

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2014-000693  
Lower Court Case No. 2012-CP-42-2674

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ANTHONY NEIL BRIGGS, #342410,

RESPONDENT-PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

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**RETURN TO PETITIONER-RESPONDENT'S PETITION FOR WRIT OF  
CERTIORARI**

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**ATTORNEY FOR RESPONDENT-  
PETITIONER.**

INDEX

INDEX.....1

QUESTIONS PRESENTED .....2

STATEMENT OF THE CASE .....3

STATEMENT OF FACTS .....5

ARGUMENT.....7

**Standard of Review**.....7

**Issue I: Cumulative Error**.....8

**Issues II and III: Forensic Interviewer**.....11

**Issue IV: Expert Witness Jury Charge**.....20

CONCLUSION.....24

## QUESTIONS PRESENTED

### **I.**

Whether the lower court erred in denying relief based on a cumulative error theory of prejudice?

### **II.**

Whether the lower court erred in concluding that defense counsel was ineffective for failing to object to the expert qualification of a forensic interviewer?

### **III.**

Whether the lower court erred in concluding that defense counsel was ineffective for failing to object to, and for directly eliciting, the forensic interviewer's testimony that bolstered the credibility of the victim?

### **IV.**

Whether the lower court erred in concluding that defense counsel was ineffective for failing to object to the trial court's failure to charge the jury on the evaluation of expert witness testimony?

## STATEMENT OF THE CASE

The Respondent-Petitioner (hereinafter referred to as “Respondent”), Anthony Briggs, was indicted in Spartanburg County for one count of criminal sexual conduct with a minor in the first degree and one count of lewd act. On August 23-26, 2010, the Respondent proceeded trial by jury. The Respondent was represented at this proceeding by Max B. Singleton.<sup>1</sup> At the conclusion of the trial, the jury found the Respondent guilty as charged. The Honorable J. Derham Cole, presiding circuit judge, sentenced the Respondent to life imprisonment for the CSC charge and to fifteen years’ imprisonment for the lewd act charge, with the sentences to run concurrently.

The Respondent timely appealed his convictions and sentence to the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Appellate Defender with the South Carolina Office of Appellate Defense, represented the Respondent on appeal. In an unpublished opinion filed May 30, 2012, the Court of Appeals affirmed the Respondent’s convictions and sentences. State v. Briggs, Op. No. 2012-UP-323 (S.C. Ct. App. filed May 30, 2012).

On June 26, 2012, the Respondent filed an Application for Post-Conviction Relief with the Spartanburg County Clerk of Court. This Application was later amended on November, 2013. The State made its Return on June 26, 2013. An evidentiary hearing into the matter was convened on November 12, 2013, before the Honorable Robin B. Stilwell, presiding circuit judge. On March 20, 2014, the PCR court filed an Order Granting Application for Post-Conviction Relief which granted relief to the Respondent on two claims pertaining to defense counsel’s performance with regard to three allegations, and denied relief with regard to the Respondent’s remaining allegations. On February 24, 2014, the Petitioner-Respondent (hereinafter referred to as “Petitioner”) served a Rule 59(e), SCRCF, motion to alter or amend the judgment. March 3, 2014, the PCR court filed

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<sup>1</sup> This Court recently suspended Singleton for nine months. See In re Singleton, Op. No. 27521 (S.C. Sup. Ct. filed May 13, 2015) (Shearouse Adv. Sh. No. 19 at 10).

an order denying the Petitioner's Rule 59(e) motion. Both parties subsequently appealed the PCR court's rulings.

The Petitioner served its certiorari petition on January 29, 2015. This Return follows.

## STATEMENT OF FACTS

The charges in this case arose out of allegations that the Respondent sexually abused his girlfriend's minor daughter.<sup>2</sup> These acts would occur while the Respondent was at home alone with the victim. According to the victim, the Respondent would touch his "private" and his mouth to her "private." App. p. 133, line 1-p. 134, line 1. This would occur on the pull-out sofa in the living room. App. p. 134, lines 20-25. The State's case against the Respondent had two primary fronts: (1) corroborating the victim's testimony; and (2) demonstrating that the Respondent either admitted to the conduct or did not sufficiently deny the allegations.

With regard to the State's attempts to corroborate the victim's testimony, the State presented the testimony of Judy Petty, who was a friend of the victim's father. Petty testified that the victim disclosed abuse to her, which she then reported to the police. App. p. 149, lines 3-13; p. 150, lines 19-25. The State also presented the testimony of Michele Arroyo-Staggs, a forensic interviewer, who stated that the victim had disclosed the sexual abuse to her. App. p. 173, lines 11-19. Arroyo-Staggs, who was qualified as an expert witness, also testified that she could tell if a child had been coached prior to an interview, that she could not see any signs of coaching during her interview with the victim, and that the nature and descriptions of the victim's disclosure were appropriate. App. p. 171, line 24-p. 172, line 18; p. 174, lines 16-21. Arroyo-Staggs' testimony bolstering the victim's credibility was given numerous times throughout her examination by both parties. See App. p. 179, line 8-p. 180, line 10; p. 185, lines 7-18; p. 186, lines 3-15; p. 188, lines 7-17; p. 190, line 14-p. 191, line 3; p. 192, lines 3-19; p. 193, line 21-p. 194, line 5; p. 197, lines 5-15; p. 197, line 18-p. 198, line 4.<sup>3</sup>

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<sup>2</sup> The victim was four years old at the time of the abuse, and six years when she testified at trial.

<sup>3</sup> As will be discussed in greater detail below, the PCR court granted relief based, in part, on defense counsel's failure to object to Arroyo-Staggs' qualification as an expert witness and to her bolstering testimony. See App. pp. 668-673.

With regard to the State's efforts to show that the Respondent either did not sufficiently deny the allegations against him or outright admitted that he committed the offenses, the State presented the testimony of two police investigators, Danny Morgan and Nikki Cantrell, as well as two jailhouse informants, Demetrius Martin and Dwight Lamar Spears. Investigator Morgan testified that the Respondent did not "really deny very strongly [the allegations] like you would expect from someone who didn't do something." App. p. 235, lines 10-11. Investigator Cantrell testified that the Respondent "had never denied when [Investigator Morgan] would talk to him about the sexual abuse allegations." App. p. 261, lines 6-7. She further testified that "he told me he was sick and he needed help." App. p. 262, line 17. The Respondent, however, did not admit to committing the acts to either investigator. Martin testified that while he was incarcerated with the Respondent at the Spartanburg County Detention Center, the Respondent admitted to him that "he rubbed his penis in between legs, butt area, and until he ejaculated." App. p. 294, lines 20-22. Spears, who was also housed with the Respondent at the jail, testified that the Respondent admitted that he played "horsy" with the victim on multiple occasions and that one time he ejaculated. App. p. 304, lines 6-22.

The Respondent presented four witnesses: the victim's mother Wendy Richards and grandmother Donna Parker, and his mother Lakla Miller and stepfather Lonnie Miller. Both Richards and Parker testified that the victim disclosed the abuse to them individually. App. p. 331, line 14-p. 332 line 1 (Parker); p. 359, lines 7-11 (Richards). The Respondent's primary defense was that he was working with his stepfather and mother during the time the incidents were to have occurred. See App. 365, lines 2-11; p. 375, lines 2-12.

## ARGUMENT

### **Standard of Review**

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the petitioning party must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

**I. Certiorari should be denied because the PCR court did not grant relief based on cumulative error and, therefore, the issue is moot.**

A. How the Issue Arose Below

In the Respondent's Amended Application for Post-Conviction Relief, he alleged that "each error made by trial counsel is worthy of granting relief under the traditional prejudice inquiry conducted pursuant to Strickland v. Washington." App. p. 514. The Respondent alleged, in the alternative, that "the cumulative prejudicial effect of all of the errors warrants the grant of a new trial." App. p. 514.

At the PCR hearing, the Petitioner argued that the PCR court should not engage in a cumulative error inquiry:

[T]o start off with, in regards to cumulative error, two cases, specifically, Lorenzen v. State and Walker v. State specifically said that South Carolina does not recognize cumulative error in post-conviction relief and so I think that's a pretty set standard right now.

App. p. 633, lines 18-22. The PCR court ultimately agreed with the Petitioner, and did not grant relief on a cumulative error basis:

This Court also does not reach the Applicant's cumulative error inquiry. As to each allegation, with the exception of allegations #9 and 10, this Court either finds that defense counsel's performance was deficient and that relief is warranted, or that defense counsel's performance was not deficient. Accordingly, there are no constitutional "errors" committed by defense counsel to aggregate and consider cumulatively.

App. p. 683.

Despite the PCR court's fully favorable ruling towards the Petitioner with regard to this issue, the Petitioner petitions for certiorari because "the PCR court improperly considered the cumulative error doctrine." Certiorari Petition at 5. The Petitioner further argues that "there is no basis by which the court could find Counsel ineffective as a result of the cumulation of errors and

the court improperly considered this.” Certiorari Petition at 5. The Respondent respectfully requests that this Court deny certiorari with regard to this claim as the issue is moot and any opinion issued in response to the claim would only be advisory.

#### B. Discussion

“An appellate court will not rule on moot and academic questions or make adjudication where there remains no actual controversy.” Abbeville County School District v. State, 410 S.C. 619, 629, 767 S.E.2d 157, 162 (2014). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” Mathis v. S.C. State Highway Department, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

The Respondent submits that this Court should deny certiorari on this issue as it is moot. The Petitioner admits that “relief was not granted on this issue.” Certiorari Petition at 5. Indeed, the PCR court stated that it did “not reach the Applicant’s cumulative error inquiry.” App. p. 683. The Petitioner does not ask this Court to take any action if certiorari was granted on this issue, nor could it. There is no remedy to grant the Petitioner as the Petitioner was not harmed by the PCR court’s refusal to consider cumulative error; indeed, that is exactly what the Petitioner asked the PCR court to do at the PCR hearing. See App. p. 633, lines 17-22. Accordingly, this issue is moot.

Though it goes unsaid in the Petitioner’s certiorari petition, the Respondent believes that the Petitioner seeks certiorari on this issue in the hope that this Court will issue an opinion that unequivocally states that cumulative error is not recognized on collateral review in South Carolina. However, “[i]t is elementary that the courts of this State have no jurisdiction to issue advisory opinions.” Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). Any such opinion issued in response to the Petitioner’s hope would be advisory as the PCR court did not grant relief

on a cumulative error basis; thus, this Court should refrain from granting certiorari to avoid issuing a purely advisory opinion.

- II. **The PCR court properly concluded that defense counsel was ineffective for failing to object to forensic interviewer Michelle Arroyo-Staggs' qualification as an expert witness.**
- III. **The PCR court properly concluded that defense counsel was ineffective for failing to object to Michele Arroyo-Staggs' improper bolstering of the victim's testimony.<sup>4</sup>**

#### A. How the Issues Arose Below

At trial, the State presented the testimony of Michele Arroyo-Staggs, who was a forensic interviewer with the Children's Advocacy Center of Spartanburg. She interviewed the victim on two occasions. See App. p. 172, line 19-p. 173, line 4. She was qualified, without objection, as an expert "in the field of child abuse assessment and treatment." App. p. 162, lines 16-22. She described her role in the interview, and the purpose of the interview in general, was "to find out again if something happened or didn't happen." App. p. 163, lines 16-17. She then described her interviewing technique that she employed to ensure that she was being told the truth:

At the Children's Advocacy Center we were trained to use what we consider the APSAC guidelines, American Professional Society on the Abuse of Children guidelines. And with using those guidelines there's always specifically three rules that we use.

The first one we can only talk about the truth. And my role is to always find out at the child's developmental abilities of course whether or not the child is able to know the difference between a truth and a lie.

And then the second rule would be that there's no guessing. If I ask a question the child can say they don't know, I don't remember.

And then from there the third rule is to kind of just adequately be able to say that the child, you know—that everything has to be

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<sup>4</sup> It should be noted that although the PCR court, the Petitioner, and the Respondent address these issues in conjunction, as they share several underlying facts, the PCR court granted relief on two separate issues: (1) the failure to object to Arroyo-Staggs' qualification as an expert witness; and (2) the failure to object to Arroyo-Staggs' bolstering testimony. The Petitioner's certiorari petition challenges these findings in one single argument, see Certiorari Petition at 6 (grouping both issues as Issue II), but they are properly considered as independent grounds for relief.

truthful. If you don't know, you don't recall, you just say I don't remember.

App. p. 163, line 20-p. 164, line 10. She also testified that she was trained to determine whether or not a child had been coached prior to the interview. App. p. 171, line 24-p. 172, line 18.

As for the substance of her interview with the victim, Arroyo-Staggs testified that the victim disclosed multiple sexual assaults that occurred at her home. App. p. 173, lines 11-19. Arroyo-Staggs further testified that she “really tried to ... assess” whether or not the victim had been coached prior to her interview and she “did not find any evidence” of coaching during either interview. App. p. 174, lines 19-21. Arroyo-Staggs then testified on several occasions on examination by both parties that the nature and description of the victim's disclosure of sexual abuse was appropriate. See App. p. 179, line 8-p. 180, line 10; p. 185, lines 7-18; p. 186, lines 3-15; p. 188, lines 7-17; p. 190, line 14-p. 191, line 3; p. 192, lines 3-19; p. 193, line 21-p. 194, line 5; p. 197, line 24-p. 198, line 4.

The most damaging testimony came during recross examination, after defense counsel specifically asked Arroyo-Staggs “how can you assess if she's telling—I mean, how can you as an expert determine if she's telling the truth?” App. p. 197, lines 8-10. Arroyo-Staggs responded that “I can definitely assess it, which I have I believe accurately and appropriately, again, basing it on age appropriateness, information she's provided.” App. p. 197, lines 13-15.

In his Amended Application for Post-Conviction Relief, the Respondent alleged that defense counsel was ineffective for failing to object to the qualification of Arroyo-Staggs as an expert witness. See App. p. 512. The Respondent also alleged that defense counsel was ineffective for failing to object to Arroyo-Staggs' testimony that bolstered the credibility of the victim. See App. p. 512. At the PCR hearing, defense counsel unequivocally testified that he did not consider

making an objection to Arroyo-Staggs as an expert, nor did he consider objecting to her testimony. App. p. 533, lines 5-16.

The PCR court granted relief on both claims. With regard to Arroyo-Staggs' qualification as an expert, the PCR court concluded that Arroyo-Staggs should not have been qualified as an expert, primarily based on this Court's decision in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). See App. pp. 668-669. With regard to the substance of Arroyo-Staggs' testimony, the PCR court found that Arroyo-Staggs' testimony amounted to "an opinion as to the credibility and truthfulness of another witness." App. p. 670. Finally, the PCR court found that defense counsel's failure to object to either Arroyo-Staggs' qualification as an expert witness or her actual testimony given as an expert was prejudicial to the Respondent. See App. pp. 671-673. The Petitioner challenges these findings on appeal. The Respondent respectfully submits that the PCR court properly found defense counsel ineffective with regard to both claims, and that this Court should deny certiorari on both issues.

## B. Discussion

As with any claim of ineffective assistance of counsel, a reviewing court must determine whether or not counsel was deficient and whether or not that deficient conduct prejudiced his client. See Strickland, *supra*. The Respondent contends that the PCR court's findings on both prongs of Strickland with regard to both issues are amply supported by the record. Accordingly, the Respondent requests that this Court deny the Petitioner's certiorari petition on these claims.

### *1. Arroyo-Staggs' Qualification as an Expert Witness*

The primary thrust of the Petitioner's argument is that defense counsel was not deficient in failing to object to Arroyo-Staggs' qualification as an expert witness because to do so would have required defense counsel to be clairvoyant and to anticipate this Court's decisions in State v.

Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). See Certiorari Petition at 7-10. Contrary to the Petitioner's assertion, the PCR court did not find defense counsel ineffective based on these decisions. While the PCR court did cite to Kromah in the portion of its order finding defense counsel deficient, see App. p. 668, this was merely as a reference to the state of the law at the time of its decision. The PCR court even noted that "Kromah was decided after the Applicant's trial," which demonstrates that it was conscious of not using Kromah to find defense counsel deficient. App. p. 669. The PCR court did not cite to Jennings at all in the deficient conduct portion of its order.

Instead of requiring defense counsel to have anticipated this Court's decisions in Kromah and Jennings, the PCR court held that defense counsel was ineffective for failing to object to Arroyo-Staggs' qualification as an expert based on this Court's decision in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009):

Douglas predated the Applicant's trial and defense counsel should have raised an objection to the qualification of Arroyo-Staggs as an expert witness based on the conclusions reached by the Supreme Court in Douglas as to the propriety of such testimony being presented by an expert.

App. p. 669. This finding was entirely correct. Despite the Petitioner's protestations to the contrary, Douglas squarely held that it was error to qualify a forensic interviewer as an expert witness absent compelling reasons to do so. See 380 S.C. at 502, 671 S.E.2d at 608 ("We find the testimony given by Herod in the present case simply was not required to be presented by an expert witness"); see also id. ("Although there may be a case in which qualification of an expert in this field is proper, we find no such necessity in this case") (footnote 2); 380 S.C. at 504, 671 S.E.2d at 609 ("[T]o the extent the Court of Appeals upheld the qualification of Herod as an expert in this case, its opinion is reversed.") While this Court's rulings on forensic interviewers have gotten

more forceful since Douglas, the fact of the matter is that Douglas would have provided defense counsel a sufficient basis for objecting to Arroyo-Staggs' qualification as an expert witness. The PCR court did not find defense counsel deficient for failing to be clairvoyant; instead, the PCR court found that defense counsel was deficient for not making an objection he had a sufficient legal basis for making. This ruling was correct and should be upheld.

Turning to prejudice, the Respondent would initially assert that the Petitioner does not explicitly challenge the PCR court's prejudice findings with regard to Arroyo-Staggs' qualification as an expert witness. While the Petitioner does include a brief section on prejudice at the conclusion of its argument on Arroyo-Staggs' vouching for the victim, see Certiorari Petition at 13, no such argument is made within the expert witness portion of its argument. This argument on prejudice also appears to be only contained to the vouching testimony, as the Petitioner argues that "[t]here is no probative evidence that had Counsel objected to *various portions of testimony by Arroyo-Staggs*, in light of the other testimony presented, the outcome of Respondent's trial would have been different." Certiorari Petition at 13 (emphasis added). Note that no similar argument that "there is no probative evidence that had Counsel objected to Arroyo-Staggs' qualification as an expert witness ... the outcome of Respondent's trial would have been different" ever appears in the certiorari petition. Since the PCR court's prejudice findings were not challenged by the Petitioner, they are the law of the case. See Caprood v. State, 338 S.C. 103, 112, 525 S.E.2d 514, 518 (2000).

Assuming, *arguendo*, that the PCR court's prejudice findings *are* challenged on appeal, the Respondent asserts that the PCR court correctly found that the Respondent was prejudiced by defense counsel's deficient conduct. The Respondent asserts that this Court need look no further

to the following exchange, which occurred on defense counsel's recross examination, to show how damaging Arroyo-Staggs' testimony, given expressly as an expert, was at trial:

Q: [H]ow can you assess if she's telling—I mean, how can you *as an expert determine if she's telling the truth* if she can't tell you exactly around the time when it happened, around some specific event or holiday?

A: *I can definitely assess it*, which I have I believe *accurately and appropriately*, again, basing it on age appropriateness, information she's provided.

App. p. 197, lines 8-15 (emphasis added). In other words, Arroyo-Staggs was asked to testify, as an expert, whether or not the victim was telling the truth, and she answered that the victim told her the truth. Given this testimony, and her myriad affirmations of the victim's truthfulness and lack of coaching, all given as an expert, there can be no doubt that the Respondent was prejudiced by her qualification as an expert witness. Accordingly, the Respondent respectfully asserts that the PCR court properly determined that defense counsel was ineffective with regard to this issue and that probative evidence exists to support its grant of relief. Certiorari should be denied.

## *2. Arroyo-Staggs' Improper Vouching for the Victim*

The Petitioner's primary argument with regard to the PCR court's grant of relief is that "Arroyo-Staggs does not state that she believed the victim or that the victim was telling the truth," so defense counsel's performance could not be deficient with regard to this issue. Certiorari Petition at 11. The Petitioner concedes that "[i]t is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim" that error occurs. Certiorari Petition at 11.

Using this argument as background, the Petitioner argues that the PCR court improperly interpreted Arroyo-Staggs' testimony, excerpted above, see App. p. 197, lines 8-15, as an opinion

“that the victim told her the truth.” Certiorari Petition at 10 (quoting App. p. 670). The Petitioner then argues that the correct interpretation of this testimony is the following:

Arroyo-Staggs does not state that she believed the victim or that the victim was telling the truth, but she instead focuses on whether or not she can assess if the child is telling the truth based upon whether or not the words and statements used by the victim were appropriate for her age.

Certiorari Petition at 11. The Respondent asserts that the Petitioner draws a distinction without meaning. The Respondent submits that even if the Petitioner’s interpretation of the testimony is correct, then the testimony was still improper and defense counsel was deficient for eliciting it.

There is no meaningful difference between the following two statements:

- Based on my training, as an expert, I believe the victim is telling the truth; or
- Based on my training, as an expert, I can assess if the victim is telling the truth. Based on my assessment, she is telling the truth.

The PCR court interpreted Arroyo-Staggs’ testimony as the former whereas the Petitioner interprets her testimony as the latter. However, the Respondent contends that it does not matter which interpretation is correct as either way, the central message conveyed to the jury is that the witness believes that the victim is telling the truth. See State v. Chavis, \_\_\_ S.C. \_\_\_, 771 S.E.2d 336, 344 (2015) (Hearn, J., concurring in part and dissenting in part) (“As the majority points out, Griggs’ testimony was improper because the only logical inference to be drawn was that she believed Victim was telling the truth about being abused.”) Consequently, this testimony was improper and the PCR court properly held that defense counsel’s performance was deficient by eliciting such damaging testimony, as well as for failing to object to, or eliciting, numerous other instances of similar testimony. See PCR App. pp. 670-671 (setting forth citations to the record and concluding that “[t]he sum of Arroyo-Staggs’ testimony consisted of opinions ... that (1) the

victim was not lying; (2) the victim gave an age-appropriate disclosure of sexual abuse; and (3) Arroyo-Staggs had independently reviewed the disclosure and found it to be truthful.”)

This Court has found ineffective assistance of counsel under similar circumstances. In Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), this Court held that defense counsel should have objected to testimony that “she found the Victim’s statement ‘believable’ and stated the Victim had no reason ‘not to be truthful.’” 386 S.C. at 564, 689 S.E.2d at 631. This Court held that there was “no defensible basis for trial counsel’s failure to challenge the forensic interviewer’s objectionable testimony.” Id. at 568, 689 S.E.2d at 633.

Here, Arroyo-Staggs explicitly testified that she could “definitely assess” whether or not the victim was telling the truth based on her training, experience, and the nature of the disclosures made by the victim. As in Smith, there is no defensible basis for defense counsel’s failure to object to this testimony. Accordingly, the Respondent respectfully submits that the PCR court properly determined that defense counsel was deficient for failing to object to, or eliciting, this damaging testimony.

The Petitioner also argues that the PCR court erred in finding that defense counsel’s performance prejudiced the Respondent. Specifically, the Petitioner appears to argue that there is overwhelming evidence of guilt because the victim disclosed abuse to Judy Petty and because Demetrius Martin and Dwight Spears—the jailhouse informants—testified that the Respondent admitted to them that he committed the offense. See Certiorari Petition at 13. The Respondent submits that this evidence simply does not amount to overwhelming evidence of guilt. Petty’s testimony amount to only an affirmation that the victim disclosed an assault to her; one witness testifying to such a statement has never been held to be overwhelming evidence of guilt. Furthermore, the PCR court concluded that the credibility of Martin and Spears “is highly suspect,”

see App. p. 672, especially given that Martin had a plea agreement with the federal government which provided him the opportunity for a lowered sentence if he cooperated in prosecuting another individual and Spears lied about his federal conviction and the length of his sentence. See App. pp. 680-681.<sup>5</sup> The testimony of Petty, Martin, and Spears, even when viewed in conjunction with one another, is not overwhelming.

Moreover, as the PCR court correctly pointed out, “[t]he crux of this case came down to the victim’s believability and credibility. There was no forensic evidence demonstrating that the victim was abused by the Applicant.” App. p. 672. As this Court held in Smith, “the outcome of the case hinged on the Victim’s credibility regarding identification of the perpetrator.” 386 S.C. at 569, 689 S.E.2d at 633. As the PCR applicant received relief in Smith, so too should the Respondent here. The Respondent respectfully submits that certiorari should be denied with regard to this issue.

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<sup>5</sup> The testimony of Spears and Martin, and how defense counsel could have used this readily available information to further damage their credibility, is the subject of the Respondent’s certiorari petition.

**IV. The PCR court properly concluded that defense counsel was ineffective for not objecting to the trial court's failure to charge the jury on the credibility of expert witnesses.**

A. How the Issue Arose Below

As noted above, Michele Arroyo-Staggs was qualified as an expert witness "in the field of child abuse assessment and treatment." App. p. 162, lines 16-22. An additional witness, Dr. Nancy Henderson, was qualified as an expert "in the field of child sexual abuse, pediatrics."<sup>6</sup> App. p. 210, lines 20-24. Although the practice of some trial judges is to give an instruction cautioning the jury about the evaluation of expert testimony when an expert is first qualified, the trial court did not give such an instruction when either Arroyo-Staggs or Dr. Henderson were qualified as experts.

The trial court also did not give an instruction regarding the evaluation of expert witness testimony during its charge to the jury. Cf. App. pp. 435-454 (entire jury charge). The trial court did give an instruction regarding the evaluation of the credibility of witnesses in general; however, the overall theme of this instruction was to give the jury a guide as to how to evaluate lay witness testimony. See App. p. 440, line 10-p. 442, line 23. At the conclusion of the jury charge, defense counsel stated that he had no objection to any portion of the charge. App. p. 454, lines 13-18.

At the PCR hearing, the Respondent alleged that defense counsel was ineffective for not objecting to the trial court's failure to charge the jury on evaluating an expert witness' testimony. See App. p. 519, line 18-p. 520, line 3.<sup>7</sup> Defense counsel testified that he believed that he received a copy of the jury charge prior the charge being given. App. p. 535, lines 5-9. Defense counsel

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<sup>6</sup> The Respondent does not question the appropriateness of qualifying Dr. Henderson as an expert.

<sup>7</sup> This allegation was an amendment to the PCR application made at the hearing. The State objected to the amendments, see App. p. 520, lines 13-22, but the PCR court permitted the amendments to be made at the conclusion of the hearing. App. p. 626, line 22-p. 627, line 2. On appeal, the Petitioner does not challenge the trial court's ruling permitting the amendment.

further testified that he thought an expert witness charge was included because “in all the trials that I had been in before that, the judge would always” give such a charge. App. p. 535, lines 13-14. When presented with the fact that the charge was not given, defense counsel testified that he had no reason for not objecting and would have objected to the lack of the charge had he realized that it was not given. App. p. 536, lines 3-15.

The PCR court granted relief on this claim. The PCR court concluded that defense counsel’s performance was deficient because an expert witness charge was required inasmuch as two expert witnesses testified and Arroyo-Staggs’ credibility “was a paramount issue for the jury.” App. p. 674. The PCR court also concluded that defense counsel’s deficient performance prejudiced the Respondent because “[w]ithout the proper cautionary instruction, it is highly likely that the jury concluded that the victim was telling the truth because an ‘expert’ confirmed that she was truthful.” App. p. 675. The Petitioner challenges these findings on appeal. The Respondent respectfully submits that the PCR court properly found defense counsel ineffective, and that this Court should deny certiorari.

#### B. Discussion

“After expert testimony is admitted by the court, it is to be considered by the jury just as other evidence, and given such weight as, in the opinion of the jury, it should receive.” State v. Johnson, 66 S.C. 23, 44 S.E. 58, 63 (1903). A trial court’s failure to give a proper instruction on the jury’s consideration of expert testimony is reversible error. Id.

This Court has held that a trial court’s ability to qualify a witness as an expert “should be jealously guarded ... and never loosely bandied about.” State v. Kromah, *supra*, 401 S.C. at 357, 737 S.E.2d at 499. Trial courts should guard against unnecessarily qualifying witnesses as experts because “although an expert’s testimony theoretically is to be given no more weight by a jury than

any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” Id.

The Petitioner does not appear to contest the PCR court’s finding that defense counsel was deficient in failing to object to the trial court’s lack of an expert witness charge. It would be difficult to mount such a challenge, as defense counsel testified that he thought such an instruction had been given, and that he should have objected to the lack of such a charge. Instead, the Petitioner argues that the PCR court erred in granting relief because the jury received an instruction on how to evaluate the credibility of witnesses, so the Respondent could not be harmed by the trial court’s failure to include such a charge. See Certiorari Petition at 14-15. The Respondent submits that this contention is meritless. The jury instructions, as a whole, simply do not convey to the jury that they are free to: (1) accept or reject an expert witness’ conclusion, even if it is uncontradicted; (2) conclude that the reasons for the expert’s opinion are unsound; or (3) decide that the expert’s opinion is not based on sufficient education and experience. This final point is particularly important when dealing with expert witnesses as “qualification as an expert clothes the witness with an air of authority that does not attach to ‘ordinary’ witnesses.” State v. Douglas, *supra*, 380 S.C. at 506, 671 S.E.2d at 610 (2009) (Pleicones, J., dissenting).

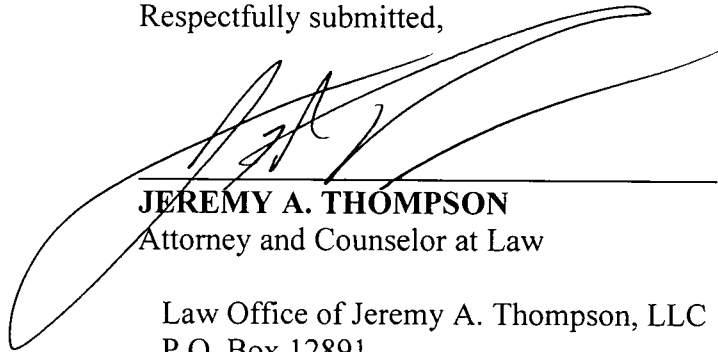
Looking at this scenario from the jury’s point of view, they were told by the court that Arroyo-Staggs was an “expert” without qualification. She then gave testimony in the form of an opinion, primarily that the victim was telling the truth that she was abused. The jury was then given no instruction as to how to evaluate that opinion, either within the context it was given or within the context of the entire case. Under these circumstances, it would be near-impossible for the jury to understand, from the charge regarding the credibility of fact witnesses alone, that they were free to completely reject everything that Arroyo-Staggs testified to.

It is difficult enough with the proper cautionary instructions to ensure that a jury does not blindly accept an expert's opinions as true and accurate. Without those instructions, no reasonable jury could ever be expected to reject an expert's conclusions. The PCR court properly realized that reality, and properly found that there was a reasonable likelihood that the jury convicted the Respondent because Arroyo-Staggs testified that the victim was truthful in her disclosure. The Respondent respectfully submits that certiorari should be denied with regard to this issue.

CONCLUSION

For the reasons stated, the Respondent asks this Court to deny the certiorari petition with regard to the arguments raised by the Petitioner.

Respectfully submitted,



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**ATTORNEY FOR RESPONDENT-  
PETITIONER.**

This 1<sup>st</sup> day of June, 2015.

STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Robin B. Stilwell, Circuit Court Judge

**RECEIVED**

JUN 03 2015

Appellate Case No. 2014-000693  
Lower Court Case No. 2012-CP-42-2674

**S.C. SUPREME COURT**

ANTHONY NEIL BRIGGS, #342410,

RESPONDENT-PETITIONER,

v.

STATE OF SOUTH CAROLINA,

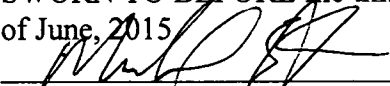
PETITIONER-RESPONDENT.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies each of the Return to the Petitioner-Respondent's Petition for Writ of Certiorari and the Respondent-Petitioner's Petition for Writ of Certiorari in the above-captioned action have been served upon opposing counsel, Suzanne H. White, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 1<sup>st</sup> day of June, 2015.

  
\_\_\_\_\_  
**JEREMY A. THOMPSON**  
ATTORNEY FOR RESPONDENT-PETITIONER

SWORN TO BEFORE me this 1<sup>st</sup> day  
of June, 2015

  
\_\_\_\_\_  
Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022