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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Edward W. Miller, Circuit Court Judge

JOSEPH PETTIGREW SANDERS, IV,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2016-001795

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court erred in holding that trial counsel was not ineffective where he failed to contact fact witnesses given to him by petitioner who would have presented evidence that the complainant fabricated sexual abuse allegations against him so that she could move home to Virginia from South Carolina?

2.

Whether the PCR court erred in holding that trial counsel properly decided not to call numerous character witnesses in a sex abuse case with no physical evidence because petitioner's "character was not put into issue?"

STATEMENT

In June 2010, a Pickens County grand jury indicted petitioner for second-degree criminal sexual conduct with a minor and lewd act upon a child. App. 829-30. App. 840-42. On June 21, 2010, petitioner was tried before the Honorable G. Edward Welmaker and a jury. App. 1. Petitioner was tried along with his co-defendant, Anita Gearhart, who was indicted for unlawful conduct toward a child. App. 725, ll. 11 – 15. Doug Richardson represented the State. App. 1. John DeJong represented petitioner. App. 1. Scott Robinson represented Gearhart. App. 1. The jury **acquitted** petitioner of second-degree CSC. App. 724, l. 22 – 725, l. 5. They convicted petitioner of lewd act and Gearhart of unlawful conduct. App. 725, ll. 6 – 15. Judge Welmaker sentenced petitioner to fourteen years' imprisonment. App. 734, ll. 7 – 9. J. Falkner Wilkes represented petitioner on appeal, which was denied by the Court of Appeals on January 30, 2013. State v. Sanders, No. 2013-UP-054 (Ct. App. Jan. 30, 2013).

On December 17, 2013, petitioner filed a PCR application. App. 737. On April 20, 2015, the Honorable Edward W. Miller held a hearing. App. 749. J. Falkner Wilkes again represented petitioner after petitioner waived any conflict of interest on the record. App. 752, l. 10 – 754, l. 6. Karen C. Ratigan represented the State. App. 749. On August 3, 2016, Judge Miller denied petitioner's application. App. 829. This petition follows.

ARGUMENT

The PCR court erred in holding that trial counsel was not ineffective where he failed to contact fact witnesses given to him by petitioner who would have presented evidence that the complainant fabricated sexual abuse allegations against him so that she could move home to Virginia from South Carolina.

Introduction

The PCR court found "merely cumulative" the testimony of a witness who would have testified that he heard the complainant in this sexual abuse case formulate a plan to falsely accuse petitioner Joseph Sanders ("Sanders") of child molestation days before the abuse allegations were reported to the authorities. App. 835. This witness, Justin Eads ("Eads"), showed up during the trial with his father ready to testify, but the PCR court found that trial counsel made a strategic decision not to even proffer Eads' testimony "because he did not know what Eads would testify about." App. 936. This illogical finding alone demonstrates the validity of petitioner's claim that trial counsel failed to perform an adequate investigation and present the testimony of several important witnesses, including the bombshell testimony from Eads.

Relevant Facts

In 2003, Sanders met Complainant's mother, Anita Gearhart ("Anita"), while travelling in Myrtle Beach. App. 538, l. 19 – 539, l. 10. Anita lived in Virginia. App. 539, ll. 6 – 10. Anita worked in the same medical field as Sanders' mother. App. 539, ll. 13 – 20. The pair began a long-distance friendship through email and telephone calls. App. 539, l. 13 – 540, l. 8. Both Sanders and Anita testified in their own defense.

In May 2005, Anita married Steve Gearhart and by October, they separated. App. 595, ll. 1 – 6. Anita and Complainant moved in with Anita's mother. App. 596, l. 19 – 597, l. 1.

Anita's sister lived in Rock Hill and Anita began looking for a job in South Carolina. App. 597, ll. 2 – 17. Anita came to South Carolina for job interviews and stayed at the Comfort Inn in Easley arranged for her by Sanders. App. 597, l. 8 – 21. Sanders frequently arranged rooms for potential business partners at the Comfort Inn. App. 543, l. 2 – 550, l. 18.

Anita brought Complainant to stay with her at the Comfort Inn one or two times. App. 545, ll. 23 – 25. App. 598, ll. 15 – 22. When Complainant visited with Anita, they toured Helen, Georgia and went bowling. App. 601, ll. 2 – 11. Anita denied having sexual intercourse with Sanders. App. 602, ll. 21 – 24. Anita never saw Sanders touch Complainant in a sexual manner. App. 601, l. 12 – 602, l. 20. Sanders unequivocally denied ever being naked in Anita's room at the Comfort Inn, touching Complainant, or having sex with Anita. App. 551, ll. 14 – 21. App. 536, ll. 4 – 9.

Complainant told a much different story about the trips to the Comfort Inn. Complainant was nine years old at the time. App. 217, ll. 6 – 7. According to Complainant, within minutes of arriving in the hotel room, Anita and Sanders "got in the bed and took their clothes off and started having sex." App. 215, ll. 7 – 10. Complainant was on the floor. App. 215, ll. 11 – 12. When her mother and Sanders finished having sex, Anita took a shower and told Complainant she could get into bed with Sanders. App. 216, ll. 1 – 3. Sanders molested Complainant while Anita took a shower. App. 216, l. 8 – 217, l. 3. A similar pattern happened at least two other times at the Comfort Inn. App. 218, l. 18 – 226, l. 20. Petitioner was not tried

for these alleged assaults at the Comfort Inn—they were admitted as prior bad acts. [1]

The indicted offenses began in the summer of 2006. App. 228, l. 17 – 229, l. 13. Anita moved to South Carolina in January 2006 to take a job with a doctor's office. App. 597, ll. 12 – 22. Anita moved in with Sanders. App. 556, ll. 9 – 16. Complainant stayed with Anita's mother in Virginia. App. 597, ll. 20 – 24. Complainant joined her mother at Sanders' house during the summer of 2006. App. 228, ll. 14 – 24. Complainant alleged Sanders immediately began touching her breasts and vagina. App. 229, ll. 7 – 18. Then, in 2008, Complainant claimed Sanders raped her. App. 231, l. 12 – 233, l. 22. The State tried Sanders for second-degree CSC with a minor and lewd act for this conduct. App. 197, l. 16 – 198, l. 3.

Complainant testified that at some point, she told Anita that Sanders was molesting her. App. 233, l. 15 – 234, l. 8. Anita told Complainant they were leaving, but nothing happened and they remained at Sanders' house. App. 234, ll. 3 – 10. Anita testified this conversation with Complainant happened right after Anita's mother died and they returned from her funeral in Virginia. App. 606, l. 1 – 607, l. 22. Complainant was extremely close with her grandmother. App. 241, ll. 10 – 25. Complainant told Anita she blamed her for her grandmother's death because Anita was a nurse and could have done something to prevent it.

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[1] The alleged assaults at the Comfort Inn were not charged conduct and were admitted under Rule 404(b)'s exception for common scheme or plan, even though they occurred well prior to the charged conduct and at a different place and under vastly different circumstances. App. 180, l. 5 – 183, l. 22. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009) (holding allegations of molestation against the same victim that occurred two years earlier were not admissible under the common scheme or plan exception) aff'd State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011). No contemporary objection was made, but the trial court's ruling was made immediately before opening statements and Complainant was the first witness. The trial judge's prior bad act ruling was not appealed nor raised at PCR as ineffective assistance for failure to preserve an issue for appeal. State v. Sanders, No. 2013-UP-054 (S.C. Ct. App. Jan. 30, 2013). App. 829-39. The Court of Appeals' opinion in Fonseca was published more than a year before petitioner's trial. Petitioner waived any allegation of ineffective assistance of appellate counsel at his PCR hearing. App. 752, l. 15 – 754, l. 10.

App. 606, ll. 7 – 21. Complainant wanted to return to Virginia to take care of her grandfather, but Anita refused. App. 606, l. 25 – 607, l. 6. Anita confronted Sanders about Complainant's allegation and he denied it. App. 608, l. 24 – 609, l. 5. When Anita questioned Complainant about the specifics of her claims, she could not give concrete answers. App. 608, ll. 12 – 24.

The police became involved after a referral from DSS in Virginia. App. 331, ll. 5 – 8. The police first talked with Complainant and then Anita. App. 311, l. 2 – 319, l. 2. After talking with Anita and taking Complainant into emergency protective custody, Anita called the police and told them Sanders wanted to come to the station and discuss the allegations. App. 324, ll. 3 – 15. That same day, Sanders voluntarily went to the police station and denied abusing Complainant. App. 324, l. 11 – 328, l. 20. After a forensic interview, the police arrested Sanders.[2] App. 360, l. 7 – 362, l. 4.

After the State rested and before Sanders began his case, the State attempted to prevent Sanders from calling Complainant's guardian ad litem, Judy Chapman ("Chapman"), as a witness. App. 450, l. 21 – 460, l. 8. The defense intended to offer Chapman's testimony that Complainant recanted her allegations. App. 450, l. 21 – 453, l. 14. One of the State's arguments was that a confidentiality statute concerning confidentiality for guardians ad litem barred Chapman from testifying and that she would be committing "a criminal act." App. 450, l. 21 – 459, l. 6. The trial judge took the State's argument under advisement and a ruling does not appear on the record, but Chapman testified and the State failed to renew its objection during her direct examination. App. 460, ll. 1 – 8. App. 483, l. 22 – 491, l. 4.

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2 Petitioner objected to the solicitor's questioning of the police officer which led the jury to conclude that the arrest warrants were the immediate result of the forensic interview. App. 360, l. 7 – 362, l. 4. The trial court's ruling which allowed this questioning was not raised on appeal. See State v. Sanders, No. 2013-UP-054 (S.C. Ct. App. Jan. 30, 2013). See also State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015 (holding that forensic interviewer's recommendation that child not be around victim was inadmissible as improper bolstering).

Chapman testified that on one occasion, Complainant became "teary-eyed" and Chapman asked what was wrong. App. 489, ll. 1 – 7. Complainant first said, "I have exaggerated about everything." App. 489, ll. 4 – 7. Chapman asked her to clarify. App. 489, ll. 8 – 10. **Complainant replied, "I've lied about everything."** App. 489, ll. 8 – 10 (emphasis added). Complainant then told Chapman that she invented the sexual abuse allegations because she wanted to move to Virginia and her mother refused. App. 489, ll. 11 – 16. She said the only thing Sanders "ever done was just flip me on the behind."[3] App. 489, ll. 17 – 21. Complainant admitted telling Chapman that she made up the allegations, but denied telling Chapman that the reason for the fabrication was because she wanted to move to Virginia. App. 234, ll. 14 – 23. App. 269, l. 14 – 270, l. 20. Complainant told the jury she only recanted because she "didn't want my mom to go to jail." App. 234, ll. 22 – 23. The forensic interviewer was qualified as an expert and listed numerous reasons why a child might recant an allegation of abuse. App. 415, l. 14 – 418, l. 1. The forensic interviewer notably failed to include as a reason for recantation that the initial allegation might actually have been false. App. 415, l. 14 – 418, l. 1.

Sanders called two witnesses who overheard Complainant make threatening remarks about him. App. 502, l. 17 – 504, l. 10. App. 509, l. 3 – 511, l. 4. Sanders and Anita had an argument while at work. App. 502, l. 17 – 504, l. 10. App. 509, l. 3 – 511, l. 4. Complainant came out of the office where Sanders and Anita were arguing and said, "[H]e's not going to talk

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[3] During the State's cross-examination, the solicitor grilled Chapman about her duty of confidentiality and asked her whether she ever thought to "check the law" before testifying. App. 497, l. 13 – 499, l. 3. The Court of Appeals held an issue related to this improper cross-examination was unpreserved. See State v. Sanders, No. 2013-UP-054 (S.C. Ct. App. Jan. 30, 2013). See also S.C. Code Ann. § 63-7-1990(B)(5) and (11) (providing that confidential information concerning a child may be released to a person named as abusing a child, that person's attorney, and the parties to a court proceeding in which the information is legally relevant). PCR counsel raised the failure to object as a ground at the hearing, but the issue was not included in the PCR court's order of dismissal. App. 815, l. 3 – 820, l. 3. App. 829-39.

to my mother that way. I'll get even with him. Just wait and see." App. 502, l. 17 – 504, l. 10. App. 509, l. 3 – 511, l. 4.

Sanders testified in his own defense and flatly denied abusing Complainant in any manner. App. 536, ll. 4 – 9. Sanders was a prominent member of the community and served as the Executive Producer of the Miss South Carolina Pageant. App. 536, l. 15 – 538, l. 16. He worked with his parents from the time he was a child for the pageant in what was essentially their family business. App. 513, l. 16 – 516, l. 2. **The jury acquitted appellant of second-degree CSC with a minor**, but convicted him of lewd act. App. 724, l. 22 – 725, l. 15.

The Evidence at the PCR Hearing and the PCR Court's Ruling

Sanders testified at the PCR hearing that he provided trial counsel with multiple witnesses for him to contact who could reveal Complainant's motives. App. 774, l. 4 – 775, l. 25. These written lists were introduced into evidence at the PCR hearing. App. 825-828. Three of these potential fact witnesses testified at the PCR hearing: Justin Eads ("Eads"), Taylor King ("King"), and Nikki Holder ("Holder"). App. 782, l. 18 – 807, l. 10. Holder and King's names appear on the handwritten list which was introduced as Exhibit 1. App. 825. Judge Welmaker called out both Holder and King as potential witnesses during jury voir dire. App. 30, ll. 1 – 8. Eads' father's and uncle's names (Joseph W. Rowe, Jr. and Richard Alan Rowe) were on the list provided to trial counsel by Sanders. App. 828.

Trial counsel admitted Sanders gave him a very large book of information to use to investigate his case. App. 755, l. 25 – 756, l. 13. He never spoke to Joseph Rowe. App. 756, ll. 14 – 23. He could not remember speaking with Holder. App. 756, l. 24 – 757, l. 12. He did not remember speaking with King. App. 758, ll. 7 – 19. Trial counsel admitted that he never spoke with any of Complainant's friends before the trial, even though it "may well have come up in a

conversation" with Sanders' family that Complainant admitted she lied. App. 758, l. 20 – 759, l. 8.

Holder attended Sanders' trial because her mother thought she might have to testify. App. 783, ll. 17 – 23. Holder knew Complainant for two years. App. 783, ll. 24 – 25. At the PCR hearing, Holder testified that Complainant told her she wanted to move to Virginia and was angry with her mother for keeping her in South Carolina. App. 784, l. 20 – 785, l. 8.

King also attended Sanders' trial, but was never contacted by trial counsel. App. 791, ll. 14 – 25. At the PCR hearing, King described Complainant telling her about the abuse, but then as they grew closer, Complainant "started crying, got super upset. **She was telling me how she was so sorry that she had done all this. She had wished that she had never done any of it. She shouldn't have lied."** App. 792, ll. 10 – 21 (emphasis added). Complainant told King that she lied so that she could move to Virginia, but was trapped into repeating her allegations because she "was afraid she was going to go to jail." App. 793, ll. 1 – 7.

Eads also came to the trial and is mentioned in the transcript as "Eakes." App. 588, l. 9 – 589, l. 24. During the defense case, Judge Welmaker placed a bench conference on the record about Eads. App. 588, l. 9 – 589, l. 24. The court and co-defendant's counsel seemed to agree that even though Eads was present in the courtroom and had driven down from Roanoke, his testimony would not be admissible. App. 588, l. 9 – 589, l. 24. Sanders' trial counsel said nothing during this colloquy. App. 588, l. 9 – 589, l. 24. Eads' testimony was not proffered. App. 588, l. 9 – 589, l. 24.

Eads' father, Joseph Rowe, Jr. ("Rowe") testified at the PCR hearing that he was Anita's son and that shortly after Anita's mother's funeral in Virginia, Eads told him that he overheard Complainant tell a friend that she planned to tell a counselor that Sanders abused her so that she

could move back to Virginia. App. 796, ll. 5 – 23. Rowe told Anita about his son. App. 797, ll. 12 – 23. Rowe "figured" that Anita told her attorneys about what Eads' heard. App. 800, l. 24 – 801, l. 11. No attorney ever contacted him about the case until during the trial. App. 801, ll. 7 – 14.

Rowe saw a news story on the internet during the trial and defended his mother in the comments section. App. 798, ll. 5 – 18. Anita's attorney then "caught wind of it." App. 798, ll. 13 – 23. Anita called Rowe and told him to bring Eads from Virginia by 9:00 the next morning. App. 798, ll. 19 – 25.

Eads testified at the PCR hearing about what he overheard. App. 802, l. 23 – 807, l. 10. After Eads' and Complainant's grandmother's funeral, they were "in the basement at my grandmother's, and she had stated that she would go to her school counselor, **and that she would come up with a lie that [Sanders] had touched her inappropriately to get back to Roanoke.** She thought that was her plan." App. 804, ll. 12 – 17 (emphasis added). Eads told his father immediately. App. 805, ll. 7 – 15. Eads remembered leaving for South Carolina at night during Sanders' trial. App. 806, ll. 1 – 14. Eads spoke to both attorneys and also spoke in the judge's chambers. App. 806, l. 20 – 807, l. 10. He was ready to testify. App. 807, ll. 9 – 10.

At the PCR hearing, trial counsel testified that he remembered Eads coming to court but there was a hearsay issue discussed in chambers. App. 759, l. 19 – 760, l. 7. Trial counsel did not speak to Eads in detail about what he knew. App. 760, l. 8 – 761, l. 10. When asked why, trial counsel admitted, "I'm sure I could have requested from the Court some time to talk to him. I did not." App. 760, ll. 11 – 17. When asked why he did not proffer Eads' testimony if Judge Welmaker refused to admit it, trial counsel replied, "Well, again, I couldn't proffer the testimony because I didn't know what the testimony would be." App. 760, l. 23 – 761, l. 4. Sanders

testified at PCR that he asked trial counsel why he did not call these witnesses and trial counsel's response was "Stone silence." App. 781, ll. 9 – 13.

Sanders alleged trial counsel was ineffective for failing to investigate and discover these fact witnesses, but the PCR court denied relief. App. 831-37. The PCR court found that trial counsel was not deficient with respect to Eads and that his decision not to proffer Eads' testimony "was a valid strategic decision" because he did not know the substance of Eads' testimony. App. 836. The PCR court held Holder, King, and Eads' testimony was "merely cumulative" because of the testimony of the guardian ad litem and the two witnesses who overheard Complainant's threats after Sanders' fight with Anita at work. App. 835-36. The PCR court also found Holder, King, and Eads not credible because "they failed to contact trial counsel" with their information. App. 836.

Discussion

The PCR court's legal conclusions turn the entire purpose of post-conviction relief on its head. Masquerading as a credibility finding, the PCR court used an incorrect legal standard when it judged the testimony of Eads, Holder, and King. The court held the witnesses were not credible because they failed to contact trial counsel. App. 836. In PCR, the question is whether **trial counsel** contacted the witnesses and conducted a reasonable investigation. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). U.S. Const. amend VI, XIV. Witnesses have no duty to contact trial counsel. If the PCR court's conclusion is correct, then it would be nearly impossible to prevail in a PCR hearing when trial counsel fails to conduct a proper investigation.

Here, it was undisputed that Sanders gave trial counsel all the information he needed to contact Holder, King, Rowe, and Eads. It was also undisputed that trial counsel failed to talk with them. No strategic decision can therefore be imputed to trial counsel because of his failure

to investigate. In Wiggins, the United States Supreme Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. Just as in Wiggins, trial counsel here failed to conduct a full investigation that would have led to the important testimony provided by Holder, King, and Eads at the PCR hearing.

The failure to interview these important witnesses is, in itself, deficient performance. Walker v. State, 407 S.C. 400, 405-06, 756 S.E.2d 144, 146-47 (2014). The PCR court essentially found trial counsel performed deficiently when it credited him with a strategic decision for not proffering Eads' testimony because he did not know what Eads would say. App. 836-37. Of course, the entire point of Sanders' failure to investigate claim is that trial counsel **failed to discover what Eads would say.**

Petitioner also proved prejudice. These witnesses were not "merely cumulative," but important fact witnesses who would have told the jury that Complainant fabricated these allegations. In Walker, the petitioner's conviction was reversed because trial counsel failed to call an alibi witness. Walker at 405-07, 756 S.E.2d at 146-48. See also Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998) (applying rule of ineffectiveness in failure to call a favorable witness outside of the alibi context). The key issue at trial was the identity of the victim's assailant and the alibi witness was essential to the defense. Walker at 405-07, 756 S.E.2d at 146-48. Similar to Walker, Holder, King, and Eads' testimony bore on the key factual issue: whether Complainant lied.

Furthermore, these witnesses' testimony was not "merely cumulative." "Manifestly however, a trial court has no discretionary power to exclude competent evidence that is not merely cumulative, offered as to a material point of fact, the proof of which is essential to the establishment of a party's cause of action or defense." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 814 (1923). "And where evidence is offered by a defendant in a criminal case is excluded on the ground that it is merely cumulative, the trial court's exercise of discretion in that regard is to be tested by the fundamental principle of our criminal jurisprudence that an accused is entitled to be fully heard in his defense." Id. (internal quotations omitted).

Eads' testimony, in particular, cannot be cumulative. The jury heard that Complainant recanted from Chapman, but they never heard that Complainant planned her fabrications in advance. Eads' overheard Complainant concoct a plan to return to Virginia by falsely accusing Sanders. A witness who heard Complainant manufacture her plan is qualitatively different than a witness who heard Complainant recant her allegations. The importance of this difference is proved by the State's use of the forensic interviewer to explain why sexual abuse victims recant. Presumably, a forensic interviewer would not be able to explain why a sexual abuse complainant tells others she plans to lie in advance.

In a sex abuse case like this one with no physical evidence, the crucial fact at issue is the complainant's credibility. See State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) (holding that trial court's error in charging the jury that the testimony of the victim need not be corroborated could not be harmless because the case "hinged on credibility."). But for trial counsel's ineffective assistance, the jury would have heard that Complainant recanted not to a figure of authority like Chapman, but to her friend King. The jury would have heard her

motivation from Holder. And, most importantly, the jury would have heard that Complainant's allegations were lies concocted at her grandmother's funeral from Eads.

The jury's acquittal of Sanders on the criminal sexual conduct charge shows they did not fully believe Complainant's story. Had the jury heard from Holder, King, and Eads, Sanders would have been acquitted of all charges. This Court should grant certiorari, order further briefing, and reverse Sanders' conviction.

2.

The PCR court erred in holding that trial counsel properly decided not to call numerous character witnesses in a sex abuse case with no physical evidence because petitioner's "character was not put into issue."

Trial counsel called no character witnesses on petitioner's behalf. At the PCR hearing, trial counsel admitted that petitioner asked him to call character witnesses. App. 764, ll. 9 – 13. Trial counsel explained: "He wanted some character witness[es] there. **I told him I didn't think his character was going to be put in issue** and therefore did not call any." App. 764, ll. 9 – 13 (emphasis added). He admitted that the rules would have allowed him to call character witnesses at petitioner's trial. App. 764, ll. 14 – 18. When asked his reasoning, trial counsel stated, "I can't answer that question. I don't know." App. 764, l. 24 – 765, l. 2.

The PCR court credited trial counsel with a strategic decision "to avoid opening the door to character attacks on his client." App. 837. Neither trial counsel, the State, nor the PCR court indicated what attacks could be made if the door were opened. The solicitor told Judge Welmaker at sentencing that Sanders had no prior criminal record. App. 734, ll. 2 – 3. When asked at the PCR hearing why he wanted character witnesses to testify, Sanders aptly stated, "I think that in a he said/she said debate, character is all you have." App. 782, ll. 1 – 4.

Petitioner stated that he could have called "[h]undreds" of character witnesses." App. 777, ll. 23 – 25. He stated that some of his character witnesses "went to court every day." App. 778, ll. 1 – 15. At the PCR hearing, PCR counsel stated that he was calling a "representative of that large group" of potential character witnesses. App. 807, ll. 16 – 24. Petitioner called three representative character witnesses. App. 808, l. 3 – 814, l. 10.

DeAnn Wright testified that she had known Sanders through the Miss South Carolina Pageant since 2003. App. 808, ll. 12 – 24. She testified about the impact Sanders' made on her daughter's life through his work on the pageant and called his character "impeccable." App. 808, l. 18 – 809, l. 11. Wright testified that she was familiar with Sanders' reputation for truthfulness and she never questioned it. App. 809, ll. 15 – 21. Wright added, "I worked with lots of people with the pageant, and still do, and his character still stands." App. 809, ll. 17 – 21.

Brenda Cisson testified that she had known Sanders since 1994 through the pageant. App. 810, ll. 17 – 24. Her daughter won the Miss South Carolina Pageant and Cisson stated Sanders has "a fine character." App. 811, ll. 2 – 16. Eddie Cisson testified that Sanders was "sometimes truthful when it wasn't to his advantage to be truthful." App. 813, ll. 4 – 10. He estimated that "close to 50" people were ready to testify on Sanders' behalf at the trial. App. 813, l. 23 – 814, l. 2.

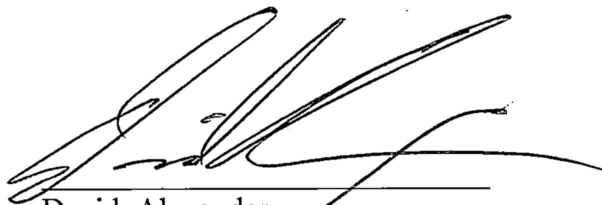
Credibility is the central issue in a sex abuse case, especially where, like this case, there is no physical evidence. Stukes, at 499, 787 S.E.2d at 483. Had trial counsel called character witnesses, petitioner would have received a charge that good character can form the basis for reasonable doubt. See State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982). In Green, this Court approved the charge that "where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant." Id. at 240, 294 S.E.2d at 335. See also State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2008); State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000).

In this close case, Sanders' character was very much at issue. The State called a character witness for Complainant—the forensic interviewer. The jury was led to believe that the forensic interviewer believed Complainant by the solicitor's questioning of Officer Rita Burgess, who testified that she obtained arrest warrants after reviewing the forensic interviewer's report. App. 360, l. 7 – 362, l. 4. The forensic interviewer testified at length why children delay disclosing sexual abuse and even gave reasons why children recant their allegations. App. 415, l. 14 – 418, l. 1. She testified that "somewhere between one and four percent of abuse allegations turn out to be fabricated, completely fabricated." App. 422, ll. 5 – 11.

The forensic interviewer bolstered the credibility of Complainant—often in ways that now would not be admissible after State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and its progeny. Sanders was entitled to let the jury know about his good character in a fashion that was admissible. Had the jury heard Sanders' character witnesses, there was a reasonable probability that the outcome would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). See also Strickland v. Washington, 466 U.S. 668 (1984). This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and granting him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of March, 2017.

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MAR 23 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Edward W. Miller, Circuit Court Judge

JOSEPH PETTIGREW SANDERS, IV,

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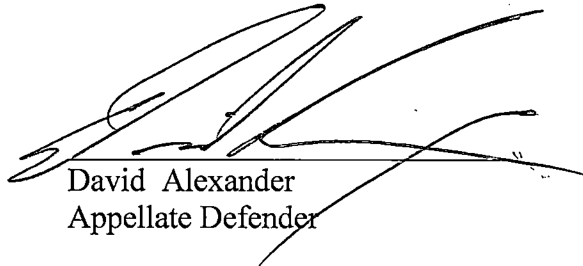
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

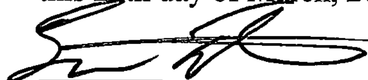
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Justin J. Hunter, Esquire, by the U.S.P.S.; and a copy of the Appendix has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Joseph Pettigrew Sanders, IV, #341505, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 20th day of March, 2017.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 20th day of March, 2017.


(L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.