

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001741

RECEIVED

AUG 20 2018

S.C. SUPREME COURT

CESAR O. PORTILLO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Did the PCR court properly find Petitioner failed to satisfy his burden of proving ineffective assistance of appellate counsel for abandoning an issue regarding testimony by the State's expert witness ("Dr. Elsey") about Victim exhibiting symptoms of PTSD where the Court of Appeals already found any such error to be harmless beyond a reasonable doubt, where this was a minor point in the State's case against Petitioner, and where Dr. Elsey's testimony was admissible regardless?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. During its March 2010 term, the Dorchester County Grand Jury indicted Petitioner for criminal sexual conduct with a minor, first-degree (2010-GS-18-0357). On July 19, 2011, Petitioner proceeded to a jury trial before the Honorable Diane Schafer Goodstein. Mitchell E. Farley, Esquire (“Trial Counsel Farley”), and Mary P. LeMatty, Esquire (“Trial Counsel LeMatty”) represented Petitioner at trial. Assistant Solicitors Meghan Hall and Russell Hilton prosecuted the case. The jury found Petitioner guilty as indicted. On July 21, 2011, Judge Goodstein sentenced Petitioner to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire (“Appellate Counsel”), of the Office of Appellate Defense, perfected the appeal. In her brief, Appellate Counsel argued the trial court erred in (1) qualifying a witness as an expert in child sexual assault cases and child sexual assault forensic interviewing; (2) allowing the expert to exceed his scope of expertise and testify about the significance of language and hand gestures used by the victim; and (3) allowing the expert to testify the victim exhibited symptoms of PTSD where no diagnosis of PTSD was made. On April 9, 2014, the South Carolina Court of Appeals affirmed Petitioner’s conviction and sentence. State v. Portillo, 408 S.C. 66, 757 S.E.2d 721 (Ct. App. 2014). The Court of Appeals found no reversible error regarding issues (1) and (2). Furthermore, the Court of Appeals, while finding the issue abandoned, nevertheless found any error regarding the PTSD symptom testimony to be harmless beyond a reasonable doubt. Petitioner subsequently filed a petition for rehearing on April 24, 2014, in which Petitioner argued the issue regarding the

PTSD testimony was not abandoned and the error was not harmless. The Court of Appeals denied the petition for rehearing on May 22, 2014.

Both Petitioner and the State sought a writ of certiorari to review the Court of Appeals opinion. The South Carolina Supreme Court found the Court of Appeals erred in even addressing an issue of vouching as it was not preserved for review. The remittitur was filed on March 17, 2015.

On August 20, 2015, Petitioner filed an application for post-conviction relief. The State made its return on December 4, 2015. An evidentiary hearing into the matter was convened on May 24, 2017, before the Honorable Robert E. Hood. Petitioner was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General Ruston W. Neely represented the State. Judge Hood denied and dismissed the application with prejudice by an order of dismissal filed July 10, 2017.

Petitioner filed a timely notice of appeal on August 8, 2017. Petitioner then filed a petition for writ of certiorari on April 6, 2018. This return follows.

STATEMENT OF THE FACTS

Petitioner's charge resulted from a January 2010 incident in which Petitioner sexually abused his nine year-old niece ("Victim") while she was spending the night in his home.

Victim had been visiting and playing with her cousin of her age ("Cousin") throughout the day before going to sleep in Cousin's room. App. p. 159, l. 8 – p. 160, l. 9. Victim awoke to Petitioner taking her hand and placing it on his "private parts." App. p. 169, ll. 17-25. In fear of the situation, Victim pretended to stay asleep. App. p. 170, ll. 5-10. Petitioner continued to stimulate himself with Victim's hand. App. p. 172, ll. 2-11. Petitioner then pulled down Victim's pajama pants and underwear to her ankles, and performed cunnilingus on Victim using his mouth

as well as his hands. App. p. 173, l. 16 – p. 174, l. 14. Victim testified in detail about the unpleasant sensations such as the saliva left on her body. App. p. 174, ll. 3-14. Petitioner wiped his saliva off of Victim with a towel. App. p. 174, ll. 17-20. Victim also explained she witnessed Petitioner “squeezing” his penis and ejaculating into the polka-dotted trash can in the room. App. p. 176, l. 5 – p. 177, l. 15. Petitioner left the room and went to the bathroom after the encounter but returned to the room, supposedly to retrieve a towel, at which point Victim pretended to just be waking up. App. p. 179, ll. 1-8. Petitioner told Victim to go back to sleep and went back to the bathroom with a towel. App. p. 179, ll. 4-18. Victim woke her aunt and alerted her of the situation while Petitioner was in the shower. App. p. 203, l. 24 – p. 204, l. 7. Victim’s aunt then took Victim and Cousin to their grandmother’s house, but not before having to order Petitioner to stay away from Victim after he tried to give her a hug. App. p. 207, ll. 2-4. Victim’s aunt testified that Petitioner was trembling and “very shaky” when confronted. App. p. 205, ll. 22-25.

Later that day, Victim’s mother (“Mother”) called Dr. Lucinda DeMarco, a family friend and pediatrician with expertise in sexual assault cases, to discuss the incident. App. p. 227, ll. 15-19; p. 242, ll. 10-17. Dr. DeMarco conducted a physical examination of Victim and discovered redness and irritation around Victim’s vagina and urethra. App. p. 247, ll. 7-18. Based on the examination, Dr. DeMarco recommended Victim be taken to the Dee Norton Lowcountry Children’s Center (“the Center”) in Charleston, South Carolina, and Mother scheduled an appointment for Victim at the Center. App. p. 230, ll. 8-11.

Dr. Donald Elsey, the director of clinical services at the Center and a licensed professional counselor, conducted a forensic interview of Victim on January 22, 2010, which lasted approximately twenty-five minutes. App. p. 258, l. 15 – p. 259, l. 13. A video recording of

this interview, in which Victim recounted the inappropriate touching, cunnilingus, and ejaculation, was played for the jury. App. p. 304, l. 11.

Dr. Elsey conducted a follow-up interview on February 1, 2010, and the family was concerned about Victim's trouble sleeping, nightmares, and lack of ability to focus in school since their initial interview. App. p. 307, l. 19 – p. 308, l. 2. Dr. Elsey testified at trial the symptoms Victim was describing could be part of PTSD, but to make that diagnosis, one has to have those symptoms for a least thirty days, and this was relatively soon after the event happened. App. p. 308, ll. 16-21. Therefore, Dr. Elsey explained, he could not make that diagnosis at that point, but did refer Victim for "trauma-focused cognitive behavioral therapy." App. p. 308, ll. 23-25.

Victim, who was eleven at the time of trial, testified to the aforementioned events as well as Victim's aunt, Mother, Dr. DeMarco, and Dr. Elsey.

Dr. Elsey's Qualifications and Testimony at Issue

Dr. Elsey has specialized in forensic interviewing, child abuse, and childhood development. App. p. 84, ll. 16-21. At the time of trial, Dr. Elsey was the director of clinical services of the Dee Norton Lowcountry Children's Center in Charleston. App. p. 82, l. 11. This position entailed supervision of all clinical staff, carrying his own caseload, conducting forensic interviews, providing treatment, giving presentations, and conducting trainings around the state. App. p. 82, ll. 11-14. Dr. Elsey received his bachelor's degree in psychology, a graduate degree in clinical counseling, and a doctorate in childhood development. App. p. 82, ll. 21-23. Dr. Elsey is a licensed professional counselor and has been trained by the American Professional Society on Abused Children in forensic interviewing. App. p. 82, l. 23 – p. 83, l. 7. At the time of trial, he underwent ongoing training and also reviewed and supervised forensic interviewing. App. p.

83, ll. 16-24. Dr. Elsey has also taught child abuse and forensic interviewing. App. p. 84, ll. 2-6. At the time of trial, Dr. Elsey had conducted approximately 4,500 forensic interviews, and as a matter of practice writes conclusions and treatment recommendations in his reports following the interviews. App. p. 85, ll. 17-18; p. 92, ll. 4-10.

After pre-trial in-camera testimony, Dr. Elsey was qualified as an expert in child sexual assault cases and child sexual assault forensic interviewing without objection. App. p. 97, ll. 7-11; p. 100, ll. 2-12.

The trial court heard more in-camera testimony from Dr. Elsey before his testimony in front of the jury during the State's presentation of its case. At that time, Dr. Elsey testified Victim told him things she was experiencing such as trouble sleeping, intrusive thoughts, and nightmares, which were indicative of a child who has experienced trauma, and therefore he recommend trauma-focused treatment. App. p. 263, ll. 2-22. When asked, as an expert in this field, whether there is a particular diagnosis which comes up related to these issues, Dr. Elsey explained those types of diagnoses are "under the post-traumatic stress, when a child's re-experiencing the stress, is having those intrusive thoughts about them." App. p. 264, ll. 7-15. Dr. Elsey testified he did reach an assessment of potential PTSD in this case. App. p. 264, ll. 16-19. Dr. Elsey noted he is actually trained in the trauma-focused cognitive behavioral therapy he recommended. App. p. 264, l. 21 – p. 265, l. 4.

Trial Counsel LeMatty objected to Dr. Elsey's "opinion regarding posttraumatic stress disorder," arguing it would not be proper for him to testify to Victim showing signs of PTSD because he did not diagnose her with PTSD. App. p. 275, ll. 8-4. Trial Counsel LeMatty argued it would "in essence mislead the jury in terms of dealing with that particular set of issues." App. p. 275, ll. 15-16. The trial judge explained that issue goes to the weight of the evidence and

cross-examination, rather than the admissibility of his testimony on the matter. App. p. 275, ll. 17-21.

In front of the jury, Dr. Elsey again testified about the follow-up interview with Victim and explained protocol includes determining if there are any concerning behavioral issues, whether they need any special help, and determining specific treatment needs. App. p. 306, ll. 16-24. Once again, Dr. Elsey recounted concerns about Victim's trouble sleeping, nightmares, and inability to focus in school. App. p. 307, l. 22 – p. 308, l. 2. When asked "what exactly did you want [Victim] to get help for," Dr. Elsey explained the symptoms she was describing "could" be part of PTSD. However, Dr. Elsey qualified, one must have these symptoms for a least thirty days for a diagnosis to be made, so it would be inappropriate to make that diagnosis at the time of the follow-up interview. App. p. 308, ll. 16-22. Dr. Elsey testified as he did in camera that he referred Victim for trauma-focused cognitive behavioral therapy. App. p. 308, l. 23 – p. 309, l. 3. Dr. Elsey clarified you cannot conclusively say, "Well, then, this happened," based on the symptoms, but rather, "Well, this certainly could be [PTSD] if not properly treated." App. p. 310, ll. 15-21.

RELEVANT PCR HEARING TESTIMONY

Appellate Counsel

At the PCR hearing convened on May 24, 2017, Appellate Counsel, Trial Counsel Farley, and Trial Counsel LeMatty noted this case arose before State v. Kromah, 410 S.C. 340, 737 S.E.2d 439 (2013). App. p. 431, l. 9. Appellate Counsel recalled the Court of Appeals found she abandoned the issue regarding Dr. Elsey's testimony about symptoms of PTSD. App. p. 429, l. 21 – p. 430, l. 2. She also recalled both parties filed petitions for writ of certiorari, and the South Carolina Supreme Court granted certiorari and found the Court of Appeals erred in even

addressing a vouching issue because it was not preserved for appeal and did not address the abandoned PTSD issue. App. p. 430, ll. 3-10.

Appellate Counsel testified the PTSD issue was Issue 3 in the appellate brief and suggested the Court of Appeals found it abandoned because while she had extensively cited to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) in her discussion of the first two issues, she did not restate them to the extent necessary under Issue 3. App. p. 432, ll. 14-25. Appellate Counsel recalled she did not think it was necessary to rephrase those citations but she would not do it again. App. p. 432, l. 24.

Appellate Counsel did feel the PTSD issue was meritorious or she would not have raised it, but she felt Issue 1 about vouching rather than PTSD was the strongest issue, and the Court of Appeals also found any error from that issue to be harmless. App. p. 433, ll. 9-25.

Regarding the Court of Appeals opinion, Appellate Counsel testified it was basically an advisory ruling in case the Supreme Court found the issue preserved, and the Court of Appeals expressly found any error from Dr. Elsey's testimony about PTSD symptoms to be harmless beyond a reasonable doubt. App. p. 436, l. 17 – p. 437, l. 3.

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1I, SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). However, it is incumbent upon Applicant to show performance by appellate counsel was deficient and he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at

690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR court properly found Petitioner failed to satisfy his burden of proving ineffective assistance of appellate counsel for abandoning the issue regarding testimony by the State's expert witness ("Dr. Elsey") about PTSD symptoms in the victim where the Court of Appeals already found any such error to be harmless beyond a reasonable doubt, where this was a minor point in the State's case against Petitioner, and where Dr. Elsey's testimony was admissible regardless.

Petitioner argues Appellate Counsel was ineffective for abandoning the issue of the forensic interviewer's ("Dr. Elsey") testimony that Victim exhibited symptoms of PTSD where the expert did not have the expertise to diagnose it. However, while Appellate Counsel did abandon the issue on appeal, this case is decisively devoid of prejudice. The Court of Appeals, for numerous reasons, correctly found any alleged error regarding this issue to be harmless beyond a reasonable doubt. Moreover, as the trial court properly held, this testimony was in fact admissible. Therefore, the PCR court correctly found Petitioner failed to carry his burden of proving prejudice from Appellate Counsel's performance.

- i. Any alleged error regarding the testimony was properly found to be harmless by the Court of Appeals, and therefore, Petitioner cannot establish prejudice.**

Petitioner's allegation he was prejudiced by Appellate Counsel's abandonment of this issue is refuted by Court of Appeals' opinion in which the Court expressly held any error regarding this issue to be harmless beyond a reasonable doubt. State v. Portillo, 408 S.C. 66, 757 S.E.2d 721 (Ct. App. 2014). The standard of review for harmless error is analogous to the

standard required to find prejudice in a PCR case as both standards require the error to change the end result of the proceeding. “Error is harmless when it ‘could not reasonably have affected the result of the trial.’” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). Furthermore, error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). “From this perspective, in order to conclude that the error did not contribute to its verdict, the Court must ‘find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’” Yates v. Evatt, 500 U.S. 391, 403 (1991). When the Court of Appeals has already determined any error from issue was harmless beyond a reasonable doubt, it follows Petitioner cannot satisfy his burden of proving the outcome of his proceedings would have been different (i.e., prejudice pursuant to Strickland). See Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt “embodies a standard requiring reversal ‘if there is a reasonable probability that the evidence complained of might have contributed to the conviction’” (quoting Yates, 500 U.S. at 403)); see also Clark v. Goose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of statements obtained in violation of Massiah was harmless error beyond a reasonable doubt, LePage suffered no prejudice from his counsel’s failure to object to the statements). In this case, the Court of Appeals correctly has already correctly held that any error regarding Dr. Elsey’s testimony about PTSD symptoms to be harmless beyond a reasonable doubt. Accordingly, the PCR court also correctly found Petitioner suffered no prejudice from the same testimony.

As the Court of Appeals properly observed, Dr. Elsey's testimony regarding Victim's symptoms of PTSD was unimportant in relation to everything else the jury observed. In fact, at the PCR hearing, Appellate Counsel testified she felt a different issue regarding Dr. Elsey was actually stronger but was also found to be harmless. App. p. 433, l. 22 – p. 434, l. 1. At trial, Victim testified in detail about the events before, during, and after Petitioner's forced sexual acts. Victim was able to recall the clothing Petitioner was wearing that day and during the sexual acts, which was the same clothing Petitioner's wife testified he fell asleep wearing that day. App. p. 166, ll. 15-20; p. 172, ll. 12-15; p. 202, ll. 5-13. Victim was able to describe the sensations of being made to touch Petitioner's penis, Petitioner performing cunnilingus on her, and the residue of saliva left on her private area by Petitioner. App. p. 170, l. 5 – p. 174, l. 18. Furthermore, physical evidence corroborated Victim's account. Dr. Demarco, a pediatric hospitalist with specialized sexual assault training who first physically examined Victim after the incident, found redness between Victim's labial lips consistent with Victim's account. App. p. 247, ll. 7-18. Victim's aunt and Mother also testified at trial and explained both the shocked and confused demeanor of Victim reporting to her aunt immediately following the incident and the "trembling, very shaky" demeanor of Petitioner after being confronted. App. p. 204, ll. 19-25; p. 205, ll. 22-25; p. 224, ll. 4-12. Moreover, Victim's aunt provided corroborating time and place testimony, as the Court of Appeals noted. The jury also saw Victim's forensic interview in which she disclosed the abuse to Dr. Elsey using age-appropriate terms to describe Petitioner's masturbatory acts and ejaculation. App. p. 304, l. 4 – p. 306, l. 13. In light of this evidence, as observed by the Court of Appeals, any testimony from Dr. Elsey regarding presence of mere warning signs of PTSD was an insignificant factor in reaching a verdict in this case.

Not only was Dr. Elsey's testimony regarding Victim exhibiting symptoms of PTSD an

insignificant point in the trial in relation to the other evidence presented, but any tendency for the testimony to confuse or mislead the jury would have been cured by clarifications from Dr. Elsey himself and other sources from which the jury heard about Victim's resulting psychological problems. Dr. Elsey, a licensed clinical counselor trained in trauma-focused cognitive behavioral therapy, testified he learned during a follow-up interview of Victim's problems with behavioral changes such as trouble sleeping, nightmares, and difficulty focusing in school. App. p. 307, l. 23 – p. 308, l. 2. Dr. Elsey testified the symptoms Victim was describing could be part of PTSD, could be PTSD if not properly treated, and he recommended she receive the type of trauma-focused cognitive behavioral therapy he was trained in. App. p. 308, l. 14 – p. 310, l. 21. However, Dr. Elsey also clearly explained he would not have been able to diagnose Victim with PTSD at that time because the symptoms must be present for at least thirty days before a diagnosis. App. p. 308, ll. 14-19. Therefore, the jury knew Dr. Elsey did *not* diagnose Victim with PTSD. Furthermore, the jury heard Mother testify about Victim's behavioral changes and bad dreams since the incident. App. p. 229, ll. 1-16. The trial court also instructed the jury that "no greater weight" should be given to an expert's testimony simply because the witness is an expert. App. p. 382, ll. 3-10. Even assuming *arguendo* Dr. Elsey's testimony about PTSD was somehow inadmissible, the jury had ample evidence on which to find Victim was abused by Petitioner, and his opinion as to PTSD symptoms was merely cumulative to other admissible evidence of Victim's difficulties following the incident. For these reasons, as the Court of Appeals concluded, Dr. Elsey's testimony at issue had no impact on the outcome of the proceedings.

ii. Dr. Elsey was qualified to testify regarding Victim's signs of PTSD

Notwithstanding the previously-adjudicated inconsequential nature of Dr. Elsey's

testimony about Victim’s PTSD symptoms, Dr. Elsey was well-qualified to testify about the symptoms and the testimony was properly admitted by the trial court. Dr. Elsey was qualified without objection as an expert in child sexual assault cases and child sexual assault forensic interviewing. App. p. 96, ll. 17-24. As noted by Appellate Counsel and Trial Counsel at the PCR hearing, this case was tried pre-Kromah. The trial court heard Dr. Elsey’s extensive qualifications including his license as a professional counselor, his graduate degree in clinical counseling, his doctorate in childhood development, his position as director of clinical services at Dee Norton Lowcountry Children Center, his experience of conducting approximately 4,500 forensic interviews at the time of trial, and writes conclusions and recommendations based on his assessments as part of his job. App. p. 82, l. 5 – p. 92, l. 18. Furthermore, Dr. Elsey was actually trained in trauma-focused behavioral therapy and has previously been qualified as an expert in the treatment of childhood trauma. App. p. 95, ll. 21-24; p. 264, l. 21 – p. 265, l. 4. Dr. Elsey testified in camera that, as an expert in his field, Victim’s trouble sleeping, intrusive thoughts, and nightmares are symptoms of post-traumatic stress. Moreover, he explained he assessed potential PTSD in this case but did not make a diagnosis as symptoms must be present for at least thirty days to do so. App. p. 264, l. 7 – p. 265, l. 4; p. 272, ll. 18-22; p. 308, ll. 14-22.

Rule 702, SCRE, provides the following:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”
Rule 702, SCRE.

Moreover, there is no exact requirement concerning how knowledge or skill must be acquired.

State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (1997) (citing State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991)); Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991) (it is not

necessary that knowledge of expert witness be derived solely from academic endeavors, as it may be derived from experience). Defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

In this case, Dr. Elsey possessed an abundance of both education and experience in the field of psychology and childhood trauma. As a veteran counselor with specialization in childhood abuse and training in trauma therapy, Dr. Elsey routinely makes conclusions and recommendations based on his assessments of interview subjects. App. p. 92, ll. 4-10. Undoubtedly, Dr. Elsey was well-versed in the warning signs of post-traumatic stress disorder in children. Dr. Elsey recognized the obvious warning signs in this case of PTSD, and recommended Victim for trauma-focused therapy accordingly. Dr. Elsey testified repeatedly he did not make a diagnosis of PTSD as symptoms must be present for thirty days, but he recognized the symptoms as potential warning signs, as someone with his education and experience should be expected to do. As the trial court correctly ruled, his qualifications to testify about the symptoms of PTSD in this case went to the weight of the evidence rather than the admissibility. App. p. 275, ll. 17-21. For these reasons, not only was this an insignificant point of the trial, but it was also properly found admissible by the trial judge.

Therefore, there is ample probative evidence to support the PCR court's finding that Petitioner has not met his burden of proving he was prejudiced by Appellate Counsel's abandonment of a non-meritorious issue which has already been ruled a harmless error by the Court of Appeals.

{Conclusion and signature on following page}

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

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8/20, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001741

CESAR O. PORTILLO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 20 day of August, 2018,



CHRISTIAN SAVILLE
Assistant Attorney General
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Dorchester County
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001741

RECEIVED
AUG 20 2018
S.C. SUPREME COURT

CESAR O. PORTILLO, #346989,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Victor R. Seeger, Esquire
SC Commission of Indigent Defense- Appellate Division
Post Office Box 11589
Columbia, South Carolina 29211

This 20th day of August, 2018



Tamieka Russell-Brown
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

AUG 20 2018

August 20, 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Cesar O. Portillo, #346989 v. State of South Carolina
Appellate Case No. 2017-001741
Lower Court Case No. 2015-CP-18-1665

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/trb
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)