

STATE OF SOUTH CAROLINA

**ORIGINAL**

IN THE SUPREME COURT

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Certiorari to Beaufort County

**RECEIVED**

Honorable Thomas A. Russo, Circuit Court Judge

**FEB 18 2020**

**S.C. SUPREME COURT**

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ARTHUR FRANKLIN SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001196

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PETITION FOR WRIT OF CERTIORARI

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**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to object to Investigator Florencio’s testimony that he had been told by the alleged victim and his aunt that petitioner was the perpetrator of the sexual abuse, since this testimony was highly prejudicial hearsay, trial counsel erroneously believed it was within a hearsay exception, and the PCR court’s erred as a matter of law by ruling it was harmless error as cumulative to the testimony of the two *State v. Lyle* witnesses who claimed petitioner also sexually abused them..... 5

Introduction..... 5

Relevant Facts..... 6

Discussion..... 9

CONCLUSION..... 12

### **ISSUE PRESENTED**

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to object to Investigator Florencio's testimony that he had been told by the alleged victim and his aunt that petitioner was the perpetrator of the sexual abuse, since this testimony was highly prejudicial hearsay, trial counsel erroneously believed it was within a hearsay exception, and the PCR court's erred as a matter of law by ruling it was harmless error as cumulative to the testimony of the two State v. Lyle witnesses who claimed petitioner also sexually abused them?

## STATEMENT

Petitioner was indicted at the September 25, 2003 term of the Beaufort County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree, pursuant to S.C. Code § 16-3-655 (A.) App. 282-283. Petitioner was convicted after a jury trial held before the Honorable Jackson V. Gregory. Judge Gregory granted the defense motion for a new trial on the basis that the alleged victim's aunt, Solak, coached him while he testified. The Court of Appeals found that the defense did not waive its right to request a mistrial where it did not contemporaneously object to the aunt's coaching of the alleged victim at trial. The Court of Appeals affirmed Judge Gregory's grant of a new trial. See State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (2007).

This Court then held that the state did not have the right to appeal the trial judge's decision to grant petitioner a new trial, and therefore vacated the opinion of the Court of Appeals. State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009).

Petitioner's case was again called for trial – this time before the Honorable Roger M. Young, Sr., and a jury on September 19, 2011. Gail Lovell represented petitioner. James Bannon was the assistant solicitor. App. 1.

On September 21, 2011, the jury found petitioner guilty. App. 201, ll. 10-13. Judge Young sentenced appellant to thirty years imprisonment. App. 214, ll. 17-19.

On appeal, the Court of Appeals, 2-1, held that the trial judge erred by overruling defense counsel's objection to Forensic Interviewer Twitty testimony that the alleged victim identified petitioner as the perpetrator of the abuse. However, the Court found the error was not reversible because it was cumulative to other testimony. See State v. Smith, 411 S.C. 161, 169-70, 767 S.E.2d 212, 217 (Ct.App. 2014). This Court denied certiorari on June 17, 2015.

Petitioner then filed an application for post-conviction relief on January 29, 2016. App. 217-223. Petitioner alleged ineffective assistance of trial counsel for “failure to timely object and move for mistrial.” App. 219.

The state filed a return, requesting an evidentiary hearing, dated June 6, 2016. App. 224-229. The evidentiary hearing was convened on October 10, 2017 before the Honorable Thomas A. Russo. James Falk represented petitioner. Ruston Neely was the assistant attorney general. App. 231. With consent, petitioner amended his PCR application to allege that trial counsel was ineffective for failing to object to Investigator Florencio’s hearsay testimony that petitioner had been identified as the perpetrator of the sexual abuse.<sup>1</sup> App. 234, l. 18 – 236, l. 13.

At the conclusion of the hearing, Judge Russo took the matter under advisement. App. 273, ll. 7-10. An order of dismissal was thereafter filed on July 12, 2019. App. 275-281. The order concluded that defense counsel was not ineffective for failing to object to Investigator Florencio’s [inadmissible testimony] that petitioner had been identified as the perpetrator of the sexual abuse. The PCR court reasoned that petitioner could not prove the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), even if there were error in the failure to object to Florencio’s testimony, because the alleged victim’s brother and sister also testified that petitioner sexually abused them. App. 279-280. Thus, the PCR court reasoned, the error was harmless because Investigator Florencio’s hearsay testimony that petitioner had been identified as the perpetrator of the sexual abuse was cumulative to the testimony of the brother and sister of the alleged victim that petitioner also sexually abused them. As argued infra, this was an error law.

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<sup>1</sup> The Assistant Attorney General cited to the Record on Appeal rather than the trial transcript during the PCR hearing which was confusing since the entire trial transcript is used on PCR, and is in the appendix filed with this Court. The objectionable hearsay testimony appears at App. 56, ll. 12-18. The supplemental appendix on file with this Court contains the State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), arguments.

From this order, petitioner is seeking a writ of certiorari, pursuant to Rule 243, SCACR.

## ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to object to Investigator Florencio's testimony that he had been told by the alleged victim and his aunt that petitioner was the perpetrator of the sexual abuse, since this testimony was highly prejudicial hearsay, trial counsel erroneously believed it was within a hearsay exception, and the PCR court's erred as a matter of law by ruling it was harmless error as cumulative to the testimony of the two *State v. Lyle* witnesses who claimed petitioner also sexually abused them

### **Introduction**

As seen, the Court of Appeals held that Forensic Interviewer Twitty's inadmissible testimony that the alleged victim identified petitioner as perpetrator of the sexual molestation was not reversible error because it was cumulative to other evidence. See *State v. Smith*, 411 S.C. 161, 169-70, 767 S.E.2d 212, 217 (Ct.App. 2014). Petitioner has now correctly alleged defense counsel was ineffective for failing to object to Investigator Florencio's testimony that it had been "reported" to him by the alleged victim, as his aunt, Ms. Solak, that alleged victim "had been sexually assaulted by his father [petitioner]."

As argued below, the PCR court's ruling that petitioner cannot prove prejudice because Investigator Florencio's testimony was cumulative to that of the alleged victim's brother and sister who also claimed petitioner sexually abused them was erroneous as a matter of law pursuant to *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566, 20, 443 S.E.2d 566, 568 (1994) which held that "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration."<sup>2</sup>

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<sup>2</sup> Petitioner recognizes that the per se prejudice portion of *Jolly v. State* is no longer good law. This does not lessen petitioner's argument in any appreciable manner in this case.

## Relevant facts

On direct examination of Investigator Florencio at trial, the solicitor asked him what “Ms. Solak”<sup>3</sup> and the alleged victim reported to him? Florencio answered, “They were there to report that sometime during the time between May, I believe it was 2009, and June of the year 2000 (sic) that complainant had been sexually assaulted by his father [petitioner].” App. 56, ll. 12-18.

Defense counsel Lovell claimed during the PCR hearing that she did not consider this testimony to be hearsay, and therefore did not object to it. Defense counsel said, “It’s been a long time since I practiced, but I would guess my first impression would be that it’s a condition, it’s something they had recorded, *it’s medical, and it’s an exception to the hearsay [rule]. He is a police officer.* That would be my argument right now.” Tr. 241, ll. 5-11. (emphasis added).

PCR counsel essentially asked Lovell if she was referring to the hearsay exception in Rule 801(d)(1), SCRE, which allowed corroborative testimony consistent with the alleged victim’s testimony, as long as it is limited to the time and place of the incident. Defense counsel responded, “That could be one of them. If I were still active in practice, that may have been my first choice, yes.” App. 241, ll. 12-18. Although defense counsel would not admit that Florencio’s testimony identifying petitioner was prejudicial, she finally allowed: “It didn’t help the case.” App. 241, l. 5 – 243, l. 9.

Defense counsel also stated that, while she was not specific in her objection to the solicitor asking witness Lynch-Stanley whether a delay in disclosure eroded the credibility of the disclosure, she testified at PCR that she objected because “I didn’t want him bolstering” the credibility of the alleged victim. App. 244, l. 13 – 246, l. 16. Lynch-Stanley testified at trial

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<sup>3</sup> Solak was the Aunt who impermissibly coached the alleged victim during petitioner’s first trial.

after defense counsel's general objection that the delayed disclosure did not erode the credibility of the complainant. App. 170, l. 21 – 171, l. 22.

At the conclusion of her testimony, defense counsel Lovell again repeated she did not object to the testimony of Investigator Florencio that petitioner had been identified as the perpetrator of the sexual abuse because she did not believe it was hearsay.<sup>4</sup> App. 247, ll. 21-25.

As seen above, the PCR court ruled that defense counsel's failure to object to Investigator Florencio's inadmissible testimony that petitioner had been identified as the perpetrator of the abuse did not rise "to the level of error required to grant post-conviction relief." The PCR court reasoned, "In the trial of this case, the jury heard testimony not only from the victim, but from the victim's brother and sister, that applicant repeatedly sexually abused each of them separately on multiple occasions over a period of years. R.p. 107-111; p. 118-120; p. 125-129." "The Victim and his sister both specifically testified that the abuse occurred in Applicant's bedroom in his residence in Bluffton. R.p. 108; R.p. 127." App. 280.

It was error for the PCR court to rule the testimony of the alleged victim's brother and sister that petitioner had sexually abused them made any error of trial counsel's failure to object to prejudicial hearsay testimony from Investigator Florencio that petitioner had been identified as the perpetrator of the sexual abuse on the alleged victim harmless. Petitioner was on trial for sexually abusing the alleged victim, and not his brother or sister. The State v. Lyle evidence the jury could consider as to a common scheme or plan or identity evidence, if it chose to consider that evidence at all, did not make the inadmissible hearsay of the investigator that petitioner was

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<sup>4</sup> On cross-examination, Lovell told the assistant attorney general that she started practicing in Connecticut in 1995 "doing public defender work" before moving to South Carolina in 1998. In South Carolina she worked for the public defender's office and "Mr. Plexico," before then working as a solicitor, and then in private "criminal defense cases prior to my going inactive in 2011." App. 249, ll. 14-24.

reported to be the perpetrator of the sexual abuse on the alleged victim harmless. Jolly v. State, supra.

The alleged victim's brother, Joshua Smith, was twenty-two years old and a marine at the time of petitioner's trial. App. 89, l. 6-19. Joshua testified that petitioner had sexually abused him while they were living in Buffalo, New York. Joshua said the sexual abuse included sodomy and oral sex.<sup>5</sup> App. 92, l. 17 – 93, l. 14.

The alleged victim's sister, Jacquelyn Solak, was attending Marshall University studying to be a nurse practitioner at the time of trial. App. 97, l. 17 – 99, l. 9. Solak testified that, while they were living in Bluffton, South Carolina, "he [petitioner] sexually molested me." App. 100, l. 21 – 103, l. 3. Solak said the sexual abuse involved improper touching, and attempted oral sex. App. 102, l. 21 – 102, l. 15. Solak did not tell anyone she had been sexually molested by petitioner "because I was scared." App. 103, ll. 10-23.

The judge instructed the jury on State v. Lyle evidence:

You also heard evidence that the defendant committed a bad act that is not the subject of a conviction, other than the one for which the defendant is now on trial. This testimony, if you conclude is true, may only be considered by you on the question of identity or common scheme or plan and for no other reason and no other purpose. You may give this evidence the weight and value, if any, which you find it should have on the sole issue of identity or common scheme or plan.

*You must not consider the evidence of the bad act not the subject of a conviction as part of the defendant's guilt of the charge we are trying today. Again, the charge that we are trying today is criminal sexual conduct with a minor. In order for the state to prove to you beyond a reasonable doubt that the defendant engaged in criminal sexual conduct with a minor, the state must first prove*

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<sup>5</sup> This Lyle evidence, the solicitor argued went to common scheme or plan, Supp. App. 12, 11. 13-21, and it was ruled admissible as to common scheme or plan following a pre-trial hearing held on September 19, 2012 before Judge Young. Supp. App. 8, l. 17 – 41, l. 12.

*beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim.*

App. 197, l. 16 – 198, l. 8 (emphasis added).

### **Discussion**

Investigator Florencio's hearsay testimony identifying petitioner as the perpetrator of the sexual abuse upon the alleged victim was prejudicial. The PCR judge's ruling that the testimony of the Lyle witnesses, petitioner's brother and sister, that they also were sexually abused by petitioner, made the error harmless was a legal error. As seen, the judge instructed the jury that they could not consider the common scheme or plan or identity Lyle evidence as to the crime for which petitioner was on trial. It was only to be "considered by you on the question of identity or common scheme or plan and for no other reason and no other purpose. You may give this evidence the weight and value, if any, which you find it should have on the sole issue of identity or common scheme or plan." App. 197, ll. 19-24.

The PCR judge, however, respectfully did with the Lyle evidence what he specifically instructed the jury it could not do: Use the Lyle evidence as propensity evidence to conclude petitioner was guilty of the charge for which he was on trial. Ironically, propensity was one of the basis of defense counsel's objection to the brother and sister accusation evidence during the pre-trial hearing. Supp.App. 14, ll. 13-19. In short, it would have been improper for the jury to conclude that, because the defendant molested witness A and B, he probably therefore also molested the alleged victim in the case for which he was on trial.

The Court of Appeals properly held that corroborating testimony that is consistent with the declarant's testimony in a criminal sexual conduct case must be limited to the time and place of the incident under Rule 801(d)(1), SCRE. State v. Smith, 411 S.C. 161, 169, 767 S.E.2d 212, 216 (Ct.App. 2014).

The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. One of these three exceptions is the rule in a criminal sexual conduct case that when the victim testifies, evidence from other witnesses that he or she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault, excluding details or particulars of the assault. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566, 20, 443 S.E.2d 566, 568 (1994).

In Jolly, the trial judge allowed evidence from Mr. Cobb, the alleged victim's uncle, that the child made a prior statement that identified Jolly as the perpetrator. This Court held that this hearsay testimony did not fall within the corroboration hearsay exception for criminal sexual conduct cases, nor was it *res gestae*, an excited utterance, or probative rape testimony, and it also was not a prior inconsistent statement. Therefore, as in this case, it was inadmissible hearsay.

This Court in Jolly held that "improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994), *citing* State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989).

Again, petitioner recognizes that the "per se rule" that this cannot be harmless error language of Jolly v. State is no longer good law. Regardless, it was improper for the PCR court here to use the common scheme or plan or identity Lyle evidence of the alleged victim's brother and sister as corroborative cumulative evidence to conclude the hearsay improper identification error in this case was harmless.

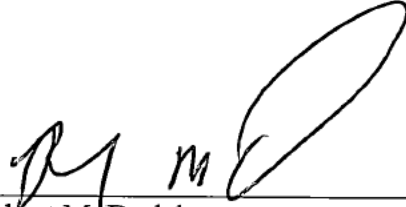
It is also worth noting that the acts constituting molestation or the sex acts alleged here as to the common scheme or plan or identity did not parallel each other, and certainly did not

establish a signature crime for purposes of the identity prong of Lyle. C.f. State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In McClellan, the defendant entered the room of each daughter, and he chose one of them, who he forced to submit, he gave the same explanation to each for his actions, and he quoted the same bible verse to each sister. The sex acts here between the brother and sister, as seen above, anal and oral sex versus improper touching were not sufficiently similar even if State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) remains good law.

In sum, the PCR court erred by finding the failure to object to investigator Florencio's hearsay testimony that petitioner had been identified as the perpetrator of the sexual abuse was harmless because of the cumulative sexual abuse testimony of the alleged victim's brother and sister that petitioner had also sexually abused them. The PCR court improperly used this improper harmless error analysis to conclude that petitioner could not prove prejudice under the second prong of Strickland v. Washington. App. 279-289.

**CONCLUSION**

By reason of the foregoing argument, a writ of certiorari should issue to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Beaufort County

Honorable Thomas A. Russo, Circuit Court Judge

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ARTHUR FRANKLIN SMITH,

PETITIONER

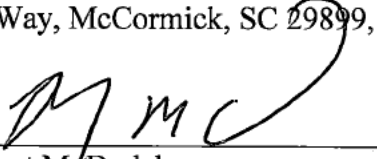
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Arthur Franklin Smith, #306393, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of February, 2020.

  
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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 18th day of February, 2020.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: December 31, 2029.