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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2025-000338

Harold Cartwright,

Respondent,

v.

The State of South Carolina,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR Court properly find Trial Counsel ineffective for failing to object when the Trial Court applied an incorrect legal standard and procedure for qualifying the State's expert witness in the field of child sexual abuse dynamics?

2. Did the PCR Court properly find Trial Counsel ineffective for failing to object and move to strike Dr. Benedetto's statement that "abusers typically seek victims of a particular age" as beyond the scope of her expertise?

3. Did the PCR Court properly find Trial Counsel ineffective for failing to move for severance of Respondent's charges?

4. Did the PCR Court properly find Trial Counsel ineffective for not objecting to the "truth-seeking" language in the Trial Court's preliminary instructions to the jury?

5. Did the PCR Court properly find Trial Counsel ineffective for failing to object when the Trial Court *sua sponte* repeatedly stopped Respondent's testimony in the jury's presence, admonished Respondent, and instructed the Prosecutor to object, giving the improper appearance of partiality and denying his right a fair trial?

STATEMENT OF THE CASE

The Aiken County Grand Jury indicted Respondent for eight (8) counts of Criminal Sexual Conduct with a Minor (CSCM), First Degree; sixteen (16) counts of Lewd Act with a Minor; two counts (2) CSCM, Second Degree; one (1) count of Criminal Sexual Conduct (CSC), First Degree; and one (1) count of CSC, Third Degree. (App. Vol. III, p. 1034 – 1089).

On November 12, 2012, Respondent proceeded to trial before the Honorable Thomas A. Russo and a jury. Robert Harte represented Respondent, and the Court subsequently granted a mistrial due to a hung jury on November 14, 2012. (App. Vol. I, p. 1–196).

On April 15, 2013, Respondent proceeded to trial before the Honorable Doyet A. Early, III, and a jury. (App. Vol. I, p. 197 – Vol. II, p. 660). Michael Routzong and David Hayes represented Respondent, and Assistant Solicitor Kevin Molony prosecuted the case on behalf of the State. The jury returned guilty verdicts for all charges on April 18, 2013. The Trial Court sentenced Respondent to *concurrent* sentences of thirty (30) years imprisonment for CSC, First Degree, conviction and CSCM, First Degree, conviction; twenty (20) years imprisonment for the CSCM, Second Degree, conviction; and fifteen (15) years imprisonment for the Lewd Act convictions. However, the Trial Court also imposed a *consecutive* sentence of ten (10) years for the CSC, Third Degree, conviction.

On September 30, 2015, the South Carolina Court of Appeals affirmed Respondent's convictions and sentences. *State v. Harold Cartwright, III*, 2015-UP-466 (S.C. Ct. App. filed September 30, 2015) (App. Vol. II, p. 661 – Vol. III, p. 1180). Chief Appellate Defender Robert M. Dudek and Appellate Defender Susan Hackett represented Respondent, and Assistant Attorney General David Spencer represented the State on Direct Appeal.

On September 26, 2018, the South Carolina Supreme Court affirmed Respondent's convictions and sentences. *State v. Harold Cartwright, III*, Op. No. 27842 (S.C. Sup. Ct. filed September 26, 2018). (App. Vol. III, p. 1180–1354).

On June 26, 2019, Respondent filed an application requesting post-conviction relief (PCR), alleging ineffective assistance of counsel. (App. Vol. III, p. 1355). Respondent also filed a motion for leave to obtain discovery on September 9, 2019. Respondent filed a Return and Motion for More Definite Statement on October 3, 2019. (App. Vol. III, p. 1490). The Honorable Courtney Clyburn Pope issued an order authorizing discovery on December 19, 2019.

On June 29, 2020, Respondent filed an amended PCR application and subsequently filed a redacted amended application on July 9, 2020. (App. Vol. IV, p. 1506–1531).

On February 3–4, 2022, Respondent appeared before the PCR Court for a virtual evidentiary hearing. (App. Vol. IV, p. 1532 –1714). Dayne Phillips represented Respondent, and Assistant Attorney General Michael Neubauer represented the State. Chief Appellate Defender Robert Dudek, Public Defender David Hayes, Public Defender Michael Routzong, and Respondent testified at the hearing. However, Mr. Routzong was unable to complete his testimony due to technical difficulties with internet connection at the Correctional Institution. The hearing was continued until the following day but ended prematurely due to technical issues with the Court Reporter's internet connection.

On February 25, 2022, Mr. Routzong finished his testimony. (App. Vol. IV, p. 1715–1902). At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for the Court's review and consideration.

On June 1, 2022, the PCR Court granted Respondent Post-Conviction Relief based on ineffective assistance of counsel after reviewing the proposed orders from the parties and weighing the evidence presented at the hearing. (App. Vol. IV, p. 1984). The PCR Court issued an order granting relief on June 6, 2022. (App. Vol. IV p. 1984 – App. Vol. V, p. 2048).

On June 13, 2022, Petitioner filed a motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. Vol. V, p. 2049–2091). The parties appeared before the PCR Court for a hearing on June 24, 2022, to address the motion to alter or amend. (App. Vol. V, p. 2092–2188).

On July 22, 2022, the PCR Court issued an Amended Order granting Respondent Post-Conviction Relief. (App. Vol. V, p. 2189–2253).

On August 8, 2022, the State/Petitioner filed a Notice of Appeal in the South Carolina Supreme Court and subsequently filed a Petition for Writ of Certiorari and Appendix on May 19, 2023. (App. Vol. V, p. 2254 – 2470). Applicant/Respondent 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. (App. Vol. V, p. 2471 – 2495).

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. (App. Vol. V, p. 2496). 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. (App. Vol. V, p. 2498).

On December 2, 2024, the PCR Court issued a Supplemental Order granting the application for PCR on five of the allegations of ineffective assistance of counsel and denying the fifty remaining allegations. (App. Vol. V, p. 2499 – App. Vol. VI, p. 2573). The State filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCP, on December 16, 2024. (App. Vol. VI, p. 2574 – 2602).

On February 4, 2025, the attorneys appeared before the Honorable Robert Bonds for a virtual hearing via WebEx. Dayne Phillips represented the Applicant/Respondent, and Assistant Attorney General Zachary Jones appeared on behalf of the State/Petitioner. The PCR Court issued an order denying the motion to alter or amend on February 24, 2025. (App. Vol. VI, p. 2644 – 2645).

PCR HEARING

Applicant

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.

Appellate Counsel Robert Dudek

Chief Appellate Defender Robert "Bob" 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.

Trial Counsel David Hayes

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.

Trial Counsel Michael Routzong

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

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

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

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

Mr. Routzong explained that he did not move to sequester the witnesses because they had already testified in the first trial (despite his strategy to attack each witness's credibility). Mr.

Routzong claimed that he did not believe the indictments were overbroad or vague. Notably, Mr. Routzong testified that he had no strategic reason for not moving for severance of the charges and doesn't remember considering to sever the charges.

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

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

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

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

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

STANDARD OF REVIEW

This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *See Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law. *See Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

1. THE PCR COURT PROPERLY FOUND TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PROPERLY OBJECT WHEN THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD AND PROCEDURE FOR QUALIFYING THE STATE'S EXPERT WITNESS IN THE FIELD OF CHILD SEXUAL ABUSE DYNAMICS.

Law

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland,* 466 U.S. at 692).

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

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. A trial court following Rule 702 of the South Carolina Rules of Evidence 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.").

Notably, although South Carolina has not adopted the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 594–95, 113 S.Ct. 2786 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework, 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, our Supreme Court has found that 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 because 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* applies in qualifying child abuse assessment experts because their testimony is non-scientific. *See generally White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Based on the holding set forth in *White*, two threshold determinations must be made by the trial court. 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.").

Deficient Performance

The PCR Court correctly found Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel's performance was deficient by failing to properly object when the Trial Court – in the presence of the jury – (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 qualified as an "expert". *See* Rule 702, SCRE. 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, and Counsel did not request a final ruling to preserve the issue for appellate review.

Prejudice

The PCR Court correctly found 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 692). Specifically, 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' testimony bolstered the complaining witnesses' credibility (particularly based on their delayed disclosure, age, behavior, and memory issues).

Ineffective Assistance

Therefore, the PCR Court properly found Trial Counsel provided ineffective assistance of counsel for failing to properly object when the Trial Court applied an incorrect legal standard and procedure for qualifying the State's expert witness, Alicia Benedetto, in the field of child sexual abuse dynamics. (App. Vol. V, p. 2219–2220). *See Strickland*, 466 U.S. 668; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted) (finding "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.").

2. THE PCR COURT PROPERLY FOUND TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT AND MOVE TO STRIKE DR. BENEDETTO'S STATEMENT THAT "ABUSERS TYPICALLY SEEK VICTIMS OF A PARTICULAR AGE" AS BEYOND THE SCOPE OF HER EXPERTISE.

Deficient Performance

The PCR Court correctly found Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel's performance was deficient by failing to properly object and move to strike Dr. Benedetto's testimony that "abusers typically seek victims of a particular age" exceeded the scope of her expertise in child sexual abuse dynamics. *See* Rule 702, SCRE. *See generally 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).

Prejudice

The PCR Court correctly found 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 692). Specifically, 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 delayed disclosure, age, behavior, and memory issues.

Ineffective Assistance

Therefore, the PCR Court properly found Trial Counsel provided ineffective assistance by failing to properly object and move to strike the expert witness's testimony as beyond the scope of her expertise. *See Strickland*, 466 U.S. 668; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted) (finding "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.").

3. THE PCR COURT PROPERLY FOUND TRIAL COUNSEL INEFFECTIVE FOR NOT MOVING FOR SEVERANCE OF RESPONDENT'S CHARGES.

Law

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 State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996) (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 State v.Middleton,* 288 S.C. 21, 23-24, 339 S.E.2d 692, 693 (1986) (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").

Deficient Performance

The PCR Court correctly found Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." *See Strickland,* 466 U.S. at 687-88. Specifically, Trial Counsel's performance was deficient by failing to move for severance of the charges because the underlying allegations failed 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"). Notably, the three complaining witnesses' alleged conduct that occurred over three distinct and unspecified periods of time, which did not arise out of a single chain of circumstances and were not proven by the same evidence (*multiple alleged victims, twenty-eight indictments, covering a total period of over eighteen (18) years*). *See Middleton*, 288 S.C. 21, 339 S.E.2d 692; *Smith*, 322 S.C. 107, 470 S.E.2d 364.

Although Trial Counsel maintained that he was afraid multiple trials could result in a longer total term of imprisonment, this fear does not constitute as an objectively reasonable trial strategy (especially given the significant sentence imposed by the Trial Court). *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).

Additionally, 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 further 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).

Prejudice

The PCR Court correctly found 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 692). Specifically, Trial Counsel's deficient performance prejudiced Applicant's right to a fair trial because the improper joinder of those charges allowed the State to bolster the complaining witnesses' credibility by having witnesses corroborate prior testimony presented during the trial.

Furthermore, Counsel had no valid strategic reason for allowing multiple alleged victims testify before the jury to strengthen the State's case. The credibility of those accusers was the central issue of the jury's determination of Respondent's guilt (i.e., having multiple victims bolster their individual credibility and 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, our Supreme Court has found that 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).

Ineffective Assistance

Therefore, the PCR Court properly found Trial Counsel provided ineffective assistance of counsel for failing to move for severance of the charges. (App. Vol. V, p. 2226–2227). *See Strickland*, 466 U.S. 668; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted) (finding "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.").

4. THE PCR COURT PROPERLY FOUND TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO THE "TRUTH-SEEKING" LANGUAGE IN THE TRIAL COURT'S PRELIMINARY INSTRUCTIONS TO THE JURY.

Law

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), 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." *Id.* (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), this Court ordered:

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

> defendant of his right to a fair trial.

Daniels, 401 S.C. at 256, 737 S.E.2d at 475. Our Supreme Court further 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.").

Deficient Performance

The PCR Court correctly found Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel was deficient for failing to object when the Trial Court's initial instructions to the jury violated due process and improperly shifted the burden of proof: "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". *See Aleksey*, 343 S.C. 20, 538 S.E.2d 248; *Daniels*, 401 S.C. 251, 737 S.E.2d 473. (App. Vol. V, p. 2227–2228).

Prejudice

The PCR Court correctly found 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 692). Specifically, Trial Counsel's deficient performance prejudiced Applicant because these improper instructions came from the Trial Court at the beginning of the trial and immediately focused the jury's attention that their role was to determine the "truth" instead of whether the State could satisfy its burden of proving every element of the offenses beyond a reasonable doubt.

Ineffective Assistance

Therefore, the PCR Court properly found Trial Counsel ineffective for failing to object to the Trial Court's opening remarks to the jury and failing to request a curative instruction. *See Strickland*, 466 U.S. 668; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted) (finding "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.").

5. THE PCR COURT PROPERLY FOUND COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT SUA SPONTE REPEATEDLY STOPPED RESPONDENT'S TESTIMONY IN THE JURY'S PRESENCE, ADMONISHED RESPONDENT, AND INSTRUCTED THE PROSECUTOR TO OBJECT, GIVING THE IMPROPER APPEARANCE OF PARTIALITY AND DENYING HIS RIGHT TO A FAIR TRIAL.

Law

Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

Deficient Performance

The PCR Court correctly found Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel failed to object when the Trial Court *sua sponte* (in the presence of the jury) repeatedly stopped Respondent's testimony, admonished Respondent, and instructed the Prosecutor to object. *See generally* S.C. Code of Jud. Conduct, Canons 1, 2, 2A.

Trial Counsel claimed that he did not object because he did not want to anger the Trial Court and described 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 fear of upsetting 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.").

Prejudice

The PCR Court correctly found 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 692). Specifically, Trial Counsel's deficient performance prejudiced Respondent because the jury observed the Trial Court's improper comments and conduct without any challenge from his Counsel. There is a reasonable likelihood that the Trial Court's improper comments and conduct negatively affected the jury's perception of Respondent based on the Court's appearance of partiality, violating Respondent's right to a fair trial. Counsel's abandonment of Applicant to the Court's relentless unfairly prejudicial comments and actions cannot be deemed as 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).

Ineffective Assistance

The PCR Court properly found Trial Counsel ineffective for failing to object to the Trial Court's unfairly prejudicial comments and conduct. (App. Vol. V, p. 2243). *See Strickland*, 466 U.S. 668; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted) (finding "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.").

CONCLUSION

Based on the foregoing reasons, Respondent Harold Cartwright respectfully requests this Court deny the Petition for Writ of Certiorari and remand this case to the Aiken County Court of General Sessions for a New Trial.

Respectfully submitted,

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