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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Deadra L. Jefferson, Circuit Court Judge

LESLIE DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000587

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by holding that trial counsel could not have known about the potential for bifurcation of Petitioner's trial simply because the trial occurred prior to this Court's decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019)?

STATEMENT

At the March 11, 2016, term of the Horry County grand jury, Petitioner was indicted for criminal sexual conduct with a minor in the first degree. App. 541-42. On January 7, 2019, Petitioner was tried before the Honorable Benjamin Culbertson and a jury. Kia Wilson represented Petitioner. C. Leigh Andrew and Mary-Ellen Walter represented the state. App. 1. Petitioner was convicted and sentenced to thirty years' imprisonment. App. 426, 434.

Petitioner timely filed the present application for post-conviction relief (PCR) on September 26, 2022. App. 437-46. In his application he alleged, *inter alia*, that trial counsel was ineffective for failing to seek to bifurcate the trial. App. 445. On July 31, 2024, the Honorable Deadra L. Jefferson held a hearing on the Petition. App. 456. Steven W. Fowler represented Petitioner. App. 456. Shayla J. Flores represented the state. App. 456.

Facts

Petitioner is the Minor's biological father. App. 189. The two lived in a mobile home in Conway when Minor was eight years old. App. 189. From time to time, Melesa Squires, a self-described heroin addict whom Minor witnessed using drugs, babysat Minor and lived in the mobile home with Minor and Petitioner. App. 189. Minor began exhibiting behavior that Squires believed was strange. App. 191.

One morning, Squires found Minor naked in bed, vomiting. App. 192-93. Squires decided to keep Minor home from school, and later that day, Minor told Squires that Petitioner had sexually assaulted her. App. 193. Squires called 9-1-1, and Minor was taken to the hospital in an ambulance. App. 198. Minor was examined by sexual assault nurse examiner Janet Moore and emergency physician Carol Rahter. App. 337. Moore would conclude that Minor's labia

majora was reddened but found no bruising, cuts, or rashes on her body. App. 260. Dr. Rahter concluded that Minor "had a totally normal exam." App. 340.

A DNA analysis expert tested samples taken from Minor's vagina and rectum. App. 315. She would testify that only Minor's DNA was found in the samples. App. 315. Petitioner's DNA was not present in the samples. App. 323.

Minor gave a videotaped forensic interview. App. 353. Minor told Dianne Nordeen, the forensic interviewer, and would later testify at trial, that she was raped from January to March of 2016.

Petitioner's Trial

The state wanted to use a prior sexual conviction to prove criminal sexual conduct in the first degree, pursuant to S.C. Code Ann. § 16-3-655(A)(2). As an element of this offense, the state was required to show that Petitioner had a previous conviction for an offense listed in §§ 23-3-430(C) or 430(D). Petitioner's prior qualifying conviction was a forty-year-old 1986 conviction for rape in the first degree, from New York state.[1] App. 238. As a result of this conviction, Petitioner was, at the time of the trial, required to register as a sex offender. App. 254.

Before trial, Petitioner moved to exclude the introduction of the prior rape conviction and the fact of his registry as a sex offender. App.109. Petitioner asserted that the statute's inclusion of prior convictions as an element was unconstitutional as violative of due process. App. 110. He further asserted that the state could stipulate to the prior conviction. Importantly, however, he did not move to bifurcate the trial. App. 112.

[1] N.Y. Penal Law § 130.35.

The trial court denied the motion. App. 115. The jury was presented with evidence of the prior rape conviction and returned a verdict of guilty. App. 426. The trial court sentenced Petitioner to thirty years' imprisonment. App. 434.

Direct Appeal

Petitioner appealed his conviction to the Court of Appeals, who affirmed in a published opinion. *State v. Davis*, 437 S.C. 93, 876 S.E.2d 321 (Ct. App. 2022). The issue on appeal was whether the trial court erred by admitting the prior rape conviction. *Id.* at 96, 876 S.E.2d at 322. The Court of Appeals held that the state was never required to accept a stipulation to a prior offense. *Id.* at 98, 876 S.E.2d at 323. But even if it was, the Court held that such a stipulation would not have helped Petitioner. *Id.* at 99, 876 S.E.2d at 324. This was because, according to the Court:

> [E]ven if this court were to force the State to accept [Petitioner's] offered stipulation, such an agreement would not dampen the prejudicial effect of the prior conviction like bifurcation of the trial. The prior sex crime element...does not involve generic prior convictions; it requires a specific conviction listed under section 23-3-430(C). Even if forced to accept [Petitioner's] stipulation that he was convicted of a specific sex crime, the State could not have proven [Petitioner] guilt of CSCM...using general language about his prior offense. The jury would have known [Petitioner] was guilty of a prior sex crime when the trial court instructed them as to the elements of CSCM...Because [Petitioner] did not seek to bifurcate his trial and a prior sex crime conviction is a statutory element of CSCM...we find the trial court did not err in admitting [Petitioner's] prior conviction for rape in the first degree or evidence that he was required to register as a sex offender.

Id. The Court of Appeals denied rehearing. App. 523.

Post Conviction Relief Proceedings

Petitioner then filed an application for PCR. During the hearing, the PCR court asked Fowler what exactly Petitioner meant when he alleged that the trial should have been bifurcated.

App. 462. The PCR court stated that it was "a little confused as to what [Petitioner] means by bifurcate." App. 462 ("Bifurcating, what is that? You don't bifurcate in a criminal trial. You bifurcate in a civil trial between punitive and general actualized damages. But I'm not aware of any bifurcation proceedings in a criminal trial"). However, after further colloquies, *see* App. 466, the argument was made and the evidentiary hearing continued.

Trial counsel would go on to testify that "the expression" on "the juror's faces" dropped at the moment the prior conviction was entered into evidence. App. 503. Trial counsel felt she was fighting "an uphill battle" after that moment. App. 503.

The PCR court denied relief and dismissed the Petition with prejudice. App. 522. In its written order, the PCR court found that *State v. Cross* had not been decided at the time of Petitioner's trial, and that trial counsel was not deficient for failing to be "clairvoyant." App. 531-32. The PCR court, however, then stated the following:

> Trial counsel **credibly** testified to meeting with Applicant in person nine (9) or ten (10) times, and it is clear from the record that she was a zealous advocate. As to the allegation that Trial Counsel was ineffective for requesting the State stipulate to Applicant's prior convictions, the record indicates Trial Counsel made an impassioned argument regarding the issue, thus preserving it for appeal. Trial Counsel **credibly** testified to her reasons for not reducing the argument to writing but continuing to render it with the hope that some new law would result therefrom. Counsel further testified that she made a strategic decision to make an oral motion and not to reduce the bifurcation motion to writing in advance of the trial.[2] Thus, the trial record wholly refutes Applicant's allegations.

App. 532. (emphasis in original; footnote omitted). This petition follows.

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2 This is not entirely accurate. Trial counsel did not articulate any reason not to articulate the bifurcation motion to writing; trial counsel did not make a bifurcation motion at all. Rather, she made a motion to suppress the fact of Petitioner's prior conviction, asserting arguments under Rule 403, SCRE, and arguing that the statute itself, by having a prior criminal conviction as an element, was unconstitutional.

ARGUMENT

The PCR court erred by holding that trial counsel could not have known that moving to bifurcate Petitioner's trial was an option.

The PCR court's central holding was that trial counsel could not have been expected to know about the potential for bifurcation prior to this Court's decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019). That was error.

To prevail on a PCR action on a claim of ineffective assistance of counsel, a petitioner must establish both that his trial counsel was deficient, and that deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 386 S.C. 562, 566, 698 S.E.2d 629, 631 (2010).

The relevant inquiry is whether the trial counsel's performance was deficient under professional norms at the time of the trial. *Pantovich v. State*, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019). "Clairvoyance," or "anticipat[ion] of changes in the law" is not required of a trial counsel to be effective under the Sixth Amendment standard. *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds, Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

An instructive example of this standard is this Court's decision in *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992). The *Robinson* petitioner asserted that her trial counsel was ineffective for failing to present battered women's syndrome as self-defense as a defense at her 1979 trial. *Id.* at 76, 417 S.E.2d at 89. This Court held that Robinson's trial counsel had not been

deficient. *Id.* Battered women's syndrome, it noted, was a new scientific development. *Id.* at 78, 417 S.E.2d at 90-91. In fact, the seminal scientific work on battered women's syndrome had been released in 1979, the same year as Robinson's trial. *Id.* at 78 n.2, 417 S.E.2d at 91 n.2 (citing LENORE WALKER, THE BATTERED WOMAN (1979)). And that book noted that the first study of battered women's syndrome in United States history only began in 1976—three years earlier. *Id.* (citing WALKER, *supra* at 20). Further, this Court's acceptance of the theory would not come until 1986, six years after Robinson's trial. *Id.* at 78, 417 S.E.2d at 90 (citing *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986)).

Another instructive example is *Teamer v. State*, 416 S.C. 171, 786 S.E.2d 109 (2016). In that case, the state appealed a grant of PCR which found, *inter alia*, that trial counsel had been ineffective for failing to object to a jury instruction. *Id.* at 182, 786 S.E.2d at 114. The jury instruction that Teamer's counsel did not object to was: "Your sole objective...is to simply reach the truth in the matter, and by doing that you will have fulfilled your obligations as jurors, and that is to simply give both the state and [respondent] a fair and impartial trial." *Id.* at 182, 786 S.E.2d at 115 (alteration in original). As this Court noted, circuit court judges had been instructed in *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) to cease the use of this precise jury instruction. *Teamer*, 416 S.C. at 183, 786 S.E.2d at 115. However, *Daniels* had been decided after Teamer's trial, and this Court held that "reasonable representation does not require trial counsel to foresee successful appellate challenges to *novel questions of law*." *Id.* (emphasis added).

Novelty is the prevailing theme of this Court's jurisprudence in this area. *Robinson* involved a novel issue of science; *Teamer* involved a novel issue of law. However, contrary to the PCR court's decision, bifurcating a trial is decidedly not a novel issue of law.

The Court of Appeals affirmed Petitioner's conviction—in the PCR court's view—by directly comparing the issues in his case to *Cross*. App. 531 (citing *State v. Davis*, 437 S.C. 93, 876 S.E.2d 321 (Ct. App. 2022)). Thus, the PCR court essentially held that trial counsel could not have known that she could move to bifurcate Petitioner's trial. App. 532. However, the PCR court also held that trial counsel articulated "a strategic decision to make an oral motion and not to reduce the bifurcation motion to writing in advance of the trial." App. 532. Likewise, trial counsel also asked the trial court to force the state to accept a stipulation to Petitioner's prior conviction, which the Court of Appeals acknowledged would not have helped Petitioner. *Davis*, 437 S.C. at 98, 876 S.E.2d at 323. Trial counsel testified at the PCR hearing that she expected the trial court to deny the motion and raised the argument only to preserve it for appellate review. The PCR court found this to be "zealous advocacy." It may well be true that trial counsel made an "impassioned argument," in support of her motion, as the PCR court found. That does not change the fact that trial counsel made an objectively poor decision by failing to move to bifurcate the trials. And to the extent that trial counsel did not know she could move to bifurcate the trials, this too constitutes ineffective assistance of counsel, because a reasonable attorney should know about the practice of bifurcation, which has existed in some form since English common law. Derek Shoemake, *Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation*, 59 S.C. L. Rev. 433, 443 & n.107 (2008) (citing, *inter alia*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 164). And bifurcation in criminal trials has existed since at least the 1970s. *Cf., Furman v. Georgia*, 408 U.S. 238 (1972).

In any event, the idea that this Court created the idea of bifurcation in *Cross* is untrue. The *Cross* Court did note that bifurcation is never "required in a non-capital case." 427 S.C. at 478, 832 S.E.2d at 288 (citing *Chubb v. State*, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991)).

This does not mean that bifurcation in a criminal case is some esoteric, previously unheard of argument that a criminal defense attorney could not possibly be aware of. While *Cross* may have been the first time this Court ordered a bifurcated proceeding, it has "never held it is *improper* to allow one." *Chubb*, 303 S.C. at 398, 401 S.E.2d at 161 (Gregory, C.J., concurring in part and dissenting in part (emphasis in original)). And the *Cross* Court took great pains to explain that it was not creating a new rule of law or procedure. 427 S.C. at 479-80, 832 S.E.2d at 289. The power to bifurcate a trial has been there all along, within the mandate of Rule 611(a), SCRE, which provides that trial courts must "exercise reasonable control over the mode and order of interrogating witnesses..." *Id.* at 479, 832 S.E.2d at 289 (quoting Rule 611(a), SCRE). Even if this Court has never ordered a bifurcated trial, it should have been obvious to any practitioner of criminal defense that the option to request one was there.[3] As recognized by the Supreme Court of the United States: "Two-part jury trials are *rare* in our jurisprudence;" they are by no means unheard of. *Cf., Spencer v. Texas*, 385 U.S. 554, 568 (1967) (emphasis added); *Erlinger v. United States*, 602 U.S. 821, 847 (2024) (describing the practice of bifurcating proceedings as "common" (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 521 n.10 (Thomas, J., concurring)).[4]

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[3] While not dispositive, it is worth mentioning that James Cross's trial counsel knew to move to bifurcate his 2013 trial without the benefit of this Court's decision in his own appeal. *Cross*, 427 S.C. at 470, 832 S.E.2d at 284.

[4] One reason why the issue of bifurcation has not commonly appeared in case law is likely that bifurcation was not always necessary. Previously, the General Assembly generally followed the "well-established rule that evidence that an accused has committed other crimes is not admissible in the prosecution for the crime charged." *State v. Hamilton*, 327 S.C. 440, 447, 486 S.E.2d 512, 515 (Ct. App. 1997) (citing, *inter alia*, *State v. Williams*, 31 S.C.L. (2 Rich.) 418, 421-22 (1845)).

Accordingly, trial counsel should have known that she could move to bifurcate, and was thus ineffective for failing to do so.[5]

Further, Petitioner was prejudiced by this failure. Petitioner was entitled to a bifurcation of his trial. The facts of Petitioner's case are nearly identical to the facts in *Cross*. Like in *Cross*, there was no physical evidence of the sexual assault; just the alleged victim's word against Petitioner's. *See Cross*, 427 S.C. at 468-69, 832 S.E.2d at 283. When considering that the case against Petitioner came down to whether the jury believed the alleged victim's word, the fact that they were wrongly informed of Petitioner's prior conviction constitutes "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.

Trial counsel testified at the PCR hearing that "the expression" on "the juror's faces" dropped when Petitioner's prior conviction was entered into evidence. App. 503. Trial counsel felt she was fighting "an uphill battle" after that moment. App. 503. Apart from the prior conviction, the case was a classic battle of credibility between Petitioner and Minor. There was no real physical evidence supporting Minor's claims. Considering this, there is more than a "reasonable probability" that the introduction of an extremely prejudicial fact, such as a prior rape conviction, against Petitioner affected the results of his trial. *Cherry*, 300 S.C. at 117-18, 386, S.E.2d at 625.

For these reasons, Petitioner is entitled to a new trial. This Court should grant certiorari.

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[5] Courts in several other jurisdictions have held that bifurcated criminal trials are sometimes necessary. *See, e.g., State v. Florez*, 777 P.2d 452 (Utah 1989); *Hines v. State*, 794 N.E.2d 469 (Ind. Ct. App. 2004).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow for fuller briefing on the issue presented in this case.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2025.