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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Pickens County
Honorable Perry H. Gravely, Trial Judge
Honorable B. Alex Hyman, Post-conviction Relief Judge

Appellate Case No. 2025-002118

Jose R. Reyes, #370793,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUES ON PETITION FOR CERTIORARI

Did the post-conviction court err finding defense counsel was not ineffective for failure to object to improper testimony that bolstered minor's credibility where the testifying witness was minor's counselor and was qualified as an expert in child abuse counseling?

COUNTERSTATEMENT OF ISSUES ON PETITION FOR CERTIORARI

Whether the post-conviction relief court correctly determined Trial Counsel's representation was not constitutionally ineffective for failing to object to Tate's testimony where the testimony was not improper bolstering but instead fact testimony about Victim's behavior and where Tate was qualified as an expert in child abuse counseling.

STATEMENT OF THE CASE

Petitioner Jose R. Reyes is presently confined in the South Carolina Department of Corrections (SCDC). During its March 2015 term, the Pickens County Grand Jury indicted Petitioner for Criminal Sexual Conduct with a Minor First Degree (2013-GS-39-03217).[1] Richard H. Warder, Esquire (Trial Counsel), represented Petitioner. Brandi B. Hinton, Esquire, prosecuted the case. On December 12–13, 2016, Petitioner proceeded to a jury trial before the Honorable Perry H. Gravely. The jury convicted Petitioner as indicted. On December 13, 2016, Judge Gravely sentenced Petitioner to twenty-eight (28) years' imprisonment.

Petitioner filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense perfected Petitioner's appeal by filing an initial brief and raising the following sole issue:

> Did the trial judge err in allowing improper bolstering of the minor witness's credibility by allowing the competency inquiry and competency determination to be made in front of the jury rather than outside the presence of the jury and before the minor witness testified?

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Reyes, Op. No. 2019-UP-214 (S.C. Ct. App. filed June 12, 2019).

Petitioner filed a Petitioner for Writ of Certiorari, which was granted. Following briefing and oral argument, the Supreme Court of South Carolina affirmed the Court of Appeals' opinion. State v. Reyes, 432 S.C. 394, 853 S.E.2d 334 (2020). The Remittitur was returned to the lower court on January 5, 2021.

On March 3, 2021, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on May 13, 2024, at the Greenville County Courthouse

[1] As noted in the brief of Respondent filed in Reyes's direct appeal, it is unclear why the indictment number does not match the grand jury term.

before the Honorable B. Alex Hyman. Petitioner was present at the hearing and represented by Sarah M. Henry, Esquire. Assistant Deputy Attorney General Joshua A. Edwards of the South Carolina Attorney General's Office represented Respondent. (App'x pp. 228–80). On September 19, 2025, Judge Hyman denied Petitioner's post-conviction relief application with prejudice. (App'x pp. 281–90).

On October 20, 2025, Petitioner filed a timely notice of appeal. On June 5, 2026, Petitioner filed his Petition for Writ of Certiorari and Appendix.

This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Victim, who was nine years old at the time of trial, lived with her parents but occasionally stayed with a relative, Megan.[2] (App'x p. 43; pp. 47–48). Victim testified Petitioner, known to her as "Fernando" and who lived at Megan's house, sexually abused her when she was six years old. (App'x pp. 48–54; p. 73; p. 76). Petitioner abused her every time she stayed at Megan's house and would touch her "private" with both his hand and penis but only inserted his hand inside of her. (App'x pp. 49–52). Petitioner also kissed Victim on the mouth during the abuse. (App'x p. 51).

Victim eventually told her aunt, Mary Couch, that she was abused. (App'x p. 53). Couch testified that while she and Victim were watching movies at Victim's house, Victim disclosed to Couch that Petitioner sexually abused her on a couch at Megan's house. (App'x pp. 62–64). Couch fetched Victim's mother (Mother), and after they listened to Victim, they immediately contacted the police. (App'x p. 65). Couch testified that Victim, in response to them calling police, "went in her room and told us she hated us and that she wouldn't never tell us nothing again because somebody was going to be mad at her." (App'x p. 66). Mother testified that a few weeks prior to Victim disclosure, Victim complained of painful urination, which led Mother to taking her to the emergency room. (App'x pp. 69–70).

Deputy Billy Trotter of the Pickens County Sheriff's Office responded on August 29, 2013, to Mother's call to report abuse. (App'x pp. 72–73). Deputy Trotter spoke with Mother and Victim, and Victim disclosed she was sexually abused. (App'x p. 73). Deputy Trotter testified that Victim did not want to talk and was embarrassed. (App'x p. 74).

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[2] Megan is Victim's first cousin once removed. (App'x p. 67).

Captain Marvin Nix of the Pickens County Sheriff's Office became involved in Petitioner's case. (App'x pp. 75–76). Captain Nix determined the individual Victim identified as "Fernando" was Petitioner. (App'x p. 77). Captain Nix testified Victim was six years old at the time of the abuse and Petitioner was either 25 or 27. (App'x p. 76). Captain Nix determined the time frame of the abuse ranged from January 2013 to June 2013. (App'x p. 80).

Victoria Tate provided therapy for Victim since March 10, 2016. (App'x p. 82). Tate testified that Victim disclosed she was sexually abused at Megan's house. (App'x p. 83). She testified Victim "appears embarrassed" and "ashamed" because she could not stop the abuse. (App'x p. 83). Tate explained, Victim "blames herself for what happened. She's very anxious. She, at times, is aggressive. She also wants to avoid talking about things that have happened to her." (App'x p. 83).

Dr. Mary Fran Crosswell, a child abuse pediatrician with the Greenville Health System, met with Victim at the Julie Valentine Center on September 18, 2013. (App'x pp. 84–85; pp. 87–88). As part of her evaluation, Dr. Crosswell reviewed Victim's prior medical records, including a recent lab report indicating Victim suffered from herpes simplex virus, type 1 (HSV-1). (App'x pp. 98–99). The HSV-1 diagnosis was in her genital area. (App'x p. 99). Subsequent testing of Petitioner's blood showed Petitioner also tested positive for HSV-1. (App'x pp. 123–24).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly determined Trial Counsel's representation was not constitutionally ineffective for failing to object to Tate's testimony where the testimony was not improper bolstering but instead fact testimony about Victim's behavior and where Tate was qualified as an expert in child abuse counseling.

Petitioner contends that the PCR court erred in not finding Trial Counsel ineffective for failing to object to improper bolstering of Victim's credibility where the witness was Victim's counselor and qualified as an expert in child abuse counseling. (PWC p. 4; p. 6). In support, Petitioner argues that Tate testified, without an objection from Trial Counsel, to her opinion of Victim's behavior and that the State used this testimony to indirectly comment on Victim's credibility. (PWC p. 7). Petitioner further argues that the jury likely interpreted the testimony and Tate's qualification as an expert in child abuse counseling to suggest they should believe Victim and her allegations. (PWC pp. 7–8). However, Tate's testimony was not improper bolstering, and her position as Victim's counsel and qualification as an expert in child abuse counseling were not improper as well. Trial Counsel cannot be deemed deficient for not objecting to Tate's testimony, and no prejudice resulted from any alleged deficiency. Therefore, the post-conviction relief court properly found that Petitioner failed to show deficiency or prejudice resulting from Trial Counsel's performance. (App'x p. 286).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to "[assistance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such

representation sets forth a *prima facie* violation of that constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. Strickland, 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). Id. at 690–95; Butler, 286 S.C. at 442, 334 S.E.2d at 814. The defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. Strickland, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Id. at 700.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

Here, the PCR court correctly found that Tate's testimony was not improper bolstering. (App'x p. 286). Contrary to Petitioner's contention that Tate's testimony was improper bolstering, her testimony was not directed at Victim's credibility and instead was merely fact testimony of Victim's behavior during their meetings. Mental trauma "is relevant to prove the elements of criminal sexual conduct, including the lack of consent." State v. Alexander, 303 S.C. 377, 381, 401 S.E.2d 146, 149 (1991). "Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred." Id. "While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others. 'Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter.'" State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (citing and quoting State v. Kromah, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013)). Tate did not "comment on the veracity of [the] child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Specifically, Tate did not state whether she found Victim's accusations credible,

truthful, or consistent and "never opined [Victim's] behavior indicated truthfulness." State v. Makins, 433 S.C. 494, 503, 860 S.E.2d 666, 671 (2021).

Notably, Petitioner failed to show how Tate's testimony about Victim's behavior bolstered Victim's credibility. Petitioner merely concluded that Tate's testimony was improper bolstering and that the State used that testimony to "indirectly comment on [Victim's] credibility and provide greater weight to their testimony." (PWC p. 7). Petitioner then speculates that the jury "likely interpreted [the testimony] . . . to suggest it should believe [Victim] because [Victim's] behavior demonstrated she was ashamed and embarrassed." (PWC pp. 7–8). However, Petitioner has failed to show how Tate's testimony indirectly conveyed to the jury that they should believe Victim. Nothing about that testimony indicates any direct or indirect comment on Victim's credibility. Notably, during cross-examination, Trial Counsel used the testimony to his advantage by eliciting testimony from Tate that it was possible that children could be embarrassed and ashamed because they told a lie:

> Q. If children are -- if children make a small -- tell a lie, does that sometime make them embarrassed and ashamed?
> A. It could.
> Q. And if they told a very important lie to the police or somebody like that, does that make them more ashamed and embarrassed?
> A. It would depend on who the child is.

(App'x p. 84).

Additionally, as the PCR court correctly found, Tate's testimony was not hearsay. (App'x p. 285); see Rule 801(d)(1)(D), SCRE (providing statement is not hearsay if victim testified and is subject to cross-examination at trial and statement is "consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident"). Because Tate's testimony was not improper bolstering or otherwise inadmissible, there was no ground for Trial Counsel to object, and the PCR

court correctly found that Petitioner failed to show deficiency. (App'x p. 286). The PCR court also correctly found that there was no reasonable probability that the outcome of the case would have been different had Trial Counsel objected to Tate's testimony. (App'x p. 286).

Additionally, Petitioner also contends that Victim was improperly bolstered because Tate was Victim's counselor and qualified as an expert in child abuse counseling. (PWC p. 4, p. 6). Specifically, Petitioner claims that the jury "should believe [Victim's] allegations because they disclosed sexual abuse to an expert in 'child abuse counseling.'" (PWC p. 8). However, as the PCR court correctly noted "it is not impermissible for a fact witness to also testify as an expert." (App'x p. 286, citing Makins, 433 S.C. at 504, 860 S.E.2d at 672). Petitioner has offered no argument or relevant legal authority showing how it was improper for Tate to testify as an expert due to her being Victim's counselor.

Therefore, the PCR court correctly found that Petitioner "failed to show deficiency or prejudice regarding counsel's failure to object to Tate's testimony." (App'x p. 286). This Court should deny certiorari.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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