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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No: 2017-001177

Terry L. McCarrell, #171323. . . . . Petitioner,

v.

State of South Carolina. . . . . Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT OR PREJUDICIAL IN THE FAILURE TO SEVER THE CHARGES.

A. WHETHER THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL HAD ARTICULATED A REASONABLE TRIAL STRATEGY IN ALLOWING THE CHARGES TO BE TRIED TOGETHER.

STATEMENT OF THE CASE

On February 19, 2013, a grand jury convened in Greenville County and indicted Petitioner, Terry L. McCarrell, for criminal sexual conduct (CSC) with a minor in the second degree (2012-GS-23-967), lewd act upon a child (2012-GS-23-968), grand larceny (2012-GS-23-2622), and contributing to the delinquency of a minor (2012-GS-23-1662). App'x. pp. 474-475; 478-479; 482-483; 486-487. All four charges were tried together on July 7, 2014 before the Honorable Robin B. Stilwell. Assistant Solicitors Lisa A. Bentley and Andrew Culbreath represented the State. Alex Stalvey represented Petitioner. Petitioner was tried *in absentia.* App'x. p. 104. The jury found Petitioner guilty on all charges as indicted. App'x. pp. 363-364. Petitioner was sentenced to twenty (20) years imprisonment for CSC with a minor in the second degree, fifteen (15) years imprisonment for the lewd act upon a minor charge, three (3) years imprisonment for contributing to the delinquency of a minor, and five (5) years imprisonment for grand larceny, with credit for time served and all to run concurrent to one another. App'x. pp. 473, 477, 481, 485. Judge Stillwell placed the sentences under seal. App'x. p. 368. Pursuant to Section 17-25-135 of the South Carolina Code of Laws, Petitioner shall be placed on the Central Registry of Child Abuse and Neglect for the CSC and lewd act charges. App'x. pp. 473, 477.

Petitioner timely filed a notice of appeal (App. Case # 2014-001586). His appeal was dismissed by the South Carolina Court of Appeals by way of an *Anders* Brief. (*State v. McCarrell*, No. 2016-UP-005 (Ct. App. 2016)).

Petitioner filed for post-conviction relief (PCR) in February 2016,[1] raising the following grounds:

1. All of the charges were tried together; the trial should have been severed to separate the Grand Larceny charges from the others. His attorney failed move to sever the trial.
   - Because the Defendant pled guilty to Grand Larceny, his guilt of that charge spilled over into the jurys' perception and assessment of his innocence of the charges he did not plead guilty to.

2. The victim of Grand Larceny was shown a photographic line up, and his identification was tainted by law enforcement's use of unneccessarily suggestive identification procedure. Additionally, this line up was introduced at trial and was prejudical to the Defendant. His attorney failed to prevent the admission of this evidence and testimony.
   - The line up included photographs that were clearly mugshots and the line up's other mens' appeareance in regard to skin tone, age, weight and hair style (including facial hair), varied widely. Therefore, the Grand Larceny victim and witness only had to choose from two photographs to identify the Defendant, instead of six. The admission of this line up at trial was also prejudicial to the Defendant because the mugshots of the Grand Larceny charge spilled over into the the jury's perception and assessment of his innocence of the other charges that he was being tried.

3. His attorney failed to object at various instances of prejudice to the Defendant at trial.

   - Evidence and testimony were introduced that were unduly prejudicial to the Defendant.

App'x. pp. 41-47.

An evidentiary hearing was held before the Honorable Brooks P. Goldsmith on February 23, 2017. App'x. p 373. Petitioner, trial counsel, and a trial witness, Brooklyn Pollard were each

[1] Petitioner initially filed his PCR while his direct appeal was still pending. App'x. pp. 28-35; 36-39. His initial PCR application was dismissed without prejudice on August 13, 2015. App'x. pp. 13-14.

present and testified. The PCR was dismissed on April 20, 2017. App'x. pp. 2-12. This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

The charges arose from accusations of theft in November 2011 at the home of Jesse and Tamila Woodard, the neighbors of victim ("Minor") at the time. At that time, the Woodards were trying to start fresh after drug addiction led to the removal of their children. App'x. p. 123, lines 4-21; p. 124, lines 6-17; p. 142, lines 1-6; p. 156, lines 4-18; p. 158, lines 1-4. Jesse had invited Minor and Petitioner into his home to look at photographs of tattoos and touch up Minor's tattoo. App'x. p. 143, lines 5-12; 144, lines 17-19; p. 145, lines 5-11. At the time, his wife Tamila was getting ready for work, and she had removed a few of her rings and placed them on a table. App'x. p. 162, lines 1-5. While Petitioner and Minor were in the home, Jesse testified he heard "something hit the floor...like a tink", but he testified that he did not "really think anything about it." App'x. p. 146, lines 1-15; p. 147, lines 4-10. At trial, Minor testified that she saw Petitioner take the rings and that she "didn't care" that he was taking them, yet also testified that "I think [Applicant] just picked it up and put it back on the table." App'x. p. 231, lines 20-22; p. 232, lines 1-10. The Woodards later called law enforcement to report that the rings had been stolen. App'x. p. 92, line 4. That same day, law enforcement searched Petitioner's person and did not find the rings; but he was nevertheless arrested based upon Jesse's statement to law enforcement. App'x. p. 150, lines 4-25. In his statement, Jesse had told police the rings were roughly "like $2,500, the value of those rings. We could have got rid of them for right at $2,500." App'x. p. 151, line 25; p.152, lines 1-9.

Petitioner's daughter, Brooklin Pollard, later returned one of the rings to law enforcement. App'x. p. 174, lines 10-12. Pollard also offered officers text messages from her cellphone that contain a conversation between she and Minor about the rings. App'x. p. 175, lines 117-125. In those test messages, Pollard alludes to Minor as the person that stole the rings

and Minor admits that she flushed them down a toilet. App'x. p. 180, lines 23-25; p. 181. Additionally, in one of the text messages, Minor stated that she "would take the fall because I think I'm pregnant...by [Petitioner.]" App'x. p. 124, lines 4-13. With Minor being thirteen years old at the time, Investigator Maschak was alarmed by that last text message and contacted Investigator Robert Perry to look into it. App'x. p. 182, lines 14-22.[2]

Investigator Maschak and Investigator Perry later spoke with Minor about the rings and the possible relationship with Petitioner at her home with her mother present. App'x. p. 183, lines 6-21. During that conversation, Minor admitted she had had possession of the rings, but stated Petitioner had stolen them. App'x p. 184, lines 20-25; p. 185, lines 1-2. Minor was charged with receiving stolen goods after giving her statement to the investigators. App'x. p. 185, lines 11-12. She consequently spent three months detained at the South Carolina Department of Juvenile Justice. App'x. p. 238, lines 15-16.

Also during the conversation at Minor's home, Investigator Maschak described Minor as uncooperative in disclosing the sexual relationship, but stated she did eventually give a statement to Investigator Perry that she and Petitioner had been having sex for several months prior to his arrest for grand larceny. Investigator Perry testified at trial that the statement Minor gave about the relationship was not detailed at all, but her statement as to the ring theft was detailed. App'x. p. 287, lines 18-24. Petitioner, still in jail for grand larceny at the time Minor disclosed the

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[2] At trial, Minor identified the text-messages she received from and sent to Pollard's phone by her signature on the texts sent as "Zoe's mommy." App'x. p. 228, lines 1-21. Minor also read for the court multiple text messages she said were between she and Petitioner, whom she stated sometimes used Pollard's cellphone. App'x. p. 228, lines 20-25; p. 229, 1-14.

alleged relationship, was thereafter charged with CSC with a minor. App'x. p. 186, lines 12-16; p. 286, lines 19-22. The charges relating to the stolen rings and CSC were tried all at once. Trial counsel did not sever the charges.

Then sixteen years old, Minor testified at trial. App'x. p. 198, lines 5-6. Minor testified that she and Petitioner lived down the street from one another and had met through a mutual acquaintance. App'x. p. 208, lines 22-25, p. 209-210. Minor could not specifically remember how long had passed between meeting Petitioner and the next time she saw or had any contact with him, but stated it was "probably a few days." App'x. p. 210, lines 1-7, 23-25. Minor did not even know in what month she met Petitioner or when the relationship began. App'x. p. 211, lines 6-7. Minor testified that she did not tell anyone about the advances she testified Petitioner made or their sexual activities, including her mother although they had a good mother-daughter relationship at the time. App'x. p. 216, lines 19-25. Minor testified that trial was the first time she had not lied at all about the sexual relationship with Petitioner. App'x. p. 240, lines 7-9.

No physical evidence of the relationship was ever found or introduced into evidence at trial. Any interview Minor had at the Judy Valentine Center was also not introduced into evidence or testified to at trial, and there is no indication she received counseling otherwise following the disclosure of alleged sexual abuse.

Minor also testified that she often physically fought other students at her school, beginning when she was eleven years old. App'x. p. 201, lines 13-25. Prior to the offenses at issue at trial, Minor had been using drugs and had been arrested for assault and battery, disturbing schools, and running away. App'x. p. 203, lines 1-7; p. 204, lines 14-15. During the period where she had run away, Minor found out she was pregnant by a teenager she knew at the time. App'x. p. 203, lines 10-11. Minor said that she was just very angry at anything and

everything in middle school, and testified, "I was just rebelling. I mean, I knew what I was doing." App'x. p. 202, lines 1-4, 21-22. Trial counsel did not cross-examine Minor at all at trial. App'x. p. 243, lines 10-13.

At the PCR hearing, trial counsel recalls meeting with Petitioner at least once before trial. App'x. p. 377, lines 24-25. Trial counsel also testified that Petitioner had been represented by another attorney up until the mid to end of June of 2014, leaving just a week or two for trial counsel to prepare for trial. App'x. p. 378, lines 8-25; p. 379. Nonetheless, trial counsel was adamant he felt no need to ask for a continuance and that he had had enough time to adequately prepare for trial. App'x. p. 380, lines 1-9; p. 383, lines 12-16. Trial counsel also testified he did not remember getting any cellphone records in discovery, although he did testify that he recalled that the State had introduced text messages attributed to Petitioner found on Pollard's phone at trial. App'x. p. 404, lines 13-25; p. 382, lines 22-25; p. 383, lines 5-11. However, trial counsel subsequently testified that he did not remember whether the text messages between Petitioner and Minor were admitted at trial, but testified that the text messages that alluded to the alleged sexual relationship would have tied Petitioner to the alleged victim. App'x. p. 408, lines 1-9. Trial counsel also testified that he was not aware that Petitioner was in jail for grand larceny at the time one or more of the incriminating text messages was allegedly sent between Petitioner and Minor. App'x. p. 405, lines 4-11, 25; p. 406, lines 1-22; p. 407, lines 1-9, 12-25; p. 408, lines 3-25. The PCR court denied relief on the issue of trial counsel's failure to challenge the text messages or use them as an alibi, finding that it had not been raised in the original application. App'x. p. 10.

Trial counsel also testified that the grand larceny charge and the charges relating to the alleged sexual misconduct with Minor would "absolutely" have been severable. App'x. p. 382,

12-14. Trial counsel did not move to sever the charges at trial because "it was part of my defense...that the only reason that the victim made up these allegations was to try to save herself or give herself some excuse to get out of the grand larceny charges." App'x. p. 381, lines 8-25. Trial counsel admitted that this essentially tied Petitioner to a crime that he persisted he was not involved in and had pled not guilty to; but trial counsel testified that he proceeded on this idea regardless because the grand larceny charge "was less significant than what he was accused of, which was a lewd act." App'x. p. 382, lines 6-11. Yet trial counsel testified he could not remember exactly what his trial strategy was. App'x. p. 387, lines 24-25. Trial counsel instead offered that "[c]hallenging the credibility of the victim certainly was one." App'x. p. 387, line 25; p. 388, line 1. Trial counsel also testified he was aware that Minor already had a significant juvenile criminal record at the time of trial, App'x. p. 380, lines 18-25. Trial counsel testified,

> I think she had lied about the stolen jewelry items. And she had a reason to try to throw [Petitioner] under the bus....She had lied in the past. I think I had got some of that out on cross-examination. I didn't ask her about the juvenile record but I did ask her about some prior credibility issues. So, I had enough, I thought, that would establish reasonable doubt with a couple jurors.

App'x. p. 388, lines 3-11. Yet trial counsel had not cross-examined Minor at all. App'x. p. 243, lines 10-13. In dismissing Petitioner's PCR on this issue, the PCR court found that this was a viable strategy as trial counsel could not have attacked the credibility of the victim had the cases been tried separately. App'x. p. 8-9.

STANDARD OF REVIEW

Upon review, the Court will defer to the PCR court's findings of fact unless there is no evidence of probative value in the record to support the findings of the PCR court. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The Court will also defer to the PCR court's findings on matters of credibility. *Simuel v. State,* 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

ARGUMENT

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. Relief is warranted for violation of this right when counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.*at 688, 104 S.Ct. at 2065; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). However, "[w]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The validity of counsel's strategy is viewed under an "objective standard of reasonableness." *Lounds v. State,* 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that trial counsel's belief that available witnesses "would not add much to the case" was not an objectively reasonable strategic reason for the failure to call them to testify when the available witnesses would have supported the defense's trial theory).

The PCR Court erred in denying relief. For the reasons discussed herein, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's order denying relief.

I. THE PCR COURT ERRED IN FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT OR PREJUDICIAL IN THE FAILURE TO SEVER THE CHARGES.

The PCR Court erred in denying relief on this ground and incorrectly applied the *Strickland* standard in finding that trial counsel was not ineffective and had articulated a valid strategic reason for failing to move to sever the charges. Thus, the PCR Court's findings and conclusions discussed herein are to be reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Motions for severance are within the trial judge's discretion. *E.g., State v. Nichols,* 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has discretion to order the indictments tried together if the defendant's substantive rights would not be prejudiced. *State v. Smith,* 322 S.C. 107, 470 S.E.2d 364 (1996); *State v. Williams,* 263 S.C. 290, 210 S.E.2d 298 (1974); *State v. Jones,* 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). Offenses are properly considered to be of the same general nature where they are interconnected. *Jones,* 325 S.C. at 315, 479 S.E.2d at 519. In contrast, offenses that may be of the same nature, but do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. *See e.g., State v. Middleton,* 288 S.C. 21, 339 S.E.2d 692 (1986) (holding that although inmate escapee committed two murders within a few miles of one another, as well as an attempted armed robbery, the trial judge erred in consolidating the charges at trial because the crimes did not arise out of a single

chain of circumstances and they required different evidence); *State v. Tate,* 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding that the joint trial on identical but unrelated forgeries violated the defendant's right to a fair trial). *Cf. State v. Woomer,* 276 S.C. 258, 277 S.E.2d 696 (1981) (holding it was proper to try together all crimes arising from a single uninterrupted crime spree). Further, "[w]hile severing trials certainly impacts judicial economy and State resources, these factors should not take precedence over the protection of a defendant's constitutional rights." *State v. Henson*, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014).

Here, trial counsel's failure to move for a severance constitutes deficient performance. As trial counsel admitted, the charges would have clearly been severable. App'x. p. 382, lines 12-14. The nature of the charges and the elements that the State needed to prove beyond a reasonable doubt for grand larceny and the CSC charge and lewd act charge are clearly vastly different. App'x. pp. 474-75; 478-79; 482-83; 486-87. *Compare* S.C. Code Ann. § 16-3-655(B)(1), formerly § 16-3-655(2); §16-15-140; § 16-17-0490; *with* § 16-13-0030. Grand larceny shares no element or evidence in common with either charge. Further, the evidence produced at trial does not indicate that the CSC and lewd act charges occurred as part of the same transaction as the grand larceny charge or that the motive in committing one offense was in furtherance of any other charge. *Cf. State v. Rice*, 386 S.C. 610, 615-16, 629 S.E.2d 393, 395-96 (Ct. App. 2006) (holding that trial court did not err in refusing to sever trial for murder and a cocaine trafficking charge because the motive for murder arose from the cocaine activities and the evidence showed that the relationship between the defendant and the victim was largely based on selling drugs). Thus, counsel's performance in not moving for a severance was deficient.

Trial counsel's performance in failing to move a severance prejudiced Applicant at trial. Had the charges been severed, there is a reasonable probability the trial result would have been

different. From the testimony and evidence given to support the CSC and lewd act charges, it was the State's theory that Minor complied with the supposed request Petitioner made for her to flush the rings because of his older age and the dominant role he held the sexual relationship. In the context of the relationship between the two, the contributing to the delinquency of a minor charge and its connection to the grand larceny charge made Minor appear more than ever as a victim swept up in the unsavory influence of an older predatory male. Indeed, the State connected the charges together as supporting the evidence for each other charge during closing arguments. App'x. p. 275, lines 4-11; p. 277, lines 6-22. Yet, the State could have tried grand larceny alone or grand larceny with contributing to the delinquency of a minor charge without fragmentation of its case. *See Rice*, 368 S.C. at 616, 629 S.E.2d at 396. Indeed, two investigators, Investigator Perry and Investigator Maschak investigated the CSC and lewd act and grand larceny charges separately by questioning Minor about each conduct separately. However, both investigators were present for both of her statements on the charges and testified to her each of her statements. Specifically, Investigator Maschak's testimony was a mixture of testifying to her statement on the grand larceny charges and the taking of her statement on both the rings and the sexual relationship. This link in the testimony, seen throughout trial in the evidence presented for both charges, resulted in the evidence of grand larceny corroborating the existence of a relationship. Hence, the evidence that Petitioner stole the jewelry and made Minor get involved in covering up the crime improperly influenced the jury in a manner similar to general character evidence by raising the specter of criminal activity and crooked morals. *Tate*, 286 S.C. at 464, 334 S.E.2d at 290 (Ct. App.1985); *State v. Smith*, 322 S.C. 107, 109-110, 470 S.E.2d 364, 365 (1996).

The prejudice resulting from the improper influence of the failure to sever is underscored by the lack of evidence for the CSC and lewd act charges against Petitioner besides the testimony of Minor. There were no eyewitnesses to the actual sexual relationship Minor alleged. Although Minor's mother testified that she had seen Petitioner visit her home when she was not present and had warned him not to do so, Minor's mother did not witness any activity to actually prove that a sexual relationship existed. No forensic interview or report from a physical examination of Minor was presented to the jury and the reasons as to why an interview or examination was not done or shown to the jury cannot stand as evidence of something incriminating. Indeed, trial counsel testified at the PCR hearing that besides Minor's testimony, there was no evidence to prove the CSC or lewd act charges. App'x. p. 394, lines 20-23.

Additionally, the result of the grand larceny charge would have been different had the trial been severed. Coupled with the lack of evidence that Minor and Petitioner planned to steal jewelry when visiting the Woodards' home, the testimony regarding Minor's extensive juvenile criminal history at a severed trial would have created reasonable doubt that Minor, rather than Petitioner, stole the rings. After all, Petitioner was searched shortly after Mrs. Woodard discovered her rings were missing and they were not found on Petitioner. Minor also admitted she had had at least one ring in her possession at one point, unlike Petitioner who never made any such admission. The State also conceded at trial that Jessie did not see Petitioner take the rings, only that he heard "a tink" and saw Petitioner "move quickly." Without the evidence of the relationship, it is more likely than not that a jury deciding Petitioner's guilt on grand larceny and contributing to the delinquency of a minor would have found that Minor stole the rings or was not led to become involved with stealing the rings through improper influence by Petitioner, and instead did so on her own based upon her admissions in light of her juvenile criminal history.

A. THE PCR COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL HAD ARTICULATED AN OBJECTIVELY REASONABLE STRATEGIC REASON FOR FAILING TO MOVE FOR A SEVERANCE.

The failure to sever the charges at trial is not a valid trial strategy that would absolve trial counsel from a finding of ineffective assistance. It is not objectively reasonable for trial counsel to allow a defendant to be "tied" to another crime for which he is being tried. *See* Trial counsel's testimony at App'x. p. 382, lines 6-11. *See also Lounds v. State,* 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002). By allowing this "tie", trial counsel "fail[ed] to subject the prosecution's case to meaningful adversarial testing" and thus made "the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984). This error actually bolstered the case against his client. *See generally, Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006), *cert. denied*, 549 U.S. 943, 127 S.Ct. 131, 166 L.Ed.2d 253 (2006).

Moreover, juxtaposing trial counsel's testimony at the PCR hearing with what actually occurred at trial further demonstrates that this was not a valid trial strategy. Trial counsel testified that he did not sever the charges because he wanted to discredit her credibility of her testimony regarding the relationship by highlighting her involvement with stealing the rings, and testified that he had cross-examined her enough to achieve this end. Yet trial counsel did not cross-examine Minor at all, which is a fact that the PCR Court's Order of Dismissal fails to account for when concluding that trial counsel employed a valid trial strategy. Further, in denying relief on this ground, the PCR Court concluded that "Trial Counsel had a very specific trial strategy in choosing not to sever these charges. He stated that he wanted to attack the credibility of the minor Victim, and he would not have been able to do that for an charge without trying all of them together." App'x. p. 8-9. There is no support for this that can be gleamed from

the circumstances or in the record, all trial counsel testified to was that he was "sure they objected to me actually asking the juvenile about her record, specifically." App'x. p. 401, lines, 2-5. Yet, trial counsel did not cross-examine Minor and Minor had volunteered her criminal history on direct examination. Thus, there is no reason given in the PCR Court's order or is made otherwise clear from the record as to why he could not have damaged her credibility at a severed trial by using evidence of her involvement with the rings or her volunteered summary of her juvenile criminal history. Stated another way, there is no indication that trial counsel would not have been able to do at a severed trial what he did not do or chose not to do at Petitioner's trial. Additionally, trial counsel's error cannot be justified on an assertion that he would not have been permitted to cross-examine her on her juvenile criminal history to attack her credibility, at trial or had the charges been severed. *See* Rule 609 (c), SCRE ("Evidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult."); *see also* Rule 609 (a) (1)-(2), SCRE.

Therefore, trial counsel's performance in the failure to move for a severance was deficient and prejudicial performance and the PCR court erred in denying relief on this ground.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's Order denying relief.

Respectfully submitted,

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