STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

YANCEY THOMPSON, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO 2014-006611

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to the impermissible hearsay testimony of the forensic interviewer, the medical doctor who examined Minor, social worker Trina Elfering, and Officer Traci Barr, since such testimony impermissibly corroborated Minor's identification of Petitioner as her abuser under Rule 801(d)(1)(D), SCRE, and improperly bolstered Minor's credibility, which prejudiced Petitioner?

II. Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to impermissible evidence that Petitioner allegedly sexually abused Minor in another jurisdiction, Richland County, where such evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, and even if the evidence was relevant, its probative value was substantially outweighed by unfair prejudice to Petitioner?

STATEMENT OF THE FACTS

During the July 2007 term, the Lexington County Grand Jury indicted Petitioner for first degree criminal sexual conduct with a minor under eleven years of age, second degree criminal sexual conduct with a minor eleven years to fourteen years of age, and disseminating harmful material to minors. App. 595. On September 2, 2008, Petitioner's case proceeded to a jury trial before the Honorable John R. Milling. App. 1. Charles and Irma Brooks represented Petitioner. Rhonda Patterson and David Stumbo represented the State. App. 1.

Trial Testimony

When Minor was a baby, her mother, Monica Gleaton, sent Minor to live with Julia Thompson. App. 223. Thompson was Gleaton's first cousin. Thompson later married Petitioner, who was a father-figure to Minor. App. 223, l. 11 – App. 224, l. 7.

According to Minor, Petitioner sexually abused her from age five to age twelve while Minor was living with Petitioner and Thompson. App. 126, ll. 14 – 15. Minor alleged that Petitioner abused her while they lived at "Bayberry," in Richland County, South Carolina. App. 128 – 132. There was no objection made by defense counsel.

Minor also alleged that Petitioner sexually abused her at various residences throughout Lexington County. Minor stated that she lived in Glen Village, on "Charleston Highway or Old Charleston Highway," on Carolyn Trail, on Charwood, on Fish Hatchery Road, at Petitioner's mother's house, and behind White Knoll High School during the alleged sexual abuse. App. 132, l. 5 – App. 138, l. 2.

On January 17, 2007, the Lexington County Department of Social Services (DSS) received allegations that Minor had been physically neglected and abused by Julia

Thompson. App. 171, ll. 13 – 23. Trina Elfering, a social worker with DSS, was assigned to Minor's case and began investigating the allegations. App. 171, ll. 3 – 6. Elfering spoke with Gleaton, Minor's mother, about the alleged physical abuse. App. 174, ll. 9 – 11. Minor was living with Gleaton in Columbia, South Carolina, at the time the investigation commenced. App. 174, ll. 7.

Elfering explained at trial that during the investigation of Minor's alleged physical abuse:

> "I went over each of the allegations with Minor, individually, and she denied that she was being beat up by the other children in the home. And she said that she was being made to do a lot of yard work, and she also **revealed** to me that she was being sexually abused by Yancey Thompson."

App. 174, ll. 14 – 19 (emphasis added). Defense counsel **did not** object to Elfering's testimony. App. 174.

Elfering also spoke with Petitioner during her investigation of the alleged sexual abuse of Minor. However, Petitioner "denied the allegations." App. 178, ll. 5 – 9. On January 22, 2007, Elfering reported Minor's allegations of sexual abuse to the Lexington County Sheriff's Office. App. 185, ll. 6 – 10. Elfering also arranged for Minor to have a forensic interview. App. 185, ll. 1 – 3.

Dr. Alicia Benedetto of the Assessment and Resource Center (ARC) in Columbia, South Carolina, conducted Minor's forensic evaluation. App. 285. Dr. Benedetto explained that she taught "forensic evaluation as part of a week-long course [provided] to child abuse professionals throughout the State of South Carolina." App. 286, ll. 10 – 12. The course, entitled "Finding Words," taught "a semi-structured interview protocol . . . known by the acronym "'RATAC.'" App. 287, ll. 15 – 16. The doctor explained:

> "The 'R' stands for rapport building. That involves spending some time with the child, getting a sense of his or her ability to communicate; where are they developmentally?"

App. 287, ll. 18 – 22.

> "The 'A' stands for anatomy identification. One of the tools that we use in the interview are anatomical drawings. They're just a simple black and white outline of a male body and a female body that we use. Depending on the age of the child, it's used in different ways, but to establish a common language for body parts so that there is no misunderstanding as to what a child is referring to in an interview. So that's the 'A.'"

App. 288, ll. 8 – 15.

> "Then there's a touch inquiry portion that refers to inquiring about a range of different kinds of touches that a child may receive, some positive and some negative."

App. 288, ll. 16 – 18.

> "The second 'A' in RATAC refers to the abuse scenario. So if a child has in the touch inquiry disclosed that there's been some inappropriate touching, then the 'A' stands for gathering details about the abuse scenario."

App. 288, l. 23 – App. 289, l. 1.

> "And then the 'C' stands for a respectable closing to the interview, where we make sure that the child understands about some safety options, and thank them for participating in the interviewing process."

App. 289, ll. 7 – 10.

Dr. Benedetto estimated that she had performed "at least 1000" forensic interviews during her time at ARC. App. 290, ll. 5 – 6. After Dr. Benedetto was qualified as an expert in the field of "child sexual abuse assessment, without objection from defense counsel" the solicitor asked whether Minor made any disclosures to the doctor during the forensic interview. App. 291, ll. 12 – 22; App. 296, ll. 17 – 19.

According to the doctor:

> "[S]he disclosed chronic sexual abuse by Yancey Thompson, who was in sort of a father-figure role to her, having been raised by him and his – his wife for most of her life."

App. 296, ll. 20 – 23.

> "[Minor] disclosed vaginal penetration, anal penetration, oral sex, and -- some physical abuse as well."

App. 297, ll. 1 – 3.

The solicitor further delved into Minor's disclosures to Dr. Benedetto:

> Q. During the time that you were interviewing [Minor] and she's – she's telling you about things that happened to her, can you describe to us her emotional state during the interview?
>
> A. Sure. [Minor] was – was frequently very distressed throughout the interview; very tearful, sobbing often. We had to take some – some breaks where we would just sit quietly for a little bit so that she could catch her breath and continue talking.
>
> Q. Were those observations relevant in any way to the diagnostic – the diagnoses that you may have had?
>
> A. Yes. Actually, I diagnosed [Minor] **with post-traumatic stress disorder** on the basis of the interview; and **that's significant, because I don't often do that.**

App. 299, l. 24 – App. 300, l. 16 (emphasis added). Defense counsel **made no objections** to this testimony.

The solicitor asked Dr. Benedetto to explain the term 'compelling' versus 'non-compelling.' App. 300, l. 24 – App. 301, l. 1. The doctor responded:

> "Sure. When we conduct an interview, we have sort of a rating system for it. It can be termed either problematic in some ways. So in other words, it can be problematic for sexual abuse, problematic for physical abuse, problematic for neglect, or it can be ruled compelling for something.

> It can be ruled compelling for sexual abuse, physical abuse, witness to abuse. It can also be ruled compelling for no abuse, which means **it's in my mind compelling** that – that there was not abuse in this particular case."

App. 301, ll. 2 – 11 (emphasis added). The solicitor continued:

> Q. Okay. As it pertains to [Minor] from your interview on February the 8th, 2007, what were your findings?
>
> A. [Minor's] interview was actually ruled compelling for physical abuse, sexual abuse, and psychological abuse.

App. 301, ll. 12 – 15. Counsel **did not object** to this testimony.

Dr. Benedetto further explained:

> "But I would be comfortable in this case saying that it's among the most compelling interviews that I've conducted, not only because of the amount of detail that she was able to provide, but also the emotional intensity that she was clearly experiencing in the room, in – in having to provide her disclosure."

App. 302, ll. 17 – 22. The solicitor ended:

> Q. So with a reasonable degree of clinical certainty, Dr. Benedetto, [Minor's] disclosure is consistent with a child who's been sexually abused?
>
> A. Yes.

App. 302, l. 23 – App. 303, l. 1. Again, defense counsel **did not object** to this testimony.

Dr. Susan Luberoff performed Minor's medical examination on February 8, 2007. App. 263, ll. 8 – 10. According to Dr. Luberoff, Minor had two deep cuts, or "transections," in her hymen that caused concern. App. 267, ll. 1 – 9.

> Q. Do you have – **did you receive information** when – when was the last date that [Minor] alleged that she was sexually abused?
>
> A. As I recall, the last time that she was sexually abused or was in a situation at risk had been some months before my

> exam. My exam was in February, and as I recall, it had been two or three or four months, not just a matter of days before I saw her.
>
> Q. So you had – so two months later when you did her physical exam and you saw these deep notched, you were surprised?
>
> A. Yes. That's an unusual finding.

App. 269, ll. 1 – 12 (emphasis added). Counsel **did not object** to this testimony.

Officer Traci Barr of the Lexington County Sheriff's Officer investigated Minor's case. App. 185, ll. 6 – 16. Barr stated that she had specialized training in child exploitation cases, child sexual assault cases, and forensic interviews of alleged child victims. App. 181 – 183. While Barr was unable to attend Minor's forensic interview, she viewed the video recording of the interview. App. 186, ll. 1 – 4. Barr also reviewed the medical report from Dr. Luberoff. App. 186, ll. 8 – 11. The solicitor probed:

> Q. Based on your training and experience, did [Minor's] disclosures **appear consistent** to you?
>
> A. **They did.**
>
> Q. And you were able to review the medical report as well?
>
> A. Correct.
>
> Q. Did it appear to **corroborate** the other - - [Minor's] account of what had happened?
>
> A. **Yes.**

App. 186, l. 18 – App. 187, l. 1 (emphasis added). Defense counsel **did not object** to this testimony.

Detective Barr indicated that she was able to corroborate that each of the residences Minor testified to living at during Petitioner's alleged sexual assaults were in Lexington County. App. 207, l. 24 – App 208, l. 2.

> Q. Now, after this, what – what were you able to follow up on after this? Were there locations where this allegedly happened? Did you follow up on those locations?
>
> A. Yes. After the forensic interview, there were several residences named, and as a part of the follow-up of my investigation, I was able to determine that there were approximately seven residences; six of those within Lexington County dating from when [Minor] was approximately five to six years old, until she was 12.

App. 187, ll. 2 – 10. Defense counsel **did not** object to this testimony.

The solicitor discussed Dr. Benedetto's testimony during closing arguments. Specifically, the solicitor contended:

> "Did the sexual battery occur? We heard the details of her testimony. We heard how she relayed this information to Dr. Alicia Benedetto during her forensic interview . . ."

App. 350, ll. 4 – 6.

> "And the doctor also testified that not only did Minor tell about what happened, but this disclosure **was one of the most compelling forensic interviews that she has ever seen.** And she's conducted at least a thousand interviews with children . . . Dr. Benedetto found [Minor's] disclosure **compelling.**"

App. 353, ll. 7 – 15 (emphasis added).

> "And you heard from the doctors who, after examining Minor after talking with Minor were concerned with their findings: Findings that **were the most compelling an interviewer have** – has ever heard in her thousands of interviews; findings where the deep notches were so – were consistent with a child who had endured sexual penetration."

App. 357, ll. 2 – 7 (emphasis added).

The solicitor also commented on Dr. Luberoff's testimony. According to the solicitor:

> "Dr. Susan Luberoff testified. Dr. Susan Luberoff has been in this business for a while, 19 years. Performed over hundreds of exams . . . [Minor] had deep notches that concerned the doctor in her hymen."

App. 354, l. 24 – App. 355, l. 4.

> "She knew that what the findings that she found on Minor was consistent with a child who had endured sexual penetration. She knew that it was consistent with [Minor's] story, and this concerned her."

App. 355, ll. 12 – 16.

The solicitor further contended:

> "You heard from the DSS caseworker, Trina Elfering, who initially got the report of physical abuse; but later went and spoke to Minor and discovered something further."

App. 356, ll. 12 – 14.

The jury found Petitioner guilty as charged. Judge Milling sentenced Petitioner to twenty-five years' imprisonment for the first degree criminal sexual conduct charge, twenty years' imprisonment for the second degree criminal sexual conduct charge, and ten years for the disseminating harmful material to a minor charge. App. 414. The sentences were to run concurrently. App. 414.

Petitioner appealed his convictions and sentences. On November 8, 2010, the South Carolina Supreme Court affirmed Petitioner's convictions and sentence in a memorandum opinion. See State v. Thompson, Memorandum Op. No. 2010-MO-028 (Sup. Ct. filed November 8, 2010). The remittitur was issued on November 24, 2010.

On January 14, 2011, Petitioner filed a PCR application. App. 419. On August 10, 2011, Respondent filed its return requesting an evidentiary hearing. App. 429. On January

28, 2013, a PCR hearing was held before the Honorable R. Lawton McIntosh. App. 434. Robert W. Mills represented Petitioner. J. Benjamin Aplin and John W. Whitmire represented the State. App. 434.

PCR Hearing

Petitioner testified during the PCR hearing. Petitioner stated that he did not see the full discovery provided to defense counsel by the State. App. 441, l. 16. Petitioner denied the allegations of sexual abuse levied against him and never gave any statements to police. App. 440, ll. 21 – 25.

Defense counsel failed to object to inadmissible evidence introduced at trial that Petitioner committed an alleged sexual assault against Minor at the Bayberry address in Richland County, pursuant to Rule 404(b), SCRE. App. 447, l. 18 – App. 448, l. 3. Counsel failed to object to the testimony of Trina Elfering from DSS that Minor revealed to her that Petitioner sexually assaulted her. App. 448, ll. 11 – 25. Counsel failed to object to Detective Traci Barr's testimony that Minor's disclosure appeared consistent based on Barr's training and experience in the field of child sexual assaults. App. 449, ll. 1 – 9. Counsel also made no objections to Dr. Benedetto's hearsay testimony that Minor made disclosures of chronic sexual abuse by Petitioner. App. 450, l. 11 – App. 451, l. 9. Further, no motions to strike the testimony or for a curative instruction were made by defense counsel. App. 451, ll. 19 – 22.

Defense counsel Charles Brooks agreed that, in retrospect, he should have objected to Trina Elfering's testimony that there were allegations of physical abuse which led to Minor's disclosure that Petitioner sexually abused her. App. 471, l. 20 – App. 472, l. 13. Counsel confirmed that Petitioner denied the sexual assault allegations. Counsel was aware

that the State's case hinged on the credibility of Minor. App. 466, ll. 14 – 22. Counsel did not recall making a motion to suppress the introduction of evidence that Petitioner sexually assaulted Minor in Richland County, which was outside the jurisdiction of Lexington County. App. 468, l. 14 – App. 469, l. 3.

Defense counsel agreed that Detective Traci Barr's testimony should have been objected to as bolstering and vouching for Minor's testimony. App. 472, ll. 14 – 24. Counsel stated that he and co-counsel, Irma Brooks, could have objected to Dr. Alicia Benedetto's testimony which detailed Minor's account of the alleged assaults. App. 472, l. 25 – 475, l. 1. Counsel acknowledged knowing of Rule 801(d)(1)(D), SCRE, and agreed that Dr. Benedetto's testimony went beyond the time and place testimony limitation of the evidence rule. App. 476, ll. 2 – 25. Counsel admitted that he should have objected to the doctor's testimony pursuant to Rule 801(d)(1)(D). App. 476. Further, counsel agreed that "hearsay testimony and bolstering and vouching testimony towards [Minor's] credibility if allowed in improperly would be prejudicial to Mr. Thompson's case." App. 478, ll. 3 – 5.

On Thursday, May 2, 2013, a post-hearing deposition was held in which co-counsel Irma Brooks testified. App. 526. Co-counsel agreed that Minor's credibility was "a central issue in the case." App. 533, ll. 19 – 21. Co-counsel acknowledged that she did not move to exclude the sexual abuse that allegedly occurred in Richland County. App. 538, ll. 11 – 24. Co-counsel also admitted that she failed to object to and move to strike the impermissible hearsay testimony of Drs. Luberoff and Benedetto. App. 542, l. 23 – App. 543, l. 1. Co-counsel agreed that "[t]here was hearsay testimony of several witnesses that both bolstered and vouched for [Minor's] testimony," which was prejudicial to Petitioner. App. 551, l. 19 – App. 553, l. 13.

Order of Dismissal

On November 26, 2013, Judge McIntosh issued an order of dismissal. App. 569. The PCR judge denied Petitioner's application. App. 580. The judge found that Petitioner failed to prove his attorneys were ineffective for "failing to object to the presentation of evidence and testimony that Petitioner sexually assaulted the victim in a neighboring county." App. 575. The judge also found that Petitioner "failed to prove his attorneys were deficient for not objecting to Dr. Luberoff's testimony." App. 576.

However, the PCR judge **did** find that Petitioner "met his burden to prove his attorneys were deficient for not objecting to Dr. Benedetto, the forensic interviewer," whose testimony was "impermissible" and "constituted vouching and hearsay." App. 577. The judge also found that Petitioner "met his burden to prove his attorneys were deficient for not objecting to Traci Barr's impermissible testimony regarding the victim's consistent disclosure." App. 577. Such testimony, wrote the judge, "constituted a comment on the veracity of the victim's account of the offenses." App. 577.

Although the judge found Petitioner's attorneys deficient, the judge did not find that the deficiency prejudiced Petitioner. App. 573. The judge, therefore, dismissed Petitioner's application. App. 580.

Motion to Alter Judgment Pursuant to SCRCP 59(e)

On December 30, 2013, PCR counsel Mills filed a motion requesting that the PCR court alter its findings of fact and conclusions of law in the order of dismissal. App. 582. PCR counsel contended that Petitioner was prejudiced by his attorneys' deficiency in not objecting to the impermissible hearsay testimony of Dr. Benedetto because "there is a lack

of any evidence as to a perpetrator other than the allegations of the alleged victim." App. 582.

PCR counsel argued that Dr. Luberoff's testimony "went beyond the limitation of testimony concerning only time and place of the assault in violation of Rule 801(1)(D), SCRE." App. 584. The deficiency "created prejudice especially in conjunction with the deficiency [the PCR] Court ha[d] found occurred due to the failure of trial counsel to object to the testimony of Dr. Benedetto which contained impermissible vouching and hearsay." App. 584. PCR counsel contended that the "cumulative effect of the deficiencies exacerbates the prejudice to [Petitioner] and, again, proves the probability that the outcome of the trial would have been different." App. 584 – 585.

Counsel contended that Trina Elfering's hearsay statements went beyond the limitations of Rule 801(d)(1)(D), SCRE, and prejudiced Petitioner "when viewed together with the other hearsay to which trial counsel did not object." App. 585.

Finally, counsel asserted that Traci Barr's impermissible testimony which constituted "a comment on the veracity of the victim's account of the alleged sexual assault," prejudiced Petitioner "in light of the other failures and deficiencies which occurred" at trial. App. 585. The solicitor's use of the impermissible hearsay, bolstering, and vouching testimony in closing argument "added to the totality of prejudice to [Petitioner]." App. 586.

On February 10, 2014, the State filed its return to the Rule 59(e) motion requesting that the motion be denied. App. 588.

Order Denying Rule 59(e) Motion

On May 22, 2014, the PCR judge issued an order denying Petitioner's motion to alter or amend pursuant to Rule 59(e), SCRCP, in its entirety. App. 593. The judge wrote:

> "Having carefully reviewed the entire record in this matter, this Court finds . . . no basis for altering or amending its prior ruling."

App. 593. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

I. The PCR judge erred by finding trial counsel provided effective representation where counsel failed to object to the impermissible hearsay testimony of the forensic interviewer, the medical doctor who examined Minor, social worker Trina Elfering, and Officer Traci Barr, since such testimony impermissibly corroborated Minor's identification of Petitioner as her abuser under Rule 801(d)(1)(D), SCRE, and improperly bolstered Minor's credibility, which prejudiced Petitioner.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence for prove the truth of the matter asserted." Rule 801(c), SCRE. A prior statement by a witness is not hearsay if "[t]he declarant testifies as the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(d)(1)(D), SCRE; see Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) ("The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies . . . A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony; however such evidence is limited to the time and place of the assault and cannot include details of particulars.").

The "[i]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Jennings, 394 S.C. 473, 478 S.E.2d 91, 93 (2011).

In Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010), this Court found that the "forensic interviewer's testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE." In that case, the forensic interviewer had testified at trial that the alleged victim told her that Smith sexually assaulted her. Id. at 564, 689 S.E.2d at 631. The forensic interviewer also testified that "she found the Victim's statement 'believable' and stated the Victim had no reason 'not to be truthful.'" Id. Trial counsel failed to object to the forensic interviewer's testimony regarding the alleged victim's disclosure during the interview. Id.

The PCR judge denied Smith relief. Id. at 565, 689 S.E.2d at 631. On appeal, Smith argued that the forensic interviewer "interjected impermissible hearsay into the trial, which improperly bolstered the Victim's testimony." Id. Smith further contended that trial counsel's failure to object to the impermissible hearsay testimony prejudiced Smith, "pointing to the State's closing argument, which emphasized the forensic interviewer's testimony." Id. at 564 – 65, 689 S.E.2d at 631.

This Court reversed the PCR judge's denial of post-conviction relief. After reviewing the record, this Court found that there was no overwhelming evidence of Smith's guilt. Id. at 568 – 69, 689 S.E.2d at 633. The State's case relied on the credibility of the alleged victim. Because the impermissible hearsay testimony of the forensic interviewer bolstered the alleged victim's credibility, counsel's failure to object prejudiced Smith. Id. at

"The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). It is improper for a witness to testify as to credibility of a child victim in a sexual abuse case. State v. Hill, 394 S.C. 280, 294 S.E.2d

368, 376 (Ct. App. 2011). See also Jennings, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.").

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that '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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

A. Dr. Benedetto

The PCR judge erred by finding that trial counsel provided effective representation where counsel failed to object to the impermissible hearsay testimony of Dr. Benedetto, the forensic interviewer. The interviewer's testimony that Minor disclosed chronic sexual abuse at the hands of Petitioner and specifically named Petitioner as her abuser was beyond the scope of time and place testimony allowed by Rule 801(d)(1)(D). The impermissible testimony violated the evidence rules. Repeating Minor's testimony that Petitioner was her abuser bolstered Minor's credibility to the jury.

Further, Dr. Benedetto's testimony that Minor's disclosure of sexual abuse by Petitioner was **"compelling" improperly bolstered Minor's credibility**. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (finding that forensic interviewer's testimony of a 'compellling finding' of physical child abuse was inadmissible); State v. McKerley, 397 S.C. 461, 397 S.E.2d 139 (Ct. App. 2012) (finding forensic interviewer's testimony that she found both interviews with minor victim to be "compelling for sexual abuse" was inadmissible).

The PCR judge found that Petitioner had met his burden of proving trial counsel was deficient in failing to object to the impermissible hearsay. Petitioner was also prejudiced by counsel's deficiency. Other than Minor's testimony at trial, the State presented no other evidence which identified Petitioner as Minor's abuser. There was absolutely no forensic evidence identifying Petitioner as the perpetrator. Petitioner gave **no confession** admitting to the alleged sexual abuse. Minor's credibility was key to the State's case. In fact, the solicitor discussed the forensic interviewer's testimony, which repeated Minor's testimony, in closing argument.

Because there was no overwhelming evidence of Petitioner's guilt, admission of Dr. Benedetto's impermissible and bolstering hearsay testimony was not harmless. See Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013) (finding counsel's failure to inadmissible hearsay in criminal sexual conduct case was ineffective assistance). Had this impermissible evidence been objected to and excluded, the result of Petitioner's trial would have been different.

B. Dr. Luberoff

Counsel was ineffective for failing to object to Dr. Luberoff's testimony that she was informed that Minor had allegedly been sexually assaulted prior to performing Minor's medical exam. Such testimony went beyond the scope of time and place testimony allowed under rule 801(d)(1)(D), SCRE. The impermissible testimony was also not relevant to Minor's medical exam. Dr. Luberoff's testimony that she discovered two cuts in Minor's hymen during the medical exam and the exam was performed months after Minor disclosed the alleged sexual assault bolstered Minor's testimony.

Further, the solicitor **addressed the medical doctor's testimony during closing argument**, which exacerbated the prejudice to Petitioner in light of other hearsay evidence which was not objected to and discussed during closing. Had this evidence been objected to and stricken from the record, in addition to the other impermissible and bolstering evidence that was heard by the jury, the result of Petitioner's trial would have been different.

C. Trina Elfering

Counsel was ineffective for failing to object to the DSS social worker's testimony that Minor disclosed to her that Petitioner sexually abused her. Like Dr. Benedetto's impermissible hearsay testimony, Elfering's testimony clearly went beyond the limitations

of time and place testimony of Rule 801(d)(1)(D), SCRE. Petitioner was further prejudiced when the jury was allowed to consider this hearsay testimony in conjunction with the other impermissible and bolstering hearsay testimony that trial counsel failed to object to. The solicitor addressed Elfering's testimony in his closing argument as well.

Had counsel objected to this impermissible and prejudicial hearsay testimony, it would have been excluded from trial. Even if the jury had heard Elfering's testimony, counsel could have moved to strike or requested a curative instruction, which would have preserved the issue for appellate review. Without this impermissible and bolstering hearsay testimony, in addition to the other testimony that counsel failed to object to, the result of Petitioner's trial would have been different.

D. Officer Traci Barr

Counsel was ineffective for failing to object to the impermissible vouching testimony of Investigator Barr. By testifying that based on her investigation of Minor's case, Minor was **"consistent"** in her disclosures, Barr improperly commented on the veracity of Minor's account of the alleged sexual assault. See Dawkins, supra. Further, the solicitor addressed Barr's testimony in closing argument, which further prejudiced Petitioner. Had Barr's testimony been objected to, the issue of whether the testimony was improper would have been preserved for appellate review. If the testimony had been objected to and stricken from the record, the jury would not have considered it during deliberation and the result of Petitioner's trial would have been different.

II. The PCR judge err by finding trial counsel provided effective representation where counsel failed to object to impermissible evidence that Petitioner allegedly sexually abused Minor in another jurisdiction, Richland County, where such evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, and even if the evidence was relevant, its probative value was substantially outweighed by unfair prejudice to Petitioner.

Evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE. Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Rule 404(b), SCRE; see also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Where the acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Before evidence of prior bad acts can be admitted, "it must be put to a rather severe test." State v. Brooks, 335 S.C. 140, 142, 515 S.E.2d 764, 765 (Ct. App. 1999). The "acid test of admissibility is the logical relevancy of the other crimes." State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). Even if such evidence is clear and convincing and falls within a Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; see also State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) ("When . . . the previous alleged bad act is strikingly similar to the one for which [defendant] is being tried, the danger of unfair prejudice is enhanced.")

In cases where evidence of other crimes is offered to prove a common scheme or plan, a court must analyze the similarities between the crime charged and the bad act

evidence. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). A "general similarity" between offenses is not enough. Timmons, 327 S.C. at 52, 488 S.E.2d at 325 (citing State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983)). There must be "a close relationship" between the prior bad act and the crime charged. State v. Ford, 334 S.C. 444, 451, 513 S.E.2d 385, 388 (Ct. App. 1999).

The common scheme or plan and identity exceptions to Rule 404(b), SCRE, "are interrelated, as evidence of a common scheme or plan essentially goes to prove the identity of the perpetrator." State v Kennedy, 339 S.C. 243, 247, 528 S.E.2d 700, 702 (Ct. App. 2000). To prove identity, the bad act "must logically relate to the crime with which the defendant has been charged." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000); State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). The evidence introduced must be "necessary" to establish the perpetrator's identity. State v. Carter, 323 S.C. 465, 467-68, 476 S.E.2d 916, 918 (Ct. App. 1996).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that '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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

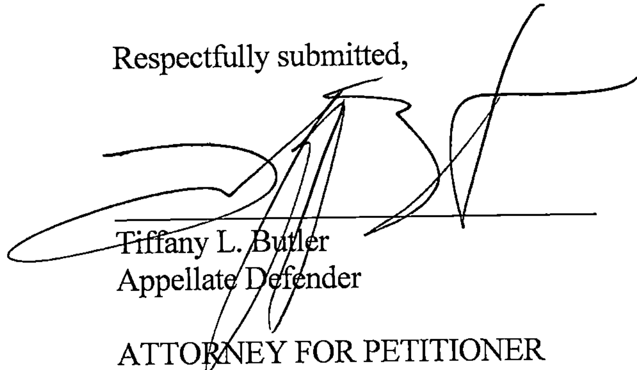
Here, defense counsel was ineffective for failing to move to exclude and object to the inadmissible testimony that Petitioner sexually abused Minor in Richland County. Evidence that Petitioner allegedly abused Minor in Richland County was not relevant to prove that Petitioner abused Minor in Lexington County. Minor testified that Petitioner was her abuser. The identity of the perpetrator was not an issue that the State sought to prove at trial. Even if the alleged abuse in Richland County was relevant to the Lexington County charges, any probative value was substantially outweighed by unfair prejudice to Petitioner. However, the judge could not make a ruling because counsel failed to object.

Petitioner had not been charged **or** indicted for the alleged sexual abuse in Richland County. The prior abuse had not been proven by "clear and convincing evidence." See Gillian, supra. Had counsel objected to and moved to exclude the prior bad act evidence, the issue of admissibility would have been preserved for appellate review and the evidence would have potentially been excluded. The jury would not have considered it and the result of Petitioner's trial would have been different.

CONCLUSION

For the reasons argued, Petitioner Yancey Thompson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

YANCEY THOMPSON, PETITIONER,

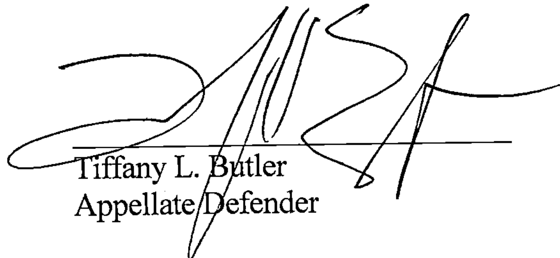
V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO 2014-006611

CERTIFICATE OF SERVICE

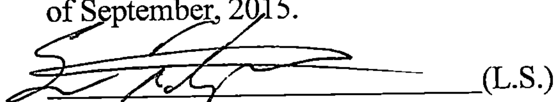
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Yancey Thompson, #330395, at BroadRiver Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of September, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of September, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.