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March 20, 2017

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MAR 20 2017

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Anthony Briggs, #342410 v. State of South Carolina; 2012-CP-42-2674
Appellate Case Number: 2014-000693

Dear Mr. Shearouse:

Enclosed please find the original, which is unbound, and fifteen bound copies of the Brief of Respondent in the above-captioned matter. I would appreciate your filing the original and fourteen copies, clocking the remaining copy, and returning the remaining copy to me. If I can be of any further assistance to the Court in this matter, please do not hesitate to contact me. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: Alicia A. Oliva, Assistant Attorney General (via hand-delivery) (w/ enclosure)
Anthony Briggs, #342410 (via U.S. mail) (w/ enclosure)
Lonnie and Lakla Miller (via U.S. mail) (w/ enclosure)

STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

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MAR 20 2017

S.C. SUPREME COURT

ANTHONY NEIL BRIGGS, #342410,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

I.

Whether the lower court properly concluded that defense counsel was ineffective for failing to object to the trial court's qualification of forensic interviewer Michele Arroyo-Staggs as an expert in the field of child abuse assessment and treatment?

II.

Whether the lower court properly concluded that defense counsel was ineffective for failing to object to Arroyo-Staggs' testimony that bolstered the credibility of the victim as well as for eliciting such testimony?

III.

Whether the lower court properly concluded that defense counsel was ineffective for failing to object to the trial court's failure to specifically charge the jury on how to evaluate expert witness testimony?

STATEMENT OF THE CASE

For the purposes of this Brief, the Respondent agrees with the Petitioner's statement of the case. The Respondent would also note that trial counsel was issued a definite nine-month suspension by this Court on May 13, 2015, and that it does not appear that trial counsel has been subsequently reinstated to the practice of law. See In re Singleton, 412 S.C. 316, 772 S.E.2d 267 (2015).

STATEMENT OF FACTS

The charges in this case arose out of allegations that the Respondent sexually abused his girlfriend's minor daughter.¹ 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 by presenting witnesses to whom the victim disclosed the abuse; and (2) demonstrating that the Respondent either admitted to the conduct to other inmates at the Spartanburg County Detention Center or did not sufficiently deny the allegations to interviewing investigators.

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. Similar testimony regarding her ability to determine whether the victim was truthful in her disclosure was given numerous times throughout her examination by both parties. See App. p. 179, line 8-p. 180, line 10; p. 185,

¹ The victim was four years old at the time of the abuse, and six years when she testified at trial.

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 4.²

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

² The PCR court granted relief based, in part, on defense counsel's failures to object to Arroyo-Staggs' qualification as an expert witness and to her bolstering testimony. See App. pp. 668-673.

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 moving 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). If no probative evidence is found, or if the PCR court's findings are controlled by an error of law, then the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

- I. **The PCR court correctly concluded that defense counsel was ineffective for failing to object to the trial court's qualification of Michele Arroyo-Staggs as an expert in the field of child abuse assessment and treatment.**
- II. **The PCR court correctly concluded that defense counsel was ineffective for failing to object to, and for eliciting, Arroyo-Staggs' testimony which bolstered the credibility of the victim.**

A. How the Issues Arose Below

As noted above, at trial, the State presented the testimony of Michele Arroyo-Staggs, who had worked as a forensic interviewer with the Children's Advocacy Center of Spartanburg. She interviewed the victim on two occasions in that capacity. See App. p. 172, line 19-p. 173, line 4. She was qualified, without objection, by the trial court as an expert "in the field of child abuse assessment and treatment." App. p. 162, lines 16-22. She testified that 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 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. Furthermore, during recross examination, 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 testified that he did not consider making an objection to Arroyo-Staggs as an expert, nor did he consider objecting to her testimony as bolstering. 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 affirm the PCR court's decisions.

B. Discussion

1. Defense Counsel Was Ineffective for Failing to Object to the Trial Court's Qualification of Arroyo-Staggs as an Expert Witness

The Petitioner raises two arguments against the PCR court's findings with regard to Arroyo-Staggs' qualification as an expert witness. First, the Petitioner argues 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 decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). See Brief of Petitioner at 14 ("Petitioner submits that the Court improperly relied predominantly on the Kromah case to find Counsel ineffective for failing to object to the qualification of Arroyo-Staggs as an expert.") Second, the Petitioner argues that since Arroyo-Staggs was qualified as an expert witness in child abuse assessment and treatment instead of forensic interviewing, there is no error. See Brief of

Petitioner at 16 (“Kromah does not bar a witness from being qualified as an expert in a field other than forensic interviewing.”) The Respondent will address each contention in turn.

Beginning with the Petitioner’s first argument, the Respondent contends that the Petitioner paints an inaccurate picture of the PCR court’s ruling. The PCR court did not find that defense counsel was ineffective pursuant to Kromah. Indeed, the PCR court specifically noted that “Kromah was decided after the Applicant’s trial.” App. p. 669. The PCR court actually anticipated this exact argument being raised, as it specifically 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), which

[P]redated 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 correct. 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 has issued numerous decisions holding that forensic interviewers should not be qualified as expert witnesses since Douglas,³ 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

³ See Kromah; State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

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 next to the Petitioner's second argument, the Respondent submits that the Petitioner has created a distinction without meaning. There is no significant difference between designation as an expert in forensic interviewing and designation as an expert in child abuse assessment. In both cases, the expert is presented to the jury as an individual who can determine whether or not the alleged victim is telling the truth about the abuse. Assigning the qualification a different name does not change its impropriety. If anything, Arroyo-Staggs' qualification as an expert in child abuse *assessment* is even more prejudicial, as the designation used conveyed to the jury that she was able to assess whether or not a child was abused based on her experience and training. Consequently, the PCR court's conclusions that Douglas prohibited Arroyo-Staggs' qualification as an expert witness, and that defense counsel was deficient for failing to object to that qualification, were correct and should be affirmed by this Court.

Regarding Strickland's prejudice prong, the Respondent would again 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.⁴ While the Petitioner does argue that the PCR court erred in finding prejudice at the conclusion of its argument on Arroyo-Staggs' bolstering testimony, see Brief of Petitioner at 24 ("Counsel's lack of objection to alleged bolstering did not prejudice Respondent"), no such argument is made within the expert witness portion of its argument. This argument on prejudice appears to be only contained to the bolstering testimony, as the Petitioner argues that "there is no reasonable probability that, but for Arroyo-Staggs[']

⁴ The Respondent uses the word "again" to describe this argument, as the Petitioner did not explicitly present any prejudice analysis in its certiorari petition pertaining to this claim either.

testimony that she can ‘definitely assess’ Victim’s truthfulness, the jury would not have convicted Respondent.” Brief of Petitioner at 27. Since the PCR court’s prejudice findings on this claim 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 Petitioner challenges the PCR court’s prejudice findings 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. This Court should affirm the PCR court’s findings.

2 Defense Counsel Was Ineffective for Failing to Object to, and for Eliciting, Arroyo-Staggs' Bolstering Testimony

The Petitioner's primary argument with regard to the PCR court's grant of relief is that "Arroyo-Staggs never states that she believes the victim or that the victim was telling the truth," so defense counsel's performance could not be deficient with regard to this issue. Brief of Petitioner at 21. The Petitioner then argues that the following interpretation of this testimony is correct:

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.

Brief of Petitioner at 21 (citing App. p. 600). 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, 412 S.C. 101, 116, 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 correctly 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. App. p. 197, line 13. "This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury." Chavis, 412 S.C. at 109, 771 S.E.2d at 340. 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, and 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 argues that there is overwhelming evidence of guilt because of the other evidence introduced against the Petitioner at trial. See Brief of Petitioner at 24-27. The Respondent submits that this evidence simply does not

amount to overwhelming evidence of guilt and that there is a reasonable probability that had defense counsel lodged proper objections, or not elicited damaging testimony, then the result of the trial would have been different. As described in the Statement of Facts above, the State's case had two main prongs: (1) evidence that the victim disclosed the abuse; and (2) evidence that the Respondent either admitted the conduct to jailhouse informants or did not sufficiently deny the conduct to police investigators. Notably, there was no forensic evidence to demonstrate that the abuse occurred.

“The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim.” Chavis, 412 S.C. at 110, 771 S.E.2d at 341. This Court has found that this inquiry centers on the type of evidence that is presented by the State. Where there is forensic evidence proving that the abuse occurred, this Court has held that there is overwhelming evidence of guilt. See generally Kromah, 401 S.C. at 361, 737 S.E.2d at 500 (“[O]verwhelming evidence had ... indicated[] that the injury was the result of physical abuse”); Chavis, 412 S.C. at 111, 771 S.E.2d at 341 (“Immediately after Victim made her 2009 disclosure, her medical exam showed that she had chlamydia, and the State presented medical records showing Appellant had been taking medications commonly used to treat chlamydia at this time.”) Here, 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. There was no evidence showing, for example, that the victim suffered from a sexually transmitted disease or that she had documented injuries that had to have resulted from abuse. Consequently, 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.

In sum, the Petitioner's arguments for reversing the PCR court on both Arroyo-Staggs' expert qualification and her bolstering testimony can be distilled into the following statement: since Arroyo-Staggs was qualified as an expert in child abuse assessment and she only strongly implied that she could tell that the victim was telling the truth, then relief must be denied. However, "that which we call a rose / By any other name would smell as sweet." *Romeo and Juliet* (2.2.43-44). Just as there is no meaningful, legal distinction between qualification as an expert in forensic interviewing and qualification as an expert in child abuse assessment, there is no meaningful, legal distinction between testimony that a victim is telling the truth and testimony that the expert witness can determine whether or not the victim is telling the truth. They are each one and the same. Consequently, the PCR court properly applied this Court's precedents to conclude that defense counsel was ineffective. The PCR court's findings are amply supported by probative evidence and the law, and the Respondent respectfully submits that this Court should affirm the PCR court's rulings.

III. The PCR court correctly concluded that defense counsel was ineffective for not objecting to the trial court's failure to charge the jury on the credibility and evaluation of an expert witness.

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." 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. 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 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 since 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 affirm the PCR court's ruling.

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." Kromah, 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 Brief of Petitioner at 28-29. 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." Douglas, 380 S.C. at 506, 671 S.E.2d at 610 (2009) (Pleicones, J., dissenting). This particularly true in forensic interviewer cases because this Court has "confronted instances where the State has abused [S.C. Code § 17-23-175] and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim." State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012). Experts are simply different from lay witnesses, given "[t]he trial court's imprimatur [of a witness] as an 'expert.'" State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).

Looking at this case 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 testimony, either within the context it was given or within the context of the entire case. Under these circumstances, it would be almost 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 about.

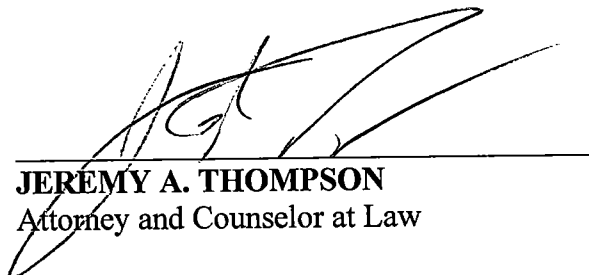
It is difficult enough with the proper cautionary instructions to ensure that a jury does not blindly accept an expert's opinions as true and accurate. Without those instructions, no reasonable jury could ever be expected to reject an expert's conclusions. The PCR court properly understood that reality, and correctly 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.

At its essence, the Petitioner's argument amounts to a contention that an expert witness charge does not have to be given because a lay witness credibility charge sufficiently covers how juries should evaluate the testimony of all witnesses. In other words, if the Petitioner is correct, then it would obviate the need for an expert witness charge altogether. That argument is contrary to South Carolina law, as an instruction on expert witnesses must be given when an expert witness testifies at trial. See Johnson. A jury charge on expert witnesses is required because experts are different, and juries need to understand how to properly evaluate that testimony. Due to defense counsel's deficient performance, the Respondent's jury was deprived of that necessary understanding. Given the critical nature of the expert witness testimony in this case, defense counsel's deficient performance prejudiced the Respondent. The PCR court's grant of relief is amply grounded in law and fact, and the Respondent respectfully submits that this Court should affirm the PCR court's ruling.

CONCLUSION

This Court should affirm the PCR court's grant of a new trial with regard to each of the issues presented.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT.

This 20th day of March, 2017.

STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

ANTHONY BRIGGS, #342410,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

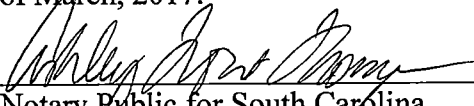
CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Brief of Respondent in the above-entitled case has been served upon opposing counsel, Alicia A. Olive, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by hand-delivery this 20th day of March, 2017.



JEREMY A. THOMPSON
ATTORNEY FOR THE RESPONDENT

SWORN TO BEFORE me this 20th day
of March, 2017.



Notary Public for South Carolina (L.S.)
My Commission Expires: 2/22/18