THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Tanya A. Gee, Circuit Court Judge

Case No.: 2015-CP-43-0037
Appellate Case No.: 2016-000615

Robert T. Taylor,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

PETITION FOR WRIT OF CERTIORARI
PETITION OF RESPONDENT-PETITIONER

Tricia A. Blanchette
Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

Attorney for Respondent-Petitioner

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the lower erred in finding that trial counsel's handling of the expert and her testimony did not amount to ineffective assistance nor did her evidentiary hearing testimony amount to newly discovered evidence.

II. Whether the lower court erred by failing to find that trial counsel provided infective assistance when he failed to argue against the imposition of a sentence of life without parole based upon Rule 404(b), SCRE, and S.C. Code 17-25-50 (2003), which resulted in the issue being unpreserved for appellate review

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). When it is argued that the lower court's decision is controlled by an error of law, a *de novo* review is required. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

STATEMENT OF THE CASE

Respondent-Petitioner hereby incorporates Petitioner-Respondent's Statement of the Case providing the procedural history.

FACTUAL STATEMENT OF THE CASE

The following factual statement is taken directly from the Order Granting Application for Post-Conviction Relief. Am. App. pp. 712-17.

The Court of Appeals provided this succinct explanation of the allegations against Taylor:

> Taylor was the pastor of the church Victim attended in Murrells Inlet, South Carolina. In November 1998, when Victim was 11, Taylor organized a camping trip with Victim and a group of six or seven boys from the church. Taylor took the boys to an area "just outside [the city of] Andrews" on Highway 521 and the group hiked about a mile into the woods to a campsite "right next to the Black River." Taylor and the boys set up a tent and a large tarp, made a fire and cooked food. At approximately 11 p.m. the boys retired to their sleeping bags under the tarp. Later that night, Taylor woke Victim, placed his hand over Victim's mouth and carried him to the tent. Once inside the tent, Taylor removed Victim's clothes and forced Victim to touch his penis and anus. Next, Taylor raped victim. After raping Victim, Taylor instructed Victim to not reveal the rape to anyone and returned Victim to his sleeping bag. Taylor slept next to Victim and held him throughout the course of the night.

State v. Taylor, 399 S.C. 51, 55, 731 S.E.2d 596, 598-99. (Ct. App. 2012).

This allegation will hereinafter be referred to as the "Williamsburg County incident," and it is the crime for which Taylor is serving a life without parole sentence and from which he seeks post-conviction relief.

As with many cases involving allegations of child sexual abuse, Victim did not disclose the Williamsburg County incident until many years later, when he was seventeen years old. On June 1, 2005, Victim provided the following written statement to the Georgetown County Sheriff's Office:

> Sometime between February and April LC3 Youth Groups went on a camping trip to Andrews, S.C. It was very could outside and it rained a little bit. My friend Charles Harrison asked me if I wanted to go. We went back in the woods about a mile and a half. There were corn fields all around with two houses on either side of the street. We set up camp around like 7:30 PM. We made a bonfire then we went to bed around 11:00. About 2 to 3 hours later, Troy woke me up by putting his hand over my mouth and telling me to be qui[et]. He took me to a sep[a]rate tent and started touching my penis. He was honestly rubbing and fondling it. He did this for like 30 minutes continuously touching me. I told him to stop numerous times he just told me to be qui[et]. After that he took me back to the other tent and made me sleep beside him. I g[ue]ss so I wouldn't say nothing. I'm really not sure if anyone say anything but if they did Zack Webster and Charles Harrison would be the ones that saw.

Six months after disclosing the abuse from the 1998 Williamsburg County incident, Victim disclosed another incident of abuse at the hand of Taylor. This incident occurred in 1999 in Georgetown County. The Court of Appeals described it as follows:

> In August 1999, Taylor and a few other adults from the church organized a trip to the beach. After leaving the beach, the group returned to the church to use the showers. Once all the showers were occupied, Taylor asked victim and another boy if they would like to use the showers at his house. Victim and the other boy accompanied Taylor to his home near the church. While Victim was showering, Taylor entered the bathroom, removed his clothes and entered the shower. Taylor forced Victim to touch his penis and Taylor touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to divulge the rape to anyone. Taylor drove Victim and the other boy back to the church.

State v. Taylor, 399 S.C. at 55-56, 731 S.E.2d at 599.

Taylor pleaded guilty in Georgetown County to the 1999 incident on April 20, 2006. The Honorable Edward B. Cottingham sentenced Taylor to eight years, suspended to five years of active time and three years' probation.

In March of 2007, approximately four months before Taylor was tried for the 1998 Williamsburg incident, the State served Taylor with a notice of intention to seek a sentence of life without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code. The State relied on Taylor's 2006 Georgetown County conviction for second degree criminal sexual conduct to enhance Taylor's punishment.

At Taylor's trial, the State moved to strike the first jury that was selected, arguing that defense counsel had used eight of ten strikes against white jurors. The trial judge found that defense counsel violated Batson v. Kentucky, when he struck juror number 146. Mr. Barr purportedly struck her because she was too educated, yet he sat a black, female juror with more education than juror number 146. A new jury was then selected, and juror number 146 was seated on the jury that convicted Taylor.

At trial, the State called four witnesses: (1) Gayle Allen Cook of the Durant's Children Center, who was qualified as an expert in the field of counseling and treatment of childhood sexual abuse; (2) Victim's mother; (3) Victim; and (4) Sergeant Laura Rogers of the Williamsburg County Sherriff's Office. Ms. Cooke testified that generally that a person who has been abused as a child may be withdrawn and have suicidal tendencies. She further explained that was "pretty normal" for abused children to turn to alcohol or drugs that that it was very common for them to have difficulties with the law. She also testified that 69% of child victims wait to disclose abuse until adulthood.

Victim's mother testified that her son attended the church camping trip in November 1998, when he was 11. She further testified that at the age of 14, Victim began abusing drugs and alcohol, and at some point prior to disclosing the abuse, he attempted to kill himself with an overdose of Xanax. On cross-examination, defense counsel asked Victim's mother a series of questions about the location of the camping trip, apparently attempting to demonstrate that she did not have firsthand knowledge that the campsite was located in Williamsburg County. (p.90-2) Counsel also elicited testimony from her that Victim's behavior was not noticeable different between the ages of eleven and fourteen, when Victim began abusing drugs and alcohol. Victim's mother also admitted that she and her husband (Victim's father) were experiencing a "little bit" of marital difficulty when she "started noticing [Victim's] somewhat unwholesome behavior."

Victim, who was 19 years old at the time of the trial, also testified, describing both the 1998 Williamsburg County incident and the 1999 Georgetown County incident. Victim testified that after being abused, he was too scared to tell anyone. At 14, Victim admitted he began smoking marijuana, and a year later, he began drinking alcohol. He testified that he did this in an effort to drown out memories of the abuse, and by age sixteen he graduated to more serious drugs, such as cocaine and pills. At the age of 17, he took nine Xanax pills because he wanted to hurt himself. After that, Victim testified that he told a male friend about being abused by Taylor as a child. Victim then disclosed the 1998 Williamsburg incident to law enforcement, and six month later, he disclosed the 1999 Georgetown incident. Victim specifically identified the location of the campsite as being in Williamsburg County. On cross-examination, defense counsel pointed out discrepancies between Victim's initial statement and his testimony in court. For instance, defense counsel pointed out that Victim first identified the trip happening sometime

between February and April, yet he testified it happened in November only after finding a church bulletin listing the actual date of the youth camping trip. Defense counsel also questioned Victim about whether the other boys saw Taylor waking up next to Victim, and Victim acknowledged that they did but none of them said anything. Victim also testified that Taylor did not bring his son on the camping trip.

The State's final witness was Sergeant Laura Rogers, a victim's advocate for the Williamsburg County Sheriff's Office. She testified that the incident occurred in Williamsburg County, and at the time of the incident, Victim was 11 years old and Taylor was 39 years old. On cross examination, defense counsel focused on the location of the incident, pointing out that Black Ricker [River] runs through both Georgetown and Williamsburg counties.

The defense called one witness, Trevor Morton. Mr. Morton is Taylor's nephew and participated in the camping trip. According to Mr. Morton, he slept next to Taylor under the tarp, and Taylor had his three-or-four-year-old son with him, sleeping in the same sleeping bag. Mr. Morton testified that he knew Taylor remained next to him all night because Mr. Morton did not sleep well due to being cold and feeling scared from the ghost stories told earlier in the evening. Mr. Morton confirmed that another tent was set up, but testified that the tent had everyone's gear stored in it. Mr. Morton did not remember Taylor sleeping next to Victim, nor did he remember anything unusual happening that night. On cross-examination, the State pointed out that Mr. Morton loved his uncle and did not want anything bad to happen to him. After Mr. Morton's testimony, the defense rested.

Defense counsel successfully requested that the trial judge charge the jury on the issue of venue, so that issue would be part of the jury's deliberation. As a result, counsel spent a fair amount [of] time arguing venue in his closing statement, though he also questioned the Victim's

credibility in an effort to create a reasonable doubt. Ultimately, the jury convicted Taylor, and the judge sentenced him to life without the possibility of parole. Am. App. p. 712-717.

ARGUMENT

I. The lower court erred in finding that trial counsel's handling of the expert and her testimony did not amount to ineffective assistance nor did her evidentiary hearing testimony amount to newly discovered evidence.

At the evidentiary hearing, Gaye Allen-Cook was called to the stand. Am. App. p. 471. The State stipulated to her expert qualification previously given at the trial in Williamsburg County.[1] Am. App. p. 472. As to her involvement in the underlying trial, she recalled receiving a call from Kimberly Barr, Assistant Solicitor, and being asked to testify. Am. App. p. 472. She understood that she was needed to testify about the dynamics of child sexual abuse and delayed disclosure. Am. App. p. 472.

When asked, she answered that she was not contacted by trial counsel prior to trial. Am. App. p. 472. She affirmed that she would have talked to him if he had contacted her and she would reviewed any case materials he requested. Am. App. p. 473.

She explained that she did not have any knowledge of the victim or the particulars of the case prior to trial. Am. App. p. 473-474. She remembered entering the courtroom on the day of trial, as follows:

> I remember walking in and being a bit overwhelmed with all of the people that were in the courtroom that day. It's a fairly large courtroom and to the right of me was where defense counsel and Mr. Taylor were seated, along with so many people that there were standing room only. And I remember looking over to the left and seeing a man and an older lady seated at a table where Ms. Barr and a couple of her assistants were seated. And I was just a bit overwhelmed at all the people that were in the courtroom and, in my years of testimony, I had not been exposed to anything quite like that.

Am. App. p. 473, lns. 10-19.

[1] An expert in the field of counseling and treatment of childhood sexual abuse. Am. App. p. 50, lns. 2-3, 11-12.

She acknowledged that she would have reviewed any documents handed to her by defense counsel during cross-examination, but she recalled counsel's questions focused more on forensic interviewing, which was not relevant since the victim was an adult at the time of disclosure. Am. App. pp. 474, 479-80. She remembered leaving and thinking that trial counsel could have attempted to discredit her testimony on cross-examination, but it was the easiest cross-examination she had underwent. Am. App. pp. 479-81.

As to her involvement in the PCR action, she indicated that she received the file piecemeal from PCR counsel due to difficulty in obtaining the file. Am. App. p. 481. She reviewed the complete file, including transcripts and the Appendix from the Georgetown case. Am. App. p. 482. One document of great interest to her was the South Carolina Department of Social Services Determination Fact Sheet, which determined that R-P presented no threat of harm of sexual abuse to his children. Am. App. p. 482, Am. Supp. App. p. 5. She indicated that she would have asked for further information on the case if this finding had been presented to her prior to her trial testimony. Am. App. p. 483.

She explained that she had met with R-P, Zack Webster, Trevor Morton, Chad Bernard, Tony and Linda Taylor and Jimmy and Peggy Morris. She explained that she shared her findings from her meetings with PCR counsel and Pete Skidmore. Am. App. pp. 483-4. As to her specific findings, she noted that Zack Webster was very close to R-P and he disclosed that R-P never attempted to abuse him. Am. App. pp. 485-6. She explained that her discussions with Mr. Webster raised a red flag for her regarding the victim's allegations due to a number of factors she discussed on the stand. Am. App. pp. 485-6. She further explained that the Morrises were missionaries and ran a ministry in Romania involving an orphanage. Am. App. p. 486. She

learned from them that they had seen R-P interact with the children at the orphanage and had no concerns. Am. App. p. 486-7.

She was emphatic that after reviewing the case file and meeting with the above listed individuals, she would not have testified for the State. Am. App. pp. 487-489. She made it clear that she does not get involved with every case that she is contacted on and this case has red flags that would have kept her from testifying for the State. Am. App. p. 489. She also explained that at this juncture, she would have been willing to testify for the defense. Am. App. p. 490. She also expressed her concern that her testimony was used to bolster the victim's testimony. Am. App. p. 496-7.

Judge Gee heard the testimony of Gaye Allen-Cook and found it to be admissible for the purpose of which it was offered at the evidentiary hearing.[2] R-P claims involving Gaye-Allen

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[2] During a bench conference, the following case law was discussed and referenced on the record:

> It is well established that it is improper for an expert to comment on the veracity of a child's accusations of sexual abuse. See State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (Finding therapist indicating he believed victim's allegations were genuine was improper.); See also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000) (Finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child), State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) ("The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter.").
>
> In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court explained:
>
> > Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded. Our courts have previously held that "[t]he assessment of witness credibility is within the exclusive province of the jury," and that witnesses generally are "not allowed to testify whether another witness is telling the truth." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); see also L.A. Bradshaw, Annotation, *Necessity and Admissibility of Expert Testimony as to Credibility of Witness*, 20 A.L.R.3d 684 (1968 & Supp. 2012) (stating an expert witness should not vouch for the truthfulness of a witness). 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. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011); cf. Smith v. State, 386 S.C.

Cooke were twofold and alternatively pled. First, R-P claimed counsel was ineffective for failing to request information regarding her findings and opinions prior to trial and discuss such with her and for failing to object and/or move to suppress her testimony. Secondly, R-P alleged that the testimony of Gaye Allen-Cook amounted to newly discovered evidence. Specifically, R-P alleged that Gaye Allen-Cook would not have taken the stand for the State if given the opportunity to review the case and would have been willing to assist in the defense of R-P. See State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); See Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)).

In the standing Order, Judge Gee reasoned that the expert testimony offered at trial was in line with State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and counsel was not ineffective for failing to contact her prior to trial or for not objecting to her testimony at trial. Thereafter, Judge Gee also denied the claim of newly discovered evidence finding: "Taylor has failed to establish that her change in position could not have been discovered, in the exercise of due diligence, prior to trial." Am. App. p. 729. R-P submits that this findings amount to an error of law. If the State's first witness - the expert that provided testimony regarding delayed disclosure and signs of sexual abuse, who admitted she was used to vouch or bolster the credibility of the victim - stated she would not have testified at trial if provided the case file and Judge Gee found her position was discoverable before trial, how is counsel not ineffective. Furthermore, how is counsel's failure to contact the expert or ask her to review case documents on the stand not outcome determinative? One does not have to utilize much imagination to

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562, 564-65, 689 S.E.2d 629, 631 (2010) (observing the forensic interviewer interjected impermissible hearsay into the trial, which improperly bolstered the victim's testimony; the forensic interviewer testified that the victim told her that the defendant had sexually assaulted her and that she found the victim's statement "believable").

> S.C. Code Ann. §§17-25-45(F) and 17-25-50 must be construed together. State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). §17-25-50 precludes an LWOP sentence "when the multiple offenses are inextricably connected and share an immediate temporal proximity." Bryant v. State, 384 S.C. 525, 532, 683 S.E.2d 280, 284 (2009). In other words §17-25-50 prevents the imposition of an LWOP sentence when the offense of conviction and the predicate offense(s) constitute "one continuous course of conduct." Gordon at 151, 588 S.E.2d at 109. "The cases which have found 'one continuous course of conduct' under §17-25-50 have been cases in which, for example, the defendant had two convictions arising out of a single incident; or situations which involve crimes closely connected in point in time; or apply to a single, continuous crime spree." Koon v. State, 372 S.C. 531, 5330534, 643 S.E.2d 680, 682 (2007) (internal citations omitted).
>
> The Appellant would content that where, as here, substantive facts of prior convictions are admitted as common scheme or plan evidence pursuant to Rule 404(b), SCRE, those prior convictions cannot be used as predicate offenses under the "continuous crime spree" definition of "one continuous course of conduct" given in Koon. IF evidence of another crime is so closely connected to the crime for which the defendant is on trial for committing, as was posited by the State in this case, then the "common scheme or plan" then the offenses must be "inextricably connected," and should be treated as "one continuous course of conduct" worth of §17-20-25's protections. See Bryant, *supra* at 532, 683 S.E.2d at 284.

Am. Sec. Supp. App. p. 403.

On December 21, 2011, the South Carolina Court of Appeals issued an Opinion affirming Applicant's conviction and sentence. State v. Taylor, 396 S.C. 193, 720 S.E.2d 522 (Ct. App. 2011). In regards to the issue raised regarding the imposition of the life sentence, the Court of Appeals held:

> We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must be "raised to and ruled upon by the trial judge to be preserved for appellate review") (emphasis added); State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant). Taylor appears to approach the issue at the post-trial motion hearing.4 Even so, this is insufficient to preserve the issue for our review because it was not raised at trial. See Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial

picture how the jury would have been impacted if, through effective cross-examination, an expert would have testified in the manner Gaye Allen-Cook did at the evidentiary hearing. Therefore, R-P asks this Court to determine that the contradictory findings require reversal and find that trial counsel rendered prejudicial ineffective assistance of counsel or alternatively that the testimony offered by Gaye Allen-Cook amounted to newly discovered evidence requiring a new trial.

II. The lower court erred by failing to find that trial counsel provided ineffective assistance when he failed to argue against the imposition of a sentence of life without parole based upon Rule 404(b), SCRE, and S.C. Code 17-25-50 (2003), which resulted in the issue being unpreserved for appellate review.

On March 15, 2007, the State served trial counsel the "State's Notice of Intent to Seek a Sentence of Life Without Parole pursuant to §17-25-45 (H), South Carolina Code of Laws." Am. Supp. App. p. 25. On July 10, 2007, R-P was called to trial in Williamsburg County in front of the Honorable George C. James, Jr. During a motion *in limine* regarding the exclusion of testimony regarding the prior Georgetown conviction, the State proffered victim's testimony. Am. App. pp. 101-150. Each party offered argument regarding the evidence in light of Rule 404(b), South Carolina Rules of Evidence, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Am. App. pp. 135-150. The State primarily argued "common scheme or plan" and provided the court with a list of the similarities between the two cases and noted that the cases were close in time (within a year of each other). Am. App. p. 125, ln. 18 - p. 126, ln. 23. Specifically, trial counsel advanced the following arguments: 1) "In looking at the facts, clearly, we don't have the appropriate components for a Lyle exception," and 2) "The prejudice from admitting these confusing statements to the jury would – substantially outweigh any probative value of this information." Am. App. p. 128, lns. 21-23, p. 129, lns. 5-9. The trial court ruled: "He (victim)

can testify as to the events that occurred, but let's stay away from the conviction." Am. App. p. 150, lns. 15-18.

Upon return of a guilty verdict, the State moved for the imposition of a sentence of life without parole (LWOP) pursuant to § 17-25-45 of the South Carolina Code of Laws. Am. App. p. 410, ln. 15. After the State's lengthy argument, defense counsel stated: "Judge, our position is that this offense does not qualify for life without parole." Am. App. p. 412, lns. 12-15. After the State responded to counsel's argument, the Court had the following conversation with trial counsel:

> Court: Mr. Barr, is it your argument that the earlier conviction, the Georgetown county conviction, makes it such that these two convictions one for Kidnapping and one for Criminal Sexual Conduct with a minor in the second degree in this incident we tried, which is it that makes this not qualified for life without parole, is it Georgetown County?
>
> Barr: The date of the offense in the Georgetown County proceedings.
>
> Court: Yes sir. It was after this incident?
>
> Barr: Yes sir.

Am. App. p. 414, lns. 4-14.

Thereafter, the court ruled:

> Mr. Barr, I don't detect anything in the statute or in the case citations which I have read that talks about the fact that this statutory scheme would not apply because at the time of the offense as it compares to the date of convictions were in. So, if you've got any case citations that would support that, I don't know that they exist, but certainly you made that argument, I deny your motion to quash the notice and of course, if you want to make a motion for reconsideration because you detected a case on that regard you can certainly do that, but I have looked for it myself just in case the situation arose bu I do not find I, so I would deny your motion to quash.

Am. App. p. 415, lns. 9-20. After which, the trial court imposed a sentence of life without parole. Am. App. p. 438-9.

Counsel filed a motion to reconsider and a hearing was convened on September 27, 2007. After the court pointed out that the crimes occurred approximately nine months apart, trial counsel argued: " Judge, under the circumstances we would definitely take the position that... that with respect to the parties, with respect to the various allegations surrounding these two events that they... they certainly could easily be looked upon as one as opposed to two separate incidents." Am. App. p. 779-780. Following the hearing, Judge James issued a written Order. Am. Supp. App. p. 30. Regarding the imposition of a life sentence, Judge James identified the following issue:

> The life without parole (LWOP) notice should have been quashed in that the Williamsburg County incident and Georgetown County incident should be construed to be one continuous event and not subject to separate consideration insofar as imposition of a life sentence for two most serious convictions is concerned.

Am. Supp. App. p. 31.

He then ruled:

> The defendant's actions did involve a common scheme or plan under State v. Lyle; however, there is no authority for the proposition that separate offenses which amount to a "common scheme or plan" under Lyle are necessarily "so closely connected in point of time that they may be considered as on offense" under Section 17-25-50. There may be some factual scenarios in which the conclusion argued by the defendant is correct, but under the circumstances of this case, the existence of a common scheme or plan under Lyle does not warrant a finding that the Williamsburg and Georgetown crimes were part of one continuous course of conduct under Section 17-25-50. Therefore, the LWOP notice should not be quashed on this basis.

Am. Supp. App. p. 33.

On direct appeal, the following issue was presented in the Brief of Appellant: "The lower court improperly sentenced the Appellant to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." Am. Sec. Supp. App. p. 401. Specifically, the following argument was made:

> motion is not preserved for appellate review); see also Wilder, 330 S.C. at 77, 497 S.E.2d at 734 (holding post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it). The balance of the argument on the issue at the post-trial motion hearing was raised by the trial court, which is also insufficient to preserve the issue for our review. Duncan v. Hampton Cnty School Dist. No. 2, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999) (finding issue unpreserved where it was raised sua sponte by the trial court and not by the respondent). Furthermore, on appeal, Taylor argues "[t]he [trial court] improperly sentenced [Taylor] to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." However, at trial and during argument on his motion to reconsider, Taylor repeatedly maintained the trial court erred in sentencing him to life without parole because the predicate most serious offense, the 1999 rape, occurred after the 1998 rape. Taylor cannot argue one ground for error at trial and a different ground for error on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). Accordingly, this issue is not preserved for our review.

State v. Taylor, 396 S.C. 193, 205-06, 720 S.E.2d 522, 528-29 (Ct. App. 2011).

By way of further explanation in a footnote, the Court of Appeals reasoned:

> Taylor contends, in a persuasive argument, that the definition of "inextricably connected" and "continuous course of conduct," as applied to these facts, entitles him to lenity or other relief in the application of section 17-25-50. However, he did not raise this issue at trial; thus, we are bound by the laws of preservation.

State v. Taylor, 396 S.C. 193, 205 n.4, 720 S.E.2d 522, 528 (Ct. App. 2011).

After both parties petitioned for rehearing, the Court of Appeals refiled an Opinion on June 6, 2012. By way of the refiled Opinion, the Court again found the issue was not properly preserved by trial counsel for appeal. State v. Taylor, 399 S.C. 51, 62-3, 731 S.E.2d 596, 602-3 (Ct. App. 2012).

At the evidentiary hearing, Applicant recalled speaking with Mr. Barr about the LWOP notice during their very first meeting. When counsel asked appellate counsel about the LWOP issue, Mr. Thompson explained the argument he made on appeal. Am. App. p. 630-632. He further explained that it appeared the Court was very interested in the issue based upon the

questioning of the State at oral argument. Am. App. p. 631, lns. 17-23. He made it clear that the problem he encountered was preservation since the trial court not counsel appeared to raise the argument in the record. Am. App. pp. 631-2. Recalling his argument in front of the Court of Appeals in regards to preservation, he stated: "I'm dealt the hand I'm dealt. I can't change the way that it – that it was argued." Am. App. p. 632, lns. 15-17. When asked if it would have aided his argument if he did not have to be concerned with preservation, he responded: "Absolutely, that's why we lost." Am. App. p. 633, lns. 14-16.

R-P submits that Judge Gee was correct in finding that the issue was properly before her since it was found unpreserved on direct appeal, yet she erred in failing to find that trial counsel rendered ineffective assistance when he failed to argue against the imposition of a LWOP sentence based on Rule 404(b), SCRE and S.C. Code 17-25-50 as was raised and found to be not preserved on direct appeal. As the Court of Appeals held, R-P submits that the trial court not counsel raised the issue at the trial level. Therefore, by failing to properly raise and preserve the issue, trial counsel prejudicially precluded proper appellate review of the argument advanced by appellate counsel.

In U.S. v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984), the Supreme Court of the United States made it clear that "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities not luxuries.'" Citing Gideon v. Wainwright, 372 U.S. 335, 334 (1963). The Supreme Court of the United States further reasoned as follows:

> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." United States v. Morrison, 449 U.S. 361, 364 (1981). Unless the

> accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. at 343. Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967).

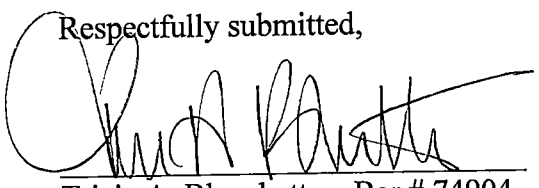
Cronic, 466 U.S. at 655-56, 104 S.Ct. at 2045.

Here, counsel failed to act as an advocate for R-P and properly preserve the "persuasive" argument advanced by appellate counsel. But for the trial court advocating the issue ultimately raised by appellate counsel, it appears counsel would have not addressed it. R-P asks this Court to find that prejudice is evident based upon review of the argument on appeal, the footnote reasoning that the argument was "persuasive," and the testimony offered by appellate counsel at the evidentiary hearing. Thus, resulting in another basis on which R-P should be granted a new trial.

CONCLUSION

As is argued in detail above, R-P would ask this Court to grant certiorari and review these two additional basis on which relief should have been granted if this Court grants certiorari on P-R's arguments asking this Court to reverse the relief granted by the lower court. R-P would also ask for the opportunity to further brief and/or argue the above issues if this Court sees fit to disturb the granting of a new trial by the Honorable Tanya A. Gee.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Respondent-Petitioner

This 14 day of November 2016