STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

KEITH DESUE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000542

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

ISSUE PRESENTED

Did the PCR court err by finding trial counsel articulated a valid strategic reason for opening the door to the admission of Minor's prior consistent statements pursuant to State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002) when the record conclusively demonstrates counsel had not read Jeffcoat and was unfamiliar with its holding when he asked Minor about whether she was coached by her adoptive parents and the solicitor, and by finding Petitioner was not prejudiced by counsel's deficient performance when three separate witnesses were permitted to testify in detail about the specific statements Minor made to them about the alleged sexual abuse?

STATEMENT

A Greenville County Grand Jury indicted Petitioner at the December 2010 term of General Sessions for first degree criminal sexual conduct with a minor. App. 250-251. His case was called to trial on January 9, 2012 before the Honorable C. Victor Pyle, Jr., and a jury. App. 1. Assistant Solicitor Bryna Seay represented the state, and Scott D. Robinson represented Petitioner. App. 1. On January 10, 2012, the jury found Petitioner guilty. App. 187, l. 23 – 188, l. 6. He was sentenced by Judge Pyle to the mandatory minimum of twenty-five years imprisonment. App. 190, ll. 14-16.

On November 7, 2013, the Court of Appeals dismissed Petitioner's direct appeal after Petitioner's appellate counsel informed the court that Petitioner, with a full understanding of the possible consequences, wished to withdraw his appeal. App. 194-195.

On January 26, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 197-203. The state filed a return to this application dated May 14, 2014. App. 204-209. The matter proceeded to an evidentiary hearing on December 16, 2014 before the Honorable Eugene C. Griffith, Jr. App. 210. Senior Assistant Deputy Attorney General Karen C. Ratigan represented the state, and Brian P. Johnson represented Petitioner. App. 210. By order dated February 4, 2015, Judge Griffith denied Petitioner relief. App. 243-249.

On October 13, 2015, Petitioner filed a Petition for Writ of Certiorari with this Court. The state filed a Return on December 29, 2015. By order dated October 20, 2016, this Court granted certiorari and ordered further briefing.

This Brief of Petitioner follows.

ARGUMENT

The PCR court erred by finding trial counsel articulated a valid strategic reason for opening the door to the admission of Minor's prior consistent statements pursuant to *State v. Jeffcoat*, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002) when the record conclusively demonstrates counsel had not read *Jeffcoat* and was unfamiliar with its holding when he asked Minor about whether she was coached by her adoptive parents and the solicitor, and by finding Petitioner was not prejudiced by counsel's deficient performance when three separate witnesses were permitted to testify in detail about the specific statements Minor made to them about the alleged sexual abuse.

Facts at Trial

Minor, who was eight years old at the time of trial, claimed that Petitioner, who was her biological father, sexually abused her on Christmas Eve 2008 while she was at Petitioner's apartment. Specifically, Minor claimed Petitioner "put ice cream on my private spot, and then he put his private spot in mine." App. 48, ll. 7-9. Minor later told her mother about the alleged abuse after her mother discovered a spot of blood in her underwear. App. 47, ll. 6-13; App. 51, l. 22-23.

On December 26, 2008, Minor's godmother, Rena Bright, took Minor to the hospital at her mother's request.[1] App. 46, l. 17 – 47, l. 13; App. 62, ll. 11-20. At the hospital, Minor was interviewed by Dr. Breann Bailey, who was the pediatrician working in the emergency room when Minor arrived. Dr. Bailey and Carmen Johnson, a registered nurse, physically examined Minor and

[1] Minor was placed in the custody of the South Carolina Department of Social Services (DSS) after she was brought to the hospital with these allegations. Shortly thereafter, Minor was placed into the custody of Amie Hall and, presumably her husband. Minor was later adopted by the Halls before the start of Petitioner's trial. Minor referred to the Halls as her mother and father. See App. 112, ll. 6-10. She called Petitioner, who is her biological father, and Jill Dudley, who is her biological mother, by their first names. See App. 46, ll. 2-14 and App. 52, l. 4.

collected vaginal, rectal, and oral swabs, among other evidence, as part of a "sexual assault evidence collection kit." App. 69, l. 1 – 75, l. 21.

Dr. Bailey testified that Minor had a small laceration on her labia minora and redness at her vaginal opening. App. 82, l. 15 – 83, l. 23. Bailey examined Minor's underwear that Bright brought with her to the hospital and observed a thick clot of blood "in the crotch area." App. 83, l. 24 – 84, l. Bailey maintained it was unlikely that this blood clot was caused by the laceration she discovered. App. 84, ll. 13-18. She ultimately referred Minor to the child advocacy center. App. 84, ll. 19-24.

On cross-examination, Dr. Bailey testified that Minor's hymen was intact and that she did not observe anything that would suggest there had ever been any intrusion of the "hymenal area." App. 89, ll. 5-16. Additionally, she testified that irregular or unhealthy bowel movements could cause the presence of blood, but that it was unlikely the blood clot found in Minor's underwear was related to a bowel movement.[2]

In addition to being examined by Dr. Bailey, Minor also spoke to two law enforcement officers at the hospital that evening. She made various statements to these officers about the alleged abuse. On December 29, 2008, Minor was physically examined by Dr. Mary Fran Crosswell at the Pendleton Place Children's Center. App. 139, ll. 16-25. Crosswell testified that during Minor's genital exam, she observed a variation of the hymenal tissue. However, Crosswell was uncertain whether this variation was a transection, which is a complete tear, or a notch, which is simply a

[2] Minor admitted during her testimony that she has had problems with her bowel movements since birth and that she often has trouble defecating. She occasionally takes medication to treat her condition. App. 54, ll. 8-18. Minor also admitted that when her mother first found blood in her underwear she told her mother the blood was caused by diarrhea. App. 56, ll. 6-13.

variation at the edge of the hymen that can occur naturally. Because of her uncertainty, Crosswell referred Minor to the Julie Valentine Center, which has specialized equipment to conduct genital exams, for a follow up examination. App. 140, l. 6 – 142, l. 1.

Dr. Crosswell examined Minor again on January 8, 2009 at the Julie Valentine Center. Crosswell testified that during this examination, she observed a transection, or tear, of Minor's hymenal tissue through the use of a colposcope, which is a specialized tool used to magnify the area. Crosswell maintained that a transection is suggestive of some type of blunt force trauma to the area. App. 145, l. 2 – 146, l. 7. She also opined that the blood clot found in Minor's underwear *could* have been caused by a penetrating injury to her vagina. App. 147, ll. 17-23.

Lastly, Minor was interviewed at the Julie Valentine Center on January 14, 2009 by Christine Carlberg. App. 131, l. 21 – 132, l. 5. A recording of Minor's forensic interview was played for the jury. App. 137, l. 3.

Significantly, there was no semen found on the vaginal, rectal, or oral swabs collected from Minor at the hospital. Moreover, no DNA evidence was discovered from an analysis of these swabs. App. 121, l. 16 – 123, l. 17.

Trial Counsel's Cross-Examination of Minor and the State's Motion

During the cross-examination of Minor, the following exchange took place between trial counsel and Minor:

> Q: Okay. [Redacted], prior to coming into court today, you met with your stepparents [sic] to prepare for this case, prepare for your testimony? You talked about it with them, didn't you?
>
> A: Yeah.
>
> Q: And you actually also talked to the Solicitor prior to coming in here several times, didn't you?
>
> A: Yes, sir.

. . .

Q: Okay. [Redacted], who told you to say what you testified to today about this? Did someone tell you to say something today about this?

A: No, sir.

Q: No, sir? No one talked to you prior to coming today about what to say?

A: Well, she - - my - - she - - she did [the solicitor] and my mommy and daddy did.

Q: So your stepmom [sic] and your stepdad [sic] and the Prosecutor talked to you before you came here today, right?

A: Yes, sir.

App. 56, l. 20 – 58, l. 4.

At the conclusion of Minor's testimony, the assistant solicitor informed the court that she had a matter of law that needed to be addressed and the judge ultimately excused the jury from the courtroom. App. 59, ll. 10-13. After the jury was excused, the solicitor argued that any prior consistent statements Minor made to other individuals should be admissible pursuant to State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (2002) because trial counsel suggested during his cross-examination that Minor had been coached by her parents and by the solicitor. The solicitor explained, "This case [Jeffcoat] stands for the fact that if a defense attorney does that, that any prior consistent statements from the victim are admissible to rebut that allegation of recent fabrication or improper influence." App. 59, l. 17 – 60, l. 9. The solicitor continued, "So the State's position would be that from this point forward, her [Minor's] prior consistent statements to other persons would be admissible in their entirety." App. 60, ll. 6-8.

When given an opportunity to respond, trial counsel told the court that he had not read Jeffcoat and was unfamiliar with the case. Because of counsel's unfamiliarity, the judge told

counsel he would "give [him] a little time to study" the matter, but then expected counsel to give argument as to whether or not the questions he asked Minor opened the door under Jeffcoat. App. 60, ll. 10-19.

After a subsequent witness testified, the court readdressed the state's motion. Trial counsel stated, "I think this [the Jeffcoat case] is going to stand from the idea that statements made prior to any sort of contact with law enforcement or anything like that would be something that can be brought into to rebut any sort of thing. **I think that I agree with Ms. Seay [the solicitor]** without Shepardizing this." App. 65, ll. 14-24 (emphasis added). Based on counsel's concession, the court said, "All right. I'm going to allow her to rebut." App. 66, l. 25 – 66, l. 1.

Testimony Regarding Minor's Prior Consistent Statements

Dr. Bailey, the pediatrician who examined Minor at the hospital, testified Minor told her "that her father had touched her two different times. Once near Christmas and once when it wasn't Christmas. And that he touched her in the bottom and he had touched her on the butt and touched her with both his hands and his face, that he had sat on her and stepped on her bottom area and it hurt when he did so. She was able to describe the father's genitalia as a worm and states that he touched her with his worm in the bottom area. And he also put ice cream on her bottom, that she had to take a bath to wash off." App. 82, ll. 3-14.

Officer Jonathan Taylor, who interviewed Minor at the hospital, testified that Minor told him she had been sexually assaulted by her father at his "studio" on Christmas Eve. App. 95, ll. 13-24. Taylor also testified Minor "stated that her dad took her panties off and put ice cream on her butt as well as he also put ice cream on her twat, which she was referring to her vaginal area, and that he struck his pee-pee in her pee-pee." He added, "She also stated that this had happened to her before by him." App. 96, ll. 3-13.

Lastly, Investigator James Austin, who also met with Minor at the hospital, testified Minor "stated she was there [at the hospital] because of what her dad had done to her. She said her daddy put ice cream on her twat, and then she started talking about something else." Austin clarified that Minor lost concentration because she had been given a sedative at the hospital. Therefore, Austin interviewed Minor again a few days later. During this second interview, Minor allegedly told Austin that while she was at her father's apartment on Christmas Eve "her dad put ice cream on her twat and licked it off. She stated he put ice cream on his worm and had her to lick it off. She stated that her dad sat on her and stepped on her. And she stated that her dad touched her butt and put his worm in her twat . . . She stated that her dad told her not to tell anybody what happened with the ice cream because he would get in trouble and he would have to kill her and himself . . . She stated he had a knife in the room at the time . . . She stated it took place in the bedroom of the studio." App. 101, l. 21 – 104, l. 24.

Before each of these witnesses testified about Minor's prior consistent statements, trial counsel made a contemporaneous objection on hearsay and bolstering grounds. However, no detailed arguments were made and the court summarily overruled each objection presumably because trial counsel had already conceded he had opened the door to such testimony. See App. 81, ll. 19-22, App. 95, ll. 9-11, and App. 101, ll. 10-13. On the morning of the second day of trial after Dr. Bailey, Officer Taylor, and Investigator Austin had all testified about Minor's prior consistent statements, trial counsel then attempted to argue that Jeffcoat was inapplicable and that he had not opened the door to such testimony. See App. 116, ll. 5-22. The trial judge continued to agree with the state that trial counsel had opened the door to such testimony, but he did caution the assistant solicitor that any further testimony about Minor's prior consistent statements would be cumulative. App. 117, ll. 10-12.

State's Closing Argument

During her closing argument, the assistant solicitor emphasized Minor's prior consistent statements and used them to bolster Minor's credibility. She argued, "[Minor] had to tell Deputy Taylor, who came to the hospital. She had to tell Investigator James Austin, who came to the hospital. She had to tell Dr. Bailey, the emergency room doctor who testified. **She told all of these people what her dad had done to her. And you heard from all those people. She never wavered in her account.**" App. 165, ll. 11-18 (emphasis added).

PCR Hearing

Petitioner testified at the PCR hearing that the state was permitted to present the testimony of several witnesses regarding prior consistent statements Minor allegedly made about the alleged sexual abuse. He said the assistant solicitor argued that, pursuant to Jeffcoat, such testimony was admissible because trial counsel had questioned Minor about whether she was coached before she testified. Petitioner said it was his understanding that counsel's questioning of Minor "opened the door for the State to be able to bolster her testimony." App. 215, l. 19 – 217, l. 14.

Petitioner also testified that he did not think trial counsel was aware of the holding in Jeffcoat or that his questioning of Minor on the subject of being coached could potentially open the door to the presentation of Minor's prior consistent statements. App. 217, l. 15 – 218, l. 12. Lastly, Petitioner maintained that trial counsel's error in opening the door prejudiced him and that the state's presentation of Minor's prior consistent statements "helped the State's case." App. 220, ll. 20-24.

Scott Robinson, Petitioner's trial counsel, testified that Petitioner always wanted to go to trial and had consistently maintained his innocence. App. 227, ll. 15-22. Robinson said he agreed with Petitioner's decision to take the case to trial because he honestly believed Petitioner was

innocent and has "always believed that." App. 235, ll. 6-7. He explained that there was "very little physical evidence" against Petitioner and that Minor's various statements were inconsistent with each other. App. 228, ll. 10-14.

Robinson could not recall whether he was familiar with the holding in Jeffcoat before it was raised by the solicitor at trial. However, he claimed that after he had a chance to review Jeffcoat, he argued the holding in Jeffcoat was "inapplicable" and that any testimony about Minor's prior consistent statements was hearsay and would improperly bolster Minor's credibility. Robinson explained that he made these arguments the following morning after the solicitor raised Jeffcoat. App. 228, l. 15 – 229, l. 17.

On cross-examination by Petitioner's PCR counsel, Robinson claimed he was certain that during the trial he thought the benefits of questioning Minor about whether she was coached and who she had talked to about her testimony outweighed the risk of opening the door to the admission of her prior consistent statements. He said "getting out the fact that she had been - - was talking to the Prosecutor and different people . . . was important." App. 230, l. 6 – 231, l. 4.

Robinson again stated he was uncertain whether he was aware of the holding in Jeffcoat before the case was raised by the solicitor. However, he admitted his statement to Judge Pyle during trial that, "I have not read this case, Your Honor," suggests he was unaware of the case and its holding. App. 231, l. 5 – 232, l. 22. Robinson maintained that, despite the possibility that he was unaware of the holding in Jeffcoat, once the trial court gave him an opportunity to read the case, he argued the holding was "inapplicable." App. 231, ll. 5-18. He said he made these arguments the following morning after the case was raised by the solicitor. However, he later conceded that his arguments challenging the applicability of Jeffcoat came after all the witnesses had already testified about Minor's prior consistent statements. App. 232, l. 23 – 234, l. 6.

PCR counsel also questioned Robinson about Rule 801(d)(1)(B), SCRE.[3] Robinson was unfamiliar with this rule of evidence. After PCR counsel explained the rule to Robinson, Robinson agreed the rule was consistent with the holding in Jeffcoat. Despite not being familiar with this rule at the evidentiary hearing, Robinson claimed he was familiar with the rule during Petitioner's trial. App. 237, l. 3 – 238, l. 17. However, when asked by PCR counsel whether he considered this rule before he questioned Minor about being coached, Robinson stated, "Back in 2009, I don't recall exactly what I was weighing at that time. I really don't." App. 238, l. 18-21.

Lastly, Robinson testified that the injuries discovered during Minor's physical examinations could not be connected to Petitioner and that he did not believe the evidence presented by the state was sufficient to support Petitioner's conviction. App. 236 ll. 7-12; App. 238, ll. 20-23. He agreed that the most influential or significant evidence against Petitioner was Minor's testimony and her numerous claims of sexual abuse that were presented to the jury through multiple witnesses. App. 239, ll. 11-13.

At the conclusion of the testimony, PCR counsel argued that Robinson should have been familiar with the holding in State v. Jeffcoat and Rule 801(d)(1)(B), SCRE. He asserted that Robinson's failure to be knowledgeable about the law allowed Minor's testimony to be bolstered by several other witnesses, "including law enforcement personnel, and hospital personnel, people who a jury and who I, personally, would revere and respect." App. 240, l. 13 – 241, l. 7. Finally, counsel argued that Minor's credibility was critical and the state's ability to bolster her claims through the admission of her prior consistent statements prejudiced Petitioner. App. 241, ll. 8-18.

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[3] Rule 801(d)(1)(B), SCRE renders a hearsay statement potentially admissible if it is consistent with the declarant's trial testimony and "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Order of Dismissal

The PCR court found Petitioner failed to meet his burden of proving trial counsel was deficient for opening the door to the admission of Minor's prior consistent statements by suggesting she was coached by her adoptive parents and the assistant solicitor. Noting trial counsel's testimony that he believed questioning Minor "about potential coaching was worth the risk" of opening the door to the admission of her prior consistent statements, the court found "trial counsel articulated a valid reason" for why he asked Minor "about whether she had spoken to several people about the case and what she should testify about." App. 246.

The PCR court also found Petitioner failed to prove he was prejudiced by trial counsel opening the door to the admission of Minor's prior consistent statements pursuant to Jeffcoat "because the State presented such strong evidence of his guilt." App. 247. The court stressed Minor's testimony that Petitioner sexually abused her along with the physical evidence presented by the state, including the blood found on Minor's underwear, the laceration on Minor's labia, the redness at her vaginal opening, and the transection of her hymen. App. 247. Therefore, the PCR court held Petitioner could not demonstrate he was prejudiced by any alleged error made by trial counsel since the state "presented abundant evidence" that Petitioner sexually assaulted Minor. App. 247.

Lastly, the PCR court noted that "trial counsel testified he did not agree with the trial judge's application of Jeffcoat" and that he "argued as such once he had time to thoroughly review the opinion." Based on this testimony, the PCR court found that if Petitioner "wished to challenge the application of Jeffcoat in this case, he should have done so on [direct] appeal." App. 246-247 (citing Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (finding a post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal)).

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel opened the door to the admission of Minor's prior consistent statements regarding the alleged sexual abuse pursuant Jeffcoat and Rule 801(d)(1)(B), SCRE. The PCR court incorrectly found trial counsel articulated a valid trial strategy for questioning Minor about whether she was coached by her adoptive parents and the assistant solicitor. The PCR court emphasized trial counsel's testimony that he believed the benefits of questioning Minor about potential coaching was worth the risk of opening the door to the admission of her prior consistent statements. However, it is clear from the record at trial that counsel was unaware of the holding in Jeffcoat or Rule 801(d)(1)(B), SCRE and therefore he could not possibly have weighed the risks and benefits of this line of questioning. Respectfully, trial counsel's testimony was not credible.

Trial counsel's deficient performance was highly prejudicial to Petitioner and most certainly affected the outcome of his trial because the admission of Minor's prior consistent statements through the testimony of Dr. Bailey, Officer Taylor, and Investigator Austin bolstered Minor's credibility, which was a critical factor in the case, and put her allegations before the jury on repeated occasions.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

In Jeffcoat, the defendant was charged with multiple counts of first degree criminal sexual conduct with a minor and lewd act upon a child based upon allegations made by his step-granddaughter that he had sexually abused her. Jeffcoat, 350 S.C. at 394, 565 S.E.2d at 322. The trial court allowed the complainant's mother and her therapist to testify about detailed aspects of the complainant's prior consistent statements pursuant to Rule 801(d)(1)(B), SCRE, after defense counsel raised the issue of improper influence or coaching by asking the complainant whether she had practiced before testifying or whether anyone had told her what to say. Id. at 396-397, 565 S.E.2d at 323-324. The Court of Appeals affirmed finding defense counsel's questions impliedly charged improper influences by the complainant's mother and the prosecution and, therefore, pursuant to Rule 801(d)(1)(B), the state was permitted to rebut the charge of improper influence by admitting the complainant's prior consistent statements. Id. at 397, 565 S.E.2d at 324.

The Court of Appeals further stressed that, pursuant to Rule 801(d)(1)(B), the party offering a prior consistent statement must demonstrate the statement was made before the alleged improper influence or motive arose. Id. at 397, 565 S.E.2d at 324. The court found the trial judge properly admitted the prior consistent statements the complainant made to her mother and therapist because the statements were made prior to any contact with the judicial system and thus could not have been

the result of either the complainant's mother or the assistant solicitor's alleged coaching of her court testimony. Id. at 398, 565 S.E.2d at 324.

Here, trial counsel was ineffective for questioning Minor about whether she had spoken to her adoptive parents and the prosecutor in preparation for her court testimony and if anyone had told her what to say during her testimony. See App. 56, l. 20 – 58, l. 4. Counsel's line of questioning indisputably opened the door for the state to present *extensive* evidence of Minor's prior consistent statements to rebut trial counsel's suggestion that Minor had been coached or improperly influenced by her parents and the solicitor.

It is clear from the record at trial that counsel was unaware of the holding in Jeffcoat and thus he could not possibly have weighed the risks and benefits of pursuing this line of questioning. See App. 60, ll. 10-19. The record at trial contradicts trial counsel's testimony at the PCR hearing that he was aware of the holding in Jeffcoat and Rule 801(d)(1)(B), SCRE and made a knowing decision to open the door to the admission of Minor's prior consistent statements. See App. 60, ll. 10-11 and App. 230, l. 20 – 231, l. 4. Notably, the PCR court failed to make any credibility findings in its order of dismissal. Respectfully, Petitioner argues that trial counsel's testimony at the PCR hearing was not credible because not only does it conflict with the record at trial, but counsel repeatedly contradicted himself and wavered during his testimony. Consequently, there is absolutely no probative evidence to support the PCR court's finding that counsel articulated a valid trial strategy for asking Minor about whether she was improperly influenced or coached. See App. 246. The court's ruling was erroneous.

Petitioner was prejudiced by trial counsel's deficient performance because his error allowed the state to present testimony from three separate witnesses, specifically Dr. Bailey, Officer Taylor, and Investigator Austin, regarding the detailed aspects of Minor's prior statements thereby

bolstering Minor's credibility before the jury. Not only did this testimony bolster Minor's credibility, it was also damaging because it was cumulative to Minor's testimony and put Minor's statements and specific allegations before the jury on repeated occasions. Further, the alleged statements testified to by Bailey, Taylor, and Austin were significantly more detailed than Minor's testimony, which was vague and undeveloped, and included allegations that Minor never testified about. For example, at no point during her testimony did Minor allege that Petitioner touched her "bottom" or "butt." However, all three witnesses claimed Minor made such allegations.[4]

The solicitor also capitalized on the admission of Minor's prior consistent statements during her closing argument to the jury. App. 165, ll. 11-18. The solicitor argued that Minor told Dr. Bailey, Officer Taylor, and Investigator Austin "what her dad had done to her. And you heard from all those people." The solicitor used these prior consistent statements to bolster Minor's credibility and claim Minor "never wavered in her account." App. 165, ll. 11-18. This is further evidence of prejudice. See Rutland v. State, 415 S.C. 570, 578, 785 S.E.2d 350, 354 (2016) (holding solicitor's closing argument "highlights trial counsel's deficient performance, and supports a finding the deficient performance undermines confidence in the outcome of the trial.").

Moreover, there is *absolutely no evidence* of probative value to support the PCR court's finding that the state "present[ed] abundant evidence" that Petitioner sexually assaulted Minor. While there was evidence that Minor had a laceration to her labia and a transection of her hymen, none of this physical evidence was connected to Petitioner nor was there testimony as to what caused these injuries. Significantly, the alleged transection of Minor's hymenal tissue was not discovered until weeks after the alleged abuse and not until Minor's *third* physical exam, suggesting

[4] Bailey testified that Minor told her Petitioner "touched her with his worm in the bottom area. And he also put ice cream on her bottom." App. 82, ll. 11-14. Taylor testified Minor "stated that her dad took her panties off and put ice cream on her butt." App. 96, ll. 6-7. Austin testified, "And she [Minor] stated that her dad touched her butt." App. 104, l. 11.

the injury could have occurred sometime in between Minor's multiple examinations. Further, there was a sufficient explanation given for what caused the presence of blood in Minor's underwear, namely irregular bowel movements. Minor herself admitted she originally told her mother the blood in her underwear was a result of diarrhea. Minor also told the jury that she had to go to the hospital because "[w]hen I stinkied, there was blood in it." App. 47, ll. 6-13.

Lastly, as argued above, Minor's testimony before the jury was very vague and the jury could have easily found her not credible. The assistant solicitor repeatedly had to use leading questions to elicit the testimony she sought from Minor. See App. 47, ll. 14-22, App. 49, ll. 13-15, and App. 51, ll. 1-13. The state even admitted in its return that Minor's "testimony was perfunctory and *not very descriptive* and, due to her age, often the result of some leading questions by the assistant solicitor." Return at p. 7 (emphasis added).

The PCR court's finding that Petitioner should have challenged the trial court's application of Jeffcoat in his case on direct appeal was error. First, the issue was not properly preserved for appellate review since trial counsel initially agreed with the assistant solicitor that he had opened the door to her presenting testimony of Minor's prior consistent statements. When the issue was first raised, counsel made no arguments that Jeffcoat did not apply or that he had not opened the door to the admission of Minor's prior statements. Instead, trial counsel stated, "I think I agree with Ms. Seay [the solicitor]." App. 65, ll. 16-24. Based on counsel's concession, the trial judge stated, "All right. I'm going to allow her to rebut." App. 65, l. 25 – 66, l. 1.

Only as an afterthought did trial counsel later contemporaneously object to the admission of the testimony regarding Minor's prior consistent statements arguing that such testimony was hearsay and would improperly bolster Minor's credibility. See App. 81, ll. 19-20, App. 95, ll. 9-10, and App. 101, ll. 10-11. During the contemporaneous objections, no further discussion or analysis

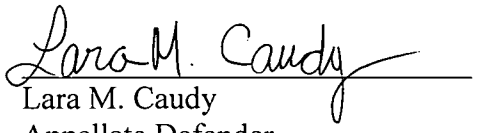
was conducted, presumably because counsel had already conceded he had opened the door to this testimony pursuant to Jeffcoat. Further, only after Dr. Bailey, Officer Taylor, and Investigator Austin had all testified about Minor's prior consistent statements did trial counsel then attempt to argue to the trial court that Jeffcoat was inapplicable and that the state should not be permitted to present any further testimony regarding Minor's statements.

It is clear from the record that any challenge to the applicability of Jeffcoat was waived by trial counsel and therefore the issue was not preserved for appellate review. However, even if the issue was preserved for appellate review and raised by Petitioner on direct appeal, the Court of Appeals would have affirmed finding trial counsel opened the door to the admission of Minor's prior consistent statements pursuant to Jeffcoat and Rule 801(d)(1)(B), SCRE.

Therefore, the PCR court erred by finding Petitioner failed to prove trial counsel rendered ineffective assistance of counsel and that he was prejudiced by counsel's deficient performance. Because there is no evidence of probative value to support the PCR court's ruling, this Court should reverse the order of the PCR court and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse the decision of the PCR court, vacate his conviction and sentence, and remand for a new trial.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Eugene C. Griffith, Circuit Court Judge

KEITH DESUE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of November, 2016.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of November, 2016.

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