STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Trial Judge
The Honorable Robert E. Hood, Post-Conviction Judge

Appellate Case No. 2015-CP-001459

Eric VanCleave.....Applicant,

v.

State of South Carolina.....Respondent.

PETITION FOR CERTIORARI

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Statement of the Case

Procedural History

The State indicted Eric VanCleave on February 25, 2013 on four charges. These charges included Criminal Sexual Conduct with a Minor, Second Degree, Lewd Act on a Minor Child under 16 years of age, Assault and Battery of a High and Aggravated Nature, and Criminal Sexual Conduct Third Degree. He was tried before a jury on April 1-2, 2013 and convicted of all charges. He was sentenced to a total of 20 years.

Mr. VanCleave filed an appeal to the South Carolina Court of Appeals. His convictions were affirmed by the South Carolina Court of Appeals on December 20, 2014. A Petition for Writ of Certiorari to the South Carolina Supreme Court was denied on June 17, 2015. Mr. VanCleave filed this Post Conviction Relief Action on September 17, 2015. The Post Conviction Relief hearing was held on September 19, 2016 before the Honorable Robert Hood. By Order dated November 21, 2016 Judge Hood denied the petition for relief. He further denied Mr. VanCleave's Rule 59 Motion to Alter or Amend the Judgment on December 28, 2017. Mr. Van Cleave filed his Notice of Appeal on January 9, 2017.

Factual History

On April 1, 2010 Eric VanCleave was arrested on four charges of lewd act and four charges of criminal sexual conduct with a minor. Warrant № K-338461 alleged that on March 30, 2002, he committed criminal sexual conduct with a minor in a camper at Barnwell State Park in Barnwell County. App. at 13. Warrant K-338465 alleged that on March 30, 2002 he committed a lewd act on a minor child in a camper at Barnwell

State Park in Barnwell County. App. at 15. Warrant № K-338462 alleged that on April 20, 2003 he committed criminal sexual conduct with a minor in a camper at Barnwell State Park in Barnwell County. App. at 20 Warrant № 338466 alleged that on April 20, 2003 he committed a lewd act on a minor in a camper at Barnwell State Park in Barnwell County. App. at 24. Warrant № 338463 alleged that on April 11, 2004 he committed criminal sexual conduct with a minor in a camper at Barnwell State Park in Barnwell County. App. at 14. Warrant № K-338467 alleged that he on April 11, 2004 committed a lewd act on a minor child in a camper at Barnwell State Park in Barnwell County. App. at 7. Warrant № K-338464 alleged that on March 27, 2005 he committed criminal sexual conduct with a minor in a camper at Barnwell State Park in Barnwell County. App. at 19. Warrant № K-338468 alleged that on March 27, 2005 he committed a lewd act on a minor in a camper at Barnwell State Park in Barnwell County. App. at 23. The dates in all the warrants were the week-end before Easter of the respective years.[1] App. at 509, ll 2-5.

After his arrest, Mr. VanCleave retained the services of Richard Briebart as his counsel. After Mr. Briebart was disbarred, he retained the services of Robert T. Williams to represent him. On June 25, 2012, Mr. Williams filed his Rule 5 Motion and several other motions. App. at 32-44. On July 24, 2012 he filed a Motion for a Speedy Trial. App. at 42. When the trial was not held, he filed a second Motion for a Speedy Trial on January 14, 2013. App. at 44-45.

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[1] Five of the arrest warrant contained this phrase as part of the affidavit "other witness can attest to the facts of the date and trip." Three contained the same phrase without the word "other."

On February 11, 2013, the Assistant Solicitor sent Robert T. Williams a request for alibi witnesses. The dates listed in the notice were April 18, 2003 to April 19, 2003 and March 25, 2005 to March 26, 2005. These were apparently for the charges in warrant numbers K-338462, K-338466, K-338464 and K-338468. The dates in the notice of alibi request are off by one day for the dates alleged in the warrants. The Notice alleged a Friday and Saturday and the warrants alleged a Sunday. As required, Mr. Williams gave the State an alibi with supporting documents for each of the dates set forth in the original arrest warrants and the indictments for those warrants. App. at 577, l 13 to 578, l 14. In the words of trial counsel, " [W]e had enough evidence that there was no way in the world that anybody could have convicted him of those warrants based on what they were saying in the warrants." App. at 577, ll 8-10.

When the case was called for trial on February 25, 2013, the Assistant Solicitor advised the Court that she had notified defense counsel that she would be presenting new indictments to the grand jury on that date and that she would consent to a continuance. App. at 56, l 2 to 56, l 22. The dates in the new indictments were for acts allegedly occurring from April 1, 2005 to May 17, 2006 and May 27 to May 29, 2006. Over the objection of Defense counsel, the trial court permitted the State to amend the indictments and scheduled the trial for April of 2013.

On February 19, 2013, the State also notified defense counsel that they would be presenting evidence of other bad act pursuant to Rule 404b. App. at 50-54. This testimony was presented to the court prior to the opening of the trial which began on April 1, 2013. App. at 137, l 1 to 139, l 5. The trial judge ruled the testimony offered

under Rule 404b to be admissible.

The alleged bad acts occurred in North Carolina during a camping trip. The witnesses were two brothers of the complaining witness at trial. Brother № 3[2] testified the alleged bad act occurred between 2002 and 2004. App. at 237, ll 11-12. He also testified it occurred in 2005. App. at 231, ll 20-22. He further testified this was at the KOA campground near Cherokee, NC. App. at 226, ll 24-25. He testified that the mountain camping trip was with the Wich family. App. at 227, l 18 to 230, ll 21. This brother testified that he was abused two nights but on the third night he let his younger brother, who was not abused, sleep in the same bed with Mr. VanCleave. Brother № 3, who was 21 at the time of the trial, testified that he went to the Cherokee camping trip when he was 13. He had previously given a statement to the police that the trip took place when he was ten to 12 years of age. App. at 232, ll 17-23.

Brother № 2 testified he went on a camping trip to Maggie Valley, which is only about 16 miles from Cherokee and 22 miles from the KOA campground in Cherokee[3] He testified the trip was in either 2005 or 2006. App. at 242, ll 8-10. He also remembered going to Ghost Town. App. at 243, ll 11-13. He did not remember the Wich family being on the trip. App. at 247, ll 4-11. He testified he only made one trip to Ghost Town with Mr. VanCLeave. App. at 247, ll 12-16. After being shown a picture taken on the

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[2] For purposes of this Petition, the three witness will be referred to as "Brother 1," "Brother 2," and "Brother 3." Brother 1 is the brother actually listed in the 2013 indictments. Brother 2 is the oldest. Brother 3 is the youngest of these three brothers.

[3] A court may take judicial notice of distance, even on appeal. *See, State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004)(fn. 3) .

trip, he admitted the Wichs were on the trip. App. at 448 l 22 to 249, l 4. He further recognized his younger brother, who was not abused. Brother № 3 had also testified his younger brother was on his trip. Brother № 3 is not in the picture. The picture, Defendant's Exhibit № 1, was identified by Mrs. Denneauch Wich as being taken July 4th week of 2007.[4] She also testified this was the only trip she made to Maggie Valley with Mr. VanCleave. App. at 276, ll 9-12.

Mr. VanCleave presented witnesses that stated that Brother 3, who claimed to be on the North Carolina trip was not present on that trip. The picture introduced showed Brother 2 but not Brother 3. Mrs. Wich produced a picture that showed the date to be July of 2007. Brother 2 would have been 19 years of age at the time of the alleged incident. App. at 276, ll 2-12; 246 ll 9-10.

The trial court admitted the other bad acts as being admissible due to the facts being proven by clear and convincing evidence. The Court did not discuss the fact that the oldest brother would have been 19 years of age and therefore was not similar to the alleged acts against Brother 1.

Brother 1 has testified that the alleged sexual abuse began in 2001 or 2002 when he was eleven or twelve years old. App. at 158, l 2 He testified the alleged abuse occurred over many years at the residence of Mr. VanCleave and other places. The abuse progressed to oral and anal sex. App. at 160, l 20-25. This alleged abuse occurred for almost 5 years on a monthly basis. App. at 78 ll 21-22. Brother 1 testified the assaults ended in August of 2006. App. at 175, ll 10-12.

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[4] This date made Brother № 2 19 years of age and Brother № 3 15 years of age.

Brother 1 also testified as to alleged criminal sexual conduct at the campground in Barnwell County. He first testified that the alleged assault occurred in 2005, as he could not recall the exact date, when he was either 14 or 15 years old.[5] App. at 167, ll 15-20. He did recall the camping trip being either Easter week-end of 2005 or Memorial day week-end. At least he was sure it was around a holiday week-end.[6] App. at 186, ll 12-25; 188, l 24 to 189 l 1. He testified Mr. VanCleave performed anal sex on him. App. at 168, ll 9-13. He testified this act occurred while two of his brothers and an older adult were in the popup camper with Mr. VanCleave and him. His older brother, Brother 2, was sleeping on a converted bed in the middle of the camper. This would have been a very short distance from where the alleged sexual assault occurred. App. at 167, ll 2-11. Mr. Sanders, who testified for the State, stated the weekend was Halloween weekend. App. at 218, ll 9-14

Brother 1 also testified to an alleged assault in May of 2006. He recalled this being a few weeks after his 16th birthday. The records from Barnwell State Park established that Mr. VanCleave had rented camping lots 14 and 15 for the week-end of May 27-29, 2006. He testified Mr. Sanders was not present that weekend. On that trip was himself, three of his brothers and Mr. VanCleave. The pop-up camper was used. All five of them slept in the pop-up camper. App. at 170, l 20 to 171, l 6. . Mrs. Denneauh

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[5] The State introduced several photographs that the assistant solicitor stated were taken in 2005. Camping tents are shown in the pictures. The State later represented that no alleged abuse occurred at the time the pictures were taken. App. at 162, ll 1-15.

[6] Easter Sunday in 2005 was March 27. This was before the date alleged in the 2013 indictment.

R. Wich testified for Mr. VanCleave that she and her family were present on the week-end trip on these dates and the Brother 1 was not present. App. at 267, ll 17 -25; 272. Ll 105.[7]

At the Post Conviction Relief hearing, Mr. VanCleave introduced documents that established he could account for where he was for every week-end over the 53 week period except for three weekends. He further produced a ticket from the North Carolina Camping trip to establish the trip was in 2007 as the photograph established. App. at 549, ll 7-18. As noted earlier, Brother 2 was 19 years old at the time of the alleged incident.

Mr. VanCleave also testified that the brief filed on his behalf did not fully develop the issue of whether the other two alleged bad acts were proven by clear and convincing evidence. The brief refers to two trips when in reality there was only one. The brief fails to point out that Brother 3 was not on the North Carolina trip. As the other bad acts were not established by clear and convincing evidence, the testimony should not have been admitted. The brief also failed to clearly articulate the lack of a basis for admitting the other bad acts. The alleged sex abuse of Brother 2 occurred when he was 19 years old. The alleged sex abuse of Brother 1, the brother named in the indictment, stopped when he was 16 years old. Mr. VanCleave contended that the State failed to show by clear and convincing evidence that the two alleged other bad acts were in fact similar.

Mr. VanCleave further complained about his trial counsel arguing to the jury that they should seek the truth and failing to object to the trial judge making such a charge to

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[7] The fact that two camp sites were rented supports Mrs. Wich's testimony.

the jury. App. at 506, ll 7-18.

Argument

Question I

Did the Post Conviction Relief Court err in failing to grant Eric VanCleave a new trial when defense counsel failed to introduce documentary evidence that supported Mr. VanCleave's defense of alibi?

Under *Strickland v. Washington*, 466 U.S. 668 (1984) a person seeking relief on the ground of ineffective assistance of counsel, must prove that trial counsel failed to meet the required standard of representation and that the deficiency of trial counsel was prejudicial to the defendant. The first analysis is to determine if trial counsel was in fact defective.

The South Carolina Supreme Court in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) set forth the obligation of defense counsel to investigate the case for his client. The Court said "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Id.* at 331-332, 642 S.E.2d at 597(emphasis in original). Quoting from the American Bar Association guidelines the *Ard* court held "Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issue of both guilt and penalty." *Id.* (emphasis in original). In *Walker v. State*, 407 S.C. 400, 406, 756 S.E.2d 144, 147 (2014) the South Carolina Supreme Court held the failure to interview the girlfriend of the Defendant was grounds for finding defense counsel ineffective. Here, the defense counsel had documents supporting an alibi of his client. Mr. VanCleave testified

as to where he was on the days the State established. But instead of producing the actual documents that would support his client's testimony, he elected to hope the jury would just believe his client. He gave no substantial reason for not producing the records his client had obviously spent hours preparing. He did say, which is quite true, that one record only proved Mr. VanCleave's credit card was in Bryson City during Memorial Day week-end of 2015. App. at 598, l 20 to 599, l 7. But the evidence was in fact very probative of his testimony that he was in Bryson City on that week-end. The records were further probative of where Mr. VanCleave was for the other week-ends.

The records produced by Mr. VanCleave at this hearing were in fact available to defense counsel at the trial. The records establish an alibi for 50 of the 53 week-ends of the period covered by the indictment. These records are certainly more than the defendant simply testifying as to where he was on the week-end in question. At trial this was all the defendant had - his word. A review of the trial transcript and a review of the records produced at this hearing shows that trial counsel was ineffective in failing to produce and use the documents supporting the alibi of Mr. VanCleave.

While also related to another issue in this Petition, the failure of defense counsel to introduce the ticket of the trip to Maggie Valley was ineffective assistance of counsel. The State made the accusation that the date on the camera could be wrong. App. at 356, 21-24 . The ticket establishes that the picture was in fact taken on the date posted on the picture. The picture establishes that Brother 2 was 19 years of age and Brother 3 was not on the trip. Both of these facts would have been helpful to Mr. VanCleave.

Question II

Did the Post Conviction Relief Judge err in failing to hold that trial counsel was ineffective for his arguing that the jury should search for the truth and for not objecting to the similar comment by the trial judge?

Defense counsel testified that he did not believe the comment by the trial judge that the function of the jury is to "determine [what] the truth to be." App. at 144, l 19-21. He further did not see an objection to his statement in opening when he told the jury "[I]f you search for the truth and if you come back with the truth, that's all we ask for." App. at 155, ll 8-11. Since 2000, such a charge from a trial judge has been disapproved. *State v. Alekesy*, 343 S.C. 20, 538 S.E.2d 248 (2000) . The same rule should apply to defense counsel. In *Aleksey*, our Supreme Court stated, "Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 343 S.C. at 26-27, 538 S.E.2d at 251. In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), our Supreme Court instructed trial judges to remove similar instructions from charge books. "Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." *Id* at 256, 737 S.E.2d at 475. More recently, the South Carolina Supreme Court has held such a charge is error. As the Court said "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." *State v. Beaty*, Op. № 27693 (S.C.Sup.Ct. Filed Dec. 29, 2016)(Shearhouse

Adv.Sh. № 1 at13).

The problem with such a statement is that it requires a jury to determine as between conflicting testimony, which side is being truthful. In reality, a jury is to determine if the State has proven its case beyond a reasonable doubt. If the jury is confused as to wherein the truth lies, they should acquit. As our State Supreme Court has contended phrases using words like "seek the truth" are improper for a trial judge to use, they are even more prejudicial when defense counsel so informs a jury. Trial Counsel was ineffective in telling the jury to "seek the truth." App. at 155, ll 8-11. This error in enhanced when he also told the jury there "In this case there is more than one victim." App. at 154, l 3. Such a statement tells the jury that the complaining witness is a victim. Once that admission is made, the finding "truth" would have to include the finding that the alleged sexual abuse did in fact occur.

Question III

Did trial and appellate counsel fail to properly argue at trial and preserve for appeal the issue involving whether the state has proven the other alleged bad act by clear and convincing evidence?

As former Court of Appeals Chief Justice Alex Sanders said "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162,182, 325 S.E.2d 550, 562 (Ct. App. 1984). In their brief, the attorney's for Mr. VanCleave stated the issue on the Rule 404b evidence to be:

Did the Trial Judge err by allowing into evidence the

> testimony from two brothers of the alleged victim as to alleged bad acts committed by Appellant on the two brothers at different times and at different locations from those alleged by their victim brother?
> App. at 426..

The Statement of the Issues does not inform the Court that the issue to be discussed involved whether the State presented clear and convincing evidence as to the other bad acts. The brief itself discusses the clear and convincing issue in only a very cursory manner. At the trial below, defense counsel only one time mentioned the clear and convincing standard. App. at 96, ll 19-23. He never pointed out why the evidence was not clear and convincing. When he did argue the testimony was confusing, he conceded that the confusion went to admissibility only. App. at 98, ll 4-12. He mistakenly argued there were two trips. App. at 99, ll 6-9. He never pointed out that there was only one trip and the evidence was not clear and convincing because one brother one was talking about a trip that did not occur.[8] The testimony establishes there was only one trip to the North Carolina mountains. While in preparation for trial the State took the trouble to find the reservation logs for one trip in Barnwell County, they apparently did not look for any reservation logs at KOA campground near Cherokee, NC. Brother № 3 is not pictured as being on the July 2007 trip. Brother № 2 did not testify as to Brother № 3 being on the trip to the North Carolina mountains. As the trip was in

[8] Much of his failure to argue this issue is based upon the fact that much of the proof that the evidence was not clear and convincing came from the testimony defense counsel presented in his case. This testimony also shows what counsel could have presented to the trial judge at the time of 404b testimony.

2007, Brother № 2 was 19 years of age.[9] Had defense counsel presented all the testimony available to him, he would have conclusively proven the that as Brother № 2 was 19 years old and Brother № 3 did not make the trip. The other bad acts, which the state contended was similar, were not proven by clear and convincing evidence. The one allegation by Brother № 2, who was on the trip, was not at all similar to the alleged attack of a child well under the age of 16. No alleged act that was similar to the complaining witness was proven by clear and convincing evidence.

In the brief, the appellate counsel mistakenly refers to two mountain trips. App.at 435-436; 438. He also did not argue the date had to be 2007 because of the date on the camera and the age of the minor child of Mrs. Wich in the picture. Appellate counsel further argued that the alleged events had been investigated by the Federal Bureau of Investigation with no warrant having been issued, when there was no testimony in the record to establish that fact.

The Appellate counsel reduced his entire clear and convincing argument to a single sentence on page 12 of the brief. He argued "Obviously the lack of detail offered by both brothers as to the events, failing to testify exactly when it occurred, as well as failing to testify to a time span elapsed, demonstrates a failure of proof shown to be clear and convincing evidence." He never pointed out the complete confusion between the testimony of the two brothers when they both described the same week-end but obviously they both were not on the camping trip. He did not point out that an alleged sex offense

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[9] An alleged sexual attack upon a 19 year old without some protest from the 19 year old is frankly hard to imagine.

with a 19 year old, according to the documentary evidence, is not similar to sex with a child of 11 or 12, which is when the minor child claimed the sex began and ended at age 16.

As much of the testimony established that the 404b evidence was not clear and convincing was introduced during the Defendant's case and the motion was not renewed after the evidence was introduced, even if the issue had been well argued, the issue would not have been preserved for review. Trial counsel never afforded the trial judge the opportunity to rule upon the clear and convincing issue incorporating all the evidence. In this respect, trial counsel was also ineffective in failing to preserve the issue for appellate review.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 685, 696 (1984). In this case Appellate counsel was ineffective in his failure to use all the facts in the case to illustrate that the State either failed to prove the "other bad acts" by clear and convincing evidence or to demonstrate through compelling evidence in the record that the "other bad acts" were not similar. As noted above, the "clear and convincing argument used a string cite on this issue without demonstrating as to why the

cases are relevant. As our Supreme Court has said "As evidenced by counsel's briefs and the Court of Appeals' statement above, counsel was deficient in failing to adequately raise or address the merits of the issue of prosecutorial retaliation." *Patrick v. State*, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002). The same principle applies in this case.

South Carolina has defined clear and convincing evidence. Our court has said "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008); *See also, Loe v. Mother, Father, & Berkeley Cty. Dep't of Soc. Servs.*, 382 S.C. 457, 465, 675 S.E.2d 807, 811 (Ct. App. 2009). Other States have similar definitions. For example, *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or. 390, 403, 737 P.2d 595, 603 (1987)("'clear and convincing evidence,' which means that the truth of the facts asserted must be highly probable") *In re Van Orden*, 271 S.W.3d 579, 584 (Mo. 2008) ('For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and your mind is left with unabiding conviction that the evidence is true."); *In re Shirk's Estate*, 194 Kan. 424, 430, 399 P.2d 850, 856 (1965)("'[T]he witnesses to a fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony be clear, direct and weighty and convincing, so as to enable you to come to a clear conviction without hesitancy of the truth of the precise facts in issue.' This is a

fair and well supported definition."); *People v. Mabini*, 92 Cal. App. 4th 654, 659, 112 Cal. Rptr. 2d 159, 163 (2001) ("Clear and convincing evidence of the corroboration means evidence of such convincing force that demonstrates, in contrast to the opposing evidence, a high probability of truth of the facts for which it is offered as proof."); *Middleton v. Allegheny Elec. Co.*, 897 S.W.2d 695, 697 (Tenn. 1995)("'Clear and convincing evidence' means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.")

Appellate counsel failed to cite the *Fletcher* case or any other case as to the definition of "clear and convincing." Of particular importance is the fact that in *Fletcher*, the South Carolina Supreme Court actually considered the testimony of the defendant in making the determination that the evidence was not clear and convincing. The Appellate counsel did not file a Reply Brief. If he had, he could have pointed out to the appellate court several errors in the Respondents's brief. For example, as to the testimony of Brother № 2 and Brother № 3, "They all provided specifics as to location where the conduct occurred. The brothers both described the camper they were in when the sexual conduct occurred." App. at 469. This statement is simply not correct. The brothers were not clear as to the camper being used in North Carolina. App. at 235, ll 11-13; App. at 243, ll 6-9; App. at 249, ll 18-24; App. at 242, l 23 to 243, l 3. Brother № 2 did not remember the Wich family being on the trip until he was shown a picture. App. at 247, l 22 to 248, l 3. He even said in response to the question "You really just don't remember much about it?" by saying "No sir." App. at 252, ll 10-11. Furthermore, the Respondent argued that the other bad acts were similar because they all occurred when the brothers

were in their mid to late teens. App. at 469. This is also not correct. The original complaining witness testified the alleged bad acts started when he was 11 or 12 and stopped at age 16. App. at 157, l 25 to 158, l 2. The Brief of Respondent continued the error of Appellant's brief that there were two different trips to North Carolina. App. at 467. These issues should have been properly addressed in a Reply brief.

When documents establish that one witness was not present on the North Carolina trip and the other witness did not remember being with the Wich family on the trip until he was shown a picture, the evidence is neither clear nor convincing.

Question IV

Did the Post Conviction Relief judge err in failing to find prejudice from the errors of trial and appellate counsel?

Trial and appellate counsel can be ineffective, but without prejudice, there is no relief. There is prejudice in this case, either individually or collectively. First trial counsel deprived his client of substantial supporting documents to establish his alibi. These documents would have raised a serious question in the mind of any reasonable juror as to whether the Mr. VanCleave was with the minor child during the times alleged in the indictment. Granted as to indictment №s 2013-GS-06-0078 and 0079 Mr. VanCleave admitted he was on a camping trip with some of the brothers on the date specifically alleged in the indictment. He denied doing anything improper on the week-end in question to any brother. He and his witness denied Brother 1 was present that week-end. As to indictment №s 2013-GS-06-0076 and 0077, the documents prepared by Mr. VanCleave, but not introduced, raise a serious question as to the credibility of

Brother № 1. The seriousness of the credibility question is such that the there is reason to question the confidence in the verdict in this case. Had the State limited their case to the one week-end for which they had documented evidence that Mr. VanCleave was on a camping trip, many of the problems in this case would have been avoided. The testimony is conflicted as to whether the minor child was on that trip, but this type of factual issue is for the jury to resolve. In this case, the jury resolved that issue against Mr. VanCleave, but without substantial documentation that Mr. VanCleave could not have committed the other alleged criminal sexual conduct charge. This would have had an impact in the jury's determination as to the credibility of the minor child.

When a jury is told they must decide whether Mr. VanCleave is telling the truth or the minor child, and that statement comes from defense counsel, then Mr. VanCleave has again been prejudiced. This prejudiced is further enhanced when trial counsel told the jury in opening statements that the case has more than one victim. If defense counsel believe the minor child was a victim, what would the jury to believe?

As the Court of Appeals considered the clear and convincing issue, this Court must concluded it was preserved. [10] The Court of Appeals in the unpublished opinion did not specifically discuss the clear and convincing issue, but did discuss other bad acts as a general concept. Included in the concept would be the clear and convincing issue.

As noted above in this Order, the testimony of Brothers № 2 and 3 at the trial was not clear. With documentation presented at this hearing it is also certainly not

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[10] The State in its brief in footnote 1 raised the question as to whether the issue is properly preserved for review.

convincing. As the Appellate counsel did not fully and properly address the issue in the brief, Mr. VanCleave has been prejudiced. The issue of "other bad acts" has long been discussed with some confusion by the courts of our state. The discussion of the issue in the appellate brief did nothing to aid the appellate court in properly resolving the issue as it relates to this case. Obviously if the clear and convincing issue was not preserved for review, the prejudice to Mr. Van Cleave is also present.

Based upon the review of the transcript and the testimony at the Post Conviction Relief hearing, the record establishes that the errors of trial counsel had an impact upon the verdict of the jury. The errors of appellate counsel in failing to properly brief the issue of clear and convincing evidence prevented the Court of Appeals from adequately understanding and addressing the issue. Furthermore, even if one individual error is not sufficient to grant Mr. VanCleave a new trial, collectively the Court considers them prejudicial to his right to a fair trial and appeal with competent counsel.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, reverse the decision of the trial judge and grant Eric VanCleave a new trial.

April 24, 2017

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Trial Judge
The Honorable Robert E. Hood, Post-Conviction Judge

Appellate Case No. 2015-CP-001459

Eric VanCleave.....Applicant,

v.

State of South Carolina.....Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Applicant in the above entitled case. That on April 27, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Certiorari in the above case addressed to Julie Coleman, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 27th day
of April, 2017.

Michelle O Collins (L.S.)
Notary Public for South Carolina
My Commission expires: 12/13/2026

LAW OFFICE OF
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April 26, 2017

Daniel Shearouse, Clerk
SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Eric VanCleave vs. State of South Carolina
Appellate Case No. 2015-CP-001459

Dear Mr. Shearouse:

Enclosed herewith are the original and six (6) copies of the Petition for Certiorari in the above referenced matter. I am also enclosing herewith, one bound and one unbound copy of the Appendix in this matter.

With kindest regards, I am

Very truly yours,

C. Rauch Wise /mqc

C. Rauch Wise

CRW/mqc
cc: Julie Coleman
Eric Van Cleave
Jennifer Van Cleave