**STATE OF SOUTH CAROLINA**
**In the Supreme Court**

**APPEAL FROM LEXINGTON COUNTY**
**Court of Common Pleas**

RECEIVED
MAR 27 2017
S.C. SUPREME COURT

**The Honorable Perry H. Gravely, Circuit Court Judge**

Civil Action No. 2014-CP-32-4479

Glenn Edwin Vanover, .....Petitioner,

v.

State of South Carolina .....Respondent.

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to properly investigate allegations that the victim made unfounded allegations of a sexual nature against a former teacher?

II. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to properly object to "bad act" evidence?

## STATEMENT OF THE CASE

The Petitioner, Glenn Vanover, was charged in Lexington County with two counts of criminal sexual conduct with a minor under the age of eleven (CSC), first-degree in violation of S.C. Code Annotated Section 16-3-655 (Indictment Nos. 2011-GS-32-2356; -2357). This was a delayed reporting case, with the claims made in February 2011 based upon alleged conduct occurring between 2004 and 2007. On August 28, 2012, the Petitioner proceeded to trial as charged before the Honorable Perry Buckner. After hearing the testimony, the jury found Petitioner guilty as indicted on both offenses. Petitioner was sentenced to two terms of twenty-six (26) years imprisonment. App. p. 511-512.

The Petitioner timely appealed his conviction and sentence to the South Carolina Court of Appeals. He was represented on appeal by Katherine C. Goode, Esquire. The lone issue appealed was whether the circuit court erred in admitting testimony concerning prior bad acts of the defendant toward the mother of the alleged victim. In an unpublished opinion, the Court of Appeals affirmed the Petitioner's conviction and sentence as the issue was not properly preserved. State v. Vanover, 2013-UP-481 (S.C. Ct. App. filed December 23, 2013). The Petitioner did not pursue a further appeal in this Court.

On December 10, 2014, the Petitioner filed an Application for Post-Conviction Relief with the Lexington County Clerk of Court raising multiple issues. An evidentiary hearing into the matter was convened on April 19, 2016, before the Honorable Perry H. Gravely, presiding circuit judge. On June 17, 2016, the PCR court issued an Order of Dismissal which denied relief on all of the Petitioner's claims. App. p. 478. The Order of Dismissal was filed June 22, 2016, and an accompanying Form 4 Judgment issued on June

27, 2016, with the parties being served with a copy of the Order of Dismissal that same date.

The Petitioner timely filed and served a Motion to Reconsider pursuant to Rule 59(e). App. p. 485. A Return to Motion to Reconsider was filed by the State on July 21, 2016. App. p. 497. On July 28, 2016, the PCR court issued a one page Order denying Applicant's Motion to Reconsider without oral argument. App. p. 506. The Order denying reconsideration was filed on August 12, 2016, with a copy being mailed to counsel of record on August 15, 2016. The Petitioner timely filed and served his Notice of Appeal from both of the PCR court's orders on September 14, 2016. The Petitioner now seeks a writ of certiorari.

## FACTUAL ALLEGATIONS

In 2011, when the victim, Petitioner's daughter, was 14 years of age, she reported to school officials that Petitioner sexually assaulted her on multiple occasions when she was between 2004 and 2007, when she was eight to ten years of age. App. p.509-510. With the delay in reporting, there was no physical evidence to support the allegations. While evidence was presented that when the victim was in the seventh grade she raised a similar claim to her mother, the defense presented testimony that the allegations were later withdrawn by the victim. App. p. 116-117; 188; 204; 211. The defense presented testimony from Petitioner and the victim's mother that the instant allegations were manufactured because the victim had not been doing well in school, had been getting in trouble, and was being disciplined at home. App. p. 189-190; 211-213. The victim admitted that both when she made the claims when she was in the seventh grade and when

she raised the allegations that gave rise to the instant charges, that she was not doing well in school. App. p. 130; 137-138.

There were no eyewitnesses to the offense, and no forensic evidence to corroborate the victim's allegations. The jury's determination was to be based solely upon the testimony of the victim who raised the allegations and the remainder of the family (Petitioner, the victim's mother, and the victim's grandmother) who denied the allegations. Thus, the case was determined based upon the credibility of the witnesses.

At trial, the victim testified that the first time the assault occurred, her older brother was at home but in a different room, when the Petitioner invited her into his bedroom where he touched her, telling her not to tell anyone. App. p. 109-110. The victim testified that the second time also occurred in the Petitioner's bedroom, again during a time when the victim's older brother was at home but not in the same room. On this, the second occasion, the victim alleged penetration occurred. App. p.111-113. The victim testified that other instances also occurred, each time in the Petitioner's bedroom, with her brother being present within the home but not the bedroom on most occasions. App. p.114-115.

When questioned by the State regarding the number of occasions in which an assault occurred, the victim testified that it occurred three times a month during the relevant two year period. App. p.132-133. On cross examination, however, when presented with the fact that this would have meant she was assaulted 72 times over the alleged two year period, the victim acknowledged her earlier testimony was inaccurate, and that it did not occur that many times. App. p. 133.

The defense's theory of the case was that the victim manufactured the allegations as a way to avoid punishment or improve her situation. In this regard, the defense presented evidence that the first time the victim raised allegations of sexual misconduct by Petitioner, the victim was angered that her older brother was given a car for his 16th birthday and she was not permitted to go with he and his friends. App. p.185-186. Immediately after the Petitioner told the victim she could not go with her brother and his friends, she pulled her mother aside and made the allegations. When the victim and her mother spoke further about the allegations, the victim alleged the assaults occurred between the ages of "two to six," later changing to ages "eight to ten." App. p. 187. In response to these accusations, the victim was permitted to do what she wanted, go and stay with a friend of hers. App. p.118-119; 186. According to the victim's testimony, she stayed with the friend for two months, but at no point in time did she disclose to the parents of that friend the reasons she left her parent's home. App. p. 118-119. The victim's mother testified that the length of the stay was only three days. App. p. 186.

After being allowed to stay with her friend, the victim went with the Petitioner and her mother to her grandmother's house. While at her grandmother's house, her grandmother suggested she would have a "lie detector test done. We will get this taken care of right now." App. p. 188. According to the victim's mother and her grandmother, the victim then admitted she was lying. App. p. 188; App. p. 204.

The second time these allegations against Petitioner were levied occurred in February 2011, when the victim was a ninth grader at Batesburg High School. App. p. 189. During that time, she was not doing well in school, and according to her mother's

testimony, the victim was constantly getting in trouble in school. App. p. 189. The victim's mother also testified that the victim had missed an excessive number of days at school. App. p. 190. In response, Petitioner and the victim's mother disciplined the victim – "No phone. No TV. Just your bed and books. You come in from school, you go to your room. You come out to eat, you go to your room." App. p. 190. This restriction lasted, on estimate, two weeks before the victim made the instant allegations to a teacher at her school. App. p. 190.

Petitioner proceeded to trial in Lexington County General Sessions on August 28-29, 2012, 5 to 8 years after the offending conduct was alleged to have occurred. Testifying on behalf of the State was Mike Horne, the teacher to whom the victim reported the allegations, Deputy Jonathan Grooms, the school resource officer for Batesburg-Leesville High School, the victim, Officer Mary Longshore, who was involved in the investigation, and Constance Lambert with DSS. All of the State's witnesses except the victim could only report on their observations of the victim during her reporting process. Thus, credibility of the victim was key.

During the victim's trial testimony, she reported that she first told her mother of the alleged abuse after watching her parents argue because "I thought she should know that." App. p. 117. According to the victim, this was when she was in the seventh grade, approximately two years after the victim reported that the last assault had occurred. App. p. 117. When questioned why it took the victim two years to tell her mother, the victim testified "I seen the way he treated my mom and how he hit her." App. p. 118. General objection was made by defense counsel, but the Court in overruling the objection treated it

as one of hearsay and cautioned the victim not to testify as to what someone else said. No further clarification or argument was presented by defense counsel despite the fact that the statement was clearly one of a prior bad act.

The defense presented the testimony of Melanie Vanover, the victim's mother and Petitioner's wife, Margaret Vanover, the victim's grandmother and Petitioner's mother, Petitioner, and Mike Horne was recalled to outline that the victim's school records were available. As outlined herein, Petitioner's theory of the case was that the victim engaged in a pattern of getting in trouble, or otherwise seeking to improve upon her plight, and would raise allegations of abuse. The victim's brother's receipt of a new car, Petitioner's refusal to allow the victim to go with her brother and his friends, and her desire to stay with a friend all supported the defendant's theory regarding the initial report of abuse to the victim's mother. Similarly, the victim's troubles in school and her punishment at home supported the Petitioner's rationale for her manufacturing the allegations. These two situations involved only the Petitioner. Similar allegations against a third party would have given significant credence to the theory, and thereby increased the likelihood the jury might return a different verdict.

Not presented to the jury was the fact that around the same time that the victim initially made the report against Petitioner, the victim made another unfounded allegation of a sexual nature against a teacher of hers, Kenneth Pace. Mr. Pace was not called as a witness in the trial, but during the PCR hearing, he testified that an allegation was made that he asked the victim about her underwear, her menstrual period, and her boyfriends. App. p. 355-56. Mr. Pace immediately went to the administration and reported the

allegations, denying the same. App. p. 356. She was removed from his class App. p. 356, but Mr. Pace had no adverse action taken against him in response. App. p. 357. Even more relevant to the defense is the fact that these false accusations against Mr. Pace correspond to his reprimand of the victim in class, providing several warnings, and ultimately gave her detention. App. p. 352. The next day the accusations arose. App. p. 355.

While trial counsel was familiar with the name Kenneth Pace, and that "there was some allegation about the alleged victim" (App. p. 327), counsel never spoke with Mr. Pace. App. p. 334. No investigation was done by trial counsel into the allegations against Mr. Pace. As a result, the victim was not questioned about the accusations. Mr. Pace did not testify. No evidence was submitted to the jury regarding the victim's false accusations of a sexual nature against Mr. Pace in an attempt to avoid punishment.

## ARGUMENT

### Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

## I. The PCR court erred in concluding that defense counsel was not ineffective in failing to investigate and present evidence of the false allegations made by the victim against Kenneth Pace.

As a general rule, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, *supra*, 446 U.S. at 691; see also Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008)(citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). "'[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'" Lounds (citing Ard, 642 S.E.2d at 597). Both this Court and the Court of Appeals have recognized that the failure to investigate and to present favorable testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

In the Order of Dismissal, the PCR court does not address whether a reasonable investigation would have required, at a minimum, an interview of Mr. Pace. Instead the PCR court merely concludes that "the Court finds Applicant did not establish the testimony would have been admissible. Further this Court finds Applicant failed to show that the failure to introduce the testimony prejudiced Applicant." App. p. 481. The Petitioner

submits that the PCR court's summary conclusions on this issue are unsupported by any probative evidence. Beginning with Strickland's performance prong, the Petitioner contends that defense counsel was under a duty to investigate prior false allegations of a sexual nature. As an initial matter, this case was a delayed reporting case, so there was no physical evidence to support the allegations. Thus, the credibility of the witnesses was key. Secondly, the theory of the defense was that the victim manufactured accusations to avoid punishment and improve her circumstances. Having a prior allegation against a teacher to avoid detention would have clearly supported this theory of the defense and undermined the victim's credibility. That the victim levied an earlier accusation against the Petitioner is one thing; making such an unfounded allegation against another person strengthens the argument immensely.

Defense counsel's testimony was that he was aware of Mr. Pace and that some situation had arisen between Mr. Pace and the victim involving her underwear at a minimum would have caused a reasonable attorney to inquire further. No such inquiry was made. As the credibility of the victim was the heart of the State's case, it is clear that counsel was under a duty to investigate. See generally Rompilla v. Beard, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring) (concluding that the defense attorneys' performance was deficient for failing to investigate a matter that "would be at the very heart of the *prosecution's* case") (emphasis in original).

Defense counsel failed to meet this critical obligation. As he admitted before the PCR court, he never spoke to Mr. Pace. App. p.334. While defense counsel did receive and review the discovery, and also speak with the family about the victim and the charges, both

the discovery materials provided by the State and the notes from the victim's mother contained references to her false accusations against Mr. Pace. Once he was armed with reference to these accusations against Mr. Pace, it was imperative for defense counsel to investigate how further to use this information to discredit the victim and corroborate the defense's theory.

Turning to Strickland's prejudice prong, the Petitioner contends that the PCR court's findings are both controlled by an error of law and unsupported by any probative evidence. As noted above the PCR court summarily concluded that the Petitioner failed to show he was prejudiced by counsel's failure. The PCR court was to determine whether or not there was a reasonable probability that the result of the trial would have been different had counsel investigated the claims against Mr. Pace and presented such evidence to the jury. See McKnight, 378 S.C. at 43-46, 661 S.E.2d at 359-360 (finding prejudice where a defense expert refuted the cause of the victim's death for homicide by child abuse but was not called by the defense). It is hard to credibly believe that there is a reasonable probability that the result of the trial would have been the same had the jury learned that the victim had previously made these allegations against Mr. Pace the day after he put her in detention. The facts parallel the theory of the case, but come from a third party witness who has no interest in the instant prosecution. No analysis was done by the PCR Court in this regard, and as such, the PCR court failed to conduct a proper analysis under Strickland's prejudice prong.

The PCR court, rather than conduct the foregoing analysis, simply determines that Petitioner did not establish the testimony would have been admissible. This conclusion

appears to substitute for any additional analysis. Such is an improper conclusion, however.

Had trial counsel interviewed Mr. Pace prior to trial, Mr. Pace would have confirmed the allegations, as he did at the PCR hearing, and trial counsel could have utilized such in cross examination to impeach the victim. If the victim denied making the allegations, Mr. Pace could have been called in Petitioner's case to present his testimony. Petitioner and the victim's mother could have also testified about the allegations had trial counsel investigated the matter prior to trial. Administrators at the victim's school could have also confirmed, at a minimum, no adverse action being taken against Mr. Pace. The circumstances Mr. Pace testified to are remarkably similar to those allegations made against Petitioner: victim gets in trouble, and makes allegations of a sexual nature in an effort to avoid discipline. The testimony is clearly relevant to the instant situation, and hardly can it be said that had allegations as similar as these been admitted during Petitioner's trial, that the verdict would be the same. Thus, are this ground is "sufficient to undermine the confidence in the outcome of the trial." See McLaughlin v. State, 352 S.E. 476, 483, 575 S.E.2d 841, 844 (2003). Vanover's convictions should be vacated, and a new trial ordered.

## II. The PCR court erred in concluding that defense counsel was not ineffective for failing to properly challenge inflammatory SCRE Rule 404(b) evidence.

As noted herein, during the trial, the victim in response to questioning by the State indicated that she did not report the alleged assault until she initially did in the seventh

grade because of purported observations of Petitioner assaulting the victim's mother. This issue was appealed, and the South Carolina Court of Appeals determined that counsel did not preserve the issue of whether or not the trial court erred in admitting Rule 404(b) evidence. Petitioner's PCR application challenges trial counsel's effectiveness in regards to this failure. In the Order, the PCR court denied Petitioner's challenge that his trial counsel's failed to properly object to the victim's testimony about Applicant's alleged abuse of victim's mother and thereby failed to preserve the issue for appeal. The Order succinctly concludes:

> Applicant has not shown whether a different objection would have resulted in a different ruling or whether this actually prejudiced Applicant. To further object could have brought more attention to the statement when there had only been a passing reference to the statement in front of the jury thus far. The Court finds Applicant has not proved any prejudice.

For the reasons set forth herein, the PCR court erred in this conclusion, and "but for counsel's errors, there is a reasonable probability the result of the trial would have been different." See McLaughlin v. State, supra.

The relevant exchange begins on page 117 of the Appendix and is as follows:

| | |
|---|---|
| [the State]Q. | Do you remember how old you were when you told your mom that [the first] time? |
| [Victim:] | No, Ma'am. I just know I was in the 7th grade. |
| Q. | An when you told her, how much time had passed since the last time he had touched you? |
| A. | Probably – probably about two years. |
| Q. | So you held it in for two years before you finally told your mom? |
| A. | Yes, ma'am. |
| Q. | And why did you hold it in so long? |
| A. | I seen [sic] the way he treated my mom and how he |

| | |
|---|---|
| | hit her. |
| Mr. Williams: | Objection, Your Honor. |
| The Court: | Grounds? |
| Mr. Williams: | It's prejudicial and it has nothing to do with the charge. |
| The Court: | I believe she can testify to what she said, counsel. |
| Mr. Williams: | All right, sir. |
| ... | |
| The Court: | Tell you just what you said and now what someone else said. Do you understand? |

(App. p. 117-118).

Trial counsel's non-specific objection appears to possibly make challenges pursuant to Rules 402 or 403 of the South Carolina Rules of Evidence. The trial court's response, however, seems to address the issue as one of hearsay. See SCRE Rules 801-804. The proper challenge, however, was pursuant to Rule 404 of the South Carolina Rules of Evidence, as the testimony regarding "how he hit her" is clearly inadmissible bad character evidence (SCRE Rule 404(a)) and inadmissible prior bad act testimony (SCRE Rule 404(b)).

"A party must state 'the specific ground of objection, if the specific ground was not apparent from the context.' Rule 103(a)(1), SCRE. However, '[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.' State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). 'The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial [court].' McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct.App.1996)." See State v. King, 784 S.E.2d 252, 260-61 (S.C. Ct. App. 2016). Trial counsel's failure to so object was deficient under prevailing standards, and Petitioner was prejudiced

thereby.

*Rule 404(a)*

In evaluating Rule 404(a), this Court has defined prohibited "character evidence" as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." See State v. Brown, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001)(citing State v. Nelson, 331 S.C. 1, 7, 501 S.E.2d 716, 718 (1998)). In Brown, a murder prosecution where the defendant raised self defense in response, the defendant's wife, a witness to the crime, was asked why she fled the scene and she responded, "'I know the moods of my husband and I knew I had to get out.' The Solicitor asked what mood appellant was in that night and Mrs. Brown stated that he had become 'very angry and agitated.' The Solicitor then asked, 'What happens when he becomes angry and agitated?' Over appellant's objection, Mrs. Brown stated, 'He gets violent.'" See Brown, 344 S.C. at 73, 543 S.E.2d at 554. Similar to the query posed to the witness in Brown of why she fled the scene, the question posed to the victim in the instant case was why wasn't the crime timely reported. Just as the response improperly introduced character evidence in Brown, so too was the admission in the instant case improper.[1]

While the instant matter involves a purported character of physical assault against the victim's mother, and the prosecution was for sexual assault of the daughter, the improper statement introduced alleged the criminal character of the defendant, and a lack of regard for the sanctity of his family. "Character evidence is not admissible to prove the

[1] In Brown, such admission was harmless because other evidence of another violent encounter between the defendant and victim the previous day was properly admitted. No such proper admission saves the improper admission of evidence against Petitioner.

accused possesses a criminal character or has a propensity to commit the crime with which he is charged." See Brown, 344 S.C. at 73, 543 S.E.2d at 554. (citing State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998)). The victim's statement clearly is one of criminal character, and suggests to the jury that one who is likely to so disregard another family member is more likely to disregard the family member in the instant case by committing the alleged crime. Admission of this evidence was improper, trial counsel erred in not properly objecting to the evidence, and Petitioner was prejudiced by his deficiency.

*Rule 404(b)*

Similar to the inadmissibility of the statement under Rule 404(a), evaluating the testimony under Rule 404(b), admission was also improper. "'The process of analyzing [prior] bad act evidence begins with Rule 401, SCRE.' State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009); see also Rule 401, SCRE (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If the circuit court determines the prior bad acts evidence is relevant, it "must then determine whether the bad act evidence fits within an exception of Rule 404(b).' Wallace, 384 S.C. at 433, 683 S.E.2d at 277." See State v. King, 416 S.C. 92, 109, 784 S.E.2d 252, 261 (S.C. Ct. App. 2016).

"'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.' Rule 404(b), SCRE. Such evidence 'may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.'" Id., (citing Rule

404(b), SCRE)

> To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) (citations omitted)).

"Once bad act evidence is found admissible under Rule 404(b), the [circuit] court must then conduct the prejudice analysis required by Rule 403, SCRE.' State v. Wallace, 384 S.C. at 435, 683 S.E.2d at 278 (footnote omitted); see also Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."). 'Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.' State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) (quoting State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)). 'Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.' Id. at 404–05, 673 S.E.2d at 441." See id.

Going through the analysis prescribed in King and earlier precedent from this Court, as an initial matter, it is clear that the evidence is that of prior bad acts. Arguably, the evidence is relevant under Rule 401, as it shows the reason why the victim did not report the offense immediately. Rule 401, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Evidence tending to explain why the reporting was delayed could fall within this definition. The response, however, was specific to why she did not report it until the seventh grade and does not address why she did not report it to the authorities for several more years

While the evidence may have some arguable relevance, the inquiry does not end there. "If the circuit court determines the prior bad acts evidence is relevant, it 'must then determine whether the bad act evidence fits within an exception of Rule 404(b).'" See King at 109, 784 S.E.2d at 261 (citing Wallace, 384 S.C. at 433, 683 S.E.2d at 277). Furthermore, "the bad act must logically relate to the crime with which the defendant has been charged." See Pagan, 369 S.C. at 211, 631 S.E.2d at 267. In the instant case, there is no evidence that prior alleged assault "logically relates" to the instant allegations, and no evidence that the alleged domestic violence falls within any of the exceptions noted in Rule 404(b). Furthermore, there is no evidence to corroborate the unfounded allegations to demonstrate their existence by clear and convincing evidence. See Pagan 369 S.C. at 211, 631 S.E.2d at 267. In short, analyzing the prior bad act under Rule 404(b) demonstrates its inadmissibility.

The foregoing demonstrates the inadmissibility of the testimony under Rule 404. However, to the extent the Court invites analysis under Rule 403, and if the Court determines some exception not addressed herein, even under Rule 403, the evidence is inadmissible because the prejudicial value of admission of such evidence substantially outweighs any possible probative value. As noted, the statement possibly has some relevance as explaining the delay in reporting. However, the statement could have been

stopped at "I seen [sic] the way he treated my mom . . ." without inclusion of the "how he hit her." Similarly, the victim testified that Petitioner told her not to tell anyone "[a]nd if I did, I would be in a lot of trouble." App. p. 113. Those statements provide the same probative value without the prejudice imparted by accusing Petitioner of domestic violence. Furthermore, the victim does not indicate that she observed domestic abuse against her mother prior to the initial encounter. For the allegations to demonstrate that the victim delayed reporting the initial encounter as a result of observations of domestic abuse, and thereby have probative value to the instant allegations, she would have had to observe the abuse prior to the sexual assault.

Converse to the minimal probative value of the prejudice associated with such an unfounded allegation, the prejudice associated with allegations of domestic violence is great. While the allegations of domestic violence and sexual assault are two different offenses, they are both crimes of violence, assaults against women, and assaults against family members. Introduction of the allegations of domestic violence reveals the lack of regard for ones' family, and makes it more likely that the accused would commit other crimes of violence against other family members. Additionally, considering the victim's mother testified on behalf of Petitioner, her testimony could easily have been discredited in the minds of jurors as being coaxed by her abuser. The prejudice associated with such an unfounded allegation is extreme, and admission is improper under Rule 403.

The allegations against Petitioner had no physical proof. Ultimately, the jury's verdict was determined as a result of credibility of the witnesses. From the verdict, the jury believed the victim, and disbelieved Petitioner, and the victim's mother, the alleged

victim of domestic abuse. It is clear that the proper objection was not made. It is also clear that, had the proper objection been made and a complete analysis conducted, the evidence would not have been admitted. The improper admission of the foregoing is "sufficient to undermine the confidence in the outcome of the trial." See McLaughlin v. State, 575 S.E.2d 841, 844 (S.C. 2003). Petitioner's convictions should be vacated, and a new trial ordered.

## CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,

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March 24, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Presiding 11th Circuit Judge

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**PROOF OF SERVICE**

The undersigned hereby certifies that on the date indicated below she personally served the Attorney General's Office with a copy of the Petition for a Writ of Certiorari and Appendix at 1000 Assembly Street, Columbia, South Carolina 29201.

Cydney M. Milling

March 27, 2017