STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

APPELLANT

APPELLATE CASE NO. 2015-001981

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in finding that the trial judge did not err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for lewd act on a minor was highly prejudicial when Petitioner was also charged with lewd act in the present case?

STATEMENT

In January of 2013, the Greenwood County Grand Jury indicted Lott for criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor third degree, indictments #2013-GS-24-101, 305. On February 28, 2013, Lott proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. Lance Sheek and Mike Medlock represented Lott at trial. David M. Stumbo and Elizabeth White prosecuted the case. The jury returned a verdict of not guilty of criminal sexual conduct with a minor first degree but guilty of lewd act on a minor.[1] Judge Griffith sentenced Lott to 15 years. A timely notice of intent to appeal was served on March 5, 2013, and the direct appeal perfected. On May 27, 2015, the South Carolina Court of Appeals, in an unpublished opinion, affirmed the sentence and conviction. State v. Lott, Op. No. 2015-UP-266 (S.C.Ct.App. Filed May 27, 2105). A timely notice of intent to appeal was filed and then denied on August 20, 2015. A petition for writ of certiorari was filed on September 21, 2015. The return was filed on September 25, 2015. On April 18, 2017, this Court granted the petition for writ of certiorari as to question one. This brief of petitioner follows.

[1] The criminal sexual conduct with a minor third degree was amended, without objection, to an indictment for lewd act on a minor.

STATEMENT OF FACTS

The jury found Petitioner guilty of committing a lewd act on a minor. Petitioner was initially indicted for criminal sexual conduct with a minor first and third degree. The State, without objection, altered the indictment for criminal sexual conduct with a minor third degree, changing it to an indictment for lewd act on a minor. (R. pp. 6-8). The jury found Petitioner not guilty of criminal sexual conduct first degree.

Petitioner was a friend of the minor's mother and step-father. (R. p. 122, line 18 – p. 123, lines 1-7). The step-father testified that Petitioner spent the night at their home on three or four occasions. (R. p. 123, lines 15-17). At trial the minor testified that she fell asleep on the couch in the living room, woke up between 2:00 AM and 2:30 AM and felt somebody's hands down her pants. (R. p. 72, lines 22-24; p. 76, lines 5-8). According to the minor, she opened her eyes and saw Petitioner. (R. p. 74, lines 23 – p. 75, lines 1-2). The minor also testified at trial that Petitioner rubbed her leg a couple of weeks earlier. (R. p. 73, lines 3- 12).

The minor testified that when she felt the hand in her pants she moved over and then went into the kitchen. (R. p. 74, lines 19-22). The minor said that her step-dad, Jamie, woke up and went into the kitchen and she went into the kitchen with him. (R. p. 72, line 25 - p. 73, lines 1-2; p. 75, lines 14-19). The step-dad told her to go back to bed. The minor testified that she told the step-dad about the incident the next day. (R. p. 75, line 23 – p. 76, lines 1-22).

At trial the step-dad testified, "I woke up and I went to the kitchen. You know, I couldn't go back to sleep, so I started doing the dishes. [Minor] walked in there. She looked like she was half asleep. I told her to go back to bed. She just went back and did." (R. p. 127, line 24 – p. 128, lines 1-4).

Investigator Jeff Scott with the Greenwood County Sheriff's Department testified that he referred the eleven year old minor to the Child's Place for a forensic interview. (R. p. 149, lines 4-18; p. 151, lines 10-20). A videotape of the forensic interview was introduced in evidence without objection. (R. p. 155, lines 2-25). An anatomical drawing used in the interview was also introduced in evidence without objection. (R. p. 156, line 8 – p. 188, lines 1-8).

Petitioner testified at trial and denied touching the minor. (R. p. 212, lines 5-12). Petitioner testified that as a result of a conversation he had with the minor and then with the minor's mother, minor was no longer allowed to play with the next door neighbor. (R. p. 212, line 13 – p. 213, lines 1-11). Petitioner testified that about a week before the minor made the accusation against Petitioner the minor was upset with Petitioner and told him, "Gary, I don't like you no more because you told mama that I – you know, what Chase did, and I can't play with him anymore." (R. p. 213, lines 12-16). The minor confirmed that her mother told her she could no longer play with Chase and she was upset about that because she had nobody else to play with. (R. p. 119, lines 7-16).

ARGUMENT

The Court of Appeals erred in finding that the trial judge did not err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for lewd act on a minor was highly prejudicial when Petitioner was also charged with lewd act in the present case.

The jury found Petitioner not guilty of criminal sexual conduct with a minor first degree but guilty of lewd act. The criminal sexual conduct with a minor charge was enhanced to first degree based on a prior 1996 conviction for lewd act. At trial the judge admitted a sentencing sheet from the prior conviction. (R. p. 167, line 15 – p. 168, lines 1-23; p. 320). The sentencing sheet included an order requiring Petitioner to register as a sex offender, as required by the statute. Additionally, an investigator was allowed to testify about the prior conviction and the requirement for sex offender registry. (R. pp. 168-171). Any probative value in this evidence regarding the prior conviction was substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The trial judge erred in admitting the evidence in regard to the prior conviction.

S.C. Code Ann. §16-3-655 provides:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
>
> (1)the actor engages in sexual battery with a victim who is less than eleven years of age; or
> (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

As the minor in the present case was eleven years old at the time of the alleged incident (R. p. 69, lines 6-7), the State proceeded pursuant to subsection (A)(2) of the statute.

Prior to trial Petitioner moved to limit the introduction in evidence of the 1996 guilty plea to lewd act on a minor by offering to stipulate that Appellant has been convicted of an offense listed in S.C. Code §23-3-430. (R. pp. 21-25). Relying on Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), Petitioner argued that the prejudicial effect of allowing the jury to learn that Petitioner had a prior conviction for lewd act on a minor outweighed the probative value. (R. p. 22, line 12 – p. 23, lines 1-19). Petitioner distinguished the burglary line of cases as the burglary statute specifically allowed for prior convictions for housebreaking or burglary but the criminal sexual conduct statute allowed prior convictions for any number of offenses listed in S.C. Code §23-3-430, like the prior felonies in Old Chief. (R. p. 23, line 20 – p. 24, 25, lines 1-21). Alternatively, Petitioner moved to bifurcate the proceedings to allow the State to prove the prior conviction after the jury made a determination as to guilt on the other elements of the offense. (R. p. 42, line 17 – p. 43, lines 1-4).

The judge ruled that the State did not have to accept the stipulation as the prior conviction was a statutory element of criminal sexual conduct with a minor first offense. (R. p. 29, line 22 – p. 30, 31, lines 1-11). The trial judge referenced the burglary statute and stated, "It seems like the same issue to me. If it's an element, the State has got the right to prove it. You can offer to stipulate it but they don't have to accept it. Since there is only one conviction, there is not that number out there that they could try to use them all." (R. p. 30, line 22 – p. 31, lines 1-3). The judge then ruled that the State could either use the prior conviction **or** the fact that Petitioner had to register as a sex offender for the prior conviction to meet the element. The judge stated, "Consistent with my understanding of the case law, I think the State could go either way. They can use either one that they want. They can use the conviction or they can use that he had to register because of the conviction, however, they want to do it." (R. p. 31, lines 3-9).

The guilty plea to lewd act required Petitioner to register as a sex offender. S.C. Code §23-3-430(C). Part (D) of the same code section provides, "Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor." S.C. Code §23-3-430 (D). S.C. Code §16-3-655(2) provides that a prior conviction for any offense listed in §23-3-430(C) **or** any offense for which the judge ordered sex offender registry qualifies as a prior conviction. As an example, a conviction for assault and battery, an offense not listed in §23-3-430(C), would qualify if the judge, in her discretion, ordered sex offender registry. There is no discretion involved with a conviction for lewd act because the sex offender registry is statutorily required for a lewd act conviction. A plain reading of S.C. Code §16-3-655(2) indicates that a prior conviction listed in S.C. Code §23-3-430(C) **or** a prior conviction where the sex offender registry was ordered would qualify. While there was a discussion about what the State could use to prove the prior conviction in the present case, there was no objection to the judge's ruling that the State could either use the prior conviction **or** the fact that Petitioner had to register as a sex offender for the prior conviction to meet the element. (R. pp. 31 – 35). As discussed below, the State introduced evidence of both the prior conviction for lewd act and the fact that Petitioner was required to register as a sex offender. Contrary to the trial judge's ruling, the statute does not provide for the admission of evidence that a defendant was required to register as a sex offender when the prior conviction was for an offense listed in S.C. Code §23-3-430(C). The judge made no findings pursuant to Rule 403, SCRE.

At trial the sentencing sheet from the prior lewd act conviction was introduced in evidence, over objection, as State's Exhibit #3. (R. p. 167, line 15 – p. 168, lines 1-8; R. p. 171, line 20 – p.

172, lines 1-8; R. p. 320). During trial the investigator incorrectly testified that Petitioner had a prior conviction for criminal sexual conduct[2]. (R. p. 168, lines 18-21). The investigator then corrected himself and testified that the prior conviction was for lewd act. (R. p. 168, line 23). The judge provided a curative explanation. The State then questioned the investigator further about the prior conviction and asked, "What was another condition of the court upon that conviction? That is written on State's Exhibit #3?" (R. p. 171, lines 16-18). The investigator responded, "To register as a sex offender." (R. p. 171, line19). The jury heard that Petitioner had a prior conviction for lewd act on a minor **and** that Petitioner was required to register as a sex offender through testimony and State's Exhibit #3.

At the close of the State's case Petitioner moved for a mistrial based on the judge's failure to require the State to accept the stipulation in regard to the prior conviction. (R. p. 196, lines 25 – p. 197, lines 1-4). The judge denied the motion for a mistrial. (R. p. 198, lines 8-15). The judge erred. The judge's limiting instruction to the jury did not cure the error. (R. p. 292, lines 7-17). The jury was confused by the testimony and evidence of the prior conviction and during deliberations the jury asked for a definition of what the lewd act was in 1996. (R. p. 302, lines 13-25). The judge advised the jury, "In regards to the sentencing sheet and your request for a definition of what the lewd act was in 1996, you're not to consider that case or its definition under the law in regard to this. That is a conviction for the purpose of whether or not the State proved the element of having a prior conviction. It is limited to that purpose only." (R. p. 302, lines 13-20). Because the sole purpose was to prove a prior conviction, as the judge instructed the jury, the name and nature of the prior conviction and the fact that the conviction required sex offender registry was not necessary to prove the prior conviction. Any probative value was far outweighed by prejudice.

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[2] It appears that a mistrial motion was made off the record and then later withdrawn. (R. p. 168, line 24 – p. 169, lines 1-2; p. 184, lines 3-7).

The trial judge erred in admitting evidence of the name and nature of the prior conviction and the fact that the conviction required sex offender registry.

The South Carolina Court of Appeals affirmed Petitioner's conviction and wrote:

> The trial court did not err in refusing to require the State to stipulate Lott had "a prior conviction of a crime under section 23-3-430." See S.C. Code Ann. § 16-3-655(A)(2) (Supp. 2014) (providing a prior conviction of committing a lewd act on a minor is an element of first-degree criminal sexual conduct with a minor); State v. Benton, 338 S.C. 151, 154-155, 526 S.E.2d 228, 230 (2000) (holding "evidence of other crimes is admissible to establish a material fact or element of the crime").

State v. Lott, Op. No. 2015-UP-266 (S.C.Ct.App.Filed May 27, 2105). The Court of Appeals' reliance on State v. Benton is misplaced. The burglary statute at issue in Benton provides that two or more prior convictions for **housebreaking** or **burglary** enhances a burglary to first degree. The criminal sexual conduct statute in the present case, however, provides that a prior conviction for any number of offenses listed in S.C. Code §23-3-430(C) or any conviction in which sex offender registry is ordered enhances a sexual battery to criminal sexual conduct with a minor first degree.

In State v. Benton, 338 S.C. 151, 155-56, 526 S.E.2d 228, 230 (2000) this Court wrote:

> Even in Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), upon which appellant relies, evidence of the defendant's prior felony conviction, an element of the weapons charge for which he was on trial, was admissible. Because the name and nature of the prior conviction were irrelevant (they were not elements of the current charge), their probative value was outweighed by their prejudicial effect. For purposes of an element of first degree burglary under § 16–11–311(A)(2), we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect. Rule 403, SCRE. (footnote omitted).

In contrast to the finding in Benton, the probative nature of the name and nature of the prior conviction for lewd act in the present case, like the name and nature of the prior conviction in Old Chief, is far outweighed by its prejudicial effect. The broad list of qualifying prior convictions pursuant to S.C. Code §23-3-430(C) is equivalent to the broad list of qualifying felonies discussed in Old Chief pursuant to 18 U.S.C §922(g)(1).

S.C. Code §23-3-430(C) provides:

(C) For purposes of this article, a person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender:

(1) criminal sexual conduct in the first degree (Section 16-3-652);
(2) criminal sexual conduct in the second degree (Section 16-3-653);
(3) criminal sexual conduct in the third degree (Section 16-3-654);
(4) criminal sexual conduct with minors, first degree (Section 16-3-655(A));
(5) criminal sexual conduct with minors, second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;
(6) criminal sexual conduct with minors, third degree (Section 16-3-655(C));
(7) engaging a child for sexual performance (Section 16-3-810);
(8) producing, directing, or promoting sexual performance by a child (Section 16-3-820);
(9) criminal sexual conduct: assaults with intent to commit (Section 16-3-656);
(10) incest (Section 16-15-20);
(11) buggery (Section 16-15-120);
(12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470);
(13) violations of Article 3, Chapter 15, Title 16 involving a minor;
(14) a person, regardless of age, who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in this State, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of indecent exposure or of a similar offense in other jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender;
(15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;
(16) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent;
(17) trafficking in persons (Section 16-3-930) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;
(18) criminal sexual conduct when the victim is a spouse (Section 16-3-658);
(19) sexual battery of a spouse (Section 16-3-615);
(20) sexual intercourse with a patient or trainee (Section 44-23-1150);

(21) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:
(a) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);
(b) perform a sexual activity in the presence of the person solicited (Section 16-15-342); or
(22) administering, distributing, dispensing, delivering, or aiding, abetting, attempting, or conspiring to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit a crime listed in Section 44-53-370(f), except petit larceny or grand larceny.
(23) any other offense specified by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA).

In contrast to the twenty three enhancement offenses listed in S.C. Code §23-3-430, the burglary statute lists two enhancement offenses and provides:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both.

S.C. Code §16-11-311(emphasis added).

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), this Court distinguished the state burglary statute from the federal statute at issue in Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), and in footnote eight wrote, "Violation of 18 U.S.C.

§ 922(g)(1) is triggered by prior convictions for many different crimes. S.C.Code Ann. § 16–11–311(A)(2) requires proof of prior convictions for only two specific crimes: burglary and housebreaking." The criminal sexual conduct with a minor first degree statute is triggered by prior convictions for twenty three different offenses, as opposed to the burglary fist degree statute which is triggered by two specific crimes. The criminal sexual conduct with a minor first degree statute is analogous to the federal felon in possession of a firearm statute found in 18 U.S.C. § 922(g)(1). In James this Court wrote:

> In Old Chief, the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by anyone with a prior felony conviction). Id. In Old Chief, the prosecution relied on the defendant's prior indictment for "assault causing serious bodily injury" to establish a violation of 18 U.S.C. § 922(g)(1), and introduced the order of judgment and commitment for the defendant's prior assault conviction. Id. The Supreme Court found that, although *relevant* under Rule 402, FRE, the evidence of the name and nature of the crime was unnecessary to prove the gun charge, and was highly prejudicial to the defendant as it was similar to the current assault charges pending against the defendant. Id. Weighing the probative value of the name and nature of the crime against its prejudicial impact, the Court held that introducing these details was unduly prejudicial under Rule 403, FRE. Id. The Court found that the defendant's admission that he committed a qualifying crime to be sufficient for purposes of proving a violation of 18 U.S.C. § 922(g)(1) under these circumstances. Id. (footnote omitted).

355 S.C. at 31, 583 S.E.2d at 748.

As in Old Chief, evidence of the name and nature of the 1996 conviction for lewd act was unnecessary to prove the crimes charged, and was highly prejudicial as Petitioner was charged with lewd act in addition to criminal sexual conduct with a minor first degree and ultimately convicted of lewd act. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984); State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000)(When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced). Petitioner was further prejudiced

by the fact that, in addition to evidence about the prior conviction for lewd act, the jury learned, through the testimony of a detective, that Petitioner was required to register as a sex offender. (R. p. 171, lines 16-19). The trial judge erred in not conducting a proper balancing test pursuant to Rule 403, SCRE. In this case, the probative value of the name and nature of the 1996 lewd act conviction is substantially outweighed by the danger of unfair prejudice in the jury hearing that appellant had been convicted of the same crime for which he was on trial.

In order to prove burglary first degree in James, the State introduced certified copies of seven prior convictions for burglary. In reversing the conviction in James the Court wrote, "We believe the probative value of all seven prior convictions was outweighed by the very great potential for prejudice to James, and crossed the line established in Old Chief, regardless of the judge's limiting instructions to the contrary." 355 S.C. at 35, 583 S.E.2d at 750. In the present case the State introduced a sentencing sheet from one prior 1996 conviction for lewd act which indicated that Petitioner was required to register as a sex offender. Although there was only one prior conviction admitted in the present case, the probative value of the name and nature of that conviction and the fact that he was required to register as a sex offender was far outweighed by the prejudice to Petitioner. The statute at issue, S.C. Code §16-3-655(A)(2), provides for enhancement based on a prior conviction for any of the offenses listed in S.C. Code §23-3-430(C) or any offense in which sex offender registry was ordered.. The burglary statute, on the other hand, provides for enhancement based only on a prior conviction for burglary or housebreaking. As argued by Petitioner at trial, the challenge in the present case is analogous to the challenge in Old Chief to 18 U.S.C. § 922(g)(1), where enhancement was triggered by a prior conviction for many different crimes. As the Court found in Old Chief, the probative value, if any, of the

name and nature of the prior conviction as well as the sexual offender registry is far outweighed by its prejudicial effect.

Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574 (1997) the Court defined unfair prejudice writing:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

The Court acknowledged that the name and nature of a prior conviction carries the risk of unfair prejudice and wrote:

> In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.

Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 652, 136 L. Ed. 2d 574 (1997) (fn.#8 omitted). The admission of evidence of the prior conviction for lewd act in the present case was unduly prejudicial. Petitioner was on trial for criminal sexual conduct with a minor

first degree and lewd act. The State presented testimony and evidence of the prior conviction as well as the fact that Petitioner was required to register as a sex offender.

As to probative value, in State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) the South Carolina Court of Appeals addressed Rule 403 with regard to photographs and defined probative value writing:

> "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed.2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.

408 S.C. at 609–10, 759 S.E.2d at 165 (Ct. App. 2014). The probative value of the name and nature of the prior conviction pursuant to S.C. Code §16-3-655(A)(2) is minimal.

In Old Chief the Court acknowledged that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence but wrote, "This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." 519 U.S. at 190, 117 S. Ct. at 654–55. Both Old Chief and the present case involve the defendant's legal status or prior conviction. Distinguishing prior conviction or status elements from general elements of the crime charged the Court in Old Chief wrote:

> Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap

> in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

519 U.S. at 191, 117 S. Ct. at 655. The prior conviction relates solely to the enhancement to first degree and is not probative of the general elements of the crime charged. The name and nature of the prior are unnecessary to the trier of fact in determining if the State met its burden of proving criminal sexual conduct with a minor. The probative value of the name and nature of the prior conviction is lessened further by the fact that Petitioner was willing to stipulate that the prior conviction qualified pursuant to §16-3-655(A)(2).

Balancing probative value and prejudicial effect the Court in Old Chief wrote:

> Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

Old Chief v. United States, 519 U.S. 172, 191, 117 S. Ct. 644, 655, 136 L. Ed. 2d 574 (1997)(fn #10 omitted).

Petitioner offered to stipulate to the prior qualifying conviction. There is no cognizable difference between the evidentiary significance of a stipulation as to the prior conviction and the sentencing sheet that was introduced in regard to the prior conviction. As the Court found in Old Chief, the important difference is that the evidence introduced by the State was unduly

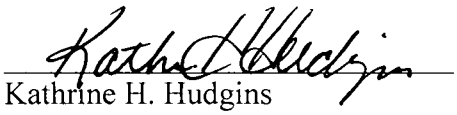
prejudicial. The only reasonable conclusion is that the risk of unfair prejudice substantially outweighed any possible probative value when the stipulation was available.

Alternatively, the danger of unfair prejudice could have been reduced through a bifurcated proceeding. After the judge refused to require the State to accept the stipulation, Petitioner moved to bifurcate the proceedings to allow the State to prove the prior conviction after the jury made a determination as to guilt on the other elements of the offense. (R. p. 42, line 17 – p. 43, lines 1-4). The State objected. The judge denied the motion stating, "Consistent with my prior ruling, I am not going to bifurcate this because I think that is an element that the State is under a burden of proof by reasonable doubt. So I am not going to do that. I understand your Motion, it's very interesting, but I am not going to grant it." (R. p. 43, line 22 – p. 44, lines 1-3).

The judge's failure to require the State to accept the stipulation in regard to the prior conviction was in violation of Old Chief. The trial judge erred in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree. The jury learning that Petitioner had a prior conviction for lewd act on a minor and was required to register as a sex offender was highly prejudicial when Petitioner was also charged with lewd act in the present case. Alternatively, the judge erred in refusing to bifurcate the proceeding. The bifurcated proceeding would have reduced the danger of unfair prejudice.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and sentence and remand the case for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This18th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Gary Eugene Lott, #262345, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this18th day of May, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this18th day of May, 2017.

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