VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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May 04 2021

S.C. SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

JONATHAN MATTHEW HOLDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000057

APPENDIX

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Q. Okay. Tell me a little bit about your argument when you moved to continue the case. At that point what information did you have about these witnesses that you expressed to the court in support of your motion?

A. The best of my recollection, I've not read recently the transcript of what I said, but to the best of my recollection it was just very simply that, what I've just said, we were having trouble locating a lot of these witnesses, with more time I would hope to be able to locate these witnesses. And, well, basically that.

I did not, of course, get into whether witnesses that I'd talked to were -- appeared to be helpful or not. I didn't get into the -- anything with the court about my lack of contact or communication from Mr. Holder and that we had only started preparing about two weeks before court. I didn't feel like that was information that needed -- wasn't necessary.

Q. Okay. Didn't you try at -- during the trial to bring in some character evidence about the victim? And if you'd like me to ...

A. Might need to be refreshed on that.

Q. Okay.

A. I do know that it came in in some of the State's witnesses on direct, really, and cross-examination.

Q. Okay.

MR. SMITH: May I approach the witness, Your Honor?

THE COURT: Yes.

A. And I've got a transcript if you can ---

Q. Okay. Well, I would point you to about page 142. And if you will confirm that in the trial transcript this is when Mr. Sowell is testifying. Can you tell us who he was?

A. He was the director of the facility.

Q. Okay. And if I'm looking at page 142 on your questions there and extending through 146, what were you trying to get at by questioning him there?

A. That this young man, the accuser, this appears to say, and the best of my recollection, thought he knew ways to get out of the facility, get himself transferred out or get released, but at least transferred out of this facility. And I don't remember for sure, but may as well have just said so, that he knew what he could do to try to get himself removed from the facility.

Q. Okay. And if we look at page 144, lines 15 through 20, doesn't the director admit there that the victim did lie sometimes?

A. Yes, he does.

Q. Okay. And then on 146, lines 12 through 15, you get him -- Mr. Sowell to say again that the witness would sometimes lie?

A. That's correct.

Q. Okay. Did you attempt to question Ms. Harvey about

whether the victim had a reputation for dishonesty?
A. Yes, I believe so.
Q. Okay. And she was also one of the State's witnesses?
A. She was.
Q. Okay. And did you meet those two people at the mental health facility shortly before trial?
A. We did either Thursday or Friday. This was ---
Q. Okay. Tell me a little bit about that meeting.
A. Well, it's a pretty -- it's a very secure facility. It's in downtown Pickens, but it's surrounded by a large anchored fence. It's a pleasant enough looking facility from the outside, but it's surrounded by a pretty large fence.

Inside it is a -- appears to be a detention facility with some freedom to roam -- move around. But we did meet there, Mr. Tooker and I. He was having trouble getting in there. It's not something -- some place that you can normally just drop in or it wasn't appropriate to just drop in and say I'm here to see this and that.

We also wanted a tour of the facility. So that had to be arranged. So Mr. Tooker and I met there at the same time. We talked to the individuals, the director and assistant director.

I don't believe, I'm not certain, but I don't believe we talked to them together. I think I had my time to talk to them separately. And we had a tour of the facility. And I

took a number of pictures of the facility to show the areas involved.

I cannot remember if we talked to other individuals there or not, the staff members, but I know we talked to the director and assistant director. We may have talked to a couple of other staff members, too.

Q. Okay. The information you learned at that meeting, did you try to use it at trial in Mr. Holder's defense?

A. Yes, I did. Starting in the simplest fashion with the layout, the pictures of what was where and where kids could go, where they couldn't go, how and when they could go, certain places in the facility, so that sort of thing.

Also talking to, particularly the director and assistant director about the policies, the process, the cameras and the layout. And then, again, I talked to them about this young man's character and reputation for truthfulness, I guess you might say. So I talked to both of them there.

I will say that the assistant director, I think her name was Megan, was very willing and talked to me. When it came time to testify, her testimony was very different from what she had told me. And I had to -- had to try to bring that out with her testimony. So that was a little bit of a surprise, but I do believe she still had the opinion at least that this young man was not always truthful.

Q. Okay. Tell me about -- Mr. Holder testified earlier

about medical records. Do you recall getting any medical records of the victim in this case?

A. Received a large volume of them. And everything that we received or that I received, I reviewed with Mr. Holder. The original discovery came in a year or two before. And we had that and had that information and reviewed that.

The medical records were just large and did not appear to show anything that would have been helpful to us once we were able to show that this young man had the issues that he had and his ability to tell the truth was limited. The other records would not have helped, would not have addressed that. And I saw it being counterproductive to try to put those in and, quite frankly, distracting to this young man's mental health situation that -- I didn't see that being of any benefit.

Q. Okay. You did move for a directed verdict in this case, didn't you?

A. Yes.

Q. Okay. And Judge Hayes denied it?

A. Yes.

Q. Were you surprised that he denied the motion?

A. No. No, not really because it's a pretty difficult task to get a directed verdict granted. The young man's testimony was there. And that is some amount of testimony that I believe Judge Hayes could have denied the motion on.

The video was, I think, probably a bigger deal. It looked incriminating. And I think all of that tied together made me not shocked that a directed verdict was not granted.

Q. Okay. And you did move for a mistrial in this case when the solicitor made his remarks. Tell me a little bit about your argument to that. What happened with the solicitor's remarks to Mr. Holder?

A. I guess in its simplest form I felt like the remarks were totally inappropriate. And I objected saying so. Yes, it was a little bit shocking and a little bit -- well, just -- it was over the line and objected and felt like telling the judge that it was not a good way necessarily to cure it, but that I would ask for a mistrial. I believe I did. But I knew it was that egregious in my opinion, so I objected.

Q. Right. Why didn't you object to the sufficiency of Judge Hayes' curative instruction?

A. I can't say that there was a particular reason other than he had given what he felt like was an appropriate curative instruction. We see curative instructions a lot. And it's always the you can't unring the bell type argument, but they -- curative instructions are frequently done or frequently appropriate.

Q. Okay. Thank you. No more questions.

MR. ARIAIL: Thank you, Your Honor. May it please the Court?

Cross-examination by Mr. Ariail:

Q. Mr. Cantrell, how you doing?

A. Doing fine.

Q. Good. Let me go through real quick on that curative instruction. If I go back, there was a discussion by the court in regards to the ---

THE COURT: I'm going to interrupt you just -- we're going to take about a two minute recess.

MR. ARIAIL: Got it.

THE COURT: Okay.

MR. ARIAIL: No problem with that.

THE COURT: Five if you need it. All right.

MR. ARIAIL: Sounds good.

THE COURT: Don't talk -- don't discuss your testimony with anyone, Mr. Cantrell.

(Whereupon court was in recess at 12:29 pm)

(Whereupon court reconvened at 12:36 pm)

THE COURT: All right. Have you finished your examination?

MR. ARIAIL: Yes, Your Honor.

THE COURT: Thank you.

MR. ARIAIL: Can I proceed?

THE COURT: All right.

MR. ARIAIL: Thank you.

THE COURT: Any arguments?

MR. ARIAIL: I haven't finished my -- I said can I proceed with my examination.

THE COURT: All right. Go ahead.

MR. ARIAIL: There we go.

Cross-examination by Mr. Ariail Continued:

Q. Mr. Cantrell, regarding the mistrial issue, I think we've gone through, the court -- and I just want to understand. Judge Hayes put in here and stated that it was just inappropriate, the comment that was made, is that correct?

A. If I can get a page number. I ---

Q. You know ---

A. --- don't doubt that's what he said.

Q. I think it's -- let me give it to you real quick. I had -- mine's off for some reason. I've got the record of appeal.

THE COURT: 297?

MR. ARIAIL: 297. Thank you.

Q. And he goes on -- actually it's on 301. The court comes back and says, members of the jury panel, shortly before you went out Mr. Tooker asked the witness whether or not he was gay. That was not an appropriate question.

So before that he says there was -- and this was on 300, at the bottom he says -- this is without the jury being present, well, I think it was an inappropriate question, quite candidly, because there was nothing without a foundation to throw that in. It is just -- it is just inappropriate. I'm

not going to go into it any further than that.

Then he comes back with a curative instruction, which, I think, he did -- not really a question. And there was no objection made after that, is that correct?

A. I believe that's correct. Yes, sir.

Q. Okay. Do you -- and I know you didn't remember why you didn't, but thinking back do you know now why you didn't make any objection at that point in time or just ...

A. I had to assume I just believed that was going to be the best that we were getting.

Q. Yeah.

A. And, quite candidly, I did not know that there might be cases in the pipeline that would suggest taking it a little further.

Q. Okay. And my -- on that issue, that's the curative instruction one. The crux of the case, I mean, they're trying to paint him in a light as, I guess, having some sexual proclivity ---

THE COURT: Character evidence.

Q. They're painting him in a certain light during this, correct?

A. I would say so. The only hesitation is that was the only comment in that respect that was made. Obviously it was cut off quickly. I don't know where Mr. Tooker would have gone with it if there'd been no objection or ruling. So as far as

speaking it out loud, ---
Q. Right.
A. --- that was the only time I'm aware of, and I know of nothing else that was said or done during the trial that would go in that direction.
Q. Now, I mean, how prejudicial you think that was for this case?
A. Well, I think it was prejudicial, inappropriate. How prejudicial? I don't know. But, quite candidly, I guess, as a defense attorney, it's kind of black and white, either it's prejudicial or it's not.
Q. Sure. I mean, clearly he was -- he was convicted of this. And, I mean, to go back -- I've got some other testimony. This is a case of victim's statements against Mr. Holder's statements, correct?
A. The video was a big deal, I think. So add in the video.
Q. The video -- and that's what I wanted to go back to. There was nothing on that video which corroborated any sexual assaults, correct?
A. Not directly corroborated. It set up what was painted as inappropriate conduct by a staff member ---
Q. Right.
A. --- being alone with an individual -- with a -- one of the individuals. So, no, it did not show the inappropriate conduct. It showed the opportunity, I guess you might say.

Q. Right. And there was -- I guess the way I look at it, there was nothing on there showing that he had inappropriately touched him or done any of these allegations while on the video?

A. Well, I would have to switch and -- as defense attorneys do, and try to think like the solicitor. And the argument is, yes, when he looked out of the room several times and looked up and down the hall, that would be a suggestion of something inappropriate going on.

Q. Okay.

A. So with that qualification, nothing else.

Q. Okay. And there was no other corroboration of this outside of his statement, correct?

A. None other, no.

Q. Okay. Also it's been proven that he was untruthful by certain people at the facility he was located at, correct?

A. Yes.

Q. So he has a problem for -- he lies, is that, I mean, what you were kind of getting at during this trial?

A. He lies. And also I believe it was shown maybe in addition to that that he lied sometimes with a specific ulterior motive also.

Q. That's where I'm going. I mean, he lies -- in one of his statements during this was I'm going to lie so that it possibly can benefit me by maybe getting me out of here. Was

that ---

A. Absolutely. Yes.

Q. Okay. So that hand-in-hand with videos, I mean, he knew where he potentially was with Mr. Holder during these times where he might have been unsupervised? Do you ...

A. I believe so.

Q. Well, the argument is he knew -- did you have information showing that he knew where the blind spots were where these cameras couldn't pick up when he was with Mr. Holder?

A. I don't specifically remember that. May well have. The library incident had nothing to do with a blind spot.

Q. Okay. Did you ---

A. It had to do with the door being closed.

Q. Did you have any evidence to be able to show that he was, you know, making these incidents up or these allegations up in areas where he knew it couldn't be, I guess, disproven by Mr. Holder?

A. I don't remember that, but it could well be. The library room area may have been one of those spots.

Q. Okay.

A. But I -- otherwise, I don't remember that. That could well be, though.

Q. Okay. We went through the witnesses. And I want to understand. You indicated during your testimony that you didn't call the witness because you did not see that they, I

guess, would -- I guess could prove anything that would help your case, is that ...

A. Basically, yes.

Q. Okay.

A. And, quite honestly, some made it clear they didn't want to testify.

Q. Okay.

A. Some made it clear they didn't know or did not remember anything that would be beneficial.

Q. Did any of them, to your knowledge, have statements that they could testify to as to what the victim said about the allegations that he was making against Mr. Holder?

A. I cannot say that I remember that. And I've reviewed all of this from time to time, but I don't remember that from my review of this information for today's hearing.

Q. Do you remember having a discussion with Mr. Holder saying some of these witnesses can testify that he has told them I didn't do this or this didn't happen?

A. I do not remember that.

Q. Okay. Did you -- I guess, how many of these witnesses did you talk to to be able to get that information? There were seven to ten that would have been listed.

A. And I'm going to go -- I'm going to disregard the people or the two individuals at the facility, the director and the assistant director.

Q. Okay.
A. I know Mr. Tooker and I both talked to them. And I have some notes, but I don't see them right here. My best recollection would be I talked to probably four or five. I could be off one, four or five of these individuals.
I do know that I think it's Katrina Jones that Mr. Holder communicated with and gave me copies of their text messages ---
Q. Right.
A. --- where she made clear that she did not, was not, or would not testify. Was praying for him, but would not testify. Brought into the text her father and her father's attorney and how she didn't have to do it. And, quite candidly, regardless of what she was going to say, if I could have gotten her to testify, I did not think she would be helpful because of that attitude, so to speak.
Q. Okay.
A. And I don't remember for sure if I talked to her or not.
Q. So there were no witnesses that you talked to that you believed that you could put up that would help contradict the victim in this case?
A. Correct.
Q. Okay.
A. And if I could qualify that to say they may well have said -- and I don't remember. Some of them may have said he

was not an honest young man.
Q. Okay.
A. But we had that -- again, as I said earlier, I believe that issue was covered more than sufficiently by some of the people that were working there and still part of the staff because by the time we went to trial, the individuals there at the facility were not necessarily on our side.
Q. Okay. The issue in regards to the medical records, did you see anything that you could use in the medical records for impeachment or with Ms. Harvey, or any witnesses that would help out in this case?
A. Did not.
Q. Okay. Ms. Harvey, did you see any other things that you could do or utilize to be able to impeach her testimony in this?
A. I think the best -- and I, again, regret I haven't gotten to find that in the transcript, is basically get her to state or at least I could question the fact that she was telling one thing in the courtroom that day and told me something different when I interviewed her.
Q. Um-hum (affirmative).
A. Which was the best I could do, I thought, under those circumstances.
Q. Okay.
A. Because I believe she still felt like he -- the young man

was not an honest young man and said so.
Q. Okay. The continuance issue -- did you feel you had adequate time to be able to look at the witnesses and be able to interview them within that two week period, I guess?
A. Not really. I wanted more time and needed more time.
Q. Okay. And tell me the reason why, I guess, I mean, it'd been going on for a couple of years. Was there any reason why you hadn't spoken to them before or anything along those lines that had impeded your investigation in this?
A. I'm not sure I had any of the names until I was able to locate Mr. Holder and start talking to him in early May.
Q. Okay. So ---
A. I was told there were witnesses ---
Q. Right.
A. --- based on my notes. I don't believe we got names ---
Q. Right.
A. Certainly not locations or contact information until he and I were able to communicate with each other on about May the 5th or 6th.
Q. Okay. In February y'all had a discussion, but you didn't go over the witnesses at that time, is that correct?
A. We did not. And I think fairly early on -- again, we get the -- the docket is announced two weeks ahead of time, but we sometimes get a heads-up on that.
And he and I were talking in my office on February the

4th and February the 10th. So I think that was before the docket formally came out, probably, and I just had word that it was coming up. But I think fairly quickly after that we found out it was not going to be called because we did not meet again after February 10th.

Q. Okay.

A. So I don't -- I just don't think we got to that point. I will say -- I will say that I was never at a point where I was sure they were going to dismiss it, sure they were going to continue it and/or knew that we didn't have a problem with the case because I knew all along that we did.

Q. Right. Were you aware -- and we went through this State v. Stukes issue in regards to the corroboration of the victim's testimony. Were you aware of any of these decisions or anything that was going on during this period of time in regards to these type of, I guess, these charges on corroboration by victims?

A. To the best of my recollection, I was not.

Q. Okay.

MR. ARIAIL: Your Honor, if you'll bear with me one second.

(Pause)

Q. I want to make sure -- on page 317, if I could turn your attention to that in the transcript. I think this is in your closing. I think we've kind of discussed this in this.

You state in your closing that when, in fact, it's admitting knowledge that there are no allegations whatsoever, that, in fact, occurs after the point in time when some of the allegations were made. But when you watch the video for three hours and you see nothing that leads to any allegations of any appropriate [sic] conduct, that's inconsistent. Is that -- I mean, that was kind of the theory -- were you using that to show that there was nothing on the video versus the victim's statement?

A. Yes.

Q. Okay.

MR. ARIAIL: I have no further questions, Your Honor.

MR. SMITH: Your Honor, if I may? I just have a few.

Redirect Examination by Mr. Smith:

Q. Mr. Cantrell, can you -- can you kind of walk through what the video shows just for the record?

A. The one that I remember the most, and it just, of course, stands out because I felt it was damaging, was a view from a distance of the door to the library. I don't think you can even necessarily tell it was the library, but everybody agreed that it was.

And it was a view of that doorway. And you could see both of them, the young man and Mr. Holder, go in there. I don't remember it particularly. Maybe there was a part of the video showed someone come out before they went in, I don't

know, but the testimony was that it was empty otherwise, and saw them go in.

And, of course, the video would show the time element and how long they were there. And the door would slowly close automatically. Sometimes it would be open partially, sometimes not.

And a number of times, I have no idea how many times, but I would say more than twice, you could see Mr. Holder step out -- well, not even really step out, but open the door and look out. I don't believe there was ever a time when the young man did, but I don't remember for sure.

But Mr. Holder would step out and look both directions, up and down the hallway or in the room there to -- well, look both ways and then the door would close again. And so that's what I specifically do remember that just stood out about the video.

Q. Do you remember if there was testimony at trial about the policies in place at the facility regarding the closing of doors?

A. Yeah. The testimony was -- and the policy appeared to be that individuals, counselors were not to be alone in an area such as that with one of the -- one of the individuals there. There was some testimony about whether that, particularly for Mr. Holder, about whether that was enforced or not. But that was specifically testified as the stated policy.

Q. Okay. And wasn't Mr. Holder's explanation of why he was in the library was that he was -- or why the door was shut was that he was helping the victim pick out a book?

A. I believe that's correct. Yes.

Q. Okay. Was the administration at the health care facility particularly cooperative in the case?

A. No. We -- it was secure. So we did have to wait. Again, I believe the solicitor had to prearrange a visit for both of us to come in and see and visit. Getting in otherwise was difficult.

We had to be -- we couldn't just roam around and look. Again, the kids were there at the time, of course, I realized. And they would not talk otherwise, to the best of my recollection. And they also, to the best of my recollection, wanted to get permission or instruction from their -- the owners and the owners' legal counsel about that.

And, in fact, one of the owners is or was an attorney but was not practicing. So they -- they were looking for instruction from their superiors.

Q. Okay. A bureaucratic, red tape kind of deal?

A. I would say yes except it's a very small bureaucracy because it's just, I think, a couple of the -- like I said, the owners are just a few.

Q. Okay. And then maybe this is my last question. Did you go over elements and potential defenses and penalties with Mr.

Holder?

A. Yes, sir. What I -- my practice is is to have a copy of the statute that the individual is charged with. I try to give them copies. I won't say for sure, but I -- that would be my practice, generally, and say what the elements -- what the allegations are and go over what the maximum sentence can be.

Q. Okay. Thank you.

MR. SMITH: No more questions, Your Honor.

MR. ARIAIL: No redirect -- no recross.

THE COURT: All right. Thanks. You can step down.

MR. SMITH: That's the State's case, Your Honor.

THE COURT: Anything you want to tell me?

MR. SMITH: Your Honor, ---

THE COURT: Well, let me ask -- let me ask -- Holder, you understand if you won this thing, you're going back and looking at 20 years. You understand that?

MR. HOLDER: Yes, sir, I do.

THE COURT: You've done -- what's your max out date now?

MR. HOLDER: November of '23.

THE COURT: You're up -- is it parolable or not? It's not?

MR. HOLDER: No, sir.

THE COURT: It's not.

MR. HOLDER: I did -- I've did basically half the time.

THE COURT: Yeah. Yeah. I got some problems with the jury charge.

MR. ARIAIL: Do I need to argue ---

THE COURT: Went up to the Supreme Court like a month after this for argument.

MR. SMITH: Yes, Your Honor. Are you referring to the Stukes case?

THE COURT: Yeah.

MR. SMITH: Okay. And I'll just give the cite for the record. It's case number 416 S.C. 493 decided in 2016.

Your Honor, this case does seem to be on point to the jury instruction that Judge Hayes gave, but I'll point out to the Court that this issue was decided in 2016 and the trial was in May of 2015.

In this case the Supreme Court reversed the Court of Appeals' unpublished decision. And just for the record I'll give that case cite as well. That is appellate case number 2015-UP-014 decided in January of 2015.

So the Court of Appeals' decision came out a few months before Mr. Holder's trial. And in that unpublished decision the Court of Appeals affirmed the jury charge in the case, which was essentially the same as this, that the victim's statement doesn't have to be corroborated.

So at the time of the case you have the Court of Appeals' decision, which admittedly was not published, but said that

this was fine. The Supreme Court did not issue its decision in the Stukes case until -- what was that -- almost a year -- a year after trial. And the State would just rely on a clairvoyance argument.

And I'll cite to another case, Thornes v. State, case number 310 S.C. 306, decided in 1993. Basically that case says attorneys don't have to be clairvoyant about new issues of law, that if there's some change in the law that's decided after a case and they were operating under good law at the time, that you can't hold them to the new standard. You know, there's not something in this Stukes case that says it applies retroactively. And so at the time the jury instruction was good under the law at the time.

And I'll even point the Court to the Stukes opinion, which adds that it is overruling its precedent up until that point. And in the Stukes case the court even cites to its previous cases where it says this jury instruction is fine. So just -- that's the State's argument is that was not a standard to which Mr. Cantrell was held at the time and he was operating under good law in not objecting to that jury instruction.

THE COURT: Well, let me ask you this. Had he made the argument as was being done according to the testimony on a not infrequent basis, if he had objected is there a substantial likelihood that the result would have been different?

MR. SMITH: Well, I don't know if I want to speculate to that, Your Honor. It may be the case that it wouldn't be a Stukes v. State, it would be a, I mean, instead of a State v. Stukes it would have been a State v. Holder. But I'll just rely on the language in Holder that the court has never required an attorney to anticipate or discover changes in the law which did not exist at the time of trial.

In this case, the standard isn't was that jury instruction good or not? This case was Mr. -- was Mr. Cantrell ineffective for not objecting to it? And according to the PCR case law that's controlling, he was not.

THE COURT: Well, what other, you know, there is circumstantial evidence from -- presented. Other than the victim's word, the only other evidence is totally circumstantial, correct? The video.

MR. SMITH: It was the videotape, I guess, which corroborated the fact that Mr. Holder was taking the victim in areas where he was not supposed to be alone with the victim, and that he was closing the door, and was not supposed to be doing that, and that he was looking out in a way that seemed to be suspicious, looking around the room.

THE COURT: Is there any other reasonable conclusion to be drawn from any of those facts? Does it lead conclusively to the guilt of the accused?

MR. SMITH: Well, I mean, there could be, Your Honor, but

Judge Hayes denied the directed verdict motion. So, I mean, in the court's interpretation ---

THE COURT: Well, that -- in a light most favorable to the non-moving party, yeah, there's circumstantial evidence. This is ...

MR. SMITH: Well, I mean, it may have been a close case, Your Honor. And, I mean, ---

THE COURT: Yeah.

MR. SMITH: --- you heard Mr. Cantrell say that the most damning evidence that he, in his opinion, was the videotape because it seemed to indicate ---

THE COURT: No. I thought his testimony -- the most damning of the videotapes was that particular one. Maybe I'm mistaken about that.

MR. SMITH: Well, I guess I'm referring to them collectively, security camera footage.

THE COURT: Yeah.

MR. SMITH: But the PCR standard is not ---

THE COURT: He could have been in there reading him a poem by Chaucer.

MR. SMITH: Well, he could be. I think that was his testimony at trial. The jury did not believe that, that he was helping him pick out books in the library.

THE COURT: Yeah.

MR. SMITH: The standard in the PCR isn't the sufficiency

of the evidence.

THE COURT: I know that. Ariail, you got anything?

MR. ARIAIL: Yeah, I do, Your Honor. I mean, I'm not going to argue too much because I agree with -- my thing is ---

THE COURT: You don't know what I've decided. What do you ---

MR. ARIAIL: No, I mean, ---

THE COURT: --- mean you agree with me?

MR. ARIAIL: --- I'm hearing -- you know, the position that I'm taking, including my client is taking is that, you know, looking at he -- okay. There's nothing that substantiates outside of the testimony of the victim. So I think I got -- on the tape there's nothing that shows that he did anything on the tapes other than being the doors or they see him on the tape. Therefore, that's not corroboration. There's got to be something more to that.

My client, you know, based upon that -- if that charge was done appropriately, he wouldn't have had to testify in regards to it because there would have been no corroboration in regards to that. And he -- he's been -- there's a likelihood that he'll get a different result if that was the case and he hadn't testified. So I just see the prejudice in regards to this. And that's why we believe on that ground should be enough for granting of a PCR.

MR. SMITH: Well, and, Your Honor, I guess I should just close a little bit on the other issues on this case, too. As far as the witnesses, Mr. Cantrell's testified that he tried to find these witnesses and that most of them didn't have any valuable testimony at trial. And they haven't been produced here today. So on that basis I think Mr. Holder's failed to carry his burden.

As far as the issue on the failure to preserve the objection to the solicitor's comment, I would argue that -- prejudice on this issue. And I believe maybe Mr. Alexander earlier referred to cases in which the Supreme Court had found that this kind of comment was prejudicial.

And I would point to those cases and just say if you review those -- the situations in those cases, they were distinguishable from this one. So for example, in State v. Nelson, case 331 S.C. 1, which is a 1998 case, there was much more evidence at trial about, you know, whether the defendant had a predilection for young women.

For example, he was a member of the Punky Brewster Fan Club. And there were ---

THE COURT: Punky Brewster.

MR. SMITH: Punky Brewster. And there were videos and photographs at trial admitted in trial about that fact. And I believe there was much more extensive evidence as to pedophilia or pederasty at trial than there was in Mr.

Holder's case. Judge Hayes nipped it in the bud pretty quickly. And we just don't believe that that issue would have been successful on appeal because it doesn't rise to the level of prejudice that those other appellants had faced.

So -- and back to the issue of this case of the video evidence. I believe there was evidence at trial that the victim had also made statements and reported this abuse to the people with the institution. And there was evidence at trial that they didn't believe him right away and that he had had behavioral changes, too, that in hindsight they had come to attribute to the -- to maybe he was acting out.

But just the standard in this case is not sufficiency of the evidence. And I would point to the fact that Mr. Cantrell did move for a directed verdict and it was denied. So that's the State's argument on that pretty much.

MR. ARIAIL: Two brief comments, Your Honor. Now, I've dealt with the issue in the mistrial. What I'm concerned about on that, and I've dealt with it before, the statement being made is clearly prejudicial.

I mean, this is a case where he's -- they're asking if he's gay, if he likes little boys. You know, the cat's out of the bag. They're trying to -- he's put him in a bad situation. A curative instruction cannot cure what they've tried to get out of him in that. So that's what I'm saying is prejudicial. And as a result I think that in itself is

another ground, which can be satisfied to help us with that.

The other -- the direct evidence, I still haven't heard any direct evidence corroborating outside of the victim that it was done. He made some statements, Mr. Smith did, that it was reported or there were things that were said that still doesn't say, hey, this is a corroboration of what happened. There's no DNA, there's no physical evidence, there's no other cameras -- anything that can do it outside the victim. So I think we're still back to where we are. And as a result, I think that's ---

THE COURT: Okay.

MR. ARIAIL: Thank you.

THE COURT: I'm going to find that trial counsel -- his objective failure to object to the particular jury charge, the non-corroboration, fell below an objective standard of reasonableness. And had he done that, he -- there's a likelihood that the result would have been different on appeal.

And also that is combined with the -- just based on the fact that there was no other direct evidence to confirm the allegations and that the State's -- and the totality of the circumstances based on the inappropriate comments of the solicitor at trial mandate the case be returned to the trial level. You get all that, Mr. Ariail?

MR. ARIAIL: I'm trying. So did you find that the lack

of preserving the curative instruction through an objection was also a ground?

THE COURT: Based on the totality of the circumstances ---

MR. ARIAIL: Okay.

THE COURT: --- in the trial, including the failure to object to the curative instruction, and the fact that there was no direct evidence, other than the testimony of the victim, bolsters the fact that the case that had -- had Mr. Cantrell objected to the jury charge, the result would have been different.

MR. ARIAIL: Okay.

THE COURT: Okay?

MR. ARIAIL: Got it.

(Hearing Ended at 1:10 pm)

(End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 25th day of October 2019.

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

March 17, 2020

s/Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jonathan Matthew Holder, #364105, Applicant,	Case No. 2018-CP-39-00576
v.	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 JUL 20 A 11:56

THIS MATTER comes before this Court by way of an application for post-conviction relief filed on May 15, 2018, by Jonathan Matthew Holder ("Applicant"). The State of South Carolina ("Respondent") filed its return on October 15, 2018, in which it requested the convening of an evidentiary hearing in order to resolve the claims raised in the application. On October 25, 2019, an evidentiary hearing in this matter was convened before the undersigned at the Greenville County Courthouse. R. Mills Arlail, Jr., Esquire, represented Applicant, who was physically present. Assistant Attorney General Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf and called as a witness Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense. Respondent called as a witness David D. Cantrell, Jr., Esquire. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has met his requisite burden of proof and is entitled to post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its June 2013 term, the

Pickens County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2013-GS-39-00957) and third-degree criminal sexual conduct with a minor (2013-GS-39-000958). In May of 2015, both indictments were amended so as to refer to different time frames. Applicant was represented by Cantrell ("trial counsel"), and Assistant Solicitor Samuel Barton Tooker of the Thirteenth Circuit Solicitor's Office prosecuted the case. On May 20, 2015, through May 21, 2015, Applicant proceeded to a jury trial with the Honorable John C. Hayes, III, presiding. At the conclusion of the second day of trial, the jury found Applicant guilty as indicted. Judge Hayes sentenced Applicant to imprisonment for ten years for each offenses, with both sentences to be served concurrently.

Trial counsel filed a timely notice of appeal. Alexander ("appellate counsel") represented Applicant on appeal, arguing Judge Hayes erred in denying trial counsel's motion for a mistrial after the State asked during its cross-examination of Applicant if he was gay and sexually interested in "young boys." Then-Assistant Attorney General Megan Harrigan Jameson represented Respondent on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam). The remittitur was issued on June 27, 2017.

CURRENT PROCEEDING

On May 15, 2018, Applicant filed his application for post-conviction relief, in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. Applicant received the constitutionally ineffective assistance of trial counsel because:
    a. Trial counsel failed to use due diligence in trying to find and procure as witnesses at trial some who heard the victim state that Applicant did not commit the crime of which he was accused; and
    b. Trial counsel did not conduct a reasonable investigation into Applicant's witnesses before trial; and

2. Applicant received the constitutionally ineffective assistance of appellate counsel because:
    a. Appellate counsel failed to argue on appeal that Judge Hayes erred in denying trial counsel's motion for a continuance, arguing instead that Judge Hayes erred in denying Cantrell's motion for a mistrial, an issue not preserved for appellate review.

At the start of the evidentiary hearing before the undersigned on October 25, 2019, Respondent requested that Applicant specify for the record the claims upon which he would move forward. Applicant specified that he would be moving forward only upon the claims specifically articulated in the application for post-conviction relief and the additional claims that trial counsel was constitutionally ineffective (1) for failing to object to Judge Hayes' instruction to the jury that the victim's testimony did not need to be corroborated and (2) for failing to use the victim's medical records to impeach the victim at trial. This Court finds that all claims other than these have been waived by Applicant, and they will not be addressed in this order.

Testimony at PCR Hearing

Applicant testified on his own behalf at the PCR hearing. He testified trial counsel was appointed to represent him in the underlying criminal cases. He testified he was not take to jail after his arrest and that he was released on a personal recognizance bond, returning to the police station two years later to be fingerprinted. He applied for a public defender's services because he was out of work at the time, and trial counsel was appointed a few months after his case began.

He testified trial counsel could not get discovery for a while and experienced difficulty in gaining access to evidence from Applicant's former employer. He did receive discovery later, but he testified he was not able to review it with trial counsel and that he did not understand it. He made it clear to trial counsel that he did not want to plead guilty or accept any plea deal.

He saw trial counsel at a restaurant before Easter and trial counsel told him that they would meet soon to discuss the case, giving him the impression that the case would resolve itself.

He testified he was in the hospital in early 2015 because he was having cancer removed. He met with trial counsel once but they did not watch any video recordings over go over testimony. He did not have a good meeting with trial counsel until a day or two before trial began. He was under the impression at the time that the trial would be continued so that the defense would be able to find more witnesses.

He and trial counsel did not discuss the elements of the crimes for which Applicant was charged or the potential punishments he could face if he were convicted. He testified he and trial counsel did go over statements from the witnesses and what the witnesses may say during their testimonies at trial after trial counsel received the statements from the police. He did not think he was adequately informed about the elements, offenses, penalties, and discovery in the case. He informed trial counsel that he did not understand. Trial counsel told him that the trial would be continued, and he thinks that both he and trial counsel were mistaken in believing that Judge Hayes would grant a continuance. During the almost-three years of trial counsel's representation of Applicant, trial counsel and Applicant met on only two or three occasions, with one of those being a quick meeting in the restaurant before Easter.

When Applicant and trial counsel met in April of 2015, they discussed discovery. This occurred approximately one month before trial. All of the statements given by Applicant's coworkers supported Applicant's defense. These witnesses were: Katrina Jones, Edward Simpson, Jamal Lattimer, James Tyler Scott, Jansen Aiken, and Tony Duncan. None of these potential witnesses testified at trial. Morene Rickard wrote a statement on Applicant's behalf. Applicant testified he gave the names of the aforementioned people to trial counsel, but did not know their addresses; he testified trial counsel knew where Applicant was employed, meaning that trial counsel could have gone there to find them. Applicant believed that these were "direct"

witnesses. Two caseworkers with the South Carolina Department of Social Services were mentioned at trial but were not called as witnesses. Applicant does not believe that trial counsel talked with any of the witnesses. Applicant testified trial counsel told him at the beginning of trial that trial counsel had gone to Applicant's employer a few days earlier with the solicitor. Applicant speculated that trial counsel was unable to speak to the witnesses because trial counsel attempted to speak to them so late.

Applicant testified he has been unable to find the witnesses since because he has been incarcerated and does not have access to resources. His wife has been in and out of the hospital with a kidney disease. She made contact with a few of those witnesses since Applicant's trial. Applicant testified one of the witnesses was a patient at the facility where Applicant was formerly employed and he admitted that the patient's credibility might be questionable as a consequence. Applicant also testified that Leanne Leslie, Katrina Jones, and Jamal Lattimer would have testified that he did not sexually abuse the victim. He extensively tried to track down people once he found out that trial was quickly approaching. He testified James Tyler Scott, who was the aforementioned patient, worked at a convenience store and that Applicant tracked down Moreen Rickard, a nurse. He thought that it would help him if the nurse testified that the victim lied about Applicant's actions. He testified the nurse did attend his trial but that trial counsel did not want to call her as a witness. He testified Joshua Hubbard and Megan Harvey took the victim to the hospital after he disclosed the sexual abuse.

When testifying about the State's questioning Applicant's sexual orientation at trial, he stated that the whole courtroom was upset at the solicitor for making the allegation. He testified trial counsel told him after the solicitor asked that particular question that they did not need to put up much of a defense because the solicitor had made a fool of himself, causing the case to be

a "slam dunk." He testified that trial counsel objected to that question at trial and that Judge Hayes gave a curative instruction to the jury. People in the courtroom screamed out when the solicitor asked the question. On cross-examination, Applicant testified that the reaction of the people in the courtroom indicated that the people thought that the solicitor's question was inappropriate.

He thinks trial counsel was constitutionally ineffective in moving for a continuance because the defense needed more time to get witnesses. He felt trial counsel did not emphasize strongly enough the importance of those witnesses to the defense and testified he was entitled to have the witnesses in order to receive a fair trial.

Applicant testified he did not meet appellate counsel, but spoke to him through letters. He wanted appellate counsel to amend his brief so as to raise other arguments on appeal. He outlined three issues that he wishes appellate counsel had raised on appeal.

Applicant testified that the victim's medical records were not turned over to the defense by the State in discovery, and that the State had those records at trial. He believes the victim's statements, as recorded in those records, show that the victim had changed his story when speaking to the medical professionals and that the victim was lying.

Applicant called appellate counsel as a witness at the PCR hearing. Appellate counsel testified he was appointed to represent Applicant on appeal. He reviewed the transcript in order to find issues. He does not believe that there is a single way to evaluate the merits of any particular issue. He takes into account whether an issue was preserved because the South Carolina Attorney General's Office will always argue that an issue was not preserved for appellate review if the defense did not properly object to it at trial.

As to Judy Hayes' denial of trial counsel's motion for a continuance, he thought that the issue did not have merit on appeal because the standard of review on the issue is very deferential to the trial court. Although he believed that there were other issues with the motion, he thought the State cured some of them by not objecting to hearsay elicited by the defense at trial. He did not argue the issue on appeal because he thought it was a losing issue for Applicant and he did not want to be in the position of having to make the argument before the appellate courts at oral argument. Appellate counsel did not see any merit in arguing that Judge Hayes erred in denying trial counsel's motion for a directed verdict.

He argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial because he thought the issue was winnable on appeal even though he thought there were preservation issues. He felt the State's question about Applicant's sexuality was inappropriate and that Judge Hayes had called down the solicitor for it at trial. He does not think he told Applicant that the issue was a "slam dunk" issue because he never uses that phrase. He noted that trial counsel argued to Judge Hayes that the prejudice caused by the State's comment could not be undone and that Judge Hayes gave a curative instruction sua sponte. He testified the Attorney General's Office did not argue on appeal that the issue was not preserved, but that the South Carolina Court of Appeals found that the issue was not preserved anyway.

Appellate counsel testified he has dealt with the corroboration jury instruction that was at issue in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). He testified Stukes was published between the conclusion of Applicant's trial and the appeal. He testified trial counsel did not object to Judges Hayes' instruction to the jury that the victim's testimony did not need to be corroborated. He testified he successfully argued in appeals following Stukes that the respective juries had been improperly instructed that the testimonies of victims did not need to be

corroborated, and that those opinions were unpublished. In response to questioning from this Court, appellate counsel testified that Stukes had not yet been published at the time of Applicant's trial but that he felt it was an arguable issue. On cross-examination, appellate counsel could not think of an appellate court opinion in this state in which it was held that Stukes applied retroactively to trials held before it was published. He testified he thinks a conviction would be reversed today if the jury were instructed that a victim's testimony did not need to be corroborated.

Respondent called trial counsel as a witness at the PCR hearing. He testified he has been practicing in the field of criminal law for forty-two years. He was appointed to represent Applicant in March of 2013, as he was working as the contract public defender in Pickens County. He testified cases do not come up for trial for a year or two after arrest in Pickens County. He met Applicant first in April or May of 2013, and testified as to the multiple meetings he had with Applicant. He testified he left multiple voicemails for Applicant during the course of his representation that were not returned.

He testified Applicant was employed at a juvenile psychiatric facility for children, at which the patients have significant psychological issues. He testified that two different male minors accused Applicant of sexually abusing them while Applicant worked at the facility. He testified that the State had as evidence against Applicant a statement from Applicant and video recordings from the security cameras at the facility. He and Applicant discussed the evidence and that it was harmful to the defense.

He did not start in-depth preparation until close to trial. Applicant told him that he had witnesses he wanted at trial, but trial counsel did not pursue them at the time because the trial date was far off into the future. He testified the State gives advance notice of upcoming trials in

Pickens County, and that he anticipated being able to gather all evidence in time for trial. He started writing letters to Applicant and attempting to contact Applicant by phone before trial without success. One of his letters was returned. He eventually found Applicant on Facebook and established contact through that website. He testified that, without his knowledge, Applicant had moved to Oconee County.

He issued subpoenas for around ten people for trial, and checked Facebook and the public index on the South Carolina Judicial Department's website to attempt to locate potential witnesses. He testified that the witnesses Applicant suggested were mostly character witnesses and that the defense did not need character witnesses for trial. He testified the best witnesses Applicant had did testify at trial.

He testified he does not know why he did not object to Judge Hayes' curative instruction after the State asked Applicant about his sexual orientation during trial and assumed that the curative instruction would be the best relief that Applicant could have hoped for. He thought that the State was trying to depict Applicant as a homosexual. He testified that the question and answer were the only statements of this type made at trial. He testified he thought the question was prejudicial to the defense.

He testified the video recordings from the facility at which Applicant worked did not directly show that Applicant inappropriately touched the victim but that they did show that Applicant had the opportunity to commit the touching and that Applicant was alone with the victim while looking around suspiciously. He did not have any evidence that the victim knew the location of the cameras' blind spots. He testified that he was able to get admitted into evidence at trial that the victim sometimes lied and was able to show that the victim may have been lying

about Applicant with the intent to gain his freedom from the psychiatric facility in which he was being housed and at which Applicant worked.

He testified he did not call the witnesses at trial that Applicant identified because some did not want to testify on Applicant's behalf and others did not have any personal knowledge that trial counsel thought would have been beneficial to Applicant's defense. He did not remember if any potential witnesses had heard the victim saying that his allegations were false. He talked to multiple witnesses named by Applicant at the PCR hearing, and testified that Katrina Jones indicated that she did not want to testify at trial, a fact which he made known to Applicant. He did not believe that he spoke to a single witness who would have, in his estimation, provided testimony favorable to the defense at trial. He also testified that some of the people may have indicated that they thought that the victim was a liar.

He did not find anything in the victim's medical records that he thought would have aided the defense at trial. He did discuss the medical records with Applicant, though.

He felt that the best he could do with Harvey, under the circumstances, was to indicate that she had told him something different in person than she was testifying to at trial.

In his February meeting with Applicant, the two discussed the case but did not discuss the identities of potential witnesses. He testified that there never was a point at which he thought the case was a "slam dunk" for Applicant.

He was not aware at the time of trial of the corroboration issue in Stukes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses,

which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008); Strickland v. Washington, 466 U.S. 668 (1984). Applicant has the burden of proving the allegations in his post-conviction relief action, and, when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland). Applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has met his requisite burden of establishing the constitutional ineffectiveness of trial counsel. The specific claims as presented by Applicant are addressed fully below:

Trial counsel was constitutionally ineffective for failing to use due diligence in trying to find and procure as witnesses at trial some who heard the victim state that Applicant did not commit the crime of which he was accused and for failing to conduct a reasonable investigation into Applicant's witnesses before trial.

Applicant argues trial counsel was constitutionally ineffective for failing to conduct an adequate pre-trial investigation because, if he had done so, he would have found witnesses who would have provided testimony favorable for the defense at trial. Although Applicant presented these as distinct claims in his application, this Court will address both in together here as they are

primarily allegations concerning trial counsel's alleged failure to find favorable witnesses due to an inadequate investigation.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014). An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005)

(holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that Applicant has failed to show that trial counsel's performance was deficient for failing to conduct an adequate pre-trial investigation. Applicant named potential witnesses that he would have liked to have at trial, but failed to offer any proof that trial counsel did not adequately investigate the matter. Trial counsel admitted that he did not begin attempting to contact the potential witnesses named for him by Applicant immediately upon being appointed, but waited until the trial date was nearer, stating that it can take years for cases to come up for trial in Pickens County. It was reasonable for trial counsel to pace his investigation and pre-trial preparation throughout the course of representation when he knew that Applicant likely would not face a trial for years. Trial counsel also explained that he did not believe that, based upon the information provided by Applicant, the potential witnesses would offer anything beneficial to the defense, serving instead only as character witnesses. And, despite, Applicant's desire to have the witnesses testify at his trial, trial counsel's testimony that he was not able to find a witness who would have provided favorable testimony and found one who did not want to testify on Applicant's behalf demonstrates that it was a reasonable and valid strategic choice for trial counsel not to call those witnesses at trial.

Applicant testified before this Court about the extensive efforts that he and his wife have taken since his trial to track down the potential witnesses he identified for trial counsel; by his own admission, their searching did not yield positive results. Trial counsel testified he was unable to find favorable defense witnesses for trial, and Applicant's testimony confirms the

difficulty in finding witnesses favorable to him. Applicant argues trial counsel's inability to produce favorable witnesses for Applicant at trial shows that trial counsel's performance was deficient; however, the inability of Applicant and his wife to find favorable witnesses undermines Applicant's own argument and supports trial counsel's testimony that he experienced difficulty in finding favorable defense witnesses. Overall, trial counsel's credible testimony about his efforts to find favorable defense witnesses and the reasonable and valid decisions he made about when to attempt to contact potential witnesses and whether certain potential witnesses would have helpful testimony show that his pre-trial investigation and attempt to find witnesses were adequate. Applicant has failed to meet his burden in showing otherwise.

This Court finds that Applicant has failed to show that there is a reasonable likelihood that the outcome of trial would have been different but for some deficiency in trial counsel's pre-trial investigation. Although Applicant testified at the PCR hearing that he wanted trial counsel to produce at trial certain witnesses and use the victim's medical records to cast doubt on the victim's allegations of suffering sexual abuse at Applicant's hands, Applicant has failed to produce these allegedly valuable pieces of evidence for this Court. Applicant did not call any of these witnesses at trial to show that they would have provided testimony favorable to his defense at trial. Applicant did not produce the victim's medical records to show its value for impeaching the victim. As such, Applicant merely has speculated that the outcome of his trial may have been different had trial counsel done more to secure witnesses for trial and used the victim's medical records, thereby failing to meet his burden of proof. Applicant's testimony at the PCR hearing with regard to at least one of the potential witnesses shows that even Applicant doubted whether the witness would have been credible and favorable to the defense.

This Court finds Applicant has failed to demonstrate that trial counsel was constitutionally ineffective for failing to conduct an adequate pre-trial investigation because Applicant has failed to show any deficiency in trial counsel's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object when Judge Hayes improperly instructed the jury that the victim's testimony did not need to be corroborated.

When charging the jury, Judge Hayes instructed it that:

> As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt."

Transcript 348. Trial counsel did not object to that instruction and testified at the PCR hearing that, at the time of Applicant's trial, he was not aware of any issues with the instruction that would have made it objectionable. Applicant argues that it was improper for Judge Hayes to instruct the jury that the victim's testimony did not need to be corroborated and that trial counsel was constitutionally ineffective for not objecting to the instruction.

The South Carolina Supreme Court held in State v. Rayfield that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting South Carolina Code Section 16-3-675. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006). Section 16-3-675 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . . ," which includes the offenses for which Applicant was tried and convicted. The Supreme Court in Rayfield held that a trial court did not have to instruct the jury on the statute, but that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. Id. at 117-18, 631 S.E.2d at 250. The trial court in Rayfield instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of

the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness . . . ." Id. at 118, 631 S.E.2d at 250. On May 4, 2016, the Supreme Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and overruled Rayfield to the extent that it condoned the giving of the aforementioned jury instruction, found the trial court erred in instructing Stukes' jury that the victim's testimony did not need to be corroborated, found that the trial court's error was not harmless, and remanded for a new trial. Stukes, at 500, 787 S.E.2d at 483.

This Court finds Applicant has shown that trial counsel's performance was deficient due to his failure to object when Judge Hayes instructed the jury that the victim's testimony did not need to be corroborated, an instruction that is prohibited under Stukes. Applicant has shown that he would have been successful on appeal if trial counsel had objected to that jury instruction because the State did not have direct evidence of Applicant's guilt and relied upon the victim's testimony. Applicant has demonstrated that trial counsel was constitutionally ineffective for failing to object to the jury instruction and is entitled to post-conviction relief.

Trial counsel was constitutionally ineffective for failing to use the victim's medical records to impeach him at trial.

Applicant argues trial counsel was constitutionally ineffective for failing to use the victim's medical records to impeach the victim at trial because they showed that the victim was lying when he accused Applicant of sexual abuse and because the State's case was based upon the victim's testimony.

This Court finds Applicant has failed to show trial counsel's performance was deficient with respect to his decision not to seek the admission of the victim's medical records at trial. Trial counsel testified he and Applicant reviewed the victim's medical records for trial and that he did not find them to have any exculpatory value and would have provided no benefit for the

defense had they been admitted into evidence. Trial counsel credibly testified that he received the records in discovery and reviewed them with Applicant. Applicant has failed to overcome the presumption that trial counsel employed a valid and reasonable strategic judgment in not seeking to admit the records into evidence. Applicant has failed to show how the records would have had any impeachment value or that there was any deficiency in trial counsel's review of the records and in his assessment that they were of no aid to Applicant.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's failure to impeach the victim using his own medical records. To demonstrate that his defense attorney was constitutionally ineffective for failing to introduce evidence at trial, an applicant for post-conviction relief must have that evidence admitted at his PCR hearing. Cf. Bannister, at 303, 509 S.E.2d at 809 (requiring that an applicant "produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); Dempsey, at 370, 610 S.E.2d at 815 (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant has failed to produce the victim's medical records for this Court's consideration; thus, he is unable to demonstrate that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel offered them into evidence at trial.

This Court finds Applicant has failed to demonstrate that trial counsel was constitutionally ineffective for failing to introduce into evidence at trial the victim's medical

records because Applicant has failed to show any deficiency in trial counsel's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the State's questions about Applicant's sexuality and his motion for a mistrial.

During its cross-examination of Applicant, the State following exchange occurred between Applicant and the solicitor:

Q: So are you gay?
A: No.
Q: Are you interested in young boys?
A: No.

Transcript 296-97. Trial counsel object to the questions, and that objection was sustained by Judge Hayes. Transcript 297. Trial counsel moved for a mistrial, arguing the questioning was irrelevant, highly prejudicial to Applicant, and without any foundation in the evidence admitted. Judge Hayes denied trial counsel's motion for a mistrial, but cautioned the State not to "have another episode like that," and issued a curative instruction to the jury sua sponte. Transcript 300-02. Trial counsel did not argue the issue any further or object to the sufficiency of the curative instruction. Trial counsel testified before this Court that he did not object further because he believed the curative instruction would be the best relief that Applicant could have reasonable expected. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam) (citing State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.")).

The solicitor's comments, when considered in their totality, show that Applicant was prejudiced by the exchange and that the result of the trial would have been different had trial counsel preserved the issue for appellate review. This Court finds Applicant has demonstrated that trial counsel was constitutionally ineffective for failing to preserve the issue for direct appellate review and that Applicant is entitled to post-conviction relief.

Appellate counsel was constitutionally ineffective for failing to argue on appeal that Judge Hayes erred in denying trial counsel's motion for a continuance.

Applicant argues appellate counsel was constitutionally ineffective because he argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial instead of arguing that Judge Hayes erred in denying trial counsel's motion for a continuance because trial counsel failed to preserve the mistrial issue for appellate review and because there is a reasonable likelihood Applicant would have been successful on appeal had he raised the continuance issue. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial after the State asked during its cross-examination of Applicant if Applicant was gay and sexually interested in "young boys." As previously noted in this order, the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review.

Generally, in analyzing a claim of the ineffective assistance of appellate counsel, the reviewing court applies the Strickland test just as it would when analyzing a claim of the ineffective assistance of trial counsel. Southerland, at 616, 524 S.E.2d at 836. Thus, in this case, the reviewing court is to ask (1) whether appellate counsel's performance was deficient and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Although an appellate attorney is required to provide his client with the effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ." Jones, at 754.

When questioned about his decision to argue that issue and not to argue that Judge Hayes erred in denying trial counsel's motion for a continuance, appellate counsel indicated he did not believe that there was any merit to the continuance issue. Trial courts are afforded deference in rulings upon motions for a continuance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (instructing that reversals of a trial court's denial of a motion for a continuance are about as rare as the proverbial hens' teeth) (quoting State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)). Appellate counsel's testimony before this Court indicated he believed Applicant had a better chance of prevailing on appeal with the unpreserved mistrial issue than with the continuance issue. He came to this conclusion because he knew that our appellate courts rarely reverse a trial court's denial of a party's motion for a continuance and because he judged the State's conduct in asking Applicant about his sexual orientation was seriously more detrimental to Applicant's right to a fair trial. In light of our appellate courts' deference to the circuit courts when reviewing for error in the denial of a continuance, this Court finds appellate counsel made a valid and reasonable strategic decision to argue the mistrial issue over the continuance issue. Applicant has failed to show that there was any deficiency in appellate counsel's performance with respect to his selection of issues to argue on appeal.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has established that trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that the victim's testimony did not need to be corroborated and failing to preserve for direct appellate review his objection to the State's questioning of Applicant about his sexuality and the trial court's subsequent denial of his motion for a mistrial. Applicant has failed to demonstrate that he is entitled to post-conviction relief based upon any other claim.

This Court notes the Parties must file and serve a Notice of Appeal within thirty (30) days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

2020 JUL 20 A 11:56
CLERK OF COURT
GREENS COUNTY
SOUTH CAROLINA

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is granted as to two claims presented by Applicant and denied as to all others; and
2. Applicant shall be awarded a new trial.

AND IT IS SO ORDERED this 16 day of July, 2020.

The Honorable Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jonathan Matthew Holder, #364105, Applicant, v. State of South Carolina, Respondent.	Case No. 2018-CP-39-576 **MOTION TO ALTER OR AMEND THE JUDGMENT**

2020 JUL 23 P 4:51
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

The State ("Respondent"), by and through undersigned counsel, moves, pursuant to Rule 59(e), SCRCP, to alter or amend the Court's Order of Dismissal, which was issued on July 16, 2020, and served on the parties by the Pickens County Clerk of Court by email on July 21, 2020. In that order, the Court granted post-conviction relief to Jonathan Matthew Holder ("Applicant"). In making this motion, the undersigned would respectfully show unto this Court:

I. Procedural History

An evidentiary hearing was held before this Court on October 25, 2019, at the Greenville County Courthouse. R. Mills Ariail, Jr., Esquire, was present on behalf of Applicant, who was also present. The undersigned was present on behalf of Respondent. At the conclusion of the hearing, the Court orally granted post-conviction relief to Applicant on some, but not all, of the claims he raised. The Court later asked Ariail to submit a proposed order for the Court's consideration; once that proposed order was submitted, the Court asked the undersigned to submit a proposed order as well. The Court issued its Order of Dismissal on July 16, 2020, finding Applicant had established that he received the constitutionally ineffective assistance of counsel during his criminal trial and that he is entitled to post-conviction relief on some grounds raised but not others. That Order of

Dismissal was filed in this matter on July 20, 2020, and served on the parties by the Pickens County Clerk of Court by email on July 21, 2020.

This motion follows.

II. Argument

First, this Court should alter or amend its judgment so as to reverse its finding that Applicant successfully demonstrated that he is entitled to post-conviction relief because David D. Cantrell, Jr., Esquire ("trial counsel"), failed to object to the trial court's jury instruction that the victim's testimony did not need to be corroborated.

When charging the jury during Applicant's criminal trial, the trial court instructed as follows:

> As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt."

Transcript 348. Trial counsel did not object to that instruction and testified at the PCR hearing before this Court that, at the time of Applicant's trial, he was not aware of any issues with the instruction that would have made it objectionable. Applicant argued at the PCR hearing that it was improper for the trial court to instruct the jury that the victim's testimony did not need to be corroborated and that trial counsel was constitutionally ineffective for not objecting to the instruction.

This Court found in its Order of Dismissal that Applicant has shown that trial counsel's performance was deficient because trial counsel did not object to the aforementioned jury instruction, which this Court also found was prohibited under State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). This Court's finding that trial counsel's performance was deficient is in error

because the Court failed properly to take into account that it is not a required component of constitutional effectiveness that a criminal defense attorney be the trailblazer in the courts' overturning of controlling precedent or predict future changes in the law. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Section 16-3-675 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . . ," which includes the offenses for which Applicant was tried and convicted. Our appellate courts held repeatedly for more than two decades that it was not error for a trial court to instruct the jury, in accordance with the statute, that the testimony of a victim in a trial for the offense of criminal sexual conduct with a minor did not need to be corroborated. In State v. Schumpert, the South Carolina Supreme Court found that the trial court had not committed reversible error when it instructed the jury that the victim's testimony did not need to be corroborated according to state law because the defendant was being tried for criminal sexual conduct with a minor, and the Supreme Court noted that the trial court instructed the jury that:

> [I]t could believe any single witness over several, it was the sole judge of the facts, [the court] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt."

312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993). In State v. Rayfield, the Supreme Court held that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated, citing the aforementioned statute. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006). The Supreme Court held that a trial court did not have to instruct the jury on the statute, but, if a

court does so, it should instruct the jury without unduly emphasizing the single charge and should ensure that the jury instructions as a whole comport with the law. Id. at 117-18, 631 S.E.2d at 250. Rayfield's trial court had instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness . . . ." Id. at 118, 631 S.E.2d at 250. The South Carolina Court of Appeals, following the Supreme Court's lead, reaffirmed the propriety of the jury instruction approximately four years before Applicant's trial in State v. Orozco when it found the trial court had improperly instructed Orozco's jury that the victim's testimony did not need to be corroborated, the State had the burden of proof beyond a reasonable doubt, the jury had the duty to find facts and determine witness credibility, and the jury should disregard any indications from the trial court as to whether the court believed certain facts to be true or untrue. 392 S.C. 212, 223-25, 708 S.E.2d 227, 232-34 (S.C. Ct. App. 2011). That same years, the Court of Appeals did so again in State v. Hill when it found that the trial court did not err by giving the instruction to Hill's jury. 394 S.C. 280, 297-300, 715 S.E.2d 368, 378-79 (S.C. Ct. App. 2011). Then, on May 4, 2016, approximately one year after Applicant's trial, the Supreme Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and overruled the foregoing cases to the extent that they condoned the giving of the corroboration jury instruction; the Supreme Court also found that the trial court erred in instructing Stukes' jury that the victim's testimony did not need to be corroborated, found that the trial court's error was not harmless, and remanded for a new trial. Stukes, at 500, 787 S.E.2d at 483.

The undersigned urges this Court to alter or amend its Order of Dismissal to take into account the fact that the Supreme Court's holding in Stukes should not be used to gauge the proficiency of trial counsel's conduct when Stukes reversed a long-applied holding in this state. Not only was the corroboration instruction proper during Applicant's trial, according to the controlling case law at the time, but the Supreme Court did not grant Stukes' petition for a writ of certiorari to review the issue until approximately two months after Applicant's trial. Furthermore, the Supreme Court granted Stukes' petition because the Court of Appeals had affirmed Stukes' conviction, finding that the instruction had been properly given. At the time of Applicant's trial, trial counsel was acting within the scope of professional competence by not objecting to the trial court's corroboration instruction. This Court's finding to the contrary effectively required trial counsel to be clairvoyant, anticipating that the instruction would be held to be improper in the future despite the fact that the appellate courts had explicitly held the instruction to be proper decades before Applicant's trial and had reaffirmed that holding not long before Applicant's trial. Not only does this Court's finding hold trial counsel to the standard of a clairvoyant, but it violates the Supreme Court's instruction that the new holding it articulated in Stukes was not to be effective in post-conviction relief actions. Stukes, at 500, 787 S.E.2d at 483, fn.5 (providing that the Supreme Court's "ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction relief."). The Court's finding that Applicant demonstrated that trial counsel's performance was deficient when he failed to object to the corroboration charge fails to take into account Respondent's argument that trial counsel was not required by the Sixth Amendment or the Supreme Court's opinion in Stukes to object to the instruction at the time of Applicant's trial, and it should be altered.

In addition, the Court should reverse its finding that Applicant demonstrated that the outcome of his appeal would have been different had trial counsel objected to the jury instruction. Applicant offered no proof that he suffered prejudice from trial counsel's not objecting to the instruction, and merely speculated that his convictions would have been reversed on appeal had the objection been made. This Court, improperly in Respondent's view, allowed Appellate Defender David Alexander ("appellate counsel") to opine that he believes Applicant would have been awarded a new trial. See Rule 071, SCRE (limiting the admissibility of the opinions of lay witnesses).

Second, this Court should alter or amend its judgment so as to reverse its finding that Applicant successfully demonstrated that he is entitled to post-conviction relief because trial counsel failed to preserve for direct appellate review his objection to the State's questioning of Applicant on cross-examination about Applicant's sexuality and the trial court's subsequent denial of trial counsel's motion for a mistrial. The Court properly considered the aforementioned issues collectively because they stem from the same incident at trial. During its cross-examination of Applicant, the assistant solicitor asked Applicant the following:

Q: So are you gay?
A: No.
Q: Are you interested in young boys?
A: No.

Transcript 296-97. Trial counsel object to the questions, and that objection was sustained by the trial court. Transcript 297. Trial counsel moved for a mistrial, arguing the questions and answers were irrelevant, highly prejudicial to Applicant, and without any foundation in the evidence admitted at trial. The trial court denied trial counsel's motion for a mistrial, but cautioned the

assistant solicitor not to "have another episode like that," and issued a curative instruction to the jury. Transcript 300-02. Trial counsel did not argue the issue any further or object to the sufficiency of the curative instruction.

Trial counsel testified at the PCR hearing that he did not object further because he believed the curative instruction would be the best relief that Applicant could have reasonably expected. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam) (citing State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.")).

This Court found in its Order of Dismissal that the assistant solicitor's questions show that Applicant suffered prejudice from the exchange and that Applicant's convictions and sentences would have been reversed on appeal if trial counsel had preserved the issue for appellate review. This finding does not take into account Applicant's own testimony at the PCR hearing, which was that the reaction of everyone in the courtroom at his trial to the assistant solicitor's questions caused him to believe that the solicitor turned everyone against him by asking the questions. Applicant's testimony that everyone in the courtroom reacted negatively to the assistant solicitor because of the aforementioned exchange undermines this Court's finding that the questions deprived Applicant of a fair trial. If anything, Applicant's testimony supports the conclusion that the strength of the State's case would have been weakened at trial because the assistant solicitor lost

favor with those present by asking the questions, and affords a strong basis for this Court to reverse its finding that Applicant suffered prejudice at trial from the exchange.

Furthermore, this Court should reverse its finding that Applicant demonstrated that the outcome of his appeal would have been different had the issue been preserved for appellate review by trial counsel because Applicant has failed to show that he would have prevailed on the issue if our appellate courts had reached the merits of the issue. "It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.'" State v. Harris, 382 S.C. 107, 119, 674 S.E.2d 532, 538 (S.C. Ct. App. 2009) (quoting State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (S.C. Ct. App. 2005)). It is an extreme measure for a trial court to grant a mistrial, a measure that should be taken only if an incident occurs at trial that "is so grievous that the prejudicial effect can be removed in no other way." Harris, at 117, 674 S.E.2d at 537.

In Harris, while Harris was being tried for murder and assault and battery with intent to kill after he shot his ex-girlfriend and killed a guest at her home, an assistant solicitor asked the daughter of the surviving victim if Harris had hit her. Id. at 111-19, 674 S.E.2d at 534-38. Harris objected and moved for a mistrial, and the trial court gave a curative instruction to the jury but denied the motion for a mistrial. Id. at 119, 674 S.E.2d at 538. The South Carolina Court of Appeals found that the trial court's curative instruction, in which the jury was instructed that it could not consider the assistant solicitor's question in its deliberations, cured any alleged error in the admission of the question. Id. The trial court in Applicant's trial, like the trial court in Harris, swiftly issued a curative instruction to the jury. The trial court in this matter instructed the jury that

the assistant solicitor's question about Applicant's sexual was not an appropriate one. Transcript 301. It also stated that:

> There is no evidence in this record to support that question. That question is not relevant – the question nor the answer.
>
> So please disregard the fact that the question was asked. Mr. Holder answered it no, so you can disregard that, too. But just disregard – that's not an issue in this case to any degree whatsoever. So disregard the fact that that question was asked.

Transcript 301-02. The fact that the trial court so quickly gave a curative to the jury, and one that so explicitly and thoroughly required the jury to disregard the questions due to their impropriety and irrelevance, makes this case comparable to Harris. As a consequence, this Court should not have found that Applicant met his burden in showing that his convictions and sentences would have been reversed on appeal if trial counsel had preserved the issue for appellate review.

III. Conclusion

WHEREFORE, having made its motion to alter or amend the judgment, Respondent respectfully requests that the Court alter or amend its Order of Dismissal, which is attached to this motion, so as to find Applicant has failed to demonstrate that trial counsel was constitutionally ineffective with regards to any of the claims Applicant has raised and to grant Respondent such further relief as the Court finds just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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Assistant Attorney General
SC Bar No.: 103282

BY: s/Taylor Zane Smith
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July 23, 2020

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jonathan Matthew Holder, #364105, Applicant,	)	Case No. 2018-CP-39-576
	)	**CERTIFICATE OF SERVICE**
v.	)	
State of South Carolina, Respondent.	)	

1. Undersigned is counsel of record for the Respondent in the above-captioned action.

2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020, and amended April 14, 2020, "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."

3. Undersigned has served a copy of the **Motion to Alter or Amend the Judgment** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

R. Mills Ariail, Jr., Esquire
mills@rmalawoffice.com

4. Undersigned has provided a copy of the **Motion to Alter or Amend the Judgment** in the above-captioned matter, as well as a copy of the order that is the subject of the motion, on Judge

Miller by emailing a copy to the email address as listed in the AIS:

The Honorable Edward W. Miller
emillerj@sccourts.org

DATED this 23rd day of July, 2020.

s/Taylor Zane Smith
ATTORNEY NAME
Assistant Attorney General
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	
	)	Case No. 2018-CP-39-576
Jonathan Matthew Holder #364105,	)	
Applicant,	)	
	)	
v.	)	**RESPONSE TO MOTION TO ALTER OR AMEND JUDGEMENT**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2020 DEC 15 P 4:26
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Mr. Holder ("Applicant"), by and through his undersigned counsel, moves to request that the Court uphold its Order of Dismissal that was issued on July 16, 2020 and deny Respondent's Motion to Alter or Amend Judgement. In the order issued on July 16, 2020 that was served on the parties by the Pickens County Clerk of Court by email on July 21, 2020, the Court granted post-conviction relief to Jonathan Matthew Holder ("Applicant").

I. Procedural History

For the sake of brevity, the Procedural History put forth in the State's Motion is accepted and incorporated here by reference.

II. Argument

A. This Court should uphold its judgment and finding that Applicant successfully demonstrated he is entitled to post-conviction relief on the grounds that trial counsel was constitutionally ineffective by failing to object when Judge Hayes improperly instructed the jury that the victim's testimony did not need to be corroborated.

This Court should uphold its judgment and finding that Applicant is entitled to post-conviction relief due to trial counsel's failure to object to the trial court's jury instruction that the victim's testimony did not need to be corroborated.

When charging the jury during Applicant's criminal trial, the trial court instructed as follows:

> "As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt."

Transcript 348. The Court, in its Order of Dismissal, properly concluded that Applicant had shown trial counsel's performance was deficient due to the fact trial counsel did not object to the aforementioned jury instruction.

As this Court ruled in State v. Stukes, a jury charge that the testimony of the victim need not be corroborated is unconstitutional on the basis that it is violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. State v. Stukes, 416 S.C. 496 (2016); *see also* S.C. Const. art. V, §21. The violative effect of such a jury charge was illustrated in Stukes when, during deliberations, the jury submitted numerous questions to the trial court, including: "the South Carolina law that the victim's testimony in CSC does not need to be corroborated, . does that law imply that the victim's testimony must be accepted as being true?" Id. at 497. Although the charge was, at the time, a correct statement of the law, instructions which confuse or mislead the jury are erroneous. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Therefore, whether or not the jury charge is a correct statement of law comes secondary to whether or not the charge could potentially confuse or mislead the jury. By looking at the questions posed by the jury in the Stukes case, it is clear that this jury charge is erroneous due to its confusing and potentially misleading nature. *See* Id.; *see also* State v. Stukes, 416 S.C. 496, 497 (2016).

The State improperly cites the Supreme Court's holding in State v. Rayfield, to support their argument that trial counsel was not constitutionally ineffective by not objecting to the jury charge. In Rayfield, the court held that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated, citing the aforementioned statue (Section 16-3-675). 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006).

Reliance on this holding is improper due to the fact that it was actually then-Justice Pleicones' dissent in State v. Rayfield that ultimately led to the decision this Court reached in Stukes. *See* State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); *see also* State v. Stukes, 416 S.C. 493 (2016). In then-Justice Pleicones dissent, he noted that he would have found reversible error, and under his view of the legislative intent, the statue is "not the proper subject of a charge, but merely serves to guide trial and appellate courts in analyzing the sufficiency of evidence." State v. Rayfield, at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting). Additionally, he noted this charge "has the potential for creating more problems than solutions, for it might cause confusion when read with the general charge on witness credibility." Id. at 120, 631 S.E.2d at 251 (internal citations omitted). The potential "confusion" that then-Justice Pleicones expressed concerns about in Rayfield, are the exact types of questions that were posed by the jury in Stukes. *See* Id.; *see also* State v. Stukes, 416 S.C. 496, 497 (2016).

Using the dissent put forth by then-Justice Pleicones in State v. Rayfield, this court held in State v. Stukes that:

> "[w]e are persuaded by the dissent in Rayfield and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. See S.C. Const. art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.")."

416 S.C. 493, 787 S.E.2d 480 (2016). This Court then goes on further to say:

> "[a]accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim."

Id. at 416 S.C. 499 (2016). Given the fact that the dissenting opinion in Rayfield ultimately led to this Court's decision in Stukes, where it was held that the jury charge at issue is violative and unconstitutional, the State's reliance on the original holding of Rayfield to argue that the trial court did not err in charging the jury that the victim's testimony need not be corroborated is improper and incorrect.

Furthermore, where the State relies on cases like Orozco and Rayfield to support their argument regarding the jury charge, these cases can be easily distinguished from Applicant's case. The main distinguishable difference in the cases is that in Mr. Holder's case, there was no other evidence or testimony offered that could prove the State's case outside of the victim's uncorroborated testimony.

In the case of State v. Orozco, not only were their two different victims who had been sexually assaulted on separate occasions, but the court allowed in as evidence Mr. Orozco's suicide attempt on the day he found out his nieces had told his sister-in-law about the assaults as evidence of "flight", which the jury could then determine whether the action was taken out of guilt or not. State v. Orozco, Opinion No. 4798 (S.C. Ct. App. 2011). While the Court did uphold the "no corroboration" jury charge in Orozco, the primary fact this was upheld is that the Stukes decision was still over 5 years away. In fact, Orozco's counsel made the correct argument against the "no corroboration" charge, in pointing to the Rayfield II dissent and highlighting that, "the earlier decision in the seminal case of State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) relied upon an

Indiana case that was later overruled by the Indiana court." State v. Orozco, Opinion No. 4798 (S.C. Ct. App. 2011).

Orozco's attorney was referring to the fact that the "seminal case" which began the "no corroboration" jury instruction was Schumpert, but in reaching that original holding, the Court relied on precedential cases in other jurisdictions, particularly the Indiana case of Lottie v. State, Lottie v. State, 273 Ind. 529, 406 N.E.2d 632 (1980).

This was the case that the South Carolina Courts relied on when they first allowed the "no corroboration" charge. Yet, only 10 years after the Schumpert decision was reached in South Carolina, the Supreme Court of Indiana decided the case of Ludy v. State where they held that the decision in Lottie to uphold the jury charge, was unconstitutional. Ludy v. State, 784 N.E.2d 459, 461 (2003) *stating*, ("[t]he challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, by using the technical term "uncorroborated," the instruction may mislead or confuse the jury.")

This holding in Ludy also helps to illustrate additional issues with the State's argument. The State makes the case that by upholding the decision to grant Applicant post-conviction relief, it sets a standard that counsel be "clairvoyant" with respect to future case law and precedent. This is not the case at all. In almost every case that the State uses to support their argument, the trial counsel in question objected to the "no corroboration" jury charge. By not objecting, and not preserving the issue for review, Applicant's trial counsel was deficient in representing Applicant to the level that is

guaranteed under the Sixth Amendment. Additionally, the State tries to further its argument that trial counsel had no reason to object by stating the decades of case law that have upheld the constitutionality of the same jury charge. What the State fails to point out is that the Indiana case which served as precedent in the seminal case of Rayfield and establishing the "no corroboration" jury charge, was overturned by another Indiana case in 2003. *See* Ludy v. State, 784 N.E.2d 459, 460-462 (2003) (reversing the decision reached in Lottie v. State, 426 N.E.2d 632 (1980), and holding that the jury charge, "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt," is erroneous and misleading to a jury). Not only that, but before Ludy was decided, there was over two decades of precedent established in Indiana, and by State's own argument, there is no reason that an attorney would think to challenge decades old precedent. In addition, the fact that South Carolina courts do not require attorney's to be "trailblazers" of law should be of no matter to this Court in determining the issue at hand. Attorneys have made the same argument before, based on the same cases that this Court found guiding in reaching the determination that such a jury instruction was unconstitutional. For example, in Orozco, had the trial attorney made the same argument today with regards to the jury instructions, it is likely that he would have prevailed, but he was unsuccessful due to the timing of the Stukes decision. Yet the fact still remains that the exact argument that State says would take a "clairvoyant" attorney to make, was made 5 years before the Stukes decision.

As put forth above, the State's reliance on Orozco and Rayfield to support their argument that a "no corroboration" jury charge is constitutional is improper and

misplaced. For the reasons put forth above, the State's argument should be disregarded by this court and it should uphold the original determination that Applicant was successful in showing that trial counsel was constitutionally deficient for not objecting to such a jury charge.

The State also puts forth the argument that applying the Stukes decision to Applicant's case is violative of the Supreme Court's instruction that the new holding it articulated in Stukes was not to be effective in post-conviction relief actions. Stukes, at 500, 787 S.E.2d at 483, fn.5 (providing that the Supreme Court's "ruling is effective in this case aud those which are pending on direct review or are not yet final, but not in post-conviction relief.").

The State's reliance on this provision of the Stukes decision is again, misplaced. While it cannot be argued that these instructions were articulated by the Supreme Court in Stukes, it should be noted at the time of the Stukes decision, Applicant's case was not yet in post-conviction relief. Therefore, the new holding articulated in Stukes should be applied to Applicant's case.

Applicant's case did not enter post-conviction relief until May 15, 2018, and the Supreme Court reached its decision in Stukes on May 4, 2016, over two years before Applicant entered the process for post-conviction relief. The Court even notes in the Order granting Applicant post-conviction relief, that Appellate counsel testified the Stukes decision was published between the conclusion of Applicant's trial his appeal. Holder v. State, Order of Dismissal, pg. 7, (July 2020). As a result, Applicant is entitled and fully within his rights to have the Stukes decision apply to his case.

B. THE COURT SHOULD UPHOLD ITS FINDING AND DECISION THAT TRIAL COUNSEL FAILED TO PRESERVE FOR DIRECT APPELLATE REVIEW HIS OBJECTIONS TO THE STATE'S QUESTIONING OF APPLICANT ON CROSS-EXAMINATION ABOUT APPLICANT'S SEXUALITY AND THE TRIAL COURT'S SUBSEQUENT DENAIL OF TRIAL COUNSEL'S MOTION FOR A MISTRIAL.

This Court should uphold the finding that Applicant's trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the State's questions about Applicant's sexuality and his motion for a mistrial.

While trial counsel correctly objected to the State's question and moved for a mistrial, trial counsel was ineffective in arguing the issue further, and as a result, the issue was not preserved for appellate review. Trial counsel correctly asserted that the question was irrelevant, highly prejudicial to Applicant, and without any foundation in the evidence admitted. Even though Judge Hayes issued a curative instruction sua sponte, trial counsel should have further objected to the sufficiency of the curative instructions. Trial counsel believed that such a question, was without basis in the evidence admitted, was prejudicial enough to move for a mistrial, but, "did not object further because he believed the curative instruction would be the best relief that Applicant could have reasonably expected." Holder v. State, Order of Dismissal, pg. 19, (Jul. 16, 2020). Even if trial counsel did not believe that objecting to the curative instructions would change the immediate outcome of the trial, he should have still objected to the curative instructions to reserve the issue for appellate review. The fact that trial counsel believed the question prejudicial enough to Applicant to move for a mistrial but failed to reserve such a major issue for appellate review, supports this Courts finding that Applicant is entitled to post-conviction based on trial counsel's constitutional ineffectiveness.

By the State's own argument, the Applicant's lay opinion of the courtroom reaction to the assistant solicitor's questions about sexuality is merely that, a lay witness opinion. Their

argument that the negative reaction to the assistant solicitor's highly prejudicial questions with no foundation in admitted evidence somehow makes Applicant's case stronger based on his recounting of the courtroom reaction in his PCR testimony is completely flawed.

Whether it hurt or helped the strength of the State's case is not at issue here. The issue is whether or not the line of questioning asked by the assistant solicitor was objectionable and prejudicial enough to constitute a mistrial. While trial counsel did motion for a mistrial, the real matter at issue here is the fact that trial counsel did not argue the issue any further after curative instructions were given to the jury, and as a result of trial counsels complacency with the curative instructions, the issue was waived for appellate review. By not further objecting to the curative instructions, trial counsel was ineffective to the point that falls below what is guaranteed to Applicant under the Sixth Amendment.

III. CONCLUSION

WHEREFORE, having responded to the State's motion to alter or amend the judgment, Applicant respectfully requests that the Court uphold its Order of Dismissal so as to find Applicant has successfully demonstrated that trial counsel was constitutionally ineffective with regards to claims this Court found for Applicant in its Order of Dismissal and to grant Applicant any further relief as this Court finds just and proper.

Respectfully submitted,

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Greenville, SC
Date: November 23, 2020

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

JONATHAN M. HOLDER,	)	
	)	
APPLICANT,	)	2018-CP-39-00576
	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
	)	

NOVEMBER 30, 2020
PICKENS, SOUTH CAROLINA
VIA WEBEX

B E F O R E:

THE HONORABLE EDWARD W. MILLER

A P P E A R A N C E S:

ATTORNEY FOR APPLICANT:

MILLS ARIAIL, ESQ.

ATTORNEYS FOR RESPONDENT:

TAYLOR SMITH, ASST. ATTORNEY GENERAL
LILLIAN MEADOWS, ASST. ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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NO	DESCRIPTION	ID	EVIDENCE

(No Exhibits Were Presented During This Hearing)

THE COURT: Okay. Everybody ready?

MR. SMITH: I think so, Judge.

THE COURT: All right. Well, Mr. Smith, this is your motion.

MR. SMITH: Okay, Judge. And I'll just state for the record that we're all here by Webex. And Mr. Ariail's here for Mr. Holder, he's also on, and that Lilly Meadows and I are here for the State today.

But just a brief recap, Mr. Holder was tried and convicted of CSC with a minor, second and third degrees, back in May of 2015. After trial he was found guilty, and Judge Hayes sentenced him to concurrent sentences of ten years. After the hearing in this PCR case before you back in October of 2019 you granted PCR to Mr. Holder on essentially two claims, that Mr. Holder's trial attorney was ineffective for not objecting to a jury instruction that the victim's testimony did not need to be corroborated, and, two, for not preserving for appeal his objection to a question from the solicitor about whether Mr. Holder was gay and liked young boys.

I filed the motion after that. And Mr. Ariail filed his return to my motion last week. So I'll address the jury instruction issue first.

Judge Hayes instructed the jury that the testimony of the victim did not need to be corroborated according to decades

long precedent in this State, that instruction was appropriate. So I cited most of these cases in my motion, but I'll run through them very quickly.

It takes us back to State v. Schumpert in 1993. In the case the South Carolina Supreme Court found that that corroboration instruction was not given in error. In 2006 in State v. Rayfield the Supreme Court again held that the instruction was not given in error.

In 2011 in State v. Orozco the Court of Appeals found that the instruction was not given in error. In that same year the Court of Appeals also found the same thing again in another case called State v. Hill. In January of 2015 the Court of Appeals issued an unpublished opinion, State v. Stukes, which included a finding that the trial court did not commit reversible error by giving that corroboration instruction, and it was not unduly emphasized, as a whole comported with the law.

Mr. Holder was then tried in May of 2015, four months later. That was about 22 years after Schumpert, nine years after Rayfield, four after Orozco and Hill, and four months after this Court of Appeals' opinion in Stukes.

Two years after trial for Mr. Holder the Supreme Court granted cert to review the Court of Appeals' opinion in Stukes. About a year after Mr. Holder's trial the Supreme Court came out with its Stukes' opinion overruling the

previous opinions going back all the way to Schumpert in the 90's and gave a new holding that it was error for the trial court to instruct the jury on that corroboration statute.

Additionally, the Supreme Court's opinion in Stukes included a footnote saying that this did not apply in post conviction relief cases for the obvious reason that it was a new rule of law, and PCR is a backward-looking avenue for relief.

At the time of Mr. Holder's trial reasonable professional norms did not require an attorney to object to the corroboration instruction. As the Court of Appeals said in, I believe it was Orozco, the Supreme Court's instruction on this issue was unmistakably clear that the instruction was not given in error if it was not unduly emphasized and comported with the law as a whole.

Judge Hayes also instructed the jury in the general ways of the burden of proof, reasonable doubt, and the jury's role as fact-finder. Mr. Holder's attorney, even though he didn't object, his actions were within the proper range of conduct for defense attorneys as articulated by the appellate courts for over 20 years.

And I also have some points to make in rebuttal to the argument raised in response in Mr. Ariail's return. One being that -- even admits in his return that the state of the law at the time of Mr. Holder's trial was that this corroboration

instruction was fine. And he goes into an argument about it may have confused the jury.

Well, I'll just say that's a point that we didn't argue at the PCR hearing. It's never been raised. And it's not something you can raise now in this sort of motion.

He also goes into the fact that the Stukes case coming after Mr. Holder's trial relied upon then Justice Pleicones' dissent way back in the Rayfield case in 2006. Well, that may be the case, but that doesn't mean that that's controlling law. Our courts have said for a long time that only the majority opinion is law, the dissenting opinion is not law.

And it's not the case that there was no evidence of Mr. Holder's guilt other than the victim's testimony. There were other pieces of evidence. For example, there was evidence at trial that the employees at this facility where the victim was housed were instructed not to be alone with patients off camera. And, of course, recording from the inpatient facility showed that Mr. Holder did go off camera with the victim.

It was evidenced that employees were instructed not be alone in rooms with patients with the doors closed. And the cameras and the victim's testimony showed that they were in rooms with the door closed.

There was evidence that Mr. Holder took pizza to work and gave it to the victim against facility policy right in the time-frame when these incidents were alleged to have happened

and that that was against facility policy.

And there was evidence that the victim's behavior deteriorated over time after these incidents were supposed to have happened. And there was an expert who testified at trial about how that was -- that would be consistent with sort of a disclosure or acting out sort of behavior in a victim.

And, of course, the jury watched the security camera footage showing Mr. Holder looking out of the closed room up and down the hallway with the logical inference being that he was looking to check to make sure that no one was coming or that they were alone.

It's just simply the case that all the case law controlling at the time of Mr. Holder's trial said that this jury instruction was fine. And I understand certainly that someone following after Mr. Holder objected and raised the issue on appeal and won, but, you know, the issue in a PCR is at the time of Mr. Holder's trial, was it required of his defense attorney to make that objection? And it's just a point that appellate courts have articulated that they do not require defense attorneys to predict future issues in appellate courts.

So that's my argument on that point. If you want us to talk about that now, we can do that, or I can move on to point two.

(Pause)

MR. SMITH: And point two would be this issue ---

THE COURT: Well, hang on. Hang on. Let's -- Mr. Ariail, you want to respond to that?

MR. ARIAIL: I will, Your Honor. That's if you'll give me a second. I have put together -- and we submitted a return to it. I think it's got some key pieces of information in there.

The first thing is, we're satisfied with your order and believe that we presented all that we needed to at the hearing. I mean, we put up his own counsel who said he should have objected. I mean, you know, and we put up the appellate counsel who provided information showing the information as to why he believed the problem was it was not preserved to be able to argue on appeal and there was also showing that there was prejudice here.

So the issue we have -- and I'll go through a little bit in the points. It comes down to the timing of this. And I know Taylor has put out there the laundry list of cases that are there.

The issue then becomes at a period of time, if I'm not mistaken, there was an appealed case, either the Orozco case or the -- it was the Stukes case. That case was on appeal, if I'm not mistaken, during the period of time that Mr. Holder was having his case tried. So for there to be an argument that he had to be clairvoyant, there have been cases out there

that show that there was an objection to this, this was an issue, they continued -- there were other states a part -- put as part of our brief.

Indiana had already overturned this. This was clearly an issue that was, you know, being litigated. And if there was a case that was on appeal, the clairvoyance issue -- it should have been objected to because we could be sitting here, instead of the Stukes case, it could have been Mr. Holder's case which would be the one that overturned this jury instruction.

So we believe that based upon the information we presented and the showing at the hearing, which we believe was correctly ruled upon by you and granted the PCR ground for him, that it should stand, and this motion to alter or amend should be denied, Your Honor.

THE COURT: Okay. All right. Taylor, your next point.

MR. SMITH: Sure, Judge. And my next point would be you granted relief to Mr. Holder because his attorney did not preserve for appellate review his objection to two questions from the solicitor. So the solicitor while cross-examining Mr. Holder said, are you gay? Mr. Holder said, no. And the solicitor asked, are you interested in young boys? And Mr. Holder said, no.

And that drew an objection from defense counsel. And that was the sum total of the questioning there. Judge Hayes

kicked the jury out, the issue was handled, and he thoroughly chastised the solicitor. And when he brought the jury back in gave a curative instruction and said this is wholly inappropriate, you should disregard that, that's not relevant at all. Pretty thorough curative instruction.

And he denied -- and defense counsel at that point also moved for a mistrial. And he said this is so bad I need a new trial. And Judge Hayes denied that motion, but said I'm going to take care of it by giving a curative instruction. And he granted relief to Mr. Holder on that issue.

And so at this point in the PCR process the question we have to ask is because trial counsel didn't continue to object saying that the curative instruction was insufficient, he didn't preserve it for appellate review. And the question we ask in these situations on PCR is if he had preserved it further, would it have been reversed on appeal? And I think the answer is definitely no.

And I'll say to that that we have here the strength of Judge Hayes' curative instruction, the appellate courts' strong deference to the rulings of trial court, the extreme nature of a mistrial. When you take all of that together, I think it's definitely not the case that Mr. Holder would have been given a new trial.

There's case law there explaining that a mistrial was an extreme remedy, it's a last resort. You're only supposed to

use that if there's no other way to cure prejudice in a criminal trial. And the similar instances we have from appellate opinions dealing with these sorts of issues show that what happened in this case definitely would not have been the kind of thing that required a new trial.

And so in the -- you know, I can cite to one case where the Supreme Court did grant a new trial. And it's the Nelson case. And I will give you the citation to that.

But in that case Mr. Nelson was being tried for CSC, and child porn and all of that. And the State admitted all sorts of evidence showing Mr. Nelson had pictures of children who looked like that victim, that he had extensive evidence of -- that he liked to watch TV shows dealing with children.

And you look at other cases distinguishable from Mr. Holder's case like the Hill case that I cite in my motion, in these types of cases that -- the question asked was definitely inappropriate, but it was so short, it wasn't something that the State came back to and it didn't rise to the level of inappropriateness that can only be cured with a new trial. So I think on an appeal Mr. Holder would not have been given a new trial.

THE COURT: Okay. Well, let me ask you this. Would you agree that there was very little or no direct evidence with respect to the elements of the crime in this case?

MR. SMITH: I would agree with that, that this was a case

that seems like largely turned on the victim's testimony as is acceptable per State law, but that his testimony was corroborated by some other circumstantial testimony like the video recording and the general facts about where Mr. Holder and the victim were located at certain times.

THE COURT: Well, -- and let me interrupt you. And that which you've referred to as circumstantial evidence was not evidence of the element of the crime, but it was evidence of policy misconduct. Would that be correct?

MR. SMITH: Well, it was evidence of Mr. Holder deviating from workplace policy, but I think the State introduced it to show that he was in places where he shouldn't have been and circumstances that he shouldn't have been in, which tended to support the credibility of the victim's testimony.

THE COURT: Well, and that would certainly be the view of the prosecution. My point is is that this was generally a weak case evidentiary-wise. Would you say that? Would you agree with that?

(Pause)

THE COURT: I'm not trying to ---

MR. SMITH: I understand that. The problem, Judge, is that there are a lot of CSC convictions where you rely essentially almost on the victim's testimony. And that's a pivotal point, but I wouldn't call that weak. I mean, I guess if you had him on camera touching the kid, that would be

stronger, but it's definitely enough to get a conviction.

THE COURT: Okay. But my point is, and I'm not trying to -- I'm just trying to point out that this is not a strong case against the defendant. And when you have what is, I think everyone agrees, this testimony, which violated the law, even though the judge certainly did what was appropriate, in combination with the now overturned requirement of corroboration.

So the totality of the circumstances in this case I think -- I'm looking -- I don't have an independent recollection of this, but I'm looking at why -- because I agree with your technical assessment of the Stukes case and the take here, I don't disagree with that.

And I'm trying to piece together why I granted this PCR. And all I can conclude is that it was because of the weakness of the case and the prejudice that was -- Mr. Holder suffered as a result of the improper questioning and now the improper instruction.

MR. SMITH: Well, I understand that, Judge. But the problem is in PCR as the U.S. Supreme Court and our Appellate Courts have said, you have to have the attorney making an error and prejudice.

And, you know, if we don't have a legal error -- in the first case the issue with the instruction is I think legally there's definitely no error here. I mean, a case coming out

four months before trial says that this instruction is fine. The Supreme Court didn't even grant cert on the Stukes case until months after Mr. Holder's trial was over.

At the time trial counsel was doing what he was supposed to do, but the other issue is, I think, we're on this prejudice point. And I understand that the State's strongest piece of evidence was definitely this victim's testimony.

So -- but the problem is is Judge Hayes gave the curative instruction. And when you look at how the Appellate Courts review denials of mistrial motions, it's not the sort of instance that would have come out in Mr. Holder's favor. The cases in which mistrials have been granted, the conduct is much more extreme than what happened here.

And by the way, Mr. Holder testified that he thought that everyone in the courtroom turned against the State at trial believing the question was inappropriate. So ...

THE COURT: All right. Mr. Ariail, anything you want to say?

MR. ARIAIL: Your Honor, I think you hit it right -- the nail on the head on this one. That's what happened when we were in front of you.

I mean, the totality of the circumstances of this with you've got the first issue with the jury charge, and now you've got this curative instruction that has not been objected to. I mean, these were two questions -- so are you

gay? No. Are you interested in young boys? No.

Well, I mean, that right there -- whatever Mr. Holder says, he interpreted it one way -- I'm looking at that from a defense standpoint and said those types of questions no doubt have hurt him because that's what they're inferring. So, you know, they've gotten the benefit out of that through the prosecution. He's been hurt in regards to the jury charge. And there's no way he can get around it.

It's a recipe for disaster is the way I see it from what is going on here. And that's why I think you granted this PCR due to the lack of evidence which you stated earlier in this case. And I think it should stand, go up.

If they appeal it, that is their decision. But I think for us for now there is prejudice that's been shown. He should have his right to have a PCR granted and move forward that way. Thank you.

MR. SMITH: Well, Judge, I'll just leave with this one ---

THE COURT: Sure.

MR. SMITH: --- point that -- I'm quoting from some case law here that the granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way. Certainly was not good that the solicitor asked him those two questions, but when you look at other cases

where mistrials have been granted, this falls far short of that sort of grievous, prejudicial effect.

THE COURT: Yeah. I mean, this is a -- this is a hard case from a judicial standpoint with respect of the PCR. I do think Judge Hayes certainly technically complied with the law. And I recognize that the Stukes case came out later.

It is -- you know, is there case law with respect to the totality of the -- there is with respect to the totality of the case going to ineffective assistance and prejudice. So I'm thinking that my ruling was just I perceived that there was a cumulative effect with the weakness of the evidence that entitled Mr. Holder to a -- to another -- a new trial.

But I will tell you, I am -- that's how I perceive what my ruling was based on. And I think you can count, Mr. Ariail, they're going to appeal it ---

MR. ARIAIL: Oh, I know.

THE COURT: --- if I grant their motion. And I don't know, is there case law out there about this? Mr. Smith, you are the -- you're the library of case law on this.

MR. SMITH: Well, there's case law saying you can't -- you can't require an attorney to make an objection based on law that does not yet exist. So on that point I think -- if that's what you're asking. I'm not sure what you ---

THE COURT: Well, no. I'm asking about the totality that when you look at the entire picture, if you don't isolate the

single issues, if you look at the -- look at the now inappropriate curative corroboration charge, and you look at the prejudice that Mr. Holder endured with the questioning that's been recited here, and the weakness of the State's case, the combination of it is, I believe, why I felt compelled to grant this.

So I recognize that I may well get reversed on this. I, you know, it won't be the first time. But I guess my -- I am so close to granting your motion, Mr. Smith. It's very difficult to -- I think what I need to do is take this under advisement to think on it a little bit.

And I guess at the PCR hearing when I listened to the testimony it was compelling. And so I'm going to take it under advisement. I'll let y'all know something here in the very near future, maybe today, but I do want to think about it.

And I compliment both attorneys for their diligent and comprehensive efforts in the case. Is there anything else?

MR. SMITH: Well, I'll just say, Judge, I think what you're getting at, there is a prejudice issue. But you can't grant PCR without finding both prejudice and that there was an error. And I think that ---

THE COURT: Yeah.

MR. SMITH: --- that's the sticking point here.

THE COURT: Yeah. I think that's -- I think that's very

accurate. So anything else, Mr. Ariail?

MR. ARIAIL: No. I just think your view is that the totality of the circumstances and I think all together -- and it's hard for me to kind of disassociate the two questions that were asked from the jury charge where you put him in a position, is he gay, is he interested in young boys, that ties in with the corroborating evidence on the previous one.

So it's hard to take them out of context and just say, hey, one is this way and one is another when they're interwoven. So that's my issue with this. And that's the difficulty I've had with it from the beginning, Your Honor. Thank you.

THE COURT: Okay. All right. Anything else?

MR. ARIAIL: No, Your Honor.

THE COURT: All right. Everybody stay COVID free, please.

MR. ARIAIL: You, too.

THE COURT: Okay. Thank you.

MR. SMITH: Thank you.

(Hearing Ended at 10:32 am)

(End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 30th day of November 2020.

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

February 3, 2021

Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	
	)	Case No. 2018-CP-39-576
Jonathan Matthew Holder #364105,	)	
	)	
Applicant,	)	
	)	
v.	)	**POST-HEARING BRIEF**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The purpose of this post-hearing brief is to address the question of whether or not the theory of "cumulative error" should apply in Applicant's case.

I. The Doctrine of "Cumulative Error"

To address the question of whether cumulative error applies in Applicant's, it is first crucial to understand the purpose of the doctrine. The Cumulative Error Doctrine is a concept that many courts have applied when analyzing ineffectiveness of counsel claims to determine if trial counsel was indeed ineffective so that it prejudieed the Defendant during their trial, thus resulting in a new trial. Under this doctrine, while none of the errors individually may have caused sufficient prejudice to overcome the harmless error doctrine, Courts have held that when analyzing these errors together they were prejudicial enough so that a new trial was proper. *See* Jones v. Stotts, 59 F.3d 143, 147 (10th Cir. 1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors); United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994) (same); United States v. Guiterrez, 995 F.2d 169, 173 (9th Cir. 1995) (same); *but see* Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995)

(stating that "a petitioner may demonstrate that cumulative effect of counsel's individual acts or omissions was [prejudicial]"); Rodriguez v. Hoke, 928 F.2d 534, 538 (2nd Cir. 1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions.").

II. Fisher v. Angelone and Smalls v. State

It is crucial to distinguish Mr. Applicant's case from Fisher v. Angelone as well as that of Smalls v. State. *See* Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998); *see also* Smalls v. State, 422 S.C. 174 (2018).

The Fisher case was a 4th Circuit case in which the Defendant had been convicted of capital murder, and after exhausting all available state remedies, Defendant petitioned the United States District Court for the Western District of Virginia for habeas corpus relief. *See* Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998). The district court denied Fisher's petition, and Fisher appealed raising numerous challenges to state court proceedings. The doctrine of cumulative error comes into play in this case because the Defendant raised the argument that trial counsel was ineffective for not objecting to tape recordings of him being played that had been captured by an informant wearing a wire. *See* Id. The Court points out that although Fisher's counsel did object to the playing of the tapes, he did not state a particular ground for his objection. Specifically, he did not argue that two of the tapes were inadmissible under the Sixth Amendment, and all six tapes were inadmissible under the Virginia Rules of Procedure. *See* Id. at 849. Since these issues had not been raised before this point in the Defendant's legal proeess, they had not been ruled by a post-conviction relief court. The Court then notes, that "even assuming, however, that counsel's failure to state the grounds for its objection was objectively unreasonable, we conclude, for the reasons that follow, that Fisher was not prejudiced in any way

by counsel's actions. Id. at 849. The Court goes on to point out that the tapes, "were but a small part of the prosecution's overwhelming case against Fisher." Id. Furthermore, they go on to state "we cannot say that, but for counsel's failure to state the grounds for his objection of the tapes, there is a reasonable probability that the result of the proceeding would have been different or that the result of the proceeding was fundamentally unfair or unreliable". Id. Finally, in their analysis of the "cumulative effect" of his trial counsel's individual actions having deprived Defendant of a fair trial, the Court notes that they, "determined that *none* of counsel's actions could be considered constitutional error". Id. at 852 (emphasis added).

The State has misplaced their reliance on Smalls v. State as well. While it is true that ineffectiveness of counsel claims should be reviewed individually by a post-conviction relief court, that does not mean that once those issues have been decided on by a post-conviction relief court that claims which are determined to have had constitutional ineffectiveness of counsel cannot be taken into consideration together. The Court in Smalls was dealing with an armed robbery case that was determined to have "overwhelming" evidence despite the potential ineffectiveness of trial counsel. Yet, the Court determined that part of this "overwhelming" evidence was the fingerprint on the gun, but that should not be considered part of the "overwhelming" evidence as it was tainted by significant error on the part of trial counsel. Smalls v. State, 422 S.C. 174, 194 (2018). Ultimately, the Court in Smalls chose to balance the ineffectiveness of trial counsel against the evidence and determined that the Defendant was indeed prejudiced by his trial counsel, holding:

> "After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the

> strength of the State's case, we find the errors significantly "undermine confidence in the outcome of the trial," *Rutland* , 415 S.C. at 577, 785 S.E.2d at 353, and leave "a reasonable probability that, but for counsel's errors, the result of the trial would have been different," *Ard* , 372 S.C. at 331, 642 S.E.2d at 596."

Id. at 195-196.

III. The Doctrine of Cumulative Error and Mr. Holder's Case

Based on the cases above that the State has relied on in asserting that there should be no "cumulation of error" in Mr. Holder's case, we contend that the cases show the exact opposite and support the finding that Applicant was prejudiced in his original trial due to ineffective assistance of counsel, and as a result should receive a new trial.

Unlike the two cases mentioned above, the post-conviction relief court in Applicant's case found two out of his five claims of ineffective assistance of counsel to have merit. In the Fisher case, there was never any finding by a post-conviction relief court that his claims that trial counsel was ineffective had any merit, while in the Smalls case, the court specifically notes that normally they would remand to a post-conviction relief court for a ruling on the issues, but they made the ruling on prejudice themselves here. *See* Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998); *see also* Smalls v. State, 422 S.C. 174, 194-195 (2018).

The fact that a post-conviction relief court found two or Mr. Holder's claims to have merit, automatically make this case distinctly different from the ones the State relies on for their argument. Additionally, the evidence against the Defendants in the other two cases was significantly more than was offered against Mr. Holder at his trial. Under the

two-pronged test set out by Strickland v. Washington, Mr. Holder successfully showed that (1) deficient performance and (2) prejudice with relation to at least two of his claims. *See* Strickland v. Washington, 466 U.S. 668 (1984). Therefore, it is not improper for a court to take both of the claims that Applicant succeeded on showing deficient trial counsel performance and weigh their prejudicial effect against the outcome to determine the confidence of the trial was undermined by the errors.

While it is true that it is unsettled whether South Carolina acknowledges the doctrine of cumulative error, there is evidence based on the holding in Smalls v. State that the South Carolina Courts are open to using the doctrine when it applies. Even though the terms "cumulative error" or "accumulation of error" are not specifically used in Smalls, the sentiment is clearly there based on the Courts holding.

As mentioned previously, the Fisher case does have specific language stating "[t]o the extent that this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now." Fisher, 163 F.3d 835, 852 (4th Cir. 1998). That being said, this is followed by an illuminating footnote that specifies,

> "Fisher relies, in part on cases considering the cumulative effect of matter actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the actual constitutional errors that *individually have been found to be harmless, and therefore not reversible*, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless."

Id. at 853, fn. 9 (emphasis added).

This brings us back to our main argument, that due to the fact Mr. Holder had two successful claims that his trial counsel was constitutionally ineffective does mean they are each to be viewed individually when considering whether or not he was prejudiced at trial. The claims that trial counsel was ineffective in not preserving its objection to the state's questions about sexuality for direct appellate review and not objecting to the unconstitutional jury instructions regarding the "no corroboration" language should be taken in account together when viewing the fairness and justness of Applicant's original trial. When these claims are coupled with the relatively little evidence offered by the state, it is our belief that Applicant should indeed be granted a new trial either under the totality of the circumstances or the doctrine of cumulation of error.

Applicant was unduly prejudiced at his trial based on his ineffectiveness of trial counsel, and as a result he should be granted a new trial.

III. CONCLUSION

WHEREFORE, Applicant respectfully requests that the Court uphold its Order of Dismissal, which is attached to this motion, so as to find Applicant has successfully demonstrated that trial counsel was constitutionally ineffective with regards to claims this Court found for Applicant in its Order of Dismissal and to grant Applicant any further relief as this Court finds just and proper.

Respectfully submitted,

R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
SC Bar No.: 15584
11 North Irvine Street, Suite 11
Greenville, SC 29601

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Date: 12/3/2025

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jonathan Matthew Holder, #364105, Applicant,	)	Case No. 2018-CP-39-576
v.	)	**RESPONDENT'S POST-HEARING BRIEF**
State of South Carolina, Respondent.	)	

A hearing on the State's ("Respondent") motion to alter or amend the judgment was held over Webex before the Honorable Edward W. Miller on November 30, 2020. Jonathan Matthew Holder ("Applicant") was represented by R. Mills Ariail, Jr., Esquire, and the undersigned represented Respondent. At the conclusion of that hearing, the Court agreed to allow the parties to submit post-hearing briefs to address the question of whether the doctrine of cumulative errors is applicable in Applicant's case. Respondent would show as follows:

I. Applicant should not now be allowed to raise an argument based upon the doctrine of accumulated errors

As an initial matter, Respondent objects to Applicant's introduction of the doctrine of cumulative into this case during the hearing on Respondent's motion to alter or amend. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Applicant did not raise the doctrine in his argument at the evidentiary hearing, and should not be allowed to do so now.

II. This Court should not apply the doctrine because it has not been recognized in the appellate courts of this State

Applicant's failure to raise this argument earlier notwithstanding, this Court should not endorse the doctrine of cumulative errors as a basis for salvaging the grant of post-conviction relief to Applicant. Our appellate courts have defined the doctrine through their application of it in the context of direct appeals. The doctrine affords relief to a party when a combination of errors that are insignificant by themselves prevents him from receiving a fair trial and "the cumulative effect of the errors affects the outcome of the trial." State v. Daise, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (S.C. Ct. App. 2017) (quoting State v. Beenkman, 405 S.C. 225, 746 S.E.2d 483 (S.C. Ct. App. 2013)). In order to merit the reversal of his conviction based on the doctrine, an appellant must demonstrate "more than error." State v. McEachern, 399 S.C. 125, 149, 731 S.E.2d 604, 616 (S.C. Ct. App. 2012) (citing State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)). The errors must adversely affect the appellant's right to a fair trial, not merely deprive him of a trial that is perfect. Id.

But our appellate courts have not recognized the doctrine in the context of evaluating post-conviction relief claims that a defense attorney rendered constitutionally ineffective assistance to his client. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether

individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed individually by post-conviction relief courts, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors.").

Our courts are not alone in declining to recognize the doctrine. United States v. Thomas, 724 F.3d 632, 648 (5th Cir. 2013) (instructing that "there is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in Strickland[v. Washington, 466 U.S. 668 (1984)]," and rejecting an argument that the post-conviction relief applicant was entitled to relief based upon the doctrine if, as the applicant argued, the other three alleged errors did not rise to the level of the ineffective assistance of counsel) (citing Strickland, at 689 ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . . The purpose is simply to ensure that criminal defendants receive a fair trial.")); Kennedy v. Kemna, 666 F.3d 472 (8th Cir. 2012) (stating that precedent in the Eighth Circuit forecloses a claim that the cumulative effect of trial counsel's errors should be considered when evaluating prejudice in post-conviction relief cases); Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005) (rejecting the petitioner's arguments that he was entitled to a writ of habeas corpus due to cumulative trial errors, instructing that "not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief," and expressly repudiating two of the Sixth Circuit's own unpublished opinions that stated that a reviewing court may consider

cumulative error in capital cases); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court's denial of habeas relief, explicitly holding that claims of the ineffective assistance of counsel are not to be reviewed collectively); State v. Ball, -- So.3d --, 2020 WL 6883305 at *8 (La. Nov. 24, 2020) (Memorandum) (finding that the claim of a post-conviction relief petitioner that cumulative error required reversal warranted little consideration because the court had never endorsed the theory of cumulative errors and restating the principle that the accumulation of errors that did not resulted in prejudice does not entitled a defendant to relief by repeating that "twenty times zero is zero.") (citations omitted); Allen v. State, 261 So.3d 1255, 1272 (Fla. 2019) (finding the petitioner's subclaim that the "cumulative impact of the alleged errors deprived her of her right to a fair trial" failed because the petitioner failed to prove error as to the other claims and each of the other claims was meritless or procedurally barred) (citations omitted).

III. Even if the Court applies the doctrine, it does not offer a basis upon which the grant of post-conviction relief should remain in effect

Even if the doctrine is applied in this case, which would be a first in this State in the post-conviction relief context, it offers no benefit to Applicant. This Court granted post-conviction relief to Applicant as to two claims, that Applicant's trial counsel was constitutionally ineffective for: (1) failing to preserve for appellate review the issue of the assistant solicitor's asking Applicant on cross-examination whether he was gay and liked young boys and (2) failing to object to the jury instruction that the victim's testimony did not need to be corroborated. The undersigned has argued before this Court that the Court should reverse its grant of post-conviction relief as to those two claims, and continues to rely upon that argument now. As to the first claim noted above, trial

counsel objected to the questions and moved for a mistrial, but did not object further when the trial court gave a curative instruction but denied the motion for a mistrial. Trial counsel was not constitutionally ineffective because he properly object to the questions and did not pursue the matter further in preserving the issue for appeal after the curative instruction because he believed Applicant had received the most relief he could have expected, and because it is quite unlikely the appellate courts would have reversed since the trial court gave an adequate curative instruction and is given deference in these situations. As to the second claim, trial counsel was not constitutionally ineffective for not objecting to the jury instruction because our appellate courts had affirmed the giving of the instruction for decades, doing so just months before Applicant's trial. In both of these situations, Applicant has failed to prove deficiency in trial counsel's performance and resulting prejudice.

If, as this Court seemed to recognize during the recent hearing, Applicant has failed to prove that, with regard to each of these claims, trial counsel's performance fell below "an objective standard of reasonableness" and that there is a reasonable probability that, absent counsel's unprofessional errors, the outcome of trial would have been different, then there are no errors to accumulate in order to find that the doctrine of cumulative error applies. Harrington v. Richter, 562 U.S. 86, 104. This Court granted post-conviction relief to Applicant on two claims and two only. If this Court agrees now with Respondent, and reverses course on either of those two claims, the doctrine cannot apply. In this case, the doctrine has no applicability because trial counsel was not deficient in a single respect, much less "pervasive[ly]" so. Simpson, at 604, 627 S.E.2d at 710. And the doctrine would require trial counsel to have committed "several errors, which [were] independently found not to be prejudicial." Id. The doctrine requires that trial counsel not only

make some error, but that he does so multiple times. Two post-conviction relief claims that fail on both the deficiency and prejudice prongs of Strickland do not combine to equal one proven accumulated errors claim; there would have at least have to be at least two claims that succeed on the deficiency prong that, though they are not prejudicial when considered distinctly, are prejudicial when considered together.

IV. Conclusion

WHEREFORE, having made its motion to alter or amend the judgment and filed this post-hearing brief, Respondent respectfully requests that the Court alter or amend its Order of Dismissal, so as to find Applicant has failed to prove that trial counsel was constitutionally ineffective.

Respectfully submitted,

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Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
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December 8, 2020

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jonathan Matthew Holder, #364105,	)	Case No. 2018-CP-39-576
Applicant,	)	
v.	)	**ORDER GRANTING RESPONDENT'S MOTION TO ALTER OR AMEND THE JUDGMENT**
State of South Carolina,	)	
Respondent.	)	

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

This matter comes before this Court by way of a motion filed by the State ("Respondent") to alter or amend, pursuant to Rule 59(e), SCRCP, this Court's grant of post-conviction relief to Jonathan Matthew Holder ("Applicant"). For the reasons that follow, this Court grants Respondent's motion and alters or amends its Order of Dismissal so as to vacate the grant of post-conviction relief to Applicant.

PROCEDURAL HISTORY

An evidentiary hearing in this matter was held before the undersigned on October 25, 2019, at the Greenville County Courthouse. At the conclusion of that hearing, this Court issued oral findings that Applicant had proven that he was entitled to post-conviction relief based upon two claims: (1) that Applicant's trial attorney had been constitutionally ineffective for failing to object to the jury instruction that the victim's testimony did not need to be corroborated and (2) that Applicant's trial attorney had been constitutionally ineffective for failing to preserve for appellate review his objection to and motion for a mistrial over the assistant solicitor's asking Applicant on cross-examination whether Applicant was gay and liked young boys. After considering the proposed orders that both parties submitted at this Court's request, this Court issued the Order of Dismissal on July 16, 2020. The Order of Dismissal was filed on July 20, 2020, and served on the

parties by the Pickens County Clerk of Court by email on July 21, 2020.

Respondent filed a timely motion to alter or amend the judgment on July 23, 2020. The parties again appeared before this Court by Webex on November 30, 2020, for a hearing on Respondent's motion. At the conclusion of that hearing, the parties submitted post-hearing briefs to this Court addressing the question of whether the doctrine of cumulative errors is applicable in this matter. On December 15, 2020, Applicant filed a return to Respondent's motion to alter or amend the judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent filed a motion to alter or amend the judgment on July 23, 2020. Respondent argued therein that this Court should alter or amend the judgment with regards to its finding that Applicant proved that his attorney had been constitutionally ineffective for failing to object to the jury instruction that the victim's testimony did not need to be corroborated because the jury instruction was acceptable at the time of Applicant's trial, trial counsel was not required to be clairvoyant by objecting to a jury instruction that would not be found to be improper by our appellate courts until after the conclusion of Applicant's trial, and Applicant did not offer prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected to the instruction. With regard to this Court's finding that Applicant proved that his trial attorney had been constitutionally ineffective for failing to preserve for appellate review his objection to and motion for a mistrial over the assistant solicitor's asking Applicant on cross-examination whether Applicant was gay and liked young boys, Respondent argued this Court should alter or amend the judgment because trial counsel made the reasonable and strategic decision not to object further, believing the curative instruction given by the trial court was the best relief Applicant could have expected, and Respondent failed to prove that there is a reasonable

likelihood that Applicant's convictions would have been reversed on appeal had the issue been preserved for appellate review.

Applicant is not entitled to post-conviction relief with respect to his claim that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim's testimony did not need to be corroborated.

This Court finds Applicant is not entitled to post-conviction relief with respect to Applicant's claim that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim's testimony did not need to be corroborated. This Court's previous finding that trial counsel's performance was deficient when trial counsel did not object to the instruction is in error because the Court failed properly to take into account that it is not a reqnired component of constitutional effectiveness that a criminal defense attorney be the trailblazer in the courts' overturning of controlling precedent or predict future changes in the law. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Section 16-3-675 of the South Carolina Code provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658," which includes the offenses for which Applicant was tried and convicted. Our appellate courts held repeatedly for more than two decades before Applicant's trial that it was not error for a trial court to instruct the jury, in accordance with the statute, that the testimony of a victim in a trial for the offense of criminal sexual conduct with a minor did not need to be corroborated. In State v. Schumpert, the South Carolina Supreme Court found that the trial court had not committed reversible error when it instructed the jury that the victim's testimony did not need to be corroborated according to state law because the defendant was being tried for criminal sexual conduct with a minor, and the Supreme Court noted that the trial court instructed the jury that:

> [I]t could believe any single witness over several, it was the sole judge of the facts, [the court] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt."

312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993). In State v. Rayfield, the Supreme Court held that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated, citing the aforementioned statute. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006). In that case, the Supreme Court held that a trial court did not have to instruct the jury on the statute, but, if a court does so, it should instruct the jury without unduly emphasizing the single charge and should ensure that the jury instructions as a whole comport with the law. Id. at 117-18, 631 S.E.2d at 250. Rayfield's trial court had instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness . . . ." Id. at 118, 631 S.E.2d at 250. The South Carolina Court of Appeals, following the Supreme Court's lead, reaffirmed the propriety of the jury instruction approximately four years before Applicant's trial, in State v. Orozco, when it found the trial court had properly instructed Orozco's jury that the victim's testimony did not need to be corroborated, the State had the burden of proof beyond a reasonable doubt, the jury had the duty to find facts and determine witness credibility, and the jury should disregard any indications from the trial court as to whether the court believed certain facts to be true or untrue. 392 S.C. 212, 223-25, 708 S.E.2d 227, 232-34 (S.C. Ct. App. 2011). That same year, the Court of Appeals again reaffirmed the propriety of the instruction in State v. Hill when it found that the trial court did not err by giving the instruction to Hill's jury. 394 S.C. 280, 297-300, 715 S.E.2d 368, 378-79 (S.C. Ct. App. 2011). In January of 2015, about four months before Applicant's, trial, the South Carolina Court of Appeals issued an unpublished opinion finding the trial court had not committed reversible error in giving the jury instruction because the instruction had not been unduly emphasized and the jury instructions, as a whole,

complied with the law. State v. Stukes, Op. No. 2015-UP-014 (S.C. Ct. App. filed Jan. 14, 2015) (per curiam).

Then, on May 4, 2016, approximately one year after Applicant's trial, the Supreme Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), reversing the Court of Appeals and overruling the aforementioned cases to the extent that they condoned the giving of the corroboration jury instruction; the Supreme Court also found that the trial court erred in instructing the jury that the victim's testimony did not need to be corroborated, found that the trial court's error was not harmless, and remanded for a new trial. Stukes, at 500, 787 S.E.2d at 483.

When charging the jury during Applicant's criminal trial, the trial court instructed as follows:

> As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt."

Transcript 348. Trial counsel did not object to that instruction and testified at the PCR hearing before this Court that, at the time of Applicant's trial, he was not aware of any issues with the instruction that would have made it objectionable. Applicant was tried and convicted in May 2015. That was about twenty-two years after Schumpert, nine years after Rayfield, four years after Orozco and Hill, and about four months after the Court of Appeals' opinion in Stukes. Going by the applicable case law at the time of Applicant's trial, trial counsel was correct that the jury instruction given at trial was not improper.

This Court amends its Order of Dismissal to take into account the fact that the Supreme Court's holding in Stukes should not be used to gauge the proficiency of trial counsel's conduct when Stukes reversed a long-applied holding in this state. Not only was the corroboration instruction proper during Applicant's trial, according to the controlling case law at the time, but the Supreme Court did not grant Stukes' petition for a writ of certiorari to review the issue until

approximately two months after Applicant's trial.[1] Furthermore, the Supreme Court granted Stukes' petition because the Court of Appeals had affirmed Stukes' conviction, finding that the instruction had been properly given. At the time of Applicant's trial, trial counsel was acting within the scope of professional competence by not objecting to the trial court's corroboration instruction. Even Applicant admits on page two of his return to Respondent's motion to alter or amend the judgment that the jury instruction was a correct statement of law at the time of trial.[2] This Court's previous finding to the contrary effectively required trial counsel to be clairvoyant, anticipating that the instruction would be held to be improper in the future despite the fact that the appellate courts had explicitly held the instruction to be proper decades before Applicant's trial and had reaffirmed that holding shortly before Applicant's trial. Not only did that finding hold trial counsel to the standard of a clairvoyant, but it ran afoul of the Supreme Court's instruction that the new holding it articulated in Stukes was not to be effective in post-conviction relief actions. Stukes, at 500, 787 S.E.2d at 483, n.5 (providing that the Supreme Court's "ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction

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[1] Applicant argues in his return to Respondent's motion to alter or amend the judgment that Respondent's reliance upon the Supreme Court's bolding in Rayfield is misplaced because then-Justice Pleicones's dissent in that case became the basis of the Court's opinion in Stukes. It is never improper for a party to rely upon the Supreme Court's holding in a majority opinion. A dissenting opinion, of course, is not binding authority. "The majority opinion shows what is the law, and the dissenting opinion shows what is not the law." State v. Batson, 107 S.C. 460, 93 S.E. 135 (1917); see Bailey v. U.S. Fidelity & Guaranty Co., 185 S.C. 169, 193 S.E. 638, 640 (an opinion of a justice who concurred in the result only does not having binding force or effect).

[2] Applicant argues in his return to Respondent's motion to alter or amend the judgment that the instruction, though proper, could have confused or mislead the jury. This is a new argument from Applicant that was not made in the pleadings, was not raised before this Court at the evidentiary hearing, and was not addressed in this Court's Order of Dismissal. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Therefore, this Court will not consider that argument now.

relief."). The Court's finding that Applicant demonstrated that trial counsel's performance was deficient when he failed to object to the corroboration charge did not take into account the fact that trial counsel was not required by the Sixth Amendment or the Supreme Court's opinion in Stukes to object to the instruction at the time of Applicant's trial. Now that this Court is taking that into account, its previous finding is now altered. This Court now finds that Applicant has failed to prove that trial counsel's performance with respect to the jury instruction was deficient.

In addition, this Court reverses its finding that Applicant demonstrated that the outcome of his appeal would have been different had trial counsel objected to the jury instruction. Applicant offered no proof that he suffered prejudice from trial counsel's not objecting to the instruction, and merely speculated that his convictions would have been reversed on appeal had the objection been made.

Applicant is not entitled to post-conviction relief with respect to his claim that trial counsel was constitutionally ineffective for not preserving for appellate review his objection

This Court finds Applicant is not entitled to post-conviction relief with respect to Applicant's claim that trial counsel was constitutionally ineffective for not preserving for appellate review trial counsel's objection to and motion for a mistrial over the assistant solicitor's asking Applicant on cross-examination whether Applicant was gay and liked young boys. During his cross-examination of Applicant at trial, the following exchange occurred:

Q: So are you gay?
A: No.
Q: Are you interested in young boys?
A: No.

Transcript 296-97. Trial counsel object to the questions, and that objection was sustained by the trial court. Transcript 297. Trial counsel moved for a mistrial, arguing the questions and answers were irrelevant, highly prejudicial to Applicant, and without any foundation in the

evidence admitted at trial. The trial court denied trial counsel's motion for a mistrial, but cautioned the assistant solicitor not to "have another episode like that," and issued a strongly worded curative instruction to the jury, which was as follows:

> Members of the jury panel, shortly before you went out, the—[assistant solicitor] asked the witness whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.
>
> So please disregard the fact that the question was asked. [Applicant] answered it no, so you can disregard that, too. But just disregard—that's not an issue in this case to any degree whatsoever. So disregard the fact that the question was asked.

Transcript 300-02. Trial counsel did not argue the issue any further or object to the sufficiency of the curative instruction. Trial counsel testified at the PCR hearing that he did not object further because he believed the curative instruction would he the best relief that Applicant could have reasonably expected. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam) (citing State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.")).

When an issue was unpreserved for direct appellate review, a PCR court is to examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's

ruling through the same lens that would be applied on appeal . . . ") (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that his convictions would have been reversed on appeal even if trial counsel had objected to the trial court's curative instruction on the basis that the instruction was inadequate to cure the prejudicial effect of the assistant solicitor's questions, thus preserving the issue for appellate review. In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial court, and a trial court's ruling in regard to a mistrial motion will not be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (citations omitted)). Abuses of discretion occur where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010). However, the "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no

other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Ferguson, 376 S.C. 615, 618–19, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct.App.2007)); see also State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." (citations omitted)).

The trial court's curative instruction cured any error or potential prejudice from the assistant solicitor's two, brief, successive questions. The trial court immediately issued a curative instruction once the jury returned to the courtroom, and told the jury to disregard the questions and answers altogether. There was no more mention of Applicant's sexuality in the two-day trial. With the curative, Applicant was not entitled to a mistrial. Applicant has failed to show that the trial court abused its discretion in denying trial counsel's motion for a mistrial and that the appellate courts would have reversed had they reviewed the issue.[3]

Having considered the prejudice prong of Strickland, this Court also finds that Applicant has failed to prove any deficiency in trial counsel's performance with respect to his decision not to object to the issue further after the trial court gave the curative instruction. Trial counsel's assessment was that there was no need to object further because to do so would have yielded no benefit to Applicant. That was a sound assessment in light of this Court's findings that the issue would not have resulted in a reversal of Applicant's convictions. It would have been merely an exercise in futility for trial counsel to press the issue, and such exercises are not required by the Sixth Amendment's guarantee of the effective assistance of counsel.

[3] Notably, Applicant believed that the assistant solicitor's questions would have turned those in the courtroom against the State, not against Applicant himself, because everyone recognized that the questions were inappropriate.

The theory of cumulative errors does not offer a basis upon which this Court's previous grant of post-conviction relief to Applicant should remain in effect.

This Court finds that, as a threshold matter, Applicant is not allowed to argue now in response to Respondent's motion to alter or amend the judgment that the theory of cumulative errors is applicable. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Applicant did not raise the doctrine in his argument at the evidentiary hearing. He is therefore barred from doing so now.

Applicant's failure to raise this argument earlier notwithstanding, the doctrine of cumulative errors is not a basis for salvaging the grant of post-conviction relief to Applicant. Our appellate courts have defined the doctrine through their application of it in the context of direct appeals. The doctrine affords relief to a party when a combination of errors that are insignificant by themselves prevents him from receiving a fair trial and "the cumulative effect of the errors affects the outcome of the trial." State v. Daise, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (S.C. Ct. App. 2017) (quoting State v. Beenkman, 405 S.C. 225, 746 S.E.2d 483 (S.C. Ct. App. 2013)). In order to merit the reversal of his conviction based on the doctrine, an appellant must demonstrate "more than error." State v. McEachern, 399 S.C. 125, 149, 731 S.E.2d 604, 616 (S.C. Ct. App. 2012) (citing State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)). The errors must adversely affect the appellant's right to a fair trial, not merely deprive him of a trial that is perfect. Id.

But our appellate courts have not recognized the doctrine in the context of evaluating post-conviction relief claims that a defense attorney rendered constitutionally ineffective assistance to his client. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v.

Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed individually by post-conviction relief courts, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors.").

Our courts are not alone in declining to recognize the doctrine. United States v. Thomas, 724 F.3d 632, 648 (5th Cir. 2013) (instructing that "there is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in Strickland[v. Washington, 466 U.S. 668 (1984)]," and rejecting an argument that the post-conviction relief applicant was entitled to relief based upon the doctrine if, as the applicant argued, the other three alleged errors did not rise to the level of the ineffective assistance of counsel) (citing Strickland, at 689 ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . . The purpose is simply to ensure that criminal defendants receive a fair trial.")); Kennedy v. Kemna, 666 F.3d 472 (8th Cir. 2012) (stating that precedent in the Eighth Circuit forecloses a claim that the cumulative effect of trial counsel's errors should be considered when evaluating prejudice in post-conviction relief cases); Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005) (rejecting the petitioner's arguments that he was entitled to a writ of habeas corpus due to

cumulative trial errors, instructing that "not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief," and expressly repudiating two of the Sixth Circuit's own unpublished opinions that stated that a reviewing court may consider cumulative error in capital cases); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court's denial of habeas relief, explicitly holding that claims of the ineffective assistance of counsel are not to be reviewed collectively); State v. Ball, -- So.3d --, 2020 WL 6883305 at *8 (La. Nov. 24, 2020) (Memorandum) (finding that the claim of a post-conviction relief petitioner that cumulative error required reversal warranted little consideration because the court had never endorsed the theory of cumulative errors and restating the principle that the accumulation of errors that did not resulted in prejudice does not entitled a defendant to relief by repeating that "twenty times zero is zero.") (citations omitted); Allen v. State, 261 So.3d 1255, 1272 (Fla. 2019) (finding the petitioner's subclaim that the "cumulative impact of the alleged errors deprived her of her right to a fair trial" failed because the petitioner failed to prove error as to the other claims and each of the other claims was meritless or procedurally barred) (citations omitted). This Court finds the doctrine is not recognized in South Carolina and is therefore not applicable to this case.

Even if the doctrine is applicable, it offers no benefit to Applicant. This Court granted post-conviction relief to Applicant as to two claims. Because this Court agrees with Respondent's argument and grants its motion to alter or amend the judgment, this Court finds that Applicant has failed to prove that there were errors to accumulate. As to the first claim upon which post-conviction relief was granted, this Court has found herein that Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim's testimony did not need to be corroborated. As to the second claim upon which post-

conviction relief was granted, this Court has found herein that Applicant failed to prove that trial counsel was constitutionally ineffective for not preserving for appellate review the issue of the assistant solicitor's asking Applicant on cross-examination whether he was gay and liked young boys. With regard to both of the claims, Applicant has failed to prove deficiency in trial counsel's performance and resulting prejudice.

Applicant has failed to prove, with regard to each of these claims, that trial counsel's performance fell below "an objective standard of reasonableness" and that there is a reasonable probability that, absent counsel's unprofessional errors, the outcome of trial would have been different. Harrington v. Richter, 562 U.S. 86, 104. There are, therefore, no errors to accumulate in order to find that the doctrine of cumulative error applies and is a basis upon which post-conviction relief should be awarded. This Court granted post-conviction relief to Applicant on two claims and two only. Since this Court agrees now with Respondent, and reverses course in its findings with regard to both of the claims, the doctrine cannot apply. In this case, the doctrine has no applicability because trial counsel was not deficient in a single respect, much less "pervasive[ly]" so. Simpson, at 604, 627 S.E.2d at 710. The doctrine, if recognized in South Carolina, would require trial counsel to have committed "several errors, which [were] independently found not to be prejudicial." Id. The doctrine requires that Applicant prove that trial counsel not only made some error, but that he did so multiple times. Two post-conviction relief claims that fail on both the deficiency and prejudice prongs of Strickland do not combine to equal one proven cumulative errors claim; there would have at least have to be at least two claims that succeed on the deficiency prong that, though they are not prejudicial when considered distinctly, are prejudicial when considered together. Applicant has not proven that such circumstances exist.

CONCLUSION

After having considered Respondent's motion to alter or amend the judgment, Applicant's return to the motion to alter or amend, the parties' arguments at the hearing on Respondent's motion to alter or amend, and the parties' post-hearing briefs, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court previously denied the application for post-conviction relief with respect to all claims but two; now, this Court alters or amend its judgment so as to find that Applicant has failed to prove that he is entitled to post-conviction relief as to any of his claims because he has failed to prove that trial counsel was constitutionally ineffective.

IT IS THEREFORE ORDERED:

1. Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP, is granted;
2. This Court's previous grant of post-conviction relief to Applicant with respect to two of Applicant's claims is vacated, and the findings of fact and conclusions of law presented herein are the basis for this Court's decision now that the application for post-conviction relief is denied and dismissed with prejudice with regard to all claims; and
3. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

CLERK OF COURT
GREENVILLE COUNTY
SOUTH CAROLINA
2021 JAN -5 P 4:14

AND IT IS SO ORDERED this 5 day of January, ~~2020.~~ 2021

The Honorable Edward W. Miller
Presiding Judge

Greenville, South Carolina

WITNESSES

Samuel Byers

Pickens Police Department

2/7/2013

ARREST WARRANT NUMBER

Ref 2013A3920700016

ACTION OF GRAND JURY

TRUE BILL

Date MAY 12 2015

Foreperson of Grand Jury

VERDICT

GUILTY

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-39-957

SBT

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

MAY 12 2015 **TERM 2013**

THE STATE

vs.

JONATHAN MATTHEW HOLDER

Amended Indictment for

0397

CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE (14-15)

VIOLATION § 16-03-0655(B)(2)

Certified Copy
Clerk of Court
Pickens County, SC
Dated MAY 12 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

AMENDED INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE
(14-15)

At a Court of General Sessions, convened on MAY 12 2015 the Grand Jurors of Pickens County present upon their oath:

That JONATHAN MATTHEW HOLDER did in Pickens County, between the dates of April, 2012 and June, 2012, engage in sexual battery with Minor 1, who was at least fourteen years of age but who was less than sixteen years of age, and that he did so in a position of familial, custodial, or official authority to coerce the victim to submit, and/or he was older than the victim. This is in violation of § 16-3-655(B)(2) [formerly 16-3-655(3)] of the South Carolina Code of Laws (1976) as amended.

Certified Copy
Harold P. Wellborn
Clerk of Court
Pickens County, SC
Dated May 2018

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

Samuel Byers

Pickens Police Department

2/7/2013

ARREST WARRANT NUMBER

Ref 2013A3920700018

ACTION OF GRAND JURY

TRUE BILL

Date MAY 12 2015

Foreperson of Grand Jury

VERDICT

GUILTY

Jeff G. Kelly

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-39-958

SBT

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

MAY 12 2015 **TERM 2013**

THE STATE

vs.

JONATHAN MATTHEW HOLDER

Amended Indictment for

3661

CRIMINAL SEXUAL CONDUCT WITH A MINOR 3RD DEGREE

VIOLATION § 16-03-0655(C)

Certified Copy
Harold P. Williams
Clerk of Court
Pickens County, SC
Dated May 2015

626

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

AMENDED INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR 3RD DEGREE

At a Court of General Sessions, convened on MAY 1 2 2015 the Grand Jurors of Pickens County present upon their oath:

That JONATHAN MATTHEW HOLDER did in Pickens County, between the dates of April, 2012 and June, 2012, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of Minor 1, a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-03-0655(C) of the South Carolina Code of Laws (1976) as amended.

Certified Copy
Harold P. Wallace
Clerk of Court
Pickens County, SC
Dated May 2018

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Pickens)
STATE VS.)
Jonathan Matthew Holder)
AKA:)
Race: Sex: M Age: 33)
DOB: [redacted]-1982 SS#: [redacted])
Address: [redacted])
City,State,Zip: Easley, SC 29642)
DL#: [redacted] SID#:)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS3900957
A/W#: 2013A3920700016
Date of Offense: 5/27/2012
S.C. Code § : 16-03-0655(C)
CDR Code #: 0397

SENTENCE SHEET

C-20

#1

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor, or Attempt - victim under 16 years of age - Second degree

in violation of § 16-03-0655(C) of the S.C. Code of Laws, bearing CDR Code # 0397
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Tooker, Sam	70997			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 10 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS: Sex OFFENDER Registry

☐ **RESTITUTION:** ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$590	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning
$ _____ paid to Public Defender Fund
Other: _____

Certified Copy
Clerk of Court
Pickens County, SC
Dated May 2018

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Harold P. Williams
Court Reporter: Vivian Cross
Presiding Judge: John C. Hayes
Judge Code: 2079
Sentence Date: 5/21/18

SCCA/217 (03/2011)

628.

STATE OF SOUTH CAROLINA)
COUNTY OF Pickens)
STATE VS.)
Jonathan Matthew Holder)
AKA:)
Race: Sex: M Age: 33)
DOB: [redacted]-1982 SS#: [redacted])
Address: [redacted])
City,State,Zip: Easley, SC 29642)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS3900958
A/W#: 2013A3920700018
Date of Offense: 5/27/2012
S.C. Code § : 16-03-0655(C)
CDR Code #: 3661

SENTENCE SHEET #2

O-15

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor, 3rd degree - Commit/Attempt Lewd act (victim under 16 yrs & actor over 14 yrs)

in violation of § 16-03-0655(C) of the S.C. Code of Laws, bearing CDR Code # 3661
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: SAM TOOKER

Tinsley Brandi Peterson	78999			
SC Bar#	Defendant	Attorney for Defendant	SC Bar#	

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 10 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____ 5/21/15
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

Certified Copy
Clerk of Court
Pickens County, SC
Dated May 2018

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Harold P. Wellman
Court Reporter: Vivian Cross
Presiding Judge Jerry C Vaughn
Judge Code: 2069
Sentence Date: 5/21/15

SCCA/217 (03/2011)