

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No: 2025-000338

RECEIVED

May 02 2025
S.C. SUPREME COURT

HAROLD CARTWRIGHT,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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INDEX

TRANSCRIPT (November 13-14, 2012)	1
TRANSCRIPT (April 15-16, 2013).....	197
TRANSCRIPT (April 17-18, 2013).....	423
RECORD ON APPEAL	661
FINAL BRIEF OF APPELLANT	1092
FINAL BRIEF OF RESPONDENT	1122
COURT OF APPEALS OPINION	1170
PETITION FOR REHEARING.....	1173
ORDER DENYING PETITION FOR REHEARING	1179
PETITION FOR WRIT OF CERTIORARI	1181
APPENDIX.....	1210
RETURN TO PETITION FOR WRIT OF CERTIORARI	1223
BRIEF OF PETITIONER.....	1259
BRIEF OF RESPONDENT	1294
SUPREME COURT OPINION	1340
REMITTITUR	1354
PCR APPLICATION.....	1355
AIKEN COUNTY CLERK OF COURT’S RECORDS.....	1365
ARREST WARRANTS.....	1404
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS’ RECORDS	1458

RETURN	1490
ORDER AUTHORIZING DISCOVERY.....	1502
AMENDED PCR APPLICATION.....	1506
PCR HEARING TRANSCRIPT (February 3-4, 2022)	1532
PCR HEARING TRANSCRIPT (February 25, 2022)	1715
PROPOSED ORDER GRANTING PCR	1903
PROPOSED ORDER OF DISMISSAL	1937
ORDER GRANTING PCR	1984
STATE’S MOTION TO ALTER OR AMEND	2049
MOTION TO RECONSIDER HEARING TRANSCRIPT (June 24, 2022).....	2092
AMENDED ORDER GRANTING PCR.....	2189
NOTICE OF APPEAL.....	2256
PETITION FOR WRIT OF CERTORARI.....	2433
RETURN FOR PETITION FOR WRIT OF CERTORARI.....	2471
TRANSFER ORDER TO SC COURT OF APPEALS.....	2495
ORDER GRANTING CERIORARI AND REMANDING.....	2496
REMITTITUR.....	2498
SUPPLEMENTAL ORDER GRANTING PCR RELIEF.....	2499
MOTION TO ALTER OR AMEND THE SUPPLEMENTAL ORDER GRANTING PCR.....	2574
MOTION TO ALTER AND AMEND HEARING TRANSCRIPT (February 4, 2025).....	2603
ORDER DENYING MOTION TO ALTER OR AMEND.....	2644
NOTICE OF APPEAL.....	2646

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

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

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

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

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

an order authorizing discovery on December 19, 2019.

On June 29, 2020, Applicant filed an amended application requesting PCR.

Applicant also filed a redacted amended application on July 9, 2020:

Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code S17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also *Cherry v. State*, 300 S.C. 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, 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 involvement in a drug investigation by the police (that prompted the unrelated statement implicating Applicant of sexual abuse) and any possible deals/offers that were possibly provided to her by the State.
- (4) Trial Counsel failed to adequately investigate and compare the timeline of when Applicant lived in the home, and the timing of the allegations.
- (5) Trial Counsel failed to obtain and review with Applicant all discovery in preparation for trial.
- (6) Trial Counsel failed to properly cross-examine and impeach the State's witnesses based on their inconsistent testimony from the first trial in the second trial; including the witnesses' prior inconsistent statements to the police.
- (7) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).
- (8) Trial Counsel provided erroneous legal advice regarding Applicant decision to testify that was not within the range of competence demanded of attorneys in criminal cases for not explaining all the risks involved in testifying as witness.
- (9) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instructions that improperly shifted the burden of proof and

misstated the law.

- (10) Trial Counsel's failed to object and preserve for appellate review inadmissible and unduly prejudicial evidence during Applicant's trial.
- (11) Trial Counsel failed to object and preserve for appellate review the State's improper closing argument that was a misstatement of the evidence and unduly prejudicial.
- (12) Trial Counsel failed to move to quash the twenty-eight (28) indictments against Applicant as unconstitutionally overbroad and vague. Specifically, where each indictment for the alleged offenses occurred at unspecified times over an entire year, and the combined indictments covered a total period of over eighteen (18) years. See *State v. Baker*, 41 1 S.C. 583, 769 S.E.2d 860 (2015).
- (13) Trial Counsel failed to object to the Trial Court's application of an incorrect legal standard for qualifying the State's expert witness in the field of child sexual abuse dynamics where the Court (1) limited Counsel to *voir dire* of the witness regarding "qualifications," (2) qualified the witness as an expert in the given field, and (3) only permitted questioning of the witness on the reliability and validity of field itself—after the witness was deemed "expert" by the Court and the State's direct examination (all of which was held in the presence of the jury rather than in an *in-camera* hearing). See Rule 702, SCRE; *State v. Council* 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); *State v. White*, 398 S.C. 376, 728S.E.2d 468 (2009); and *Watson v. Ford*, 389 S.C. 434, 699 S.E.2d 169 (2010).
- (14) Trial Counsel failed to object and move to strike the expert witness's testimony that went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCRE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).
- (15) Trial Counsel erroneously stipulated to a witness's medical condition of stage 4 cancer before the second trial and failed to object to the admission of her prior testimony from the first trial, where at the time of the second trial the witness was still alive, still in Aiken County (hospice), still had the same cancer as when she testified at the previous trial, and Counsel's stipulation provided the foundation needed by the State to even seek admission of her prior testimony. See Rule 804, SCRE; *Dodd v. Berlinsky*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001).

- (16) Trial Counsel failed to investigate and obtain all the necessary documentation from SLED regarding its policies, procedures, qualifications, laboratory bench notes, and overall testing of the purported semen stain from a fitted bedsheet for review by an independent DNA expert, and in cross-examination; failed to hire an expert in DNA analysis to independently review the documentation; and failed to demand independent testing by his DNA expert of clippings from the fitted bedsheet with the purported semen stain. See *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).
- (17) Trial Counsel failed to move for the Trial Court to conduct follow-up voir dire questioning of a potential juror who indicated he knew one of the investigating officers but was not asked how he knew the officer, whether he could determine the facts fairly to the Applicant, and the potential juror's number.
- (18) Trial Counsel failed to move to quash the jury panel pursuant to Baston where the State utilized its statutory strikes to strike two white females from the petit jury, yet where the State sat eleven white jurors, six of whom were female. See U.S. Const. amends. V, VI, XIV; *State v. Adams*, 322 S.C. 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... I, and "you will be in a position then to render a true and just verdict, an verdict that speaks the truth of the case", and "It's your civic responsibility to pay close attention and decide whose telling the truth." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (24) Trial Counsel failed to object and preserve for appellate review the State's improper opening statement when it invited the jury to utilize the unconstitutionally overbroad and vague indictments in its deliberations by saying, "These are the dates when all this is said and done", and "It's important to see how we grouped these indictments together."
- (25) Trial Counsel improperly argued in his open statement that "[i]f they're telling the truth, [the Applicant] can't be innocent...," and where the State used that same quote against the defense in its close, saying, "As Mr. Routzong [Trial Counsel] said in his opening statement, if you believe the victims, the Applicant's guilty," and where use of such a statement could not be considered a reasonable trial strategy.
- (26) Trial Counsel failed to object and move to strike under Rules 401 and 403, SCRE, when the State delved unopposed into victim impact on direct examination of the complaining witness (Victim 2), "Now, sitting here today, telling these events to these 13 strangers, how are you doing?" to which the witness responded, "I would rather be at home with my children, but it's something that needs to be done; I'm glad I finally get to tell what happened." See *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997).
- (27) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper bolstering when Melinda Lively (mother of Victim 2) answered in the affirmative to the State's question, "Did you just hear Victim

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

- (28) Trial Counsel failed to object and preserve for appellate review unfairly prejudicial hearsay that went beyond the scope of time and place, and constituted improper bolstering, when the Prosecutor asked Melinda Lively on redirect examination, "In 1999, had you learned that your daughter, [Victim 2], had been abused by the Defendant?" to which the witness replied, "Yes, when she was four." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (29) Trial Counsel failed to move to strike hearsay testimony of a complaining witness (Victim 1) when the witness said, "My mom told me to lie then....," and Counsel's hearsay objection was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (30) Trial Counsel failed to move to strike leading testimony of a complaining witness (Victim 1) when Counsel's objection to specific and detailed alleged conduct of the Applicant was sustained by the Trial Court. See *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943).
- (31) Trial counsel failed to properly argue and preserve for appellate review Counsel's objection, when during the testimony of a complaining witness about alleged threats and demands for oral sex, Counsel objected, "Your honor, I'm having a real hard time hearing her testimony," and the Court ordered her to speak up.
- (32) Trial Counsel provided ineffective assistance by reaffirming the complaining witness's version of events regarding her initial recantation of the allegations by asking her, "[Y]ou're saying it was your mom, Buffy Cartwright that ultimately convinced you to and Victim -1 responded, "Yes." This highly prejudicial questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- (33) Trial Counsel failed to adequately prepare for trial where he attempted to impeach a complaining witness through use of prior testimony at the first trial, yet it appears failed to have a copy of the transcript to use in the present trial, and where the Trial Court ordered Counsel to move on to another line of questioning.
- (34) Trial Counsel failed to object and move to strike the DSS case worker's unfairly prejudicial testimony that DSS only becomes involved in a case "[i]f it meets the legal statute in the State of South Carolina, we take it as a report and go interview family". This improper testimony violates Due Process and

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

- (35) Trial Counsel failed to object and move to strike unfairly prejudicial hearsay that went beyond the scope of time and place, and to improperly bolstering and hearsay within hearsay, when the DSS agent testified that she "received a call from her supervisor saying we received a report of sexual abuse concerning [Victim 1] and her step-father Harold Cartwright." See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1)(D).
- (36) Trial Counsel failed to object and preserve for appellate review the issue of burden shifting and violation of Due Process when the Trial Court's initial instructions to the jury indicated that Trial Counsel would provide an opening statement and that opening statements were "what lawyers contend the facts will be; the issues will be what they're asking you to look for to keep tuned into what they intend to prove, what the case is about." See U.S. Const. amends. V, VI, XIV.
- (37) Trial Counsel provided ineffective assistance by attempting to impeach the testimony of Victim 3's disclosures of abuse, yet Counsel's questions theory that this witness previously disclosed the abuse to several people. Notably, the State immediately capitalized on Counsel's error on redirect by stating, "Mr. Routzong [Trial Counsel] talked a whole lot about you telling people about what happened. So lets talk about that." This unfairly prejudicial line of questioning reaffirmed the State's case against Applicant and cannot be deemed a reasonable trial strategy. See U.S. Const. amends. V, VI, XIV.
- (38) Trial Counsel failed to object and preserve for appellate review the admission of Buffy Brown's prior testimony (ex-wife of Applicant, and mother of Victim 1 and Victim 3) where the witness was still alive, purportedly had the same disease, and no foundation was made by the State showing any reasonable efforts to have her present to testify at the second trial. Furthermore, the transcript was not simply published to the jury; rather, it was acted out by a person on the witness stand as Buffy, the prosecutor for direct questions, and Counsel for cross, wherein inflections and mannerisms would likely be as the prosecution saw fit rather than as it actually occurred at the previous trial.
- (39) Trial Counsel failed to object during the "acting-out" of Buffy Brown's prior testimony as unfairly prejudicial hearsay that went beyond the scope of time and place, and to improper bolstering where the Prosecutor asked if she and the police found out that Applicant had been molesting Victim 1, to which she replied in the affirmative. See *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242 (1989); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule

801(d)(1)(D).

- (40) Trial Counsel failed to object and preserve for appellate review pursuant to Due Process and *Jackson v. Denno* to the admission of Applicant's consent to search form (State Exhibit #9), the buccal swab obtained by the State from the search (State Exhibit #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 jailor 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, if true, then failing to examine this area cannot be a valid trial strategy).
- (44) Trial Counsel provided ineffective assistance where Counsel's theory for why Victim 3 lied was that Applicant discovered pornographic pictures of her on the internet and publicly said so, where State witnesses repeatedly indicated Victim 3 was not in any such pictures, and where Counsel failed to proffer any such photographs into evidence to support his theory.
- (45) Trial Counsel failed to object and preserve for appellate review the Trial Court

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

- (46) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instruction to the jury as a charge on the facts (as improperly infecting the jury with the Court's opinion on the case): "You've got a version of facts by some witnesses and a complete different version of the facts by other witnesses. "
- (47) Trial Counsel failed to object and preserve for appellate review the Trial Court's closing instructions to the jury that were tantamount to instructions to search for the truth and violative of Due Process: "It is your duty to determine what the true facts are and what the truth is and who is telling the and "You're to make your decision based solely on what you determine the true facts are in this case." See *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).
- (48) Trial Counsel failed to object and preserve for appellate review the Trial Court's jury instruction that, "pursuant to our state law, the testimony of the victim in these cases need not be corroborated." See *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).
- (49) Trial Counsel failed to object and preserve for appellate review the Prosecutor's improper comments during closing argument. Specifically, the Prosecutor's comments were calculated to arouse the jurors' passions or prejudices and vouched and bolstered the credibility of the State's witnesses. See *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See *State v. Copeland*, 321 S.C. 318, 324 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.C. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted); *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("[b]ecause a jury must make its own assessment on the credibility of

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

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

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

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

- (3) In the event Trial Counsel properly preserved the issue in his contemporaneous objection ("leading") to the Trial Court, then Appellate Counsel provided failed to raise and argue the issue of whether the expert witness's testimony went beyond the scope of her expertise. Specifically, the witness's admitted area expertise focused on the perspective of a child experiencing abuse, yet the witness improperly testified as a psychological "profiler" of the accused when the Prosecutor asked whether it was typical for an abuser to have a favorite age to sexually abuse, and the witness answered in the affirmative. See Rules 701 and 702, SCRE; *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).
- (4) Appellate Counsel failed to raise and argue Trial Counsel's objection where the Trial Court refused to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 : "Have you, any member of your family, or friend been impacted in anyway by Sexual Crime or Sexual Assault or Child Molestation?" and Question 3: "Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?" Notably, the questions sought by Counsel would have elicited the prejudicial bias to disqualify jurors who answer in the affirmative, and thus, depriving Applicant of a fair trial if allowed on the -jury panel.
- (5) Appellate Counsel failed to raise and argue Applicant's motion for directed verdict of acquittal where the motion was timely raised and ruled upon by the Trial Court. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004).

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

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

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

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

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

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

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

EVIDENTIARY HEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LAW

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ALLEGATIONS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL GRANTING POST-CONVICTION RELIEF

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

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

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

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

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

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

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

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

that the expert's testimony will be reliable. *White*, at 273, 676 S.E.2d at 688 (citing Rule 702, SCRE). There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. *Id.* at 274, 676 S.E.2d at 688. However, evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies. See *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial judge has vetted the matters of qualification and reliability and admitted the evidence." (quoting *White*, 382 S.C. at 274, 676 S.E.2d at 689 (2009)))

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

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

In *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015), the defendant appealed his convictions for multiple crimes involving unlawful sexual conduct with a minor, arguing the trial court erred in allowing an expert witness to testify about a forensic interviewer's report because the State failed to demonstrate the expert's reliability. *Chavis*, 412 S.C. at 104, 107, 771 S.E.2d at 337, 339. Our Supreme Court found that, although the expert had “extensive experience and training,” the State failed to show the expert's individual reliability because there was no evidence establishing the expert's conclusions were accurate. *Id.* at 107-08, 771 S.E.2d at 339. The *Chavis* court explained that “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” *Id.* at 108, 771 S.E.2d at 339. Thus, the *Chavis* court concluded that the trial court erred in allowing the expert's testimony because the threshold reliability requirement of Rule 702 was not met. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Strickland, 466 U.S. 668.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ALLEGATIONS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
DENYING POST-CONVICTION RELIEF

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

The Applicant alleged Trial Counsel failed to interview critical witnesses who could have added to the credibility of the applicant's case and challenged the credibility of the State's witnesses when it was reasonable and necessary to do so while preparing for trial (See *Wiggins v. Smith*, 539 US. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 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 alleged Trial Counsel failed to hire an expert witness to review the forensic evidence presented by the State and rebut the State's arguments and evidence, specifically the electronic evidence and DNA evidence. See *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

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

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

Allegation Three: Trial Counsel's alleged failure to investigate a Victim's potential deal with the State.

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

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

and dismissed with prejudice.

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

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

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

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

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

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

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

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

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

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

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

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

Applicant's character at trial. See *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22.

Accordingly, this allegation is denied and dismissed with prejudice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Applicant alleged Trial Counsel failed to move to quash the jury panel pursuant to *Batson* 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 failed to move to sequester any of the witnesses for trial where the State repeatedly referred to prior witness testimony when questioning later witnesses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

allegation is denied and dismissed with prejudice.

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

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

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

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

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

testimony that the crash victim was recently married and photographs depicting the victim and her husband. *Id.* at 19, 488 S.E.2d at 314. The Supreme Court held the evidence was irrelevant, highly inflammatory, and likely affected the outcome of the trial because the other evidence of guilt was inconclusive. *Id.* at 20, 488 S.E.2d at 314. In this case, however, the State's brief inquiry into how the Victim was doing, though irrelevant, was not, by itself, likely to arouse the sympathy or prejudice of the jury. Furthermore, the Victim's response to the State's question—that she "would rather be home with [her] children, but it's something that needs to be done"—was not "highly inflammatory" victim impact evidence like the evidence at issue in *Livingston*. This Court finds Applicant was not prejudiced by the State's brief inquiry or the Victim's response. See *Cherry*, 300 S.C. at 17-18, 386 S.E.2d at 625. Accordingly, this allegation is denied and dismissed with prejudice.

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

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

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

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

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

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

This Court finds this allegation to be without merit. As 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

801(d)(1)(D).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

hanging in his cell present in the courtroom.

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

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

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

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

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

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

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

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

witnesses.

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

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

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

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

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

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

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

is denied and dismissed with prejudice.

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

The Applicant alleged Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 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. Cronin*, 466 U.S. 648 (1984), and claims Trial Counsel "failed to subject the prosecution's case to meaningful adversarial testing." This bare conclusion, devoid of supporting facts, is insufficient to merit a determination by this Court. See *Land v. State*, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980) (holding a PCR applicant must assert facts, as contrasted with conclusions, to meet the burden imposed upon him). Therefore, this allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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

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

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

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

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

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

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

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

Applicant alleged Appellate Counsel should have raised the issue of Dr. Benedetto's testimony that abusers typically seek victims within a certain age range as going beyond the scope of her expertise. This Court finds this allegation to be without merit. Much like the allegation listed above, the Applicant has failed to provide the Court with evidence to support a finding of deficiency. Therefore, the Court finds no deficiency in failing to raise it on appeal. *See Cherry*, 300 S.C. at 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 alleged Appellate Counsel should have challenged the trial court's refusal to ask Defense Questions 1 and 3 during *voir dire*, where Question 1 ("Have you, any member of your family, or friend been impacted in any way by Sexual Crime or Sexual Assault or Child Molestation?" and Question 3 ("Does any member of the jury panel believe that anyone charged with crimes involving Sexual Molestation of a child is more likely guilty than not?") would have elicited potential bias among the jurors. This Court finds this allegation to be without merit. Appellate Counsel testified he raised four issues on appeal; counsel is not required to raise every non-frivolous issue on appeal but may select among them to maximize the likelihood of a favorable outcome. See *Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. Thus Court finds Appellate Counsel attempted to raise those issues he believed were most likely to obtain a favorable result. Accordingly, this allegation is denied and dismissed with prejudice.

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

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

CONCLUSION

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

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

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

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

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

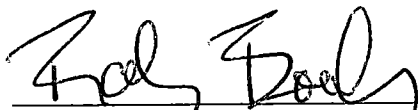
This Court has concluded that Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations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

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

IT IS SO ORDERED!

Walkerboro

, South Carolina



The Honorable Robert J. Bonds

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Harold Cartwright, #355084

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT
)

) Case No.: 2019-CP-02-01582
)

) **RESPONDENT'S MOTION TO ALTER OR**
) **AMEND THE SUPPLEMENTAL ORDER**
) **GRANTING POST-CONVICTION RELIEF**
) **PURUSANT TO RULE 59(e), SCRCP**
)
)
)
)

On December 2, 2024, the Court filed its Supplemental Order Granting Applicant Post-Conviction Relief. Respondent received written notice of this filing on December 6, 2024. In the Order, the Court finds Applicant is entitled to post-conviction relief based on five grounds of ineffective assistance of counsel during his April 2015 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 the Court's 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 (collectively, “Counsel”). 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. Cartwright*, Op. No. 2015-UP-466 (S.C. 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. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018).

Applicant filed the present application for post-conviction relief (“PCR”) on June 26, 2019. Applicant then filed an amended application on June 6, 2022, requesting relief based on fifty-five

allegations of ineffective assistance of trial and appellate counsel. 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 ultimately issued an order granting relief on twelve of the grounds raised by Applicant.

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

On December 2, 2024, this Court issued a Supplemental Order granting the application for PCR on five of Applicant's allegations of ineffective assistance of counsel and denying the fifty remaining allegations.

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 B. [REDACTED] in 1999. Prior to marrying Applicant, B. [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 continued multiple times every year until 1995, when she was ten. Applicant did not mention the

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).

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 B[REDACTED]. Victim 2 testified that, beginning in 2002, Applicant started going into her room early in the mornings before school and “humping” her, lying on top of her and rubbing his penis in between 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, in the same manner as that described by Victim 2. She testified he occasionally got mad, held a gun up to his head, and threatened to kill all of them and himself. In addition, Victim 3 testified the family began living in a shed on Applicant's brother's property in 2009 after they lost their house to foreclosure. Applicant was not working at that time, and he arranged for Victim 3 to be “home schooled” by him in the shed when the rest of the family were away; during that time, Applicant continued “humping” her and eventually forced her to have sexual intercourse with him. Victim 3 testified that Applicant made her start taking birth control after she turned fourteen. She testified the family moved to a new house in 2010, and she started going back to school the following year. Victim 3 testified that Applicant stopped

regularly having sex with her in 2010, after Hoss Cartwright, Applicant's son, moved into the house, but continued humping her in her room before school.² After Victim 3 began going back to school, Applicant would criticize the appropriateness of her clothing by making her bend over or sit cross-legged on the floor while he tried to see her private parts.³ 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).

The State and Trial Counsel stipulated that Buffy B[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, B[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 B[REDACTED] he had done nothing wrong. B[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. 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. (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).

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).

³ Hoss also testified Applicant would tell Victim 3 to adopt "the weirdest positions" to see if her clothes were too exposing; if Applicant decided they were, he would tell Victim 3 "I can see your pussy" or "your tits are hanging out," which Hoss felt was extremely vulgar and inappropriate for a father to say to his daughter. (April 17–18, 2013, Trial Tr. p.13, lines 11–19).

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 B. [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 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 B [REDACTED] testimony from Applicant's first trial where Buffy B [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 B [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 SUPPLEMENTAL ORDER GRANTING POST-CONVICTION RELIEF

In its Supplemental Order granting post-conviction relief, this Court found Counsel was ineffective on only five of the grounds alleged in the application: Allegations 13, 14, 22, 23, and 45. Respondent respectfully contends the Court overlooked or misapprehended material points of law and fact in deciding to grant PCR on those five allegations. On each of those allegations of ineffective assistance, Applicant failed to prove deficiency, prejudice, or both. Accordingly, Respondent respectfully asks this Court to issue an amended order denying and dismissing each and every allegation with prejudice.

Ineffective Assistance of Counsel, Generally

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), SCRPC. 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.* (quoting *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.

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

This Court found 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.

Respondent submits this allegation is without merit. 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.⁴ (April 17–18, 2013, Trial Tr. p.55, lines 1–12).⁵ The trial court overruled Counsel's objection. (April 17–18, 2013, Trial Tr. p.55, lines 13–18). After the conclusion of direct examination, Counsel again objected to Dr. Benedetto's qualification, and the trial court made the same ruling. (April 17–18, 2013, Trial Tr. p.71, line 21–p.72, line 25). The Court has not explained how Counsel's multiple objections were unreasonable or how he could have obtained a different result by raising the issue a third time. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)) (“So long as the judge had an opportunity to rule on an issue, and did so, it was ‘not incumbent upon defense counsel to harass the judge by parading the issue before him again.’”).

⁴ Technically, “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). 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*.

⁵ Prior to trial, Counsel also objected to Dr. Benedetto’s qualification and made a motion *in limine* to exclude Dr. Benedetto’s testimony on the ground that it would constitute an opinion on the credibility of the child witnesses. The trial court denied the motion but permitted Counsel to raise the issue again “when we get to that point.” (April 15–16, 2013, Trial Tr. p.14, line 16–p.21, line 17).

Second, Applicant has utterly failed to establish that the field of child sexual abuse dynamics is *not* a reliable science. Therefore, even if Counsel had more thoroughly objected to the qualification of Dr. Benedetto on reliability grounds, there is no reason to believe his objection would have been successful. In fact, experts are routinely qualified to testify in the field of child sexual abuse dynamics, and our appellate courts have repeatedly emphasized that expert testimony in this field is proper, useful, and admissible. *See, e.g., State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 271 (2018) (“[T]he law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized.”); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) (“Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.”); *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App. 2015) (“The general behavioral characteristics of child sex abuse victims are . . . appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.”), *abrogated on other grounds by Jones*, 423 S.C. 631, 817 S.E.2d 268; *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) (“Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.”). Applicant has not introduced any evidence challenging this consensus; therefore, he has not met his burden of proving that the outcome of his trial would likely have been different if Counsel had more insistently demanded an inquiry into the reliability of the child sexual abuse dynamics field.

Furthermore, trial courts may, in their sound discretion, omit unnecessary reliability examination from expert qualification proceedings. *See Kumho Tire Company v. Carmichael*, 526 U.S. 137, 152 (1999) (holding trial judges must be able to exercise “discretionary authority . . . to

avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted”). As already explained, the use of expert testimony in the field of child sexual abuse dynamics is commonplace in sexual abuse cases and has repeatedly been blessed by our appellate courts. The trial court had no obligation to conduct an unnecessary inquiry into the reliability of this well-accepted and uncontroversial field. *See* John E.B. Meyers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. Davis J. Juv. L. & Pol’y 1, 45–46 (2010) (“[F]rom a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.”), *quoted with approval in Brown*, 411 S.C. at 342, 768 S.E.2d at 251.

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

The holding of *Chavis* does not apply to the issue in this case. *Chavis* clearly involved only the reliability of one specific protocol, as applied by a single expert; the *Chavis* decision did

not purport to address the reliability of child sexual abuse dynamics as a field. In *State v. Jones*, the supreme court expressly distinguished *Chavis*, holding that *Chavis* applied only to the RATAAC protocol and not to the field of child sexual abuse dynamics. *Jones*, 423 S.C. at 638–40; 817 S.E.2d at 271–72.⁶

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

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.

⁶ It should be noted that the *Chavis* court ultimately found the trial court's error was harmless beyond a reasonable doubt due to the "substantial evidence of guilt" in that case: multiple witnesses confirmed that the victim's stepsister had made a contemporary disclosure of sexual abuse; "provocative" photographs of the victim were found on the defendant's computer; the victim's medical exam revealed that she had chlamydia, and the defendant was taking medication commonly used to treat chlamydia; the victim's sisters and stepsister also testified to being abused by the defendant; and the stepsister testified she saw the defendant abuse the victim. Respondent submits the evidence in this case is at least as strong as the evidence in *Chavis*, if not stronger: among other things, in addition to the detailed testimony of abuse given by the three victims, multiple witnesses confirmed that the three victims made contemporary disclosures of abuse; multiple witnesses confirmed Applicant's habit of entering his stepdaughters' rooms and spending a long time "waking them up" in the mornings before school; Victim 3's account of Applicant's bizarre habit of trying to see her private parts under her clothes was corroborated by Hoss; Applicant's semen was found on the bedsheets taken from Victim 3's bed; Buffy B. testified Applicant confessed to her that he "might have molested" her daughters and asked B. to wash his DNA off of Victim 3's bedsheets; and multiple witnesses confirmed Applicant's frequent threats to kill the victims and himself. With so much corroborating testimony and physical evidence, there is no reasonable likelihood that Dr. Benedetto's testimony made much of a difference in the jurors' evaluation of the victims' credibility.

**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.

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.

The Court's Order cites only two cases in support of its finding of deficiency on this ground: *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001), and *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991). *Ellis* held that a police officer, who was qualified as an expert in "crime scene processing and fingerprint identification," was not thereby qualified to give an opinion on the "ultimate issue" of whether the defendant was acting in self-defense when he shot

the victim. Likewise, *Wilkins* held that an expert may give an opinion on the “ultimate issue” in a case, provided that expert is properly qualified. It is not clear what these cases have to do with Dr. Benedetto’s testimony, since Dr. Benedetto did not offer an opinion on any ultimate issue in this case, but merely gave a general statement concerning typical qualities of child abusers.

In addition, contrary to the Court’s finding, 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, did nothing to support 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.

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 22: Failure to move to sever Applicant’s charges

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

Here, although Counsel could not confirm what his strategy was for failing to move for severance, he *did* articulate his fear that the State would be able to introduce evidence of Applicant's sexual abuse of Victim 2 at any trial on the charges concerning Victim 3, and *vice*

versa, based on the strong similarity of the “humping” pattern of abuse that both of those victims reported. (PCR Tr. p.1653, lines 1–17). In addition, he noted that splitting the charges across multiple trials would have allowed the State to seek life without parole, as Applicant was facing multiple “most serious” charges regarding each victim. (App.p.1838, line 9–p.1839, line 1). *See* S.C. Code Ann. § 17-25-45(C)(1) (providing all forms of non-consensual criminal sexual conduct with minors constitute “most serious” offenses); *id.* § 17-25-45(A)(1) (providing a person convicted of a “most serious” offense must be sentenced to life without parole if that person already has a prior conviction for one or more “most serious” offenses). There are other factors Counsel may have considered; for example, holding three separate trials would give the State three opportunities to obtain a conviction, as opposed to one.

The Court’s Order acknowledges Counsel’s fear that multiple trials could result in a longer total term of imprisonment; however, it simply declares this strategic concern was “objectively unreasonable.” The Court then states Counsel was deficient for failing to sever the charges because he should have known the State’s case would likely appear stronger at a single trial due to the sheer number of indictments and victims presented to the jury. However, the mere fact that Counsel’s conduct had some foreseeable risk does not render it unreasonable. Defense attorneys are often called upon to make difficult choices between two strategic options, and to weigh one set of risks against another. That is exactly the sort of dilemma Counsel faced in this case: if he allowed 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. Under these circumstances, it was not an “objectively unreasonable” decision to go forward in a single trial; Applicant’s first trial—which covered the same charges and victims—had ended in a hung jury, so 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 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 Counsel's decision deficient.

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 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 B [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 Counsel had no ground to seek severance of the charges.

Because Counsel articulated valid strategic reasons for not moving to sever the charges and because he would not have succeeded if he did so move, Applicant 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. 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).

However, the trial court’s comments were all made in the context of the jury’s role in evaluating witness credibility—the court explained that, if witnesses give conflicting testimony, the jury must judge “their believability or their credibility. . . . [Y]ou determine whose [*sic*] telling the truth, the believability of the witnesses, the credibility; . . . [I]t’s your civic duty to pay close attention and decide whose [*sic*] telling the truth.” (April 15–16, 2013, Trial Tr. p.59, line 12–

p.60, line 13). At the time of Applicant's trial, controlling supreme court precedent held that such statements were not error, if given in the context of credibility instructions. *State v. Aleksey*, 343 S.C. 20, 27–29, 538 S.E.2d 248, 251–53 (2000) (“There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court’s instructions concerning seeking the truth were given in the context of the jury’s role in determining the credibility of witnesses.”).

The supreme court addressed this issue again in *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.2.⁷

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

⁷ Although it held the trial court’s use of “seek the truth” language was improper, the court in *Beaty* ultimately held the error did not require reversal. *Id.* at 34, 813 S.E.2d at 506.

The Court's order also cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), which held that trial courts are to "remove any suggestion from [their] general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties." Citing *Aleksey*, however, the majority opinion in *Daniels* held that this improper language was cured by the trial court's "full and adequate instructions on reasonable doubt." *Id.* at 258–59, 737 S.E.2d at 477.

Here, just as in *Aleksey* and *Daniels*, the fact that the challenged language appeared in the 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 Counsel's failure to object. *See id.*; *see also Aleksey*, 343 S.C. at 28–29, 538 S.E.2d at 252. The trial transcript reflects that the trial court repeatedly and emphatically instructed the jury that the State bears the burden of proof beyond a reasonable doubt and that Applicant must be presumed innocent and need not offer any proof of his innocence. (April 15–16, 2013, Trial Tr. p.56, lines 2–6; p.57, lines 2–11; April 17–18, 2013, Trial Tr. p.200, line 5–p.201, line 24). The trial court's jury instructions, considered as a whole, were free from error and cured any conceivable prejudice. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

For these reasons, Applicant has not met his burden of proving that Counsel's failure to object to the trial court's "seek the 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 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 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 State objected numerous times, requiring the trial court to instruct Applicant several times to give responsive answers to Counsel's questions and to refrain from giving hearsay testimony. (April 17-18, 2013, Trial Tr. p.136, lines 14-17; p.139, lines 8-21; p.150, line 19-p.151, line 5). On other occasions, the trial court admonished Applicant when he tried to testify as to what other people said, and the court attempted to steer Applicant back on track when he appeared to be going off-topic. (April 17-18, 2013, Trial Tr. p.130, lines 11-20; p.133, lines 17-18; p.141, lines 14-24; p.142, lines 8-9; p.146, lines 4-19;). At one point, the court admonished Counsel for asking speculative questions and told the solicitor to "object to those speculation type of questions and answers." (April 17-18, 2013, Trial Tr. p.136, lines 10-11).

The Court's Order found that these comments by the trial court amounted to "usurping the role of the prosecutor and giving the improper appearance of partiality before the jury." The Court

found Counsel was ineffective for failing to object because the trial court's conduct may have "negatively affected the jury's perception of Applicant and violated his right to a fair trial."

On the contrary, the trial court's actions were reasonable and necessary under the circumstances. A trial judge's inherent power to maintain order and decorum in the courtroom includes the authority to admonish, rebuke, or warn a witness because of the witness's language or conduct. *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999), *abrogated on other grounds by State v. Wright*, 391 S.C. 436, 706 S.E.2d 324 (2011). It is not improper for a trial court to interrupt a witness when it is necessary to prevent improper or irrelevant testimony from coming in. In addition, many of the trial court's remonstrances toward Applicant followed objections by the State on grounds of hearsay or relevance; it is not "usurping the role of the prosecutor" for the court to sustain a prosecutor's objections to improper testimony and instruct the witness to give appropriate answers to counsel's questions. Applicant's repeated failures to abide by the rules necessitated the court's repeated warnings.

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: "I can't say that I felt like the Court went too far. . . . I did not feel like he crossed any line[.]" (App.p.1818, line 18–p.1819, line 3).

The Court's Order also suggests Counsel should have objected to the trial court's alleged "facial expressions" during Applicant's testimony, but Counsel testified he did not remember any specific instances of Judge Early making improper faces during Applicant's trial. (App.p.1820, lines 2–11). Counsel also testified that, based on discussions with jurors, "they've almost always confined themselves to the evidence that was presented, or the demeanor of the witnesses. I've never had any jurors respond to anything about the Court." (App.p.1820, line 21–p.1821, line 2).

Counsel's appraisal of the trial court's facial expressions is entitled to substantial deference, especially since this Court has no way of going back in time and observing the trial court's demeanor for itself. In addition, Counsel's belief that the trial court's facial expressions did not affect the jury's decision-making is a valid reason not to object. Where Counsel has articulated a valid reason not to object, his decision cannot be deemed deficient.

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

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

(April 17–18, 2013, Trial Tr. p.202, lines 12–25). “A curative instruction is generally deemed to have cured any alleged error.” *State v. Dial*, 405 S.C. 247, 258, 746 S.E.2d 495, 501 (Ct. App. 2013).

Therefore, 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.

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,

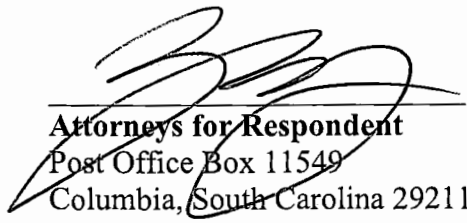
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12/16, 2024

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

) IN THE COURT OF COMMON PLEAS
)
)

) 2019-CP-02-01582
)

HAROLD B. CARTWRIGHT, #355084

Applicant,

vs

) AFFIDAVIT OF SERVICE BY MAIL
)
)

STATE OF SOUTH CAROLINA,

Respondent,

FILED 12-19 20 24
Robert J. White
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 Respondent's Motion to Alter or Amend the Supplemental Order Granting Post-Conviction Relief Pursuant to Rule 59(e) in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

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

DATED this 16th day of December 2024.

Blake Means
Blake Means, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 2
COUNTY OF AIKEN) DOCKET NO. 2019-CP-02-01528

CARTWRIGHT, HAROLD,)
 Plaintiff,)
versus)
)
STATE OF SOUTH CAROLINA,)
 Defendant.)

H E A R I N G
BEFORE THE HONORABLE ROBERT J. BONDS

DATE: February 4, 2025.
TIME: ***
LOCATION: SOUTH CAROLINA CIRCUIT COURT 2
TRANSCRIBED BY: Latasha Jefferson

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18

19 ALSO ATTENDING:

20 (None)

21

22

23

24

25

1 INDEX

2

3 Proceedings..... 4

4 Certificate of Transcriber..... 41

5

6

7 EXAMINATIONS

8 (None)

9

10 EXHIBITS

11 PARTY DESCRIPTION PAGE

12 (None marked)

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24 (THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
25 IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 THE COURT: Gentlemen, are you all there?

2 MR. JONES: Yes, your Honor. Can you hear me?

3 MR. PHILLIPS: Yes, your Honor.

4 THE COURT: All right. Great. Can you gentlemen hear
5 me?

6 MR. JONES: Yes, your Honor.

7 MR. PHILLIPS: Yes, sir.

8 THE COURT: All right. Well, sorry about last week. I
9 know we had some technical difficulties, and I apologize for
10 that. But I'm certainly happy to hear from the Attorney
11 General on the motion, I guess, to reconsider the order now
12 that's been signed in -- in this matter. And I'm happy to
13 hear from you, sir.

14 MR. JONES: Thank you, your Honor. And I appreciate
15 the Court's willingness to work with us with these technical
16 difficulties and --

17 THE COURT: No worries, sir.

18 MR. JONES: -- that taken care of. But the first
19 matter I want to bring to the Court's attention just to get
20 right into it, is the finding that counsel was ineffective
21 for failing to object to the qualification of the State's
22 expert witness, Dr. Benedetto. First, of course, I just
23 wanted to bring up, as I did in my brief, that the -- that
24 trial counsel did make an objection to -- on the grounds that
25 in his view Dr. Benedetto had not shown that her field was

1 reliable. So my -- the deficiency problem of my argument
2 would be that there was no failure to object on that ground.
3 It was overruled pretty quickly by the trial judge, but that
4 -- that -- the objection was made on that basis in the
5 transcript.

6 Second of all, moving on to the prejudice prong, the
7 State's position is that there has been no showing that the
8 field of child sexual abuse dynamics is not a reliable field.
9 And in fact, we have -- it's been blessed by our appellate
10 courts in many different occasions as even the appellate
11 decision in this case, State v. Cartwright, from -- back in
12 2018, that's 425 S.C. 81, discusses in its discussion of
13 Dr. Benedetto's qualification. And they cite State v. Jones
14 417 S.C. 319, for the proposition that expert's testimony on
15 child sexual abuse dynamics was properly admitted by the
16 trial court because the testimony was reliable. And there's
17 many other cases which I cite in my brief discussing the --
18 the appropriateness of this field of testimony.

19 So the State's position is that there was not any
20 prejudice, because even if counsel had more vigorously made
21 that objection, and obtained a ruling from the judge, he
22 likely would not have succeeded because under the -- the law,
23 certainly as it stands now -- and I would argue as it stood
24 then, the -- that this was a field that had been examined
25 before, and had been found many times to be a -- a valid

1 field for the subject -- a valid subject for expert
2 testimony.

3 In addition, I would just like to point out the -- as I
4 cite in my brief to Kumho Tire Company versus Carmichael,
5 that's the U.S. Supreme Court case, which was of course
6 focused on the federal rule, but at the time, the federal
7 rule and state rule were the same, and they both required
8 reliability to be shown. However, in Kumho Tire, the U.S.
9 Supreme Court says that, "Trial judges must be able to
10 exercise discretionary authority to omit unnecessary
11 reliability proceedings in ordinary cases where the
12 reliability of an expert's methods is properly taken for
13 granted."

14 And again, I would just argue that this is such a case
15 because of the -- the common and relatively uncontroversial
16 use of child sexual abuse dynamics experts in these sorts of
17 cases. So for all of those reasons, I would hope -- my
18 position is that trial counsel was not deficient for failing
19 to make that objection. And even if the objection had been
20 made and more specific -- more specifically -- and more
21 specifically ruled on, it would've resulted in -- it would
22 not have resulted in the exclusion of Dr. Benedetto's
23 testimony. Mr. --

24 THE COURT: Attorney General Jones.

25 MR. JONES: Yes, your Honor.

1 THE COURT: I take it there are several different
2 matters. Is that your argument as it relates to the first
3 matter? Because what I'd like to do is maybe get response
4 from Mr. Phillips. Is that okay?

5 MR. JONES: That's fine, your Honor. And that would --
6 that would probably make everything proceed a lot more
7 smoothly if (crosstalk).

8 THE COURT: That'll help -- that'll help me because by
9 the time we get through it all, I will have forgotten --
10 number one, and I won't have been able to read my notes. I'm
11 -- I've got my notes here. So I didn't mean to cut you off.
12 Is there anything else concerning this, basically the failure
13 to object or get a ruling on that? But basically, I
14 understand you're saying that it wasn't prejudiced because
15 this is sort of a well-recognized field as I understand it,
16 in essence. Is that kind of your argument, sir?

17 MR. JONES: Yes, your Honor. That's the thrust of my
18 argument. The only -- one other thing I would like to say is
19 that in the order, which your Honor signed, the case of State
20 v. Chavez is cited a few times, and State v. Chavez, I
21 believe, is distinguishable because that concerned a specific
22 protocol known as the RATAC protocol. And in Chavis, the
23 appellate court held that the RATAC protocol was not --

24 THE COURT: Right.

25 MR. JONES: -- shown to be reliable. That's different

1 from the field of child sexual abuse dynamics as a whole.
2 And Chavis was in fact distinguished in State v. Jones on
3 that basis.

4 THE COURT: All right.

5 MR. JONES: That's it for that issue, your Honor.

6 THE COURT: All right. Thank you. Thank you very
7 much, Attorney General Jones. Mr. Phillips?

8 MR. PHILLIPS: Thank you, your Honor. Specifically,
9 the allegation regarding -- or what's presented as
10 ineffective assistance is by failing to properly object.
11 Specifically, not that the counsel just failed to object, but
12 to properly object to the standard and procedure used by the
13 trial court to qualify the State's witness as an expert in
14 child sex abuse dynamics.

15 Specifically, again, that -- the performance was
16 deficient when they failed to properly object -- adequately
17 challenge when the trial court limited counsel's voir dire
18 regarding the qualifications of that witness, then just
19 immediately qualified the witness as an expert, and only
20 permitted the questioning in limited capacity on the
21 reliability and validity on the field itself.

22 After -- and I think that's where I want to emphasize
23 is, after the witness was already deemed an expert by the
24 Court. And so, the procedure used by the judge was improper,
25 certainly not in the context of, I think, what was supposed

1 to be done in -- I understand the State's argument, but our
2 position is not necessarily the issue of the air -- or excuse
3 me, the air preservation on an objection. We understand
4 there's an objection.

5 Our argument is that it wasn't a proper objection, that
6 he didn't challenge the three things outlined. And again, I
7 think this issue as far as what's been presented in the
8 order, it starts on page 26, that trial counsel should have
9 made proper objections to the limitation of the voir dire
10 regarding the qualifications. And then, of course, the
11 limitation on the challenging the reliability and validity of
12 the field itself. But that was after the Court, in my
13 opinion, improperly deemed the witness as an expert at that
14 -- at that stage.

15 And so, it's more of a failure to properly challenge to
16 preserve that issue for appellate review, more of the
17 procedure of how the judge handled it, less about whether
18 they made a proper -- or whether they actually objected.
19 Because of the failure to make that property -- proper
20 objection, it's not preserved for appellate review. And
21 that's the prejudice that that issue could not be raised on
22 direct appeal for the court of appeals to make that
23 determination.

24 THE COURT: What about the fact that it's a recognized
25 science, that basically almost sort of irrespective of what

1 the trial judge did, I guess is sort of what the Attorney
2 General is saying, that this is a -- now is a pretty well
3 respected -- I say respected. It's a well-accepted field of
4 expertise. And so, what -- what do you say about that,
5 Mr. Phillips?

6 MR. PHILLIPS: Applicant's position doesn't -- we don't
7 dispute that -- that there's been many witnesses that have
8 been qualified as an expert in child sex abuse dynamics.
9 We're not saying that that's not a field that has been
10 qualified in South Carolina numerous times. It's all about
11 counsel's failure to properly object related to how the trial
12 judge handled that procedure. Because again, depending on --
13 I mean, it's case specific and not based on solely as to the
14 area of child sex abuse dynamics, but to this specific
15 witness, and the way it was handled by this --

16 THE COURT: So what you're saying is -- Mr. Phillips,
17 is almost like -- kind of, like, maybe failure to get out --
18 get out the starting block? Sort of the field to get out the
19 gate?

20 MR. PHILLIPS: That's correct. And that the -- and --
21 and that kind of dovetails into some of the other issues
22 where trial counsel failed to object to a lot of the trial
23 court's conduct in the trial.

24 THE COURT: What -- what I do remember about this case,
25 and -- one, he was tried originally with a paid lawyer and

1 there was a hung jury. Two, the fellow who took the case on
2 took it on what I would call very short notice to the point
3 where like, "Wow, somebody could be prepared for this type of
4 case that quickly." And I think that there was a lot of -- I
5 -- I -- I remember that there was a lot of -- a lot of
6 concern, I thought, that the lawyer presented when -- in --
7 in -- when he was -- when he was dealing with Judge Early, a
8 lot of concern about -- that I do -- I just -- I remember
9 those (crosstalk).

10 MR. PHILLIPS: To provide -- to provide context to
11 that, Judge. I think what you're remembering is that the
12 trial counsel had testified that, you know, "There's a
13 certain way, Judge Early handles himself and you don't
14 object, because it'll make him angry, and faces that he would
15 make that was very common." I -- I -- certainly, we can get
16 the transcript pages pulled up, but I believe that's
17 certainly --

18 THE COURT: Yeah. That's -- that --

19 MR. PHILLIPS: -- that was raised.

20 THE COURT: -- that's some of the things that I -- that
21 I remember. Then, of course, I remembered a bunch about the
22 -- the girl and the video that may have been a video, but may
23 not have been a video. And then the dad can -- or the
24 stepdad confronting and -- yeah, I -- okay. That's coming
25 back to -- so you're saying dovetails into your other

1 arguments as it relates to the objecting or the -- the --
2 perhaps better dealing with -- with -- with just the judge in
3 general? Is that -- is that what you're saying by the
4 dovetail?

5 MR. PHILLIPS: Well, and that -- I think as far as --
6 basically, as when you said, I was more related to your
7 response, that trial counsel's failure to object in a -- a
8 lot of places as far as proper objections in terms of more
9 than just a -- a standard objection to fully flesh out the
10 issue for direct appeal is basically what I was going because
11 the trial court never addressed that issue.

12 I think, you know, there could be a line added under
13 this section specifically stating that it -- that this issue
14 was not preserved for appellate review as I'm reading it to
15 specifically outline it. But it's less about the objection
16 itself and more about that he had -- he did not properly
17 object to the way the trial court did not follow the -- the
18 appropriate procedure.

19 THE COURT: All right. So I'm going to get an attorney
20 -- anything else on that -- on this -- his first situation,
21 Mr. Phillips? Can I go back and get any reply from the
22 Attorney General?

23 MR. PHILLIPS: None -- none from the Applicant, your
24 Honor.

25 THE COURT: But before he starts, I got to remember.

1 In this case also where the son was named [REDACTED] Cartwright?

2 MR. PHILLIPS: That's correct.

3 MR. JONES: Yes, your Honor.

4 THE COURT: All right. I -- I remember that one. All
5 right? All right, so anything in reply as it relates to Mr.
6 Philips -- Mr. Phillips' argument? I'll be happy to hear
7 from you, then I want to go to the next thing. Okay?

8 MR. JONES: Yes, your Honor, just very briefly. I'd
9 like to thank Mr. Phillips for clarifying that my position on
10 that is that matters of how a qualification examination is
11 undertaken, like, all matters of courtroom procedure, I would
12 argue is within the discretion of the trial judge. And
13 again, I would cite back to that Kumho Tire case from the
14 U.S. Supreme Court. The name -- number of that case is, by
15 the way, 526 U.S. 137.

16 And then at page 152 is the quote where they say,
17 "Trial judges have the discretion to omit reliability
18 proceedings when the reliability is properly taken for
19 granted." And I think that would be the case in this
20 situation. But with that having been said, I'm happy to move
21 on to the next issue.

22 THE COURT: Yes, sir. That'd be great, Attorney
23 General Jones.

24 MR. JONES: Thank you, your Honor. This related issue
25 is allegation 14, which is the failure to object to and move

1 to strike Dr. Benedetto's statement that, "Abusers typically
2 seek victims of a particular age." Now, this court found
3 that trial counsel should have objected to that statement
4 because it goes beyond the scope of her expertise as an
5 expert in child sexual abuse dynamics.

6 My argument is: first of all, it does not go beyond the
7 scope of that expertise because someone who's an expert in
8 child sexual abuse dynamics naturally would have more
9 experience than the average lay person in testifying about
10 the qualification -- or the general attributes of child
11 sexual abusers.

12 However, regardless of that, I think my stronger
13 argument is based on the prejudice prong, which is that this
14 didn't -- this statement that abusers typically seek victims
15 of a particular age didn't prejudice Mr. Cartwright because
16 under the State's theory of the case, he targeted his victims
17 at ages 5, 9, and 13 respectively.

18 So there were many years between the ages of each of
19 the victims when he first targeted them. So to the extent
20 Dr. Benedetto's statement -- if -- if it came in at all, it
21 came in as somewhat contrary to the State's theory of the
22 case in this -- in this situation. Not to a great extent,
23 but certainly not prejudicially to the Defendant. And so,
24 for those reasons --

25 THE COURT: (Inaudible).

1 MR. JONES: I'm sorry, your Honor?

2 THE COURT: No, no, no. You're good.

3 MR. JONES: But that's about all I have to say about
4 that. If Mr. Phillips wants to respond, or if Your Honor has
5 any questions.

6 THE COURT: Mr. Phillips?

7 MR. PHILLIPS: Just in short that the Applicant's
8 position is that that line of testimony that, "Abusers
9 typically seek victims of particular age," goes beyond the
10 scope of what should have been presented as expert testimony.
11 In addition to that, that it -- somewhat, bolsters the
12 accuser's credibility based on their ages. I understand
13 their ages are not exactly the same, but the issue is that
14 they're all fairly close.

15 And the only purpose, you know, I always try to look at
16 that when I'm in a trial as far as what testimony is being
17 presented as far as an objection, whether it be 403 type
18 issue as well. That the only purpose of saying that,
19 "Abusers typically seek victims of a particular age," is to
20 tell the jury to support -- essentially to, you know,
21 bolster. It's not a vouching. To bolster the accuser's
22 credibility based on their accusations -- their allegations.
23 So that's -- that's the affluent. Sorry.

24 THE COURT: What about the bolstering? Are you --
25 Attorney General Jones, are you basically saying that it's

1 not really bolstering because it's inconsistent with the
2 State's theory? Because the range is so wide? Is that your
3 argument? Or just tell me about the -- about the counter,
4 the bolstering argument. Because it does seem like it could
5 be procedures and bolster.

6 MR. JONES: Thank you, your Honor. And again, I'd like
7 to just point to the Supreme Court's opinion in
8 State v. Cartwright where they did specifically say
9 Dr. Benedetto's testimony was not improper bolstering.
10 Notwithstanding the fact that she corroborated some of the
11 things that -- or rather her testimony about general --
12 general traits of child sexual abuse victims was -- could be
13 viewed as consistent with some parts of the victim's
14 testimony. That does not mean that -- make it improper
15 bolstering, and they go in for a very detailed discussion of
16 that.

17 I would argue that the same thing applies here only
18 more so because this is actually a statement that, you know,
19 was -- was not -- not exactly consistent with the State's
20 theory. It's not like these children were all from a very
21 narrow range. I'm reminded of the case of State v. Perry,
22 which I don't have in front of me, and I can't remember the
23 site for, but that was one about multiple victims. And the
24 Supreme Court held that -- in that case, the State was trying
25 to argue that the victims were roughly the same age because

1 they were -- I think one was 9 and one was 11, and the
2 Supreme Court held that was not a sufficient similarity to
3 introduce evidence of one against the other.

4 That's not really the same issue here, but it is
5 interesting that if a 9 and -- if a 9-year-old and an
6 11-year-old are not of similar ages, then I fail to see how a
7 5-year-old and a 13-year-old can be considered similar aged
8 victims. Anyway, this -- that's just my -- my position is --
9 again, that -- it -- it really didn't amount to much, that
10 was prejudicial to the Defendant in the big -- in the grand
11 scheme of this case.

12 I don't think the jury heard that statement and
13 thought, "Oh, well, the" -- "if abusers typically seek the
14 victims of a similar age, then this 5-year-old" -- "this
15 person who was targeted at age 5, and this person who was
16 targeted at age 13 must be telling the truth." I don't think
17 that's a likely takeaway for the jury in that case.

18 THE COURT: All right. Thank you, Attorney General
19 Jones. Do you want to go on -- I -- I -- you've got a few
20 more? I'm ready to go on to whatever you want to argue next,
21 sir.

22 MR. JONES: Yes, your honor. Just three more, I
23 believe.

24 THE COURT: Yes, sir.

25 MR. JONES: The next would be allegation 22, which is

1 the failure to move to sever applicant's charges. In this
2 case, again, I would submit that trial counsel was not
3 deficient for not moving to sever the charges. He did
4 testify that he was worried from the number of charges and
5 the seriousness of the charges that, if he moved to sever
6 these into multiple trials it could result in Mr. Cartwright,
7 his client, being noticed for mandatory LWOP, which I submit
8 is a -- a reasonable concern given the seriousness of the
9 charges.

10 And also, another argument I make is that the -- the
11 cases were sufficiently approved by overlapping evidence
12 that: one, it's not guaranteed that he would've obtained
13 severance of the charges, even if he had moved for it.
14 Certainly, I think not severance of all three victims into
15 separate charges, or -- or separate trials especially victims
16 two and three were -- I mean, they were sisters. They were
17 abused in the same house in the exact same method.

18 The overlapping evidence was -- was so similar. I
19 mean, he -- Mr. Buffy B[REDACTED] testified that Mr. Cartwright
20 confessed to her that he had molested both of them. They
21 both had -- they both testified to the exact same system that
22 he would use of going into their rooms under the pretext of
23 waking them up prior to going to school, and would lie down
24 on top of them, place his penis between their legs, and
25 "hump" them, was the word they both used.

1 So the -- the similarities there were -- were such that
2 in my view, these trial -- these charges would not have been
3 severed into separate trials. And even if they were, there
4 would've been so much overlapping evidence that could have
5 come in at both trials either on -- on the -- on the merits
6 of the -- of the trial itself or under rule -- under the rule
7 allowing prior -- or other bad acts to come in.

8 So the -- he would've obtained nothing by moving to
9 sever those charges since so much of the evidence would still
10 have come in and would've exposed his clients to mandatory
11 LWOP. Certainly, you know, other lawyers might disagree with
12 that strategy and might've said, "Well, we should go ahead
13 and risk the multiple trials." Because as I believe
14 Mr. Phillips's argument is, "There's" -- "then there just
15 would've been fewer indictments presented to the jury. There
16 would've been less total evidence, probably. We could have
17 tried to fight some of the evidence under Rule 404."

18 That's -- those are certainly valid strategic
19 considerations, but not every lawyer would agree with that.
20 And under the deficiency prong of Strickland v. Washington,
21 decision of counsel is entitled to -- to great deference and
22 should be -- should not be overturned just because a
23 different lawyer would've done differently. As long as you
24 can say that no competent -- unless no competent lawyer
25 would've acted as trial counsel did then still should be

1 deferred to as a strategic consideration. And I think that
2 was articulated, and that is supported by the record, your
3 Honor.

4 THE COURT: Mr. Phillips?

5 MR. PHILLIPS: Thank you, your Honor. I -- I believe
6 this is one of the strongest issues that we have in this
7 situation -- in this case, excuse me. The reason I -- I -- I
8 say that is just the overall prejudice created by having the
9 significant number of indictments with the numerous witness
10 -- or numerous victims in this case. On direct examination
11 at the PCR hearing, trial counsel did -- basically, he said
12 he -- "Frankly" -- quote, "I don't know that I ever" --
13 "Frankly, I don't know I ever considered doing it."

14 So he admits he didn't even potentially consider a
15 severance certainly didn't provide any strategic reason for
16 it. And then he admitted that, he says, "I think now" --
17 this is quote, "I think now I probably would want to sever
18 them." I think the -- it's unreasonable trial strategy to
19 say that is -- because you didn't want him to get an LWOP
20 sentence when he received a very significant sentence, which
21 is practically a de facto life sentence as is.

22 But when you look at specifically having multiple
23 accusers testify strengthens, obviously, the State's case
24 bolsters the credibility of those accusers, which is the
25 central issue for the jury's determination of guilt.

1 Specifically, when you have charges where they didn't happen
2 at the same time, the -- provable by different evidence. I
3 -- clearly, when you look at the 404(b) context, the danger
4 of unfair prejudice is enhanced when a prior bad act is
5 strikingly similar to the one from which they're being tried.

6 And now you have three with just such a significant
7 number of indictments that I believe that it certainly fails
8 the consolidation of charges test that it doesn't arise --
9 those charges do not arise out of the same transaction,
10 provable by different evidence, and just beyond the pale on
11 the overwhelming prejudice created by having that evidence
12 presented as -- in one specific trial, even if the State was
13 allowed to get in to additional testimony through 404(b).

14 Still believe when you have the significant number of
15 indictments as you have in this case that -- which is its own
16 issue, I just believe when you -- you have clear deficient
17 performance and overwhelming evidence of prejudice in this
18 case, I believe it -- in this position, it -- it absolutely
19 denied his right to a fair trial. That joinder was improper,
20 not only on bolstering the witness' credibility, but also,
21 just the overwhelming evidence of prior bad act that this
22 amount of propensity evidence in and of itself not -- not
23 challenged, and all coming in, that certainly doesn't fall
24 under the consolidation of charges test is -- is inadmissible
25 for several reasons.

1 And that severance was, in my opinion, it -- it would
2 be unreasonable no matter what level of trial strategy is
3 presented. And case law is very clear that trial strategy
4 must be reasonable, that it'd be unreasonable not to move for
5 severance. But what we have is trial counsel admitting that
6 he didn't really consider it, and that he would've moved for
7 severance now. And claiming that the LWOP issue, given the
8 significant sentence you're getting even on one set of
9 charges, and ultimately what he received, certainly it's
10 unreasonable for that to be presented as a valid trial
11 strategy.

12 THE COURT: All right. Anything in reply, Attorney
13 General Jones?

14 MR. JONES: Thank you, your Honor. Just regarding the
15 point about counsel's strategy, the -- the fact that he
16 couldn't articulate years after the trial, his exact
17 recollection as to what his strategy might have been, there's
18 plenty of case law saying that that's not required in
19 post-conviction relief cases under Strickland v. Washington.
20 The decisions of counsel are entitled to be affirmatively
21 considered by the Court.

22 And so -- and the -- the question is not whether
23 counsel himself can remember, and testify to having pursued
24 this strategy. It's whether a reasonable lawyer in his
25 position would have pursued that strategy. And my position

1 remains, this was a calculated risk to proceed in a single
2 proceeding. Again, this was a situation where he had already
3 had one paid lawyer who did -- proceeded in this -- in this
4 joint trial of all three victims, and that ended in a hung
5 jury.

6 So it was not, like, a foregone conclusion that he was
7 going to be convicted just because of this or that the jury
8 was going to put undue weight on the amount of indictments.
9 I can't provide you with a citation to this, but I'd be
10 surprised if the judge didn't issue the traditional
11 instruction that, "Indictments are not evidence." And in
12 general, I would just -- so I would say the -- the -- just
13 the fact that Mr. Phillips pointed out that trial counsel did
14 testify he couldn't remember why he had failed to move to
15 sever the charges or that in hindsight, he might've made a
16 different decision.

17 Again, he also testified that he was concerned about
18 the -- the exposure to multiple serious convictions and that
19 it could result in an LWOP sentence. And he also testified
20 that he was afraid the State would be able to introduce
21 evidence of the similar bad acts at separate trials under the
22 *Lau v. State* framework. So he did give those strategic
23 considerations in the testimony, and even if he didn't, it's
24 -- the strategy is entitled to be evaluated on its
25 reasonableness, apart from whether he could recall it or not.

1 So that -- that would be my position on that, your Honor.

2 THE COURT: All right. Yes, sir.

3 MR. PHILLIPS: And, your Honor, I'll be very brief.

4 Just specific -- because the first trial ended in a hung
5 jury, we know that there's not overwhelming evidence of
6 guilt. That this is not a situation where the State can
7 claim harmless error. When trial counsel says he doesn't --
8 that he didn't consider it, certainly the State can't argue
9 that it's a calculated decision because he didn't consider
10 it. It wasn't calculated in any way, it -- by his own
11 admission. I believe the prejudice is -- is apparent in
12 that, especially when you have a mistrial in the first one, a
13 hung jury.

14 Again, I believe it -- based on what's presented, that
15 it's -- even if it was a -- a decision that trial counsel
16 made, it'd be an unreasonable one, that it's not in the
17 professional norms that this situation, this set of
18 circumstances would be reasonable and necessary to move for a
19 severance. And it would be nothing more than a kind of post
20 hoc rationalization to try to say, "Well, maybe it would come
21 in under 404(b)."

22 The Applicant was never given that opportunity to try
23 to fight that admissibility or to even be in a position to
24 have the severance preserved for appellate review if it was
25 denied. And so, on that basis, it's an unreasonable trial

1 strategy, and that severance would've been -- moving for
2 severance would've been appropriate.

3 THE COURT: All right. What you got next?

4 MR. JONES: Your Honor, the next issue would be
5 allegation 23, failure to object to truth seeking language
6 and the trial court's preliminary instructions to the jury.
7 This is where the trial court instructed the jury in its
8 preliminary instructions to -- and used phrases like,
9 "Determine what the true facts are, render a true and just
10 verdict, and pay close attention and determine who's telling
11 the truth."

12 Now, first of all, I would like to point out that all
13 those statements were made in the context of the trial
14 court's instruction on witness credibility. And at the time
15 of this trial, the case that discussed truth seeking language
16 would be State v. Olexa, and State v. Olexa specifically
17 said, "It's not error when to instruct" -- "to use truth
18 seeking language in the context of a witness credibility
19 instruction. It's only error and reversible when the trial
20 court uses truth seeking language in the context of a
21 reasonable doubt instruction, or a burden of proof
22 instruction."

23 And that's not what we have here. This was clearly in
24 the context of witness credibility and the trial court's
25 burden of proof and reasonable doubt standards were complete

1 -- were correct, and did not rely on the truth-seeking
2 language cited by this court in the order.

3 Finally, the -- excuse me, your Honor, the -- oh, the
4 Court did -- the Supreme Court did ultimately deprecate the
5 use of truth-seeking language in State v. Beatty. However,
6 that was came out long after this trial was completed, and
7 the Court acknowledged that the -- seeking the truth language
8 used in that case was in fact in the bench book that was
9 promulgated by the Supreme Court. And they decided that it
10 was not reversible in Beatty. In fact, it wasn't reversible
11 in State v. Olexa or in State v. Daniels as I believe. And
12 which are the cases that this -- this court -- I believe, yet
13 this court cited.

14 THE COURT: All right. Thank you. Yes, sir. Mr.
15 Phillips?

16 MR. PHILLIPS: Thank you, your Honor. Our -- our
17 specific argument is in the opening remarks, the judge
18 specifically says, "A verdict that speaks the truth of the
19 case." Based on Olesky. And then again, what -- when we're
20 looking at State versus Beatty, which of course came out
21 subsequent to this trial, they -- it's a reiteration from the
22 Court saying that they're admonishing the Court from using
23 this language that they had specifically said it is improper.

24 It's not a new ruling and -- so to speak. It's not a
25 change of, you know, precedent. And so, our specific

1 position is once in the opening remarks to the jury when the
2 judge says, "A true and just verdict, a verdict that speaks
3 the truth of the case," that trial counsel should have
4 objected to that.

5 And it's an improper burden shifting argument as well
6 as a misstatement of the law and should have asked at a
7 minimum for a curative instruction, I believe at the very
8 beginning, probably wouldn't rise to a level of a mistrial,
9 but at a minimum should have asked for a curative
10 instruction. So from the very beginning of the trial, the
11 jury is immediately told to determine the truth of the
12 charges instead of the focus of whether the State could prove
13 each and every element of the offense beyond a reasonable
14 doubt.

15 THE COURT: All right. Anything in reply?

16 MR. JONES: Just in reply, your Honor. I would -- I
17 would characterize State v. Beatty as making a significant
18 change in the law when State v. Olexa said that, "This
19 truth-seeking language is not error unless it's given in the
20 reasonable doubt, and burden of proof context in the judge's
21 jury instructions." That was not the case here.

22 Then State v. Beatty came out and said, "Actually it's
23 error when the Court says it at all, and the Court should
24 omit it from their jury instructions." That case didn't come
25 out until after this trial was held, and trial counsel can't

1 be deemed ineffective for failing to anticipate a change in
2 the law.

3 THE COURT: All right.

4 MR. JONES: That's all I would've to say about that,
5 your Honor.

6 THE COURT: Okay. What else do you got?

7 MR. JONES: Finally, your Honor, I think the last issue
8 is allegation 45, which is failure to object to the trial
9 court's interruptions of applicant's testimony. This -- I
10 would just point out that the -- many of these interruptions
11 by the trial court were in the context of the State making an
12 objection when Applicant tried to give non-responsive
13 testimony or to testify to matters that he was told by
14 somebody else.

15 And trial court would make -- would sustain the State's
16 objection and then instruct the Applicant to -- to omit --
17 make his testimony responsive to the question and to avoid
18 from testifying as to what he was told by other people. I
19 don't see how the trial court aired in doing that. I don't
20 see how that was objectionable. And certainly, the trial
21 court is also entitled on its own initiative to keep
22 witnesses on track when they go off on tangents or go astray.
23 As that happened a couple of -- on a couple of occasions, or
24 when they approach giving inadmissible testimony.

25 I don't -- that's not a something that should be

1 objected to. It's within the purview of the court's control
2 of the courtroom. I certainly don't agree that it amounted
3 to usurping the role of the prosecutor and giving the
4 improper appearance of partiality before the jury. I don't
5 think we can -- I don't think that's a fair inference from
6 the record. And similarly, the -- Mr. Phillips also
7 complains that trial counsel should have objected to the
8 facial expressions that the Court allegedly made during the
9 Applicant's testimony.

10 But trial counsel testified that he didn't recall Mr.
11 -- sorry, he didn't recall Judge Early making any improper
12 facial expressions during the Applicant's test testimony.
13 And so, there was just the fact that I believe Mr. Phillips
14 referred to trial counsel's testimony that Judge Early would
15 sometimes make faces is not enough to say that he made faces
16 in this case or that they amounted to any sort of prejudicial
17 effect when trial counsel specifically said he did not
18 believe that they were prejudicial in this case.

19 I really think this is -- this is not the sort of thing
20 that we can really say at -- years later with nothing but the
21 bare record in front of us that, "Oh, well, it's clear trial
22 counsel dropped the ball on this matter," since this is a --
23 a -- a matter of -- of what it actually looked like on the
24 day of -- in that courtroom. And the only person we have
25 who's testified about that would be trial counsel, and he

1 said he didn't think it was a problem.

2 THE COURT: Okay.

3 MR. JONES: Finally -- finally, just one more thing,
4 your Honor, is that Judge Early did tell the jury to
5 disregard any expressions he might've made or any actions he
6 might've had, like yawning or picking up his glasses or
7 stretching, or anything like that, and told them that they do
8 not reflect any sort of opinion on the facts of the case, and
9 they should not be considered. So if -- even if there was a
10 problem I submit that, that instruction would've curated it.

11 THE COURT: All right. Mr. Phillips?

12 MR. PHILLIPS: Thank you, your Honor. When you review
13 the testimony -- or Applicant's testimony at trial, the
14 amount of times that the trial court interjects themselves
15 and provides specific comments I believe does cross a
16 threshold that should have triggered an objection. If I
17 remember correctly, trial counsel claimed he didn't object
18 because he didn't want to anger Judge Early any further.

19 And then he goes in to explain specifically that, you
20 know, he normally -- and as far as the facial expressions, he
21 says he'd be amazed if he didn't make faces during the trial.
22 And he said, you know, he -- he's never objected and wouldn't
23 have objected this time. But overall, I mean, we don't have
24 to just focus on general demeanor.

25 We have the transcript where the trial court repeatedly

1 interjects himself and makes comments directly in -- in
2 regards to the Applicant. Which I believe if there -- a fair
3 reading of those comments would certainly indicate to the
4 jury if the -- at a minimum, the trial court's disdain
5 towards the -- the Applicant. And certainly, whether that
6 would hurt his credibility when this is a credibility case
7 that the lynchpin of the jury's determination is whether they
8 believe the Applicant versus the alleged victims in this
9 case.

10 And so, with that be -- with credibility being the key
11 and having the trial court interject themselves repeatedly in
12 a -- in a very -- I mean, even in a black and white
13 transcript, you got there, you can tell it's pretty
14 aggressive in terms of the trial court's way of they -- how
15 they interact with the Applicant. I mean, specifically
16 looking at one, you know, he says, "Don't interrupt me when
17 I'm talking. Now, you think you can play by the rules." And
18 it is just a lot of back and forth where the Court
19 continuously interjects.

20 And I understand that -- part of that they would say is
21 that there are things being said by the -- the witness that
22 is inappropriate, but we do not have objections from the
23 State. It'd be different if the trial court was responding
24 to objections. But there are no objections. This is sua
25 sponte trial court interjecting themselves into the trial.

1 Specifically, in -- in my opinion, ultimately, for lack of a
2 better kind of analogy, putting the thumb on the scale in
3 terms of how the trial court viewed the Defendant and/or at
4 least the, how the Applicant testified. And that it would
5 have crossed the threshold to show -- of prejudice.

6 I think on its face, there should have been at some
7 point a -- an in-camera hearing. I think the -- it -- to me,
8 under the professional norms, it would be reasonable for
9 counsel to ask for the jury to say that they have a matter of
10 law, ask for the jury to step out and to try to get this on
11 track as far as, "Your Honor, I'd like to make an objection
12 related to the trial court interjecting." And it made clear
13 based on the issues that we've had in this case is that trial
14 counsel was afraid, did not want to anger the trial court any
15 further and didn't object for that basis.

16 And so, I believe the transcript itself acknowledges
17 that, that, you know, trial counsel acknowledges basically
18 the trial court's sua sponte instructions to the prosecutor
19 to object more, and facial expressions. Let me try to find
20 the specific page number for that, your Honor.

21 Your honor, I -- in the interest of time, I may have to
22 just email you that I -- I thought I had it at my fingertips
23 here, but I know that there was a specific -- what our
24 position was, what we had, that there was specific, that
25 trial counsel acknowledged essentially that there was an

1 issue with the trial court in regards to basically saying
2 that the prosecutor needed to object more. And so, I need to
3 be able to pull that. Because I know that's a -- probably a
4 pretty critical thing. I thought I had it at my fingertips
5 here, but I can get it for your Honor.

6 THE COURT: Now, I do believe -- I remember that. I do
7 believe that the trial judge may have indicated to the
8 solicitor that they needed to object more.

9 MR. JONES: And just in fairness, the portion you might
10 be looking for in the transcript, I have it as -- in the
11 April 17th to 18th transcript at page 136, lines 10 to 11.
12 That is where the trial court tells the solicitor to object
13 to speculation type of questions and answers, in response to
14 an instance where trial court did make a -- a question that
15 invited speculation.

16 THE COURT: Okay. Thank you.

17 MR. PHILLIPS: Thank you, Mr. Jones. I -- and -- and
18 like I said, I know I had it listed. Again, when a trial
19 court injects himself that many times sua sponte and then
20 tells the prosecutor to object more, I think overall
21 demeanor, you -- we, not only have sufficient evidence where
22 there should have been a -- an objection, but certainly
23 prejudice to the Defendant when this is a credibility case
24 when the jury's having to make a decision solely on
25 credibility.

1 THE COURT: So that's certainly prejudice. Because
2 what I saw it as, I saw it as the gentleman admitting that he
3 felt he needed to object to this, but didn't because he
4 didn't want to upset the judge.

5 MR. PHILLIPS: So in --

6 THE COURT: That's -- that's sort of in -- in -- in his
7 testimony. Because, Lord does, we had a long hearing on this
8 thing, and I remember every period of days, and I remember
9 him basically testifying that, you know, "I should have
10 objected, but I didn't because in essence, I didn't want to
11 bring down the wrath, or the ire of the judge upon me."
12 And I guess he's saying that, "Basically by" -- "by then
13 bringing it upon myself, I'm bringing that upon my client."
14 So -- so what's -- let's assume that's not reasonable. I
15 don't know. I mean, I -- I -- I don't know. But -- so
16 what's -- go back and hit me with the prejudice on that.

17 MR. PHILLIPS: The -- the -- the prejudice would be
18 when trial counsel fails to object based -- purely off the
19 fear of upsetting the Court when you have a appropriate
20 objectionable --

21 THE COURT: And I'm not saying he said that. That --
22 that's just -- I don't have that in front of me. That's just
23 kind of the -- what I remember now a year and a half ago.
24 But go ahead, I -- I don't -- go ahead.

25 MR. PHILLIPS: That when you don't have any challenge

1 from counsel to preserve that issue for appellate review, the
2 -- basically a structural error when trial court's injecting
3 themselves. But the issue just in general, when that issue
4 is not preserved for appellate review, and specifically, in
5 my opinion, the jury's perception of the Applicant's
6 testimony not having any challenge to that when credibility
7 is -- is key in this matter where it's the jury making a
8 decision whether to believe the Applicant or the accusers,
9 that: one, not only do you have the issue not preserved for
10 appellate review, but you have no challenge of the trial
11 court's conduct. And certainly, the jury's perception of the
12 Applicant, I believe is -- is tainted at that point.

13 THE COURT: Right.

14 MR. PHILLIPS: The Applicant needs his fair trial. His
15 right to a fair trial.

16 THE COURT: Anything in reply, Attorney General Jones?

17 MR. JONES: Thank you, your Honor. I would just
18 briefly say one thing Mr. Phillips said was that the trial --
19 the trial court's interruptions were sua sponte and were not
20 made in response to State's objections. I counted at least
21 three instances, which I cited in my motion for -- for
22 reconsideration of those -- the trial court's statements
23 being given in response to the State's objections to hearsay
24 or to nonresponsive answers. So at least several of those
25 were in response to objections which Mr. Phillips has

1 acknowledged would've been not objectionable.

2 Finally, I would also point to the -- at the PCR
3 hearing trial counsel did say that it -- it was -- that
4 Applicant was not easy to control on the stand which goes to
5 support. This was not just the State or -- or the Court
6 singling out Mr. Cartwright for bad treatment. It was the --
7 and the -- you can look at the -- his testimony itself, it
8 does go into tangents, and he does go on about what other
9 people were -- or try to get into what other people told him.

10 And trial counsel acknowledged that he was hard to
11 control. And I think the transcript bears that out. And
12 that would justify the Court in taking measures to try to
13 control his testimony. I think, however, the general -- if
14 you look at -- if you read his entire testimony, it's clear
15 that he was able to get into everything -- or Mr. Cartwright
16 was able to get into everything that he needed to present his
17 defense his theory of the case. And certainly, there were --
18 there were large portions which are -- are not interrupted at
19 all when he is testifying appropriately.

20 Finally, trial counsel did say at the PCR hearing that
21 he didn't view the judge's attempt to main order as being
22 prejudicial. He said, "I can't say that I felt like the
23 Court went too far. I did not feel like he crossed any
24 line." That would be -- again, that's his perspective. And
25 he's the one -- only one of all of us here -- I -- none of us

1 here were there. He was. And that was his view at the time.
2 So this is a -- a situation where I think under Strickland v.
3 Washington, the Court ought to be deferential to his view at
4 the time, and -- and not try to read into the transcript in
5 motions that trial counsel himself says he didn't see going
6 on.

7 THE COURT: All right. Gentlemen. All right.
8 Anything else?

9 MR. PHILLIPS: Nothing further, your Honor.

10 MR. JONES: Yes, your Honor. Those were the only five
11 issues on which you granted relief. And so, our position is
12 that if you were to reconsider and deny those five issues,
13 then that would result in denying relief on the entire PCR
14 application. And so, with that, I will conclude my
15 presentation, your Honor.

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

17 MR. PHILLIPS: Just your honor, that -- again, that
18 based on what's been presented, the testimony, again, this
19 was a very lengthy, multi-day. I know we had some
20 communication issues with -- it was back during COVID when we
21 did it virtually, but this was a very lengthy PCR hearing
22 compared to most certainly significant amount of testimony
23 and issues.

24 And so, based on that, I would say that deficient
25 performance on these issues -- individual issues, have been

1 proven as well as the prejudice, that there's a reasonable
2 likelihood, or probable likelihood that the outcome would've
3 been different based on that. And so, I wanted to just go
4 back -- I know I -- I didn't give you the specific cite but
5 in the appendix of the appeal on page 1818, I think it's
6 actual -- from the appellate record, volume 4, trial
7 counsel's quote. "And so, essentially, I" -- "I ask, and
8 it's your testimony that none of that was improper?"

9 And he says, "As I sit here right now and recall this,"
10 he goes through, he says, "I can't say I felt that the Court
11 went too far. But in fairness to Mr. Cartwright and the
12 State and the Court, I'd have to say, you know, when you're
13 in practice in front of Judge Early for so many years, you've
14 gotten used to a lot of things. I don't know, it's hard for
15 me to answer that question. I came here and say that I don't
16 feel he crossed any line, but I wasn't really happy about
17 what was going on. Because you don't like to see any witness
18 struggle."

19 And he says, "Mr. Cartwright was kind of struggling and
20 part was because of the interjections by Judge Early." And
21 so he -- he goes in to explain that in -- in detail. And,
22 you know, part of that he explains again, is just his overall
23 interactions. The fact that he had been before Judge Early
24 for many years. Again -- and he says -- partly says, "I
25 didn't control him quite well, maybe prepared" -- "or didn't

1 prepare him as well as I could."

2 And I just wanted to -- I think that line of testimony
3 is where he specifically addresses that, your Honor. And it
4 really goes into where he -- I mean, he basically admits that
5 he doesn't -- part -- part of his objections at -- at the PCR
6 hearing is not to anger the Court further, essentially. So
7 on the -- on that basis, we believe that there is deficient
8 performance and prejudice for each individual issue that was
9 just addressed in this hearing. And that the motion to offer
10 amend should be denied.

11 THE COURT: All right. Gentlemen, thank you very much.
12 Thank you for your camphor getting along very professional
13 presentation that you all provided me in this case. This is
14 -- this is probably the most developed PCR that I've had.
15 Fortunately, I hadn't had a whole lot of them, knock on wood.
16 I don't have any -- I don't think I have any of this -- this
17 year PCR terms of court.

18 But in any event, out of the ones that I've had -- and
19 I've had a month worth of PCR terms of court, this has been
20 the best research and the best -- best briefed PCR that I --
21 that I've had. So I -- I want to thank you all for the
22 professional job that you've done.

23 MR. PHILLIPS: Thank you, your Honor.

24 MR. JONES: Thank you, your Honor.

25 MR. PHILLIPS: Thank you.

1 THE COURT: Thank you. Listen, have a great day and
2 I'll have a decision to you within a week.

3 MR. JONES: Thank you, your Honor.

4 THE COURT: Thank you so much.

5 MR. PHILLIPS: Take care, Zach.

6 MR. JONES: Take care, Dayne. Have a good one.

7 MR. PHILLIPS: Bye. You too.

8

9 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

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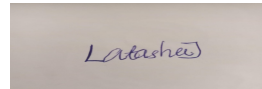
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CERTIFICATE OF TRANSCRIBER

I, LATASHA JEFFERSON, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had, and evidence introduced in the trial of the captioned case, relative to appeal, in the South Carolina Circuit Court 2 of Aiken County, South Carolina, on February 4, 2025.

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

April 1, 2025.

A rectangular box containing a handwritten signature in blue ink that reads "Latasha".

LATASHA JEFFERSON

TRANSCRIBER

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

ORDER DENYING RESPONDENT'S
MOTION TO ALTER OR AMEND THE
SUPPLEMENTAL ORDER GRANTING
POST-CONVICTION RELIEF PURSUANT
TO RULE 59(e), SCRPC

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

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

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

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 the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

FEB 24 2025

Page 1 of 2

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FILED

2-24-25

Robert J. Harte
C.C.P. & G.S.

Shadell Parks
Deputy Clerk

Robert J. Harte
C.C.P. & G.S. Aiken County, S.C.
Shadell Parks
Deputy Clerk

SP

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

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

IT IS SO ORDERED!

Ray Bonds
The Honorable Robert J. Bonds

Wallabor, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2019-CP-02-01582

Harold Cartwright, SCDC # 355084.....Respondent,
v.
State of South Carolina,.....Petitioner.

NOTICE OF APPEAL

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

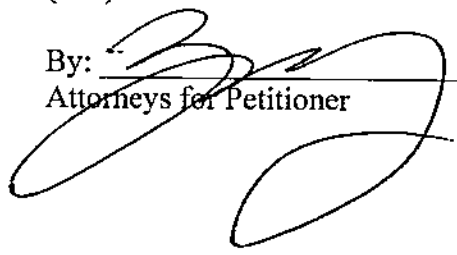
February 25, 2025

Respectfully submitted,

ALAN WILSON
Attorney General

ZACHARY W. JONES
Assistant Attorney General
S.C. Bar No. 104174

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
Attorneys for Petitioner

Other counsel of record:
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Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
Attorney for Respondent

FILED March 10 20 25
Robert J. Bonds 1240
C.C.P. & G.S.
Charla Peartre amp
Deputy Clerk

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2019-CP-02-01582

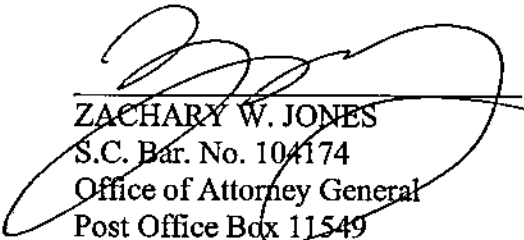
Harold Cartwright, SCDC # 355084.....Respondent,
v.
State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Zachary W. Jones, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent 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, SC 29201

I further certify that all parties required by Rule to be served have been served this 25th day of February, 2025.


ZACHARY W. JONES
S.C. Bar. No. 104174
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner



ALAN WILSON
ATTORNEY GENERAL

February 25, 2025

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

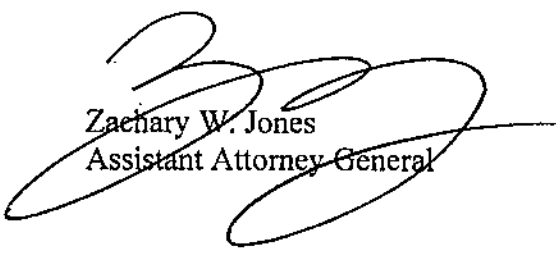
Dear Ms. Howard:

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.

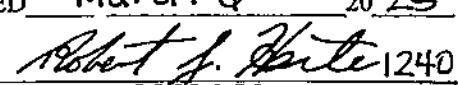
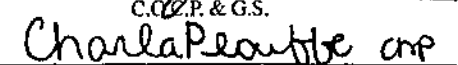
Please let me know if anything additional is needed at this time.

Sincerely,


Zachary W. Jones
Assistant Attorney General

ZWJ/bm

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)

FILED March 6 20 25

C.O.P. & G.S.

Deputy Clerk