ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari To York County
The Honorable John C. Hayes, III., Circuit Court Judge

DARRELL EFIRD, PETITIONER pro se

V.

STATE OF SOUTH CAROLINA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Darrell Efird, #322883
Petitioner, pro se

S.C. Departments of Corrections
Perry Correctional Institute
430 Oaklawn Road
Pelzer, S.C. 29669

INDEX

QUESTIONS PRESENTED

A. Did The Petitioner Receive Ineffective Assistance Of Trial Counsel Within The Following Categorical Issues:

1. Failure to object and seek curative judicial intervention when the State:

   (a) Improperly injected a "Golden Rule" argument?;

   (b) Improperly appealed to inflame the passions and prejudices of the jurors?;

   (c) Improperly vouched for the veracity of the Accuser?;

   (d) Improperly argued the Defendant's lack of emotion (remorse)?;

2. Failure to object and move to dismiss indictments when they clearly - on their face:

   Reflected violations of the protection against "double jeopardy"; and Conveyed an insufficiency of offense element characteristics necessary to support a fundamentally fair and Constitutionally sound trial?

3. Failure to object and seek curative judicial intervention when:

   The State's expert witness testified outside the restrictions set forth by the trial judge. (Improper Corroboration Testimony)?

4. Failure to move for the quashing of a Search Warrant and the suppression of evidence obtained through the action upon the defective Search Warrant?

B. Did The State Violate The Petitioner's Substantive And Procedural Due Process Rights By Prosecuting Upon Indictments That Were Obtained Outside Of Legal Process And Thus Failed To Convey Proper Jurisdiction?

C. Was The Cumulative Impact Of Trial Counsel's Failures, Omissions, Oversights And Errors As Presented At Post-Conviction Relief Sufficient To Undermine Confidence In The Trial Outcome And Thus Warrant A New Trial?

STATEMENT OF THE CASE

The Petitioner, Darrell Efird, was tried before a York County jury on July 10-12, 2007 for the following offenses: three (3) counts of Criminal Sexual Conduct With A Minor, Second Degree (Indictment numbers 2007-GS-46-1991 to 1993); one (1) count of Criminal Sexual Conduct, Second Degree (Indictment number 2007-GS-46-1994); one (1) count of Attempt to Commit Criminal Sexual Conduct, First Degree (Indictment number 2007-GS-46-1995); and Incest (Indictment number 2007-GS-46-1996). The Honorable Lee S. Alford, presided over the trial.

Through the course of the trial, Judge Alford granted the Petitioner's motion for a directed verdict upon one (1) count of Criminal Sexual Conduct With A Minor, Second Degree (2007-GS-46-1991).

At the close of trial, after being given an Allen charge, the jury returned the following verdicts: guilty of the remaining two (2) counts of Criminal Sexual Conduct With A Minor, Second Degree (2007-GS-46-1992 & 1993), and the Incest charge (2007-GS-46-1996). The jury also found the Petitioner guilty of the lessor-included offense of Assault and Battery of a High and Aggravated Nature (ABHAN) on the original charge of Attempt to Commit Criminal Sexual Conduct, First Degree (2007-GS-46-1995).

Judge Alford sentenced the Petitioner to a term of twenty (20) years imprisonment for Criminal Sexual Conduct, Second Degree (2007-GS-46-1994), a consecutive term of ten (10) years and a concurrent term of twenty (20) years for the two remaining counts of Criminal Sexual Conduct With A Minor, Second Degree (2007-GS-46-1992 & 1993), a concurrent ten (10) year term for ABHAN (2007-GS-46-1995),

and a concurrent term of one (1) year for Incest (2007-GS-46-1996).

The Petitioner appealed his convictions and sentences which were Affirmed by the South Carolina Court of Appeals. State v. Efird, Unpublished Opinion number 2009-UP-248, filed May 29, 2009.

Petitioner filed an Application for Post-Conviction Relief on July 30, 2009. An amended application was filed on August 30, 2010, following which, and evidentiary hearing was held before the Honorable John C. Hayes, III., on September 3, 2010. The Order of Dismissal was filed on September 23, 2010.

A timely petition for writ of certiorari concerning the Order of Dismissal from Post-Conviction Relief (PCR) was filed on the Petitioner's behalf by Appellate Defender, Elizabeth A. Franklin-Best on June 29, 2011. However, due to irreconcilable differences of opinion between the Petitioner and Appellate Defense Counsel Best, the Petitioner requested and was granted his motion to relieve counsel and permission to proceed pro se with a petition for writ of certiorari by letter dated January 31, 2012.

The Petitioner's pro se petition for writ of certiorari follows:

ARGUMENTS

A. The Petitioner Received Ineffective Assistance Of Trial Counsel Within The Following Categorical Issues:

1. Failed to object and seek curative judicial intervention during the State's closing arguments at several instances of reversible impropriety:

In the case at bar the State's closing argument was wholly improper and trial counsel's failures to object upon each facet of impropriety was ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 334 S.E.2d 813 (1985).

A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury, Von Dohlen v. State, 602 S.E.2d 738 (2004), cert. denied, 544 U.S. 943 (2005), nor may the solicitor's argument be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it, Humphries v. State, 570 S.E.2d 160, 166 (2002).

The South Carolina Supreme Court has drawn a clear distinction between an intentionally improper closing argument and an "instance wherein through inadvertence a comment is made." Dunn v. Charleston Coca-Cola Bottling Company, 426 S.E.2d 756, 758 (1993). In the later situation, the Court observed, "Oftentimes the judge is permitted to give a curative instruction." Id.

In the case at bar, even supposing the solicitor's wholly improper closing arguments were construed as unintentional and inadvertent "comments," the Petitioner was robbed of an in-court

ruling on the matter and was denied curative judicial intervention by trial counsel's failures and/or choices not to object and seek a cure for the prejudice and unfair harm caused by the State. See Pemberton v. State, 560 N.W.2d 524 (Ind.Sup.Ct. 1990); Strickland, supra.

At a constitutional level, the relevant question is whether the solicitor's arguments may have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Von Dohlen v. State, supra. The answer to that "question" requires a reviewing court to look to the "nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345-46 (4th Cir. 1996).

(a) Improperly injected a "Golden Rule" argument;

In the case at bar, the solicitor argued a "Golden Rule" argument in her closing at App. p.438, lns. 6-20, to wit:

> "And she (alleged Victim) got up here and talked about having sex with her father. Just imagine for a minute that for whatever reason and it's illogical and it'll never happen to you but imagine that I called you up and I said you know Mr. Juror, Mr. So and So, I want you to get on the stand and tell me about the last time you had sex with your wife or your husband. ... But for whatever reason you were compelled to do that think about how difficult it would be to get on that stand and testify you know what my wife and I last Thursday night this is how it happened. You would be mortified. And that was a consensual, loving, hopefully fun encounter for you. That wasn't a dark dastardly deed that you weren't even consenting to. Thing about what that takes. Put yourself in her shoes."

Discussion and Arguments:

That statement by the solicitor committed a "Golden Rule" violation and this Court has long held that such arguments are improper. See State v. Reese, 633 S.E.2d 898 (2006) (citing Von Dohlen v. State, 602 S.E.2d 738 (2004), cert. denied, 544 U.S. 943, 125 S.Ct. 1645 (2005)). "Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice."

This Court has found reversible error where a solicitor has suggested that the jurors place themselves in the victim's shoes, "size six." Von Dohlen, supra. This Courts has also found reversible error when the solicitor asked the jurors "Who speaks for [the victim]?" Reese, supra. And in State v. McDaniel, 462 S.E.2d 882 (1995) the South Carolina Court of Appeals reversed the conviction where the solicitor asked the jury to place themselves in the place of the victim.

The solicitor's argument was improper and trial counsel should have objected to it and sought curative judicial intervention even up to a mistrial. Strickland, supra.

(b) Improperly appealed to inflame the passions and prejudices of the jurors. See App. p.435, ln.13 -through- p.436, ln.1, to wit:

> "Most people don't want to think about child abuse. Most people don't want to believe that it happens in our community. And most people say you know what I can't look at a child and become sexually aroused. I don't know how anybody can do that; I don't understand it. It's just not

> something I even want to think about. But the reality is that child abuse happens in our community and it happens alot more than people are willing to believe. It used to be a dark little corner and only a few people came out of there but the reality is that it is growing and that child abuse does happen and that we must confront it. And it takes jurors willing to believe children testifying against adults and parents to hold these people accountable."

Discussion and Arguments:

That statement was wholly improper as it was intended to arouse the juror's passions and prejudices while appealing to community sentiments. (See also App. p.436, lns. 2-19) This particular argument by the solicitor suggested the jury return a verdict of guilty based on their sense of community outrage and not because of the Defendant's actual guilt. This argument by the solicitor dilutes the burden of proof that the State must shoulder and denied the Petitioner of his right to a fair trial. Darden v. Wainwright, 477 U.S. 168 (1986); State v. Durden, 212 S.E.2d 587 (1975). See also In re Winship, 397 U.S. 358 (1970).

Here again, the solicitor's argument was improper and trial counsel should have objected and pursued curative judicial intervention to negate the prejudice and harm caused by the State, even up to a mistrial. Strickland, supra.

(c) "Improperly vouched for the veracity of the Accuser. See App. p.459, ln.4, to wit:

> "Her (the alleged victim's) story is consistent, cohesive, and true."

Discussion and Arguments:

That statement constituted improper vouching. The government may

not vouch for the credibility of its witnesses either by putting its own prestige behind the witness, or by indicating through explicit personal assurances of a witness's veracity, or where the prosecutor implicitly vouches for a witness's veracity by indicating that extrinsic information not presented in court supports the witness' testimony, United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088 (1981); State v. Shuler, 545 S.E.2d 805, 818 (2001); State v. Kelly, 540 S.E.2d 851 (2001). Nor may the prosecutor imply that the government has taken steps to assure the veracity of its witnesses, United States v. Brown, 720 F.2d 1059, 1073 (9th Cir. 1983).

In the case at bar, by telling the jury that the Accuser's testimony was "true", the solicitor directly assured the jury that the Accuser should be believed over the Petitioner.

This was a matter of improper vouching for the prosecutor's own witness and trial counsel should have objected and sought curative judicial intervention to reduce the prejudice and harm caused by the State, even up to a mistrial. Strickland, supra.

(d) "Improperly argued the Defendant's lack of emotion (remorse). See App. p.449, ln.18 -through- p.450, ln.5, to wit:

> "Think about if your child got on the stand in an open courtroom and said that he came into my bed at night and he fingered her and he had sex with her and he made her perform oral sex on him and he performed oral sex on her. Even if it's a lie the pain you must feel, the betrayal you must feel. If I would have said that to my daddy every word out of my mouth would have been a slap across the face. Or did he (the Defendant) sit there like he already knew the story? Like it really wasn't a revelation and like he really could have

> responded. Does he get up on that stand does he show the awe and confusion and fear that he claims that is in his heart? Or does he sit there stoic, denial, lying, and blank like his wife? ..."

Discussion and Arguments:

That statement by the solicitor to the jury was an improper comment upon the Petitioner's "perceived" non-emotional reaction or "lack of remorse" displayed in open court. The solicitor's argument implied that he had something to be remorseful about and portrayed him as an empty, emotionless and deceiving person who would not acknowledge his guilt.

In this case, there should be no doubt that the solicitor's statement was improper and calculated to produce a wrongful conviction. United States v. Young, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042 (1985). By painting the Petitioner as emotionless, remorseless and a liar in her closing arguments, the solicitor prosecuting the case did not further the aims of justice or aid in the search for truth. The result of the portrait painted by the solicitor inflamed the biases in the jury and influenced their verdict based on something other than the evidence. Cf. United States v. Singer, 660 F.2d 1295, 1304 (1981), cert. denied, 445 U.S. 1156, 102 S.Ct. 1030 (1982); Hall v. United States, 419 F.2d 582, 587-88 (1969).

This was an improper statement based on the solicitor's perceived interpretation that the Petitioner displayed no emotions or remorse in open court and trial counsel should have objected and pursued curative judicial action to negate the prejudice and harm caused by the State. See Fossick v. State, 453 S.E.2d 899 (1995); Strickland, supra.

Summarized Arguments On Improper Closing Arguments Category Of Issues:

For a Applicant to be granted Post-Conviction Relief as a result of ineffective assistance of trial counsel, he must present that his counsel (1) failed to render reasonable effective assistance under prevailing professional norms, and (2) that he was prejudiced by that ineffective assistance. U.S.C.A. Const.Amend.6; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Brown v. State, 533 S.E.2d 308 (2000).

The Petitioner clearly satisfied the evidentiary requirements for relief on Post-Conviction Relief (PCR). He clearly established through fact and case law precedents that he was deprived the effective assistance of trial counsel guaranteed by the United States Constitution.

A review of the PCR pleadings and testimony before the Court of Common Pleas reveals that trial counsel did not object and seek curative judicial intervention on numerous improper statements delivered by the solicitor during closing arguments. See App. p.p.537-636. Moreover, the testimony of trial counsel conveys the fact that he did not even recognize the inflammatory, prejudicial and improper character of the solicitor's closing arguments despite ample authority which establishes the inappropriate, egregious and reversible nature thereon. See App. p.p.616-633.

Yet, despite the evidence, testimony and case law on the improper statement issues, the PCR court erroneously and unreasonably ruled against the Petitioner's ineffective assistance of counsel claims relative to this cluster of closing arguments issues and denied PCR relief. See App. p.p.642-644.

Wherefore the Petitioner Prays this Honorable Court to grant certiorari review on this category of issues.

2. Failed to object and move to dismiss indictments when they clearly, on-their-face reflected violations of the protection against "double jeopardy"; and Conveyed an insufficiency of offense characteristics necessary to support fundamentally fair and Constitutionally sound trial. See App. p.p.553-554; and p.p.596-604.

The double jeopardy clause protects citizens against second prosecutions for same offenses after acquittal, a second prosecution for the same offense after conviction, and against multiple punishments arising from same offenses. See State v. Blick, 481 S.E.2d 452 (1997).

In the case at bar the Petitioner argues that he was charged with and prosecuted upon "multiplicitous indictments" resulting in both, multiple convictions and multiple punishments for the same offense. (See Application for PCR arguments at App. p.p.553-54). Thus, based upon the Petitioner's "layman" understanding of the issue, it seems the relevant inquiry rests on whether the jury convicted the Petitioner more than once upon the same offense and/or whether he received multiple punishments upon the same or overlapping multiplicitous offense indictments?

At PCR, the Petitioner presented and argued the fact that the alleged Victim of each offense indicted, his daughter, was born on **July 14, 1986**, and so, on **July 15, 2002** she was sixteen (16) years of age. And as such, at sixteen (16) years of age, under South Carolina law, the alleged Victim was not a minor pursuant to criminal law statutes, S.C. Code Ann. §16-3-655 for which was the basis of which the prosecution on the majority of the Criminal Sexual Conduct

offenses. (App. p.p.598-99).

The Petitioner submits that the "date of offense" specified in each indictment is an essential element of the criminal offense specified. Wherefrom, he presented and explained at PCR that:

> [1] On Indictment No.: 2007-GS-46-1992 (App. p.p.652-53) the offense specifies Criminal Sexual Conduct with a Minor, Second Degree, between 2001 and 2002, and declares the Victim to have been between the ages of "at least fourteen (14) ... but less than sixteen (16) years of age, ..." (§16-03-655(2)).

However, the alleged Victim actually became sixteen (16) years of age on July 15, 2002, the year included as an offense element, and as such, the alleged Victim was not a minor for the purpose of CSC criminal statutes after July 15, 2002.

For the sake of clarity concerning the generalized ambiguity within the language of the indictment-("... between 2001 and 2002 ...") the Sentencing Sheet signed by the trial Judge, Solicitor and Defendant specifies the Offense Date as 09/01/2002 which is after the alleged Victim became sixteen (16) years of age on 07/15/2002. And so, the essential "time frame" element becomes too generalized and vague to support a criminal prosecution, conviction and punishment upon such a "time specific offense characteristic" that is the foundation for the nature of the offense. Said another way, due process of law and fundamental fairness principles cannot support a prosecution, conviction and sentence upon Criminal Sexual Conduct with a Minor if the charging instrument on which the prosecution legally depends does not establish with certainty that the alleged Victim of the offense was in fact a minor. (§16-03-655) Yet, the Petitioner was prosecuted, convicted and sentences to twenty (20) years imprisonment upon this indictment (2007-GS-46-1992 see App. p.p.651-653).

[2] On Indictment No.: 2007-GS-46-1993 (App. p.p.655-56) the offense specifies Criminal Sexual Conduct with a Minor, Second Degree, between 2002 and 2003, and declares the Victim to have been between the ages of "at least fourteen (14) ... but less than sixteen (16) years of age, ..." (§16-03-655(2)).

Again however, the alleged Victim was sixteen (16) years of age on July 15, 2002, and as such, was not a minor from July 15, 2002 through a significantly large portion of "time specified" in that indictment ("... between 2002 and 2003 ...")(§16-03-655).

This indictment specifying the essential time element for the criminal offense against a "minor" between 2002 and 2003 is far too generalized and vague to support a prosecution, conviction and sentence under S.C. Code Ann. §16-03-655, whereas again, the alleged Victim was not a minor after July 14, 2002.

Due process of law and principles of fundamental fairness are eviscerated upon this Criminal Sexual Conduct with a Minor, Second Degree charging instrument that does not establish with certainty that the alleged Victim of the offense was in fact a Minor when the alleged offense took place. Also, here again, the Sentencing Sheet signed by all parties and the trial Judge specifies the Offense Date as 09/01/2002 which clearly places the offense date after the alleged Victim's sixteenth (16th) birthday. Yet, the Petitioner was prosecuted, convicted and sentenced to ten (10) years imprisonment for Criminal Sexual Conduct with a Minor - who was less than sixteen (16) years of age on this indictment (2007-GS-46-1993 see App. p.p.654-656).

[3] On Indictment No.: 2007-GS-46-1994 (App. p.p.658-59) the offense specifies Criminal Sexual Conduct, Second Degree, between 2002 and 2005.

On this particular indictment, the time frame specified for designating an offense actually covers a period of time when the alleged Victim was a Minor (before July 15, 2002) and additionally spans three (3) years.

Essentially, the State chose the year of 2002 as the baseline time frame element for the majority of it's indictments. Yet, this indictment in particular was so generalized and vague that it allowed the prosecution of a criminal offense spanning three (3) years - and despite the Sentence Sheet specifying the actual Offense Date for this indictment as 09/01/2002 - it allowed far too much element overlap to be certain that the jury did not convict the Petitioner on evidence of crimes presented upon the other identical and essential time frame offense characteristics for Criminal Sexual Conduct with a Minor.

Here again, the Petitioner was prosecuted, convicted and sentenced to twenty (20) years imprisonment upon this indictment that spanned three (3) years and overlapped into a time when the alleged Victim was a Minor. Such an indictment on-its-face is a violation of due process and offends the principles of fundamental fairness on the circumstances and facts unique to the case at bar. See 2007-GS-46-1995 App. p.p.657-659).

Discussion and Arguments:

Given the bedrock time frame elements chosen by the prosecutor in composing the indictments presented, to wit: [1] 2007-GS-46-1992 - Criminal Sexual Conduct with a Minor, Second Degree; 2007-GS-46-1993 -

Criminal Sexual Conduct with a Minor, Second Degree; 2007-GS-46-1994 - Criminal Sexual Conduct, Second Degree; the PCR court should have concluded that the Petitioner was tried, convicted and/or punished for the same offense conduct.

Such circumstances amount to charging a single offense in multiple counts which is commonly called "multiplicitous indictments." Most times when multiplicitous indictment violations become apparent after trial, courts will require the government to dismiss or consolidate multiplicitous counts. See U.S. v. Sanchez-Lopez, 879 F.2d 541, 549-50 (1985); U.S. v. Molinares, 700 F.2d 647, 659 n.11 (1983). See also U.S. v. Dunford, 148 F.3d 385, 389 (4th Cir. 1998) (proper remedy for multiplicitous indictment(s) established by affirming (1) conviction, vacating (13) convictions and remanding for resentencing.)

However, going further in the case at bar, the multiplicity of the indictments used to prosecute and sentence the Petitioner, clearly resulted in multiple convictions and sentences for a single specified offense occurrence characteristic designated as the year 2002. Such is a violation of double jeopardy protections and offends the provisions of the United States Constitution. Dunford, supra. See also, Abney v. United States, 431 U.S. 651, 660-62 (1977) where the United States Supreme Court explicitly held that double jeopardy principles act to protect a criminal defendant from even the "risk" of being punished twice for the same offense.

Wherefrom, the Petitioner clearly presented and argued to the PCR court that his indictments, in the very least, were written and composed to create more than a "risk" for double jeopardy convictions and punishments. (See App. p.p.553-54; and p.p.596-604). And as such, the Petitioner explained to the PCR court that his trial counsel

provided ineffective assistance for failing to object and challenge the indictments on double jeopardy grounds. Such a failure by trial counsel was indisputably prejudicial, and thus, the PCR court's ruling and conclusion on this issue was clearly erroneous and unreasonable within the circumstances and facts unique to the case at bar. (See App. p.p.635-46).

And so, the Petitioner Prays this Honorable Court to grant certiorari to review the lower court conclusions and determinations on this issue.

3. Failed to object and seek curative judicial intervention when the State's expert witness testified outside the restrictions set forth by the trial Judge. (Improper Corroboration Testimony - See App. p.206, ln.25 -through- p.207, ln.14)

The Petitioner presented in his PCR Application that his trial counsel provided ineffective assistance by failing to object to improper corroboration testimony given by the prosecution's expert witness, Dr. Allison F. Defelice. (App. p.p.557-58)

At the PCR evidentiary hearing the Petitioner argued to the court that the scope of Dr. Defelice's testimony had been limited by the trial Judge. (App. p.p.588-89) The Petitioner gave reference to the transcript on the matter.

Whereas, the expert witness was asked by the solicitor to recite what materials she reviewed to make herself familiar with the trial case at issue. From which, the expert witness testified that she reviewed: "**(a)** the General Sessions case file summary of the York County Sheriff's Office; **(b)** the Law Enforcement Incident interview report; **(c)** the written statement that Tabitha (alleged Victim)

provided to law enforcement - five (5) pages in length; **(d)** the contract we heard testimony about; **(e)** the voluntary statement given by Tabitha's mother Christine Efird; and **(f)** the testimony of Mrs. Efird given yesterday."

Discussion and Arguments:

Based on the list of materials reviewed and testimony heard, the expert witness conveyed to the jury that, all of her testimony is based upon her assessment of the particular facts of the case at bar. Thus, the expert's entire testimony became improper corroboration testimony beyond the scope of the Judge's specific limitations and defense counsel should have objected to the listing of materials reviewed as recited by the witness which conveyed to the jury that her testimony is founded upon intimate, direct substantial profession conduct that did not occur in this case. See defense counsel's arguments to preclude this witness's testimony at App. p.187, ln.22 -through- p.189, ln.11. It is obvious that defense counsel recognized the potential dangers of unfair prejudice posed by an expert witness's testimony on subject matters where a thorough and comprehensive examination of the alleged Victim and others associated with the incidents on trial are typically necessary. Since no such examination and personal evaluation was conducted by this witness, defense counsel properly sought to exclude her testimony.

Nevertheless, the trial Judge allowed Dr. Defelice to testify in her expert capacity within limits of generality. However, the expert's testimony crossed those "generality line boundaries" when she listed her review of case specific materials and her assessment of specific

testimony provided that related to the specific case facts at controversy. The expert's testimony was an exercise in veiled corroboration directly upon the credibility of abused children, and in particular, the veracity of the alleged Victim in the case at bar, within a guise of generalities.

See United States v. Antone, 981 F.2d 1059, 1062 (1992) (quoting United States v. Binder, 769 F.2d 595 (1985) at 602) holding that; the effect of the expert's testimony was to "bolster the children's story and to usurp the jury's fact-finding function." Essentially, the jury in the case at bar was being asked to accept the expert's determination that the alleged Victim was being truthful.

Trial counsel at bar allowed the issue to pass without objection despite his obvious awareness to the dangers of unfair prejudice inherent in such expert witness testimony. See Jolly v. State, 443 S.E.2d 566 (1984) holding that, improper corroboration testimony (in the guise of generalities) to the alleged Victim's testimony in a Criminal Sexual Conduct prosecution cannot be harmless, as it enhances the devastating impact of such testimony due to its cumulative effect toward improper corroboration.

The PCR court's final order on this issue is both erroneous and unreasonable. The conclusions arrived at by the PCR court are not supported by the record nor by the plethora of case law existing that supports the Petitioner's arguments for post-conviction relief. (See App. p.645).

Wherefore, the PCR court should have found ineffective assistance of counsel on this issue and resulting prejudice sufficient to warrant a new trial. And so, the Petitioner Prays this Honorable Court to grant certiorari review on this issue.

4. Failure to move for the quashing of a Search Warrant and suppression of evidence obtained through the action upon the defective Search Warrant.

In the case at bar, the State executed a search upon the Petitioner's residence seeking various sexual related items and any document between the alleged Victim and the Petitioner. See Search Warrant at App. p.562 and note that it is unsigned.

The return to the Search Warrant (App. p.563) reflects that a written contract document signed by the Petitioner and alleged Victim was seized pursuant to the Search Warrant. Note the Return is signed by a Magistrate Judge.

During the prosecution and trial, the solicitor used the written contract to corroborate the alleged Victim's testimony in it's case-in-chief and to extensively cross-examine the Petitioner during his testimony.

At PCR, the Petitioner presented correctly the fact that, in terms of the evidence presented at trial, the written contract that was seized pursuant to an unsigned Search Warrant was the most important piece of evidence in favor of the prosecution (App. p.p.582-84). The Petitioner went on to present correct legal arguments to support his allegations on this issue at PCR.

Further, the Petitioner presented to the PCR court his post-trial attempt history to ascertain the "Affidavit" used to justify probable cause for the Search Warrant's issuance, (App. p.p.587-88). Through those efforts, the Petitioner had never viewed an Affidavit of probable cause associated with the Search Warrant, nor a signed copy of the Warrant itself. (See also App. p.p.604-605; and p.614).

When the Petitioner's trial counsel was presented a Search Warrant and Affidavit through direct examination at PCR, trial counsel perused the document handed him by the State and stated that both the Search Warrant and Affidavit were signed by Magistrate Judge, Lynn Benefield on the date listed on those documents of March 22, 2006. Following which, those documents were assigned Respondent's Exhibit #1 and entered into evidence (App. p.619). Trial counsel testified on cross-examination that for some reason he had an unsigned search warrant in his file that he either got through Discovery or from his client (the Petitioner). He stated it is not unusual to have both signed and unsigned Search Warrants in case files (App. p.632). Then, on re-direct examination by the State, trial counsel clarified that he did have a signed copy of that Search Warrant prior to going to trial. ... (App. p.633)

Discussion and Arguments:

The Petitioner presented evidence at PCR that the documents (Search Warrant) furnished by the officers conducting the search of his residence pursuant to warrants were unsigned (App. p.562, and App. p.p.583-588). In contrast, the State did not offer any evidence to establish that the Search Warrant copies delivered at the time that the warrant was executed were complete and accurate copies of the warrant that had actually been signed and issued in accordance with State law.

In State v. Covert, Op.No. 4071 (S.C. Ct.App. filed January 17,2006)(Shearouse Adv.Sh.No.3 at 56), the Court of Appeals reversed a defendant's conviction for trafficking in cocaine and possession with

intent to distribute cocaine in proximity of a school, where the evidence did not establish that the Search Warrant was signed by the Magistrate Judge prior to its execution. The majority held the warrant defective because it was not "issued" as required by Section 17-13-140. The majority relied on the long-standing state law establishing that a warrant cannot be "issued" without a signature regardless of the Magistrate's intent. See Davis v. Sanders, 19 S.E. 138, 139-40 (1894); and Du Bose v. Du Bose, 72 S.E. 645, 646 (1911). The majority also relied on the important policy reasons recognized by other states for requiring that a warrant be signed in order to be issued. See People v. Hentkowski, 397 N.W.2d 255, 257-58 (Mich. 1986); and also State v. Surowiecki, 440 A.2d 798, 799 (Conn. 1981); State v. Williams, 565 N.E.2d 563, cert. denied, 501 U.S. 1238 (Ohio 1991).

The signing of the warrant is the essence of its issuance. It is the confirmation of the Magistrate's having made a determination that the facts asserted in the Affidavit support a finding of probable cause. Without a signature on the page of the warrant which reflects a finding of probable cause and authorizes the search, the warrant has not "issued" for purposes of Section 17-13-140.

In State v. Mollison, 459 S.E.2d 88, 92 (1995), cert. denied, citing State v. McKnight, 352 S.E.2d 471 (1987); it was explained that the requirements of signature for issuance of a warrant and of furnishing a copy of the signed, issued warrant are substantial requirements that go to the integrity of the process for issuing and executing Search Warrants. These requirements ensure that the party whose premises are to be searched is informed of the scope and authority of the government's intrusion. Violations of such

requirements should result in exclusion of the evidence. See State v. Freeman, 459 S.E.2d 867, 871-72 (1995) (suppressing evidence where the State could only produce an unsigned, unsworn copy of the Return, not properly executed Return.)

Moreover, the requirement of Section 17-13-150 that the officer executing the search furnish a copy of the warrant together with the Affidavit upon which it was issued also mandates that the copy furnished must reflect the signatures of the necessary parties to the issuance process. Some of the same policy considerations that serve as the underpinnings of the signature requirement apply with equal force to the requirement that the furnished copy be a copy of the warrant actually issued. As the Michigan Court of Appeals noted in Hentowski, supra, the presence of a signature on the document distinguishes an actual warrant from other proposed documents drafted by law enforcement agencies which never actually become legally enforceable warrants. Id. at 497 N.W. 258. The presence of a signature provides needed protections and assurances to the person in control of the property to be searched, so that when they are presented with a document purporting to authorize a search, they are able to determine whether or not they should allow the officers to conduct the search. See Hentowski, 397 N.W.2d at 259, cited by the Court of Appeals in Covert, supra, These policy considerations would not be served if the copy required to be furnished, as in the case at bar, were merely draft documents that do not reveal that they were ever attested to under oath by the officer who sought them or that they were signed by a reviewing judge, and as such, does not reveal that they were actually issued.

And so, the Petitioner clearly and correctly presented to the PCR court that his trial attorney provided ineffective assistance for failure to move the trial court to quash the Search Warrant and suppress the evidence seized because the State failed to execute the search on the basis of a warrant in keeping with S.C. Code Ann. §17-13-140 and to provide copies of the issued warrant and Affidavit upon which it was issued in keeping with S.C. Code Ann. §17-13-150.

The State statutory provisions governing Search Warrants are separate and distinct from the prohibition in the federal and state constitutions against unreasonable searches and seizures. See U.S.Const.amends. IV, XIV; S.C.Const.art. I,§10. Section 17-13-140 imposes stricter warrant requirements than the constitutional provisions. See State v. Jones, 536 S.E.2d 675, 678 (2000); State v. McKnight, 352 S.E.2d 471, 472 (1987). It is also more far-reaching with respect to who has standing to challenge a search, extending its protection to any person against whom the state attempts to introduce the evidence. See McKnight, 352 S.E.2d at 473-74. The rules governing searches under the federal and state constitutional do not control the question of the validity of searches pursuant to warrants under the state statutes.

At PCR the Petitioner met his burden of proof by introducing evidence supporting that the suppression of critical evidence, more likely than not, would have been granted at trial, but for, counsel's failures on the issue, the burden shifted to the State at PCR to establish the lawfulness of the search. Here, the State did not establish that the search at issue was conducted on the basis of a warrant that was "issued" in keeping with the requirements of Section

17-13-140 and did not establish that the copies of the "issued" warrant were furnished by the officers in conducting the search as required by Section 17-13-150.

However, during the Petitioner's Post-Conviction Relief evidentiary hearing held on September 2, 2010, Petitioner's trial attorney was presented a document by the State and asked to identify it. Counsel responded and stated that it appeared to be a Search Warrant that included an Affidavit for the warrant. Counsel stated that it appeared that the Affidavit and Search Warrant were signed by the Magistrate Judge, Lynn Benefield. That document was entered into evidence as Respondent's Exhibit #1 - See App. p.619.

Despite the testimonial statements made by counsel and the introduction of what "appeared" to be a signed Affidavit and Search Warrant for the Petitioner's case at issue, no one can seem to locate that most elusive document. See Appendix Supplement at p.p.666-680; Affidavits of Cindy E. Ramsel, and Margaret Lemonds, dated June 29, 2011; and a Correspondence reply and copy of the Search Warrant from Petitioner's trial attorney dated March 2, 2012.

In the case at bar, prior to, during, and after trial, defense counsel only possessed a Search Warrant that was unsigned by a Magistrate Judge and no Affidavit sworn to under oath citing probable cause for the warrant. (See Supp.App. p.p.676-680 demonstrating that defense counsel's file does not contain a signed Search Warrant and Affidavit even as of March 2, 2012. And so, the Petitioner, nor his family and friends have been able to review or acquire a copy of the alleged signed Affidavit and Search Warrant despite exhausting every avenue available to them.

Since the Petitioner's trial was composed of a swearing match between the alleged Victim and Petitioner, without a shred of evidence to support even the possibility of inappropriate conduct, beyond the "contract" seized through the execution of an unsigned Search Warrant, trial counsel provided ineffective assistance of counsel at trial for failing to move to quash the Search Warrant and for the suppression of material acquired through its execution. Had counsel done so the State would have been required to prove the validity and proper nature of the warrant based on compliance with Sections 17-13-140 and 17-13-150. Had the State failed, the trial Judge would have been required, as a matter of law, to quash the Search Warrant and suppress the material acquired thereon. Moreover, had the trial Judge not quashed and suppressed, the issue would have been preserved for direct appeal. trial counsel's failure on this issue is well below the prevailing standards of professional conduct, and prejudice to the Petitioner at trial on this issue is indisputable and not subject to a harmless error test.

Because the State failed to meet this burden of demonstrating compliance with the requirements of the warrant statutes, at the time of the warrant "issuance" and execution, the PCR court erroneously and unreasonably conclude that the Search Warrant was proper and could not be challenged (App. p.p.644-45). The PCR court should have found in favor of the Petitioner on this issue alone and granted relief in the form of a new trial. Whereas, even a year after the PCR, no one can find and locate a signed Search Warrant and Affidavit thereon, that was allegedly made a part of evidence at PCR as Respondent's Exhibit #1. (See App. p.619 -then- compare Supp.App. p.p.666-680).

Therefore, the Petitioner asserts that the existence of a signed Search Warrant and sworn Affidavit thereto, does not and never did exist. And if such does exist, then it was signed and created long after the Petitioner's trial, at some point in time after the matter was brought into the light by the Petitioner for PCR. **Note:** this matter may constitute a "Fraud" upon the PCR court!

The Petitioner submits he should have been granted Post-Conviction Relief upon this issue, and he Prays this Honorable Court to grant certiorari review on this issue and compel the State to produce evidence of absolute compliance with the requirements of Sections 17-13-140 and 17-13-150 at the time of the Search Warrant's issuance and execution.

B. The State Violated The Petitioner's Substantive And Procedural Due Process Rights By Prosecuting Upon Indictments That Were Obtained Outside Of Legal Process And Thus Failed To Convey Proper Jurisdiction.

After the Petitioner's trial, through the course of research and information acquired toward the preparation of his PCR, the Petitioner learned that his indictments were not derived through a lawfully constituted Grand Jury process. But rather, were acquired based upon what is termed a "Sham Legal Process" according to S.C. Code Ann. §16-17-735.

The Petitioner presented this matter as an issue in his Application for Post-Conviction Relief at App. p.p.550-53. He explained that, on the date conveyed by his indictments as presented to a Grand Jury where "True Bills" were returned, June 14, 2007, there was no seated General Sessions Court by which the Grand Jury could

acquire authority to return criminal indictments. The Petitioner presented the statutory provisions, case law precedents and constitutional arguments associated with his claims thoroughly in his Application for PCR. He summarized the matter by declaring that, "... since jurisdiction of an offense must be conferred by law, jurisdiction to take cognizance of an offense or to render a particular judgement cannot be conferred on the General Sessions Court" when the offense designated in the indictment has not been "true billed" by a Grand Jury whose jurisdiction and authority may only be conveyed as a constituent arm of an actually seated General Sessions Court.

And so, based upon his layman understanding of this issue, (See Evans v. State, 611 S.E.2d 494 (2005); State v. Williams, 210 S.E.2d 298 (1974)), the Petitioner believes that he submitted and argued correctly that, the State failed to comply with statutory and constitutional laws that are jurisdictional in nature. Whereas, such specify the manner and means for the lawful return of "true billed" indictments before any trial can take place under the circuit court's original criminal jurisdiction.

At the PCR evidentiary hearing, the Petitioner introduced as evidence an official calendar of dates when General Sessions Courts were convened in York County. The official calendar was provided by the South Carolina Courts Administration Office and were entered as evidence as Applicant's Exhibit #1., at App. p.p.592-93. The Petitioner explained that there was no Court of General Sessions convened in York County on June 14, 2007, App. p.593. The Petitioner summarized his understanding of the statutory laws and constitutional

provisions on the matter by stating quite simply that; The Grand Jury cannot meet outside a (seated and/or convened) General Sessions Court (App. p.595).

The Petitioner, as a layperson in all things legal, first presented the argument that his trial attorney was ineffective for failing to object and move to dismiss the indictments on the ground that his indictments were derived outside of a lawful process. However, this was a "layman's" error in assignment of blame, because in reality, defense counsel had no reason to question the Grand Jury process based on the face of the indictments. Moreover, defense counsel was not in error to grant a "goof faith" trust that the solicitor would ensure the indictments were acquired through the proper legal process.

However, outside the context of an "ineffective assistance of counsel" claim on this issue, the Petitioner clearly and repeatedly expressed to the PCR court that the General Sessions Court had no authority to exercise it's original criminal jurisdiction over his case for trial because his indictments were derived through an illegal or "Sham Legal Process." (See App. p.p.551-552; p.591; p.606.) Thus, the PCR court should not have overlooked or somehow missed the obvious "jurisdictional challenge" being in-artfully raised by the Petitioner. Moreover, the Petitioner also clearly raised "prosecutorial misconduct" as underlying the illegal process by which the indictments used to prosecute him were acquired (App. p.606).

And so, the PCR court was duty bound to rule upon the "jurisdiction challenge" clearly raised by the Petitioner. Yet, the PCR court's final order does not specifically address

the jurisdictional challenge, but rather, the final order conveys an analysis based on a distinction between a, "designated Term of General Sessions Court," and the indictment language stating "[a]t a Court of General Sessions." Further, the final order implies that Grand Jury sessions may be convened at any time the Clerk of Court may designate (App. p.641).

The final order's declarations and implications on this issue ignores the fact that Grand Juries convened for criminal purposes are in fact an arm of the Court of General Sessions and by law cannot by formed outside a convened or seated Court of General Sessions.

Therefore, the Petitioner submits that the PCR court erred in ignoring or overlooking the jurisdictional challenge made clearly and repeatedly within the Petitioner's overall arguments on this issue. The PCR court's determination and conclusion on this issue is unreasonable under the circumstances presented, and it's ruling was further in error because the only proof/evidence before the court was that no Court of General Sessions was convened or seated on June 14, 2007, and thereby, the only evidence presented was that the trial court did not have legally conveyed criminal jurisdiction based on an illegal or "Sham Legal Process" used to acquire the criminal indictments.

Wherefore, the Petitioner Prays this Honorable Court to grant certiorari review to determine the legal and jurisdictional claims set forth within this issue.

C. The Cumulative Impact Of Trial Counsel's Failures, Omissions, Oversights And Errors As Presented At Post-Conviction Relief Was Sufficient To Undermine Confidence In The Trial Outcome And Thus Warrants A New Trial.

In the case at bar, the PCR court took the initiative to rule upon an issue sua sponte that was not specifically raised by the Petitioner. See App. p.644, 3rd paragraph, where the court rules upon the "Cumulative Effect" of several errors. The court explained that it addressed this issue to allay such a "cumulative" impact of errors argument, and the court specifically found that, "... even when viewed cumulatively, the alleged error, to the extent the allegations constitute error, did not so infect the Applicant's trial with unfairness as to make Applicant's resulting convictions a denial of due process." (App. p.644).

The Petitioner asserts that the PCR court's analysis of cumulative error impact is based upon an erroneous standard, and is unreasonable under prevailing professional norms of conduct required of criminal defense attorneys. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); et.al.

Just as the PCR court overlooked or missed the jurisdictional challenge made by the Petitioner (Issue B), the court unreasonably minimized the significance of trial counsel's cumulative errors that are unique to the case at bar, to wit in chronological trial order:

Pretrial Errors:

(a) Failed to object and move to dismiss indictments charging double jeopardy offenses;

(b) Failed to challenge sufficiency of offense elements composing the indictments;

(c) Failed to move for suppression of evidence obtained upon defective Search Warrant.

Trial / Post-Trial Errors:

(d) Failed to object and seek curative measures when the State's expert witness testified outside restrictions set by the trial Judge; (Improper Corroboration Testimony)

[Closing Argument Issues]

(e) Failed to object and seek curative measures upon an improper "Golden Rule" argument;

(f) Failed to object and seek curative measures upon the argument that appealed to the passions and prejudices of the jury;

(g) Failed to object and seek curative measures upon the improper vouching for the veracity of the Accuser;

(h) Failed to object and seek curative measures upon an improper argument stating the Defendant's lack of emotion (remorse).

Those categorical errors are significantly interwoven at specific intervals such that anyone reviewing the overall context of trial issues must take pause due to the glaringly obvious magnitude of cumulative error and the undeniably prejudicial impact as a result thereof.

Discussion and Arguments:

A cumulative error and prejudice analysis does not per se require an "infection assessment" expressed by the PCR court. Whereas, a criminal Appellant presenting "ineffective assistance of counsel" claims is not required to demonstrate that trial counsel's deficient performance "more likely than not" altered the outcome of the trial. The Strickland test merely requires that a criminal Appellant demonstrate that "but for" his counsel's deficient performance, there is a "probability sufficient to undermine reliability in the outcome" of the trial. **Id.** at 104 S.Ct. 2068. Thus, a criminal Appellant need not prove at any level that trial counsel's deficient performance was

outcome determinative, as the language of Strickland focuses on a showing of a "likelihood of a result more favorable" to the Appellant. **Id.** at 2068.

In the challenges the Petitioner has made, he expected the PCR court to examine each challenge (allegation) individually, and he also expected the court to recognize, what seems to be the common sense matter of cumulative error impact.

Strickland required a totality review of error(s) and their impact upon the result of a trial which is "cumulative error analysis". **Id.** at 2069. An analysis based on cumulative error was articulated in United States v. Brown, 739 F.2d 1136, 1145 (1984) which expressed that; cumulative error used in the context of appellate review means that, trial counsel's individual errors and/or omissions may not, looking at the trial as a whole, cast doubt on the reliability of the result, and thus would not merit a reversal. On the other hand, even if the individual act and/or omissions are not so grievous as to merit a finding of ineffectiveness and prejudice, their "cumulative effect" may be substantial enough to meet the Strickland test. There is no mechanical number of minor errors and/or omissions that are summed to trigger a "cumulative error" review. It is a matter based upon a case-by-case basis and should be evaluated to ascertain the likelihood of an outcome more favorable to the criminal Appellant within the totality of circumstances and facts unique to the trial case at issue.

The Petitioner's case has already triggered a sua sponte cumulative error and effect analysis by the PCR court. However, the PCR court's analysis and standard of review on the matter was both

erroneous and unreasonable.

Therefore, the Petitioner Prays this Honorable Court to grant certiorari upon the lower court's determinations and conclusions related to this "cumulative error" issue.

CONCLUSION

For the proceeding reasons, the Petitioner respectfully asks this Court to grant this petition for writ of certiorari.

Darell Efird #322883

Darrell Efird, 322883
Petitioner pro se