING ITS CASE IN CHIEF.

The PCR Court properly found Trial Counsel's performance deficient for failing to move to sequester witnesses where the State repeatedly referred to prior testimony when questioning witnesses during its case in chief. (App. Vol. V, p. 2224–2225). Specifically, the PCR held "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." (App. Vol. V, p. 2225). *See* Rule 615, SCRE ("[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses . . . .").

Petitioner's argument that the three complaining witnesses would not have been sequestered further supports the prejudice created by Trial Counsel's failure to move for severance of the charges. This prejudice is enhanced when the State is able to bolster the credibility of their witnesses by asking witnesses to corroborate testimony that had been previously presented during trial.

5. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR NOT MOVING TO INDIVIDUALY *VOIR DIRE* JURORS WHO INFORMED THE TRIAL COURT THEY HAD EXPERIENCED SEXUAL ABUSE AND FAILED TO PUT THOSE JURORS' INFORMATION ON THE RECORD.

The PCR Court properly found Trial Counsel's performance deficient for not moving 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. (App. Vol. V, p. 2225). The PCR Court also found "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." (App.

Vol. V, p. 2225).

The PCR Court held "it is the clear 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." (App. Vol. V, p. 2225). The PCR Court further held "Trial Counsel was deficient for failing to ensure that conversations regarding juror fairness and impartiality were on the record to preserve the issue for appellate review." (App. Vol. V, p. 2225–2226).

6. THE PCR COURT PROPERLY FOUND COUNSEL'S PERFORMANCE DEFICIENT FOR NOT PLACING ON THE RECORD JUROR NO. 94'S REVELATION THAT SHE HAD "A RELATIVE THAT WAS AVICTIM."

The PCR Court properly found Trial Counsel's performance deficient for not putting on the record juror no. 94's revelation that she had "a relative that was a victim" because Counsel moved to have the juror stricken for cause and had to strategically use one of his preemptory strikes on this juror. (App. Vol. V, p. 2226).

7. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR NOT MOVING FOR SEVERANCE OF RESPONDENT'S CHARGES.

The PCR Court properly found Trial Counsel deficient for failing to move for severance of Respondent's charges. (App. Vol. V, p. 2226–2227). Specifically, the three complaining witnesses' alleged conduct that occurred over three distinct and unspecified periods of time, which did not arise out of a single chain of circumstances and were not proven 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).

Respondent previously presented this argument as an additional sustaining ground in subsection (C) of issue one above. Based on the testimony presented at the hearing, Trial Counsel failed to provide a reasonable trial strategy regarding this allegation. *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"); *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.").

8. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR NOT OBJECTING TO "TRUTH-SEEKING" LANGUAGE IN THE TRIAL COURT'S PRELIMINARY INSTRUCTIONS TO THE JURY.

In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 475 (2012), this 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. This 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.

In this case, the PCR Court properly found Trial Counsel deficient for not objecting to "truth-seeking" language in the trial court's preliminary instructions to the jury. (App. Vol. V, p.

2227–2228). Specifically, the PCR Court found that Trial Counsel was deficient for failing to object to this language regarding 'true' and 'just' verdicts", and "[a]t the time of this trial[,] the South Carolina Supreme Court issued clear language in *Daniels*, that any reference to the word 'true' must be removed from the Court's comments to the jury." (App. Vol. V, p. 2228).

9. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR PRESENTING IMPROPER COMMENTS DURING OPENING STATEMENT.

The PCR Court properly found Trial Counsel "deficient for the comments made to the jury and could not articulate any strategy for these comments." (App. Vol. V, p. 2229). Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Respondent] can't be innocent...," and where the State used that same quote against the defense inits close, saying, "As [Trial Counsel] said in his opening statement, if you believe the victims, the [Respondent's] guilty," and where use of such a statement could not be considered a reasonable trial strategy. Specifically, Trial Counsel misstated the law and improperly shifted the required burden of proof.

10. THE PCR COURT PROPERLY FOUND COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE DSS CASE WORKER TESTIFIED 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 PCR Court properly found Trial Counsel ineffective for failing to object when the DSS case worker testified 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." Specifically, the PCR Court found "Trial Counsel was deficient for failing to object these comments as they amounted to a comment on a legal issue and was prejudicial to the [Respondent] because it lowers the State's burden in the eyes of the jury." (App. Vol. V, p. 2235).

Respondent previously presented this argument as an additional sustaining ground in subsection (A) of issue one above.

11. THE PCR COURT PROPERLY FOUND COUNSEL DEFICIENT FOR FAILING TO CROSS-EXAMINE THE STATE'S WITNESSES ABOUT ALLEGED DISCREPANCIES REGARDING WHOSE BEDROOM THE SEMEN-STAINED BEDSHEETS WERE TAKEN FROM FOR TESTING.

The PCR Court properly found Trial Counsel deficient for failing 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. (App. Vol. V, p. 2242). Notably, Petitioner acknowledged in the petition that the inherent prejudice and theme of this case that "[t]he heart of the State's case was the testimony of the victims as corroborated by other witnesses, not the physical evidence like Respondent's semen on the bedsheets (for which Respondent was able to offer an innocent explanation).

12. THE PCR COURT PROPERLY FOUND COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT SUA SPONTE REPEATEDLY STOPPED RESPONDENT'S TESTIMONY IN THE JURY'S PRESENCE, ADMONISHED RESPONDENT, AND INSTRUCTED THE PROSECUTOR TO OBJECT, GIVING THE IMPROPER APPEARANCE OF PARTIALITY.

The PCR Court properly found Trial Counsel ineffective for failing to object when the Trial Court *sua sponte* repeatedly stopped Respondent's testimony in the jury's presence, admonished Respondent, and instructed the Prosecutor to object, giving the improper appearance of partiality. (App. Vol. V, p. 2243).

Respondent previously presented this argument as an additional sustaining ground in subsection (B) of issue one above.

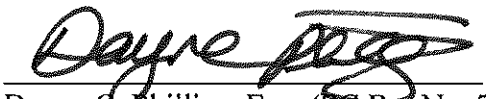
13. PCR COURT INCORRECTLY FOUND COUNSEL DEFICIENT FOR NOT OBJECTING TO THE TRIAL COURT'S INSTRUCTION THAT THE TESTIMONY OF THE VICTIM NEED NOT BE CORROBORATED.

The PCR Court incorrectly found Trial Counsel deficient for not objecting to the Trial Court's instruction that the victim's testimony need not be corroborated. (App. Vol. V, p. 2245).

CONCLUSION

Based on the foregoing reasons, Respondent Harold Cartwright respectfully requests this Court deny the Petition for Writ of Certiorari and remand this case to the Aiken County Court of General Sessions for a New Trial.

Respectfully submitted,



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(803) 807-0234
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ATTORNEY FOR RESPONDENT

October 9, 2023

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Oct 09 2023
S.C. SUPREME COURT

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-001088

Harold Cartwright,

Respondent,

v.

The State of South Carolina,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon Assistant Attorney General Zachary Jones, by emailing and depositing a true and correct copy of the same via first-class mail, postage prepaid, at PO Box 11549, Columbia, SC 29211, on October 9, 2023.

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of October, 2023.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

The Supreme Court of South Carolina

Harold Cartwright, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2022-001088

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction relief appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Brenda F. Shealy
CHIEF DEPUTY CLERK

Columbia, South Carolina
November 3, 2023

cc: Dayne C. Phillips, Esquire
Zachary William Jones, Esquire
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

Harold Cartwright, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2022-001088

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, we grant the petition, dispense with further briefing, and remand 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 order shall be entered within forty-five (45) days of this court's mailing of the remittitur. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining a PCR applicant claiming ineffective assistance of counsel must show: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different); *id.* at 686 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); *Fishburne v. State*, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019) (remanding a case back to the PCR court for a supplemental order setting forth findings of fact and conclusions of law which were not addressed in the original PCR order).

FOR THE COURT

BY _____

CLERK

Columbia, South Carolina

FILED
Sep 19 2024

cc:
Dayne C. Phillips, Esquire
Zachary William Jones, Esquire
The Honorable Robert J. Bonds

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
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October 15, 2024

The Honorable Robert J. Harte
PO Box 583
Aiken SC 29802

REMITTITUR

Re: Harold Cartwright v. State
Lower Court Case No. 2019CP0201582
Appellate Case No. 2022-001088

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Catherine Harrison, deputy

CLERK

Enclosure

cc: Dayne C. Phillips, Esquire
Zachary William Jones, Esquire

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

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that this document constitutes a true and correct copy of the original documents which have been filed in my office this DEC 02 2024

Robert J. Harte
C.C.C.P. & G., Aiken County, S.C.
CharlaPeaufle CMP
Deputy Clerk

This matter comes before the Court on Harold Cartwright's application for Post-Conviction Relief (PCR). Applicant appeared before the Court on February 3, 2022, for a virtual hearing on the above-captioned PCR action. Dayne Phillips 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.

FILED December 20 2
Robert J. Harte 1045
C.C.C.P. & G.S.
CharlaPeaufle CMP
Deputy Clerk

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