

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Aug 28 2024

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2024-00627

Dwayne C. Tallent, #357180 ,..... Petitioner,
v.
State of South Carolina,..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

September 28, 2024.

PETITION

Questions Presented

1. **DID THE PCR COURT ERR IN DENYING PETITIONER RELIEF WHERE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A CONTEMPORANEOUS OBJECTION AT THE TIME OVERLY PREJUDICIAL EVIDENCE OF OTHER BAD ACTS WAS OFFERED.**

Procedural History

Applicant is presently imprisoned in the South Carolina Department of Corrections, Broad River Correctional Institution, pursuant to orders of commitment of the Greenville County Clerk of Court. During its January of 2015 term, the Greenville County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2014-GS-23-11873). During its December 2016 term, the Grand Jury true-billed amended indictments for first-degree criminal sexual conduct with a minor (2014-GS-23-011873), second-degree criminal sexual conduct with a minor (2014-GS-23-011877), lewd act upon a child (2014-GS-23-11875), and contributing to the delinquency of a minor (2014-GS-23-011874).

On July 17-19, 2017, Applicant proceeded to a jury trial, with the Honorable Robin B. Stilwell presiding. Matthew J. Kappel represented Applicant at trial, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. At the conclusion of trial, the jury found Applicant guilty as indicted. The trial court sentenced Applicant as follows: for contributing to the delinquency of a minor, imprisonment for three years; for lewd act on a minor, imprisonment for 15 years; for second-degree criminal sexual conduct with a minor, imprisonment for twenty years; and for first-degree criminal sexual conduct with a minor, imprisonment for thirty years. All sentences were ordered to run concurrently with credit for

time served.

Trial counsel filed a timely notice of appeal. J. Falkner Wilkes ("appellate counsel") later filed a notice of appearance indicating that he would be co-counsel on appeal with trial counsel. Appellate counsel argued on appeal that the trial court erred: (1) in denying trial counsel's motion to sever the charge of contributing to the delinquency of a minor from the charges of criminal sexual conduct with a minor and lewd act on a minor; and (2) in admitting evidence of Applicant's manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine. The South Carolina Court of Appeals affirmed the convictions and sentences, finding that "[t]he trial court did not abuse its discretion in denying [Applicant's] motion to sever and in admitting evidence related to drug use and manufacturing." State v. Tallent, 430 S.C. 438, 449, 845 S.E.2d 508, 514 (Ct. App. 2020). The Court of Appeals later denied appellate counsel's petition for rehearing. The South Carolina Supreme Court then denied appellate counsel's petition for a writ of certiorari. State v. Tallent, S.C. Sup. Ct. Order filed March 9, 2021. The remittitur was issued on March 15, 2021. On February 2, 2022 Petitioner filed a petition for post-conviction relief. An evidentiary hearing was held on January 17, 2024, the Hon. R. Scott Sprouse presiding. J. Falkner Wilkes, represented the Petitioner at the PCR hearing. Assistant Attorney General W. Joseph Maye represented the State. Subsequent to the hearing the court entered an ORDER OF DISMISSAL. Notice of Appeal was timely filed. This Petition follows.

Standard of Review

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support

them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).” Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

ARGUMENT

I. **THE PCR COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF STATE V. WILES AND STATE v. MORALES.**

At the Petitioner’s criminal trial defense counsel made a pre-trial motion to exclude 404(B)¹ evidence. Ruling *in limine* the court denied the defense’s motion. Through it’s fifth and last witness the State offered the 404(B) testimony without objection from the defense. At the PCR hearing defense counsel testified that although he had intended to make a contemporaneous objection to the 404(B) testimony, he simply forgot to do so. Lacking a contemporaneous objection at the time the evidence was offered the issue as to the admissibility of the 404(B) testimony was not preserved for appeal. A ruling *in limine* is not a final ruling on the admissibility of evidence; thus an issue is not preserved for appellate review unless an objection is made at the time the evidence is offered. *See State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996).

In his PCR below Petitioner alleged that counsel’s failure to preserve the 404(B) issue for appeal constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The PCR court denied relief based on a finding that the trial court’s ruling *in limine*

¹Rule 404(b), SCRE

constituted a final ruling and thus no contemporaneous objection was required to preserve the issue for appeal. In its decision the PCR court relied on State v. Wiles², apparently for the proposition that comments by the prosecutor in opening statements, standing alone, are sufficient to find that the trial court intended its ruling *in limine* to be a final ruling. This was error.

In Wiles the trial judge clearly indicated that his ruling was a final. In its decision in Wiles the court stated: “Nonetheless, by his actions, the trial judge clearly indicated that his ruling was a final, rather than preliminary, one because he commented **to the jury** about petitioner's escape before any evidence was admitted.” State v. Wiles, 679 S.E.2d 172, 383 S.C. 151 (S.C. 2009). (*emphasis in original*). In the present case the trial judge never gave any indication that the ruling *in limine* was intended to be final, nor did he make any comment on the evidence to the jury before the evidence was admitted. Absent any indication by the trial that the ruling was intended to be final, an essential element necessary to the decision in Wiles is clearly missing in the present case. Wiles therefore is distinguishable.

The PCR court's reliance on Wiles rests solely on the prosecutor's comments about the 404(B) evidence in his opening statements. Again, Wiles remains distinguishable. While the court in Wiles considered in its analysis comments made by counsel in their opening statements, in Wiles *both* counsel appeared to have interpreted the court's ruling *in limine* as a final ruling. While the prosecutor in the Petitioner's case commented on the 404(B) evidence in opening statements, the defense avoided any comment that clearly conceded that the jury would hear the 404(B) evidence. While defense counsel mentioned the 404(B) witness in opening, he did so only to explain that witness' relationship and interactions within the family in general, as he did

²State v. Wiles, 679 S.E.2d 172, 383 S.C. 151 (S.C. 2009).

other witnesses and members of the family. He never indicated that the witness would testify, nor did he refer to the 404(B) allegations that witness could potentially give. Defense counsel's opening comments therefore fail to support a finding that he believed the court's *in limine* ruling was final, and his testimony at the PCR hearing makes it abundantly clear that he did not. At the PCR, defense counsel testified that he intended, yet failed, to make a contemporaneous objection to preserve the issue for appeal. PCR T. 5. Therefore, the only portion of Wiles that is applicable to the present case is the general rule: "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). The PCR court therefore erred in its reliance on Wiles to find that the ruling *in limine* at the commencement of the Petitioner's trial was final, and as such, that a contemporaneous objection was therefore not required when the 404(B) testimony was introduced.

The PCR court further appears to err in its interpretation of the record from the criminal trial. In what appears to be a citation in support of its decision the PCR court states: "Further, if no evidence is offered between a preliminary ruling and the admission of the evidence ruled upon, then "the decision is final" and there is no need for an additional objection. State v. Morales, 439 S.C. 600, 889 S.E.2d.551 (2023) (*citing State v. Jones* 435 S.C. at 144, 866 S.E.2d at 56)." Here Morales clearly does not apply. The motion *in limine* in the present case was held prior to opening statements. The 404(b) evidence at issue was offered through the State's fifth and last witness. To the extent that the PCR court also relied on Morales to find the ruling in limine final and no further objection necessary to preserve the 404(b) issue for appeal, it is again in error.

The record shows that counsel was required to make a contemporaneous objection to the introduction of 404(b) evidence to preserve the issue for appeal. As a result of his failure to make a timely objection, the 404(b) issue was not preserved for appeal. The failure to make a contemporaneous objection at the time the evidence was offered was therefore error on the part of trial counsel and the first prong of Strickland is met. The second prong of Strickland requires a showing of prejudice. Prejudice is established by an analysis of the issue had it been raised and preserved for direct appeal.

II. HAD THE 404(b) ADMISSIBILITY ISSUE BEEN PRESERVED THE PETITIONER WOULD HAVE PREVAILED ON DIRECT APPEAL.

A. EVIDENCE OF PRIOR BAD ACTS INADMISSIBLE UNDER STATE V. LYLE, 125 S.C. 406, 118 S.E. 803 (1923), RULE 404(b), SCRE, AND STATE V. WALLACE .

In this case the Appellant was charged with multiple counts of criminal sexual conduct and lewd act involving a single individual, the prosecutrix in this case. Without objection from the defense the state introduced evidence of other bad acts with a second individual, who was about the same age as the prosecutrix. The testimony of the witness was allowed as other bad act evidence under the common plan or scheme exception to Lyle and Rule 404. This was error.

Generally, “evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged.” Lyle, 125 S.C. at 415, 118 S.E. at 807. However, there are certain well-established exceptions to this general rule: [E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two

or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Lyle, 125 S.C. at 415, 118 S.E. at 807; Rule 404(b), SCRE (“Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”). State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009).

Motive was not made a material issue at trial and the occurrence of physical contact was denied by the defendant. The introduction of the prior bad act is therefore unsupported under the motive and intent exceptions provided in Lyle and Rule 404. State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009). Likewise, neither mistake, accident nor identity were at issue in the trial. The introduction of the prior bad act evidence is therefore equally unsupported by related exceptions under Lyle or Rule 404. Common plan or scheme was the only exception argued by the state as its basis for the admission of the Rule 404 evidence.

Common Plan or Scheme

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Lyle; Rule 404(b). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. "A close degree of similarity exists when the similarities

outweigh the dissimilarities." State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (*quoting* Wallace, 384 S.C. at 433, 683 S.E.2d at 278).

“The common scheme or plan exception ‘is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged ... is held admissible as tending to show continued illicit intercourse between the same parties.’” Kirton, 381 S.C. at 10, 671 S.E.2d at 117 *citing* State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). Here the other bad act evidence is not between the same parties, instead it involves a third party, and is alleged to have occurred prior to the offenses charged. Other than the occurrence of touching, the alleged offenses and the other bad act evidence bear little material resemblance.

The prosecutrix testified when she was around five she went in his room and jumped on top of him while he was in bed and he began rubbing genitals up against me through the blanket while she was clothed. She testified that Applicant would touch her with hands and rub up against her. This progressed to oral sex and full penetration when she was nine. On couch he rubbed his penis between her legs. When she was fourteen years old, she claimed he fully penetrated her rectum, that he would masturbate in front of her and use his fingers to penetrate her. There was him touching her genitals and her touching his and him masturbating in front of her. That they performed oral sex on each other “dozens and dozens and dozens” of times T. 62. The prosecutrix testified that the overwhelming majority of occasions were digital and penile penetration. She also testified that they “French” kissed. Most of this occurred in the Applicant’s bedroom and once in her room when she was fourteen. T. 49-68.

The 404(b) witness testified that the Applicant touched around her with his hand, private parts, her vagina, and on backside although not as much. That the touching occurred both under

and over her clothes. She testified that the Applicant's fingers never went inside of her and that the Applicant never touched her with his penis. The touching occurred in both her parent's and her room. She also testified that she asked him about kissing one time and that he showed her. She testified that the Applicant told her that nobody would understand the love he had for her. T. 49-75.

Given the vast differences in the testimony trial counsel properly argued that the requirements of Rule 404, SCRE and State v. Lyle had not been met to allow what was clearly no more than propensity evidence. Counsel correctly cited State v. Tutton and State v. Rogers, arguing that there was a lack of a close degree of similarity between the acts described by the prosecutrix and those of the 404(b) witness. At the suppression hearing the Court found only that the "similarities outweigh the dissimilarities". T. 90. (This was error as even Wallace required "a close degree of similarity" as a threshold for admissibility.) When the testimony of the 404(b) witness was presented before the jury trial counsel failed to make a contemporaneous objection and renew his argument from the suppression hearing. (330-331). The issue was therefore not preserved for appeal. "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021). "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011)..." State v. Cantrell, 2023-UP-383, Appellate Case 2021-001144 (S.C. App. Dec 06, 2023).

Due to the lack of substantial similarities in this case between the testimony of the prosecutrix and the 404(b) witness, the probative value of the other bad act evidence is slight. *See*

State v. Kirton, 381 S.C. 7, 9, 671 S.E.2d 107, 117 (Ct.App.2008) (holding a common scheme or plan requires similarity between the prior act and the charged act that increases the probative value of the evidence); State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice).

In this case there are no more than generic similarities between the offenses for which the defendant was charged and those alleged by the 404(b) witness. Other than some similarity generally in the allegation of “touching” there the allegations of the prosecutrix and 404(b) witness are nothing alike. The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct.App.2004); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). Generic similarities fail to meet the standard necessary for admissibility. A *close degree of similarity* or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception. State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct.App.1999) *emphasis added*.

The prior bad acts alleged through the testimony of the witness fail to establish any common scheme or plan, much less raise to the level of *modus operandi* as argued by the state. “Clear and convincing evidence of prior crimes or bad acts that is logically relevant is ... admissible to prove ... a common scheme or plan that embraces several previous crimes so

closely related to each other that proof of one tends to establish the other.” State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct.App.1994). Here, the prior bad acts fail to do more than establish evidence of propensity and bad character, which is clearly impermissible: “It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual.” State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); *see also* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith).

In Fonseca the court rejected the State’s argument that two incidents that occurred in Fonseca’s marital home while his wife was in the other room, demonstrated that the Fonseca had a common scheme or plan to attack the victim while his wife was not present or was in the other room. Fonseca, which was adopted by the supreme court as well reasoned³, appeared to be the first sign of a slowing of the Wallace juggernaut. Despite the court’s ruling in Fonseca, the rule of Lyle and 404 against the use of propensity evidence has continued to be eroded, virtually to the point of non-existence in criminal sexual abuse cases, especially those involving minors. As pointed out by the dissent in Wallace:

[O]ur cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. *Compare, e.g., Vogel v. State*, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) vacated on other grounds 371 S.C. 511, 641 S.E.2d 24 (2007) internal citations omitted, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission

³State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011).

of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions,⁷ I believe that thorough scrutiny is warranted.

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) *Justice Pleconies, dissenting*.

In this case, the 404(b) testimony was nothing more than bad character and propensity evidence. Any similarities were merely generic and far outweighed by dissimilarities between the facts surrounding the prosecutrix and the 404(b) witness. The State never argued that the testimony of the 404(b) witness proved anything. It just argued that the 404(b) evidence was “very similar” and therefore admissible. It never argued nor articulated how the 404(b) testimony established some unique plan or scheme necessary to prove motive, intent, etc., under Lyle. If there was some pattern or scheme of manipulation of the prosecutrix, there was no evidence that the 404(b) witness was similarly manipulated. What it did show was that the defendant had touched a young girl before, therefore allowing the jury to infer that the defendant had the propensity to commit the offenses charged. In any other type of case, evidence of this nature would have immediately been judged too dissimilar under Lyle and Rule 404.

Even if the other bad act evidence were admissible under Rule 404(b), the testimony of the 404(b) witness should have nevertheless been excluded, as its probative value was substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; *see also* Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence.”). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App.). State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (S.C. App., 2005) The testimony of The witness was unnecessary to any element in the state’s case and overly prejudicial. As a result, the 404(b) evidence in this case should have been excluded under both Rules 404 and 403. A timely objection would have resulted in either the exclusion of the evidence or the issue being preserved for appeal.

Harmless Error Analysis

To deem an error harmless, this court must determine “beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (*internal quotations omitted*). Due to the prejudicial tendency of admitting prior bad act testimony it cannot be said that beyond a reasonable doubt the verdict was not affected by the evidence. *See* Fosneca, *supra*. Therefore, the erroneous admission of evidence under 404(b) in the defendant’s case constitutes reversible error. Failure to raise the issue at trial contemporaneous with its offer constitutes error. Because the 404(b) evidence and the crime charged failed to show “a close degree of similarity” Tallent would have either prevailed in having the evidence excluded or would have prevailed on direct appeal. The outcome of the case would have been different and therefore both prongs of Strickland v. Washington have been met.

B. BUT FOR COUNSEL’S ERROR IN FAILING TO PRESERVE ISSUE FOR APPEAL APPELLANT’S CASE WOULD HAVE BEEN SUBJECT TO THE HOLDING OF STATE v. PERRY.

In addition to the viability of the argument under Wallace, had the issue been properly preserved the Applicant's case would have been pending when Wallace was reversed, making the admission of the 404(b) evidence in this case clearly reversible error. Wallace was reversed by State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (S.C. 2020). Perry was based facts so similar to the Applicant's case that Perry would be controlling in Applicant's case, requiring a reversal. In Perry the Court noted that: "In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that character. Perry. The Perry Court recognized that historically, evidence of other crimes required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged. Perry. Exactly as in the present case, the State in Perry did not offer any argument that the stepdaughter's testimony served a legitimate purpose, or that a logical connection exists between Perry's abuse of his stepdaughter and the current charges. The State simply relied on Wallace, and argued what it called substantial similarities between the two crimes outweighed any dissimilarities. Therefore, the State argued, the stepdaughter's testimony was admissible. While the Court in Perry found that there were similarities between the crime charged and the 404(b) evidence, it reasoned that:

Rather, in our significant collective experience dealing with crimes of this nature, a very high percentage of sexual crimes against children are committed just like Perry's alleged crimes: by father figures, in the home, in a bedroom, beginning in the prepubescent years. The fact Perry's crimes fit this general pattern does not give Perry a "monopoly" on his criminal method.

State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (S.C. 2020).

Perry was filed May 6, 2020. The direct appeal in the Applicant's case was not ruled on by the Court of Appeals until June 10, 2020, after Perry. The remittitur was not entered in the Applicant's case until March 15, 2021. The Applicant would have been able to rely on Perry, which is almost identical in facts, in his direct appeal had the issue been properly raised and preserved for appeal. Counsel's failure to make a timely objection and preserve the issue for appeal therefore constitutes error that prejudiced the Petitioner. The PCR court therefore erred in denying Petitioner relief.

CONCLUSION

Based on the foregoing this Court should grant the Petition and reverse the decision of the PCR court.

Respectfully submitted,
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