

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

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LARRY JAMES TYLER,

**RECEIVED**

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PETITIONER **SO Court of Appeals**

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002364

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PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Was trial counsel ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges?

## STATEMENT

In 2011, Petitioner lived with his mother, Ernestine Witherspoon, in Darlington County. App. 274; App. 31, ll. 13 – 25. From July 1, 2011 to September 24, 2011, Doris Brown, the grandmother of the twelve-year-old female (hereinafter “minor”) and her younger sister, Jasmine M., took the girls to the home where Petitioner lived with his mother, to visit. On one visit, he gave the minor a cell phone. On their way home in the car, the sister said there was a picture of a naked man on the phone. Ms. Brown took the phone back to Petitioner. App. 43, ll. 21 – App. 46, ll. 13.

Tyquan Brown was a cousin of the minor. App. 68, ll. 9 – 12. He visited Petitioner at his home and Petitioner gave him the cell phone. App. 68, l. 25 – App. 69, l. 14. In addition to the pictures, Tyquan noticed some drafted text messages on the phone that had not been sent which purportedly consisted of Petitioner attempting to communicate with the minor. App. 70, l. 5 – 72, l. 15. Brown called the minor’s mother, told her what he found, and gave her the phone. App. 72, l. 12 – App. 73, l. 23.

Georgita Brown, the minor’s mother, saw the pictures and the drafts. App. 80, l. 5 – 81, l. 12. She called the police, met Deputy Eric Hodges, and gave him the cell phone. App. 81, l. 16 – App. 83, l. 9.

Deputy Hodges found Petitioner at a mechanic’s garage. App. 87, l. 25 – 89, l. 1. Petitioner was pulling into this garage when Hodges pulled him over. Id. Hodges asked for Petitioner’s license, Petitioner provided Hodges with a Florida driver’s license, and said that he did not have a South Carolina driver’s license. Id. Hodges did a “name and date of birth check” with the DMV and found that Petitioner had a suspended South Carolina driver license. Id.

Hodges arrested Petitioner for driving under suspension after checking his license. App. 89, ll. 2 – 9. He then told Petitioner, after advising him of his Miranda, 384 U.S. 436 (1966) rights, that

he was working on another investigation. Id. Deputy Hodges obtained a search warrant for Petitioner's residence and his car. App. 90, ll. 17 – 21. Hodges found “pictures that were off the computer and off... some other phones.” App. 90, ll. 22 – 24.

Deputy Russ Harrell searched Petitioner's computers, cell phones and email accounts as well and found more photographs, one of which depicted an unrelated minor engaged in a sex act. App. 107, ll. 19 – 22. Petitioner was arrested and charged with criminal solicitation of a minor, sexual exploitation of a minor in the second degree, contributing to the delinquency of a minor, and disseminating harmful material to minors. App. 6, l. 16 – 7, l. 5.

A number of other photographs were found on Petitioner's computer. App. 90, ll. 22 – 24. The minor and her sister testified that Petitioner took photographs of them too. App. 52, ll. 17 – 25. None of the other photographs on Petitioner's computer or the ones he took of the minor depicted any illegal activity. The only photo that constituted illegal conduct was the anal sex photograph found on the Yahoo! email account that had nothing to do with the minor. App. 107, ll. 19 – 22.

Three of the charges against Petitioner arose from a set of draft text messages on a cell phone that he gave to the minor. App. 261, ll. 5 – 8. The sexual exploitation of a minor, second degree, charge arose from a photograph of an unrelated minor found on a Yahoo! email account associated with Petitioner. Id.

On February 25 – 27, 2013, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury in Darlington County. App.1. Richard Jones represented Petitioner. Id. John Holt and Patti Parker represented the state. Id.

Prior to trial, defense counsel moved to exclude one of the forty-one photos allegedly seized from Petitioner's email account. App. 21, ll. 7 – App. 22, ll. 10. The one photo to be excluded was “significantly different” from the others. Id. The state responded that that photo “showed sex” but

the “young lady’s face was not visible.” The solicitor said: “I took that off and inserted the one from the Yahoo account which was visible.” However, he reduced all of the photos to thumbnail size on a disk. App. 22, ll. 11 – App. 23, ll. 24. The judge said that they were “going on with the case.” App. 24, ll. 12 – 17.

Minor and her sister went with their grandmother to visit the mother of Petitioner at her home where he lived. App. 52, ll. 3 – 16. She claimed that Petitioner was always taking pictures of them with his cell phone. App. 52, ll. 17 – 25. She identified the cell phone Petitioner gave her and said when they got in the car with their grandmother, they noticed pictures on the phone. App. 53, l. 23 – 55, l. 13. One photograph was a girl in a bikini and the other one was of Petitioner with blue underwear. App. 51, ll. 2 – App. 56, ll. 7. She did not read or see any text messages. App. 59, ll. 1 – App. 60, ll. 8.

Deputy Russ Harrell seized Petitioner’s computer, hard drive, and several cell phones. App. 98, ll. 18 – App. 99, ll. 25. Harrell went over the unsent drafted text messages concerning the minor that were drafted on one of the cell phones but not sent. App. 101, ll. 11 – App. 104, ll. 16.

Harrell then discussed photographs taken from Petitioner’s desktop computer. Most of the images were of young girls under ten years of age in “unnatural positions.” App. 107, ll. 16 – 18. One particularly harmful photo showed a young girl in a kneeling position and anal sex was being performed on her. App. 107, ll. 19 – 22.

The jury returned verdicts of guilty as charged. App. 186, l. 17 – 187, l. 21. Judge Burch sentenced Petitioner to eight years’ imprisonment for disseminating harmful material to a minor; sexual exploitation of a minor, second degree; criminal solicitation of a minor; and three years’ imprisonment for contributing to the delinquency of a minor. App. 194, ll. 3 – 13. All of the sentences were concurrent. Id.

The Court of Appeals affirmed Petitioner's convictions in State v. Tyler, 2015-UP-025 (January 14, 2015) rejecting his argument that the trial court should have directed verdicts in his favor. App. 284 – App. 285; App. 265.

On January 2, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 196 - 210. The state filed a return on May 15, 2015. App 211 – 214.

An evidentiary hearing was held on July 18, 2016 before the Honorable G. Thomas Cooper. App. 215. Lance S. Boozer represented Petitioner. Id. J. Rutledge Johnson represented the state. Id.

Petitioner alleged trial counsel provided ineffective assistance because counsel failed to make a motion to sever the sexual exploitation of a minor charge from his remaining charges. App. 231, ll. 21 – App. 239, ll. 20.

During the PCR hearing, trial counsel reiterated the impact of the Yahoo! email photo as, “an awful picture.” App. 253, ll. 12 – 14. During cross examination at the evidentiary hearing, trial counsel admitted “perhaps” there was a reason to make a motion to sever and that, “perhaps one [charge] would lead the jury to believe the other [charges].” App. 259, ll. 14 – 21.

Trial counsel said: “[I]n my mind the exploitation dealt with the picture of the young lady involved in a sexual act. The disseminating [harmful material to a minor], the solicitation of a minor and contributing [to the delinquency of a minor] all dealt with [the minor].” App. 260, l. 18 – 261, l. 11.

On November 4, 2016, the PCR judge filed an order denying Petitioner relief from his convictions and sentences. App. 264 – 272. He found that Petitioner failed to meet his burden of proving that trial counsel was ineffective because there was “no reasonable basis to make a motion to sever the charges.” App. 268. He also found that Petitioner could not show how he was prejudiced because the trial judge cured any potential bias of the jury that consolidation of the

charges may have caused when he instructed the jury to, “reach separate verdicts on each and every charge.” App. 271.

A Petition for Writ of Certiorari was filed pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988) by former Appellate Counsel. On September 5, 2018, this Court denied the motion to be relieved and ordered briefing of the present issue. Current Appellate Counsel was assigned to this case for re-briefing.

This petition follows.

## ARGUMENT

Trial counsel was ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges.

### **Discussion**

“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 the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced.” State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668 (1984)). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-118, 386 S.E.2d at 625.

In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), Middleton was indicted separately for two counts of murder and criminal sexual conduct, and one count of attempted

armed robbery, aggravated assault, and aggravated assault and battery. Id. The state argued for consolidation because the crimes were all part of a single crime spree and that the same knife was used for both sets of charges. Id. at 23, 399 S.E.2d at 693.

Our Supreme Court held that Middleton's charges failed to meet the requirements for consolidation because, "*the crimes did not arise out of a single chain of circumstances, and required different evidence for proof.*" Id. (emphasis added); see also State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985) (finding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial).<sup>1</sup>

In State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) this Court found that the trial court properly consolidated McGaha's trials. In that case this Court applied the test from State v. Harris, 351 S.C. 642, 652, 572 S.E.2d 267, 272 (2002) that stated a trial court may try consolidate trials together, "where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no [substantive] right of the defendant has been prejudiced." Id.; McGaha, at 293-294, 744 S.E.2d at 604. This test is conjunctive in nature and all elements must be present to consolidate separate trials.

McGaha was alleged to have committed criminal sexual conduct, in the first degree, and a lewd act upon a child, on two minor sisters. McGaha, at 291, 744 S.E.2d at 603. The Court found that the trial court properly held that McGaha's abuse of both minors stemmed from a single chain of circumstances. Id. at 295, 744 S.E.2d at 605. The charges arose from a single chain of circumstances because,

McGaha gained access to the children because the grandmother allowed him to live in their play room. McGaha used this access on multiple occasions to take

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<sup>1</sup> Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (finding it proper to try together all crimes arising from a single uninterrupted crime spree).

each child from her bed to the play room, where he molested [them]. Dana was eight and Elaina was seven when the abuse ended. The time periods of the abuse overlapped almost precisely—McGaha abused Dana between March 2009 and August 2010 and Elaina between May 2009 and August 2010. Their similar ages and the similar duration of the abuse supports the trial court's emphasis on its finding that they “had the same relationship to” McGaha. *The molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element.*

State v. McGaha, 404 S.C. 289, 295, 744 S.E.2d 602, 605. (emphasis added)

In McGaha, this Court also found that the charges regarding both minors were proved by the same evidence. Id. The lower court held, “a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other.” Id. at 297, 744 S.E.2d at 606.

To determine prejudice against McGaha created by consolidating his trials, the test was, “whether evidence of one or more charges would be admissible in a trial involving only the other charge.” Id. at 298, 744 S.E.2d at 606. In McGaha, the state argued that evidence of McGaha’s molestation of either child would be admissible in both cases under Rule 404(b), SCRE, as proof of a common plan or scheme. For the evidence to be admissible in separate trials for the purpose of showing a common scheme or plan, the state would have to establish a logical connection between the crimes by showing a “close degree of similarity.” Id. at 298, 744 S.E.2d at 607.

Petitioner’s case is unlike McGaha on each of the aforementioned points. Petitioner’s two sets of charges were not “from a single chain of circumstances.” The photograph discovered on the Yahoo! email account that depicted a minor engaged in a sex act was not related to the charges against Petitioner regarding the minor. App. 261, ll. 5 – 8.

Unlike in McGaha, Petitioner gained access to the minor and the Yahoo! email account photograph via different means. Family members brought the minor to where Petitioner resided,

and the photograph was ostensibly sent to Petitioner from another email account. Unlike McGaha, there is nothing on the record to show that the time periods of the two sets of charges overlapped. Furthermore, in McGaha, the lower court found that McGaha “had the same relationship,” to both of the minors. In contrast here, Petitioner’s relationship to the minor and the minor in the photograph are entirely different. Petitioner and the minor share a familial, albeit through adoption, relationship; whereas, there is no evidence Petitioner had any relation to the minor in the Yahoo! email account photograph.

Petitioner’s sexual exploitation of a minor charge and his remaining charges could not be proved by the same evidence. The evidence for the sexual exploitation of a minor charge stemmed from a photograph found on Petitioner’s Yahoo! email account. App. 106, l. 1 – 107, l. 23. The rest of his charges stem from the photographs and draft text messages stored on a cell phone. There is no element of either set of charges that are proved by the evidence from the other set. Therefore, unlike in McGaha, Petitioner’s consolidated trial regarded two sets of charges that could not be proved by the same evidence.

Petitioner can show Strickland prejudice from defense counsel’s failure to move to sever and the resulting consolidation of his cases. The test used in McGaha to determine if McGaha was prejudiced by the consolidation of his trial was that: if evidence from one or more of the charges would be admissible in a trial involving only one of the charges, then there is no prejudice. McGaha, at 298, 744 S.E.2d at 606.

In McGaha, the lower court found, and the Court of Appeals affirmed, that if McGaha’s trials were severed the evidence from one of McGaha’s trials could have been used in the other because the evidence would be admissible under Rule 404(b), SCRE, as proof of a common scheme or plan. Id. at 298, 744 S.E.2d at 607.

Here, none of the exceptions in Rule 404(b), SCRE, would apply. Introduction of the photograph: would not go to show a motive for soliciting or disseminating harmful material to the minor; would not prove identity of anyone; would not show the existence of a common scheme or plan; would not show absence of mistake or accident; and would not show any intent on behalf of Petitioner to commit the crimes alleged against him regarding the minor.

In this case, trial counsel provided ineffective assistance when he failed to move to sever Petitioner's exploitation of a minor, second degree charge from his remaining charges because they *do not* arise out a of a single chain of circumstances and *are not* provable by the same evidence. See Middleton, 288 S.C. at 23, 339 S.E.2d at 693 (finding the charges "did not arise out of a single chain of circumstances, and required different evidence for proof"). The charges for contributing to a delinquency of a minor, disseminating harmful material to a minor, and criminal solicitation of a minor all stemmed from alleged events between Petitioner and the minor. The sexual exploitation of a minor charge arose from a photograph, on Petitioner's Yahoo! email account, of a completely unrelated minor, that the minor never saw or knew about.

There was no evidentiary or causal connection between the events related to the minor and the sexual exploitation of a minor charge. The only commonality between the two sets of charges was that the search warrant issued to investigate the allegations by the minor against Petitioner uncovered the photograph of the unrelated minor engaged in a sex act. App. 34, ll. 6–16.

As defense counsel explained in his closing argument, the evidence against Petitioner on the three charges regarding the minor showed, "odd" or "creepy" behavior, but nothing criminal. App. 159, ll. 20 – 23 The South Carolina Supreme Court has held in State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) that, "[A] necessary corollary to the presumption of innocence is that a

defendant must be tried for what he did, not for who he is.” Id. at 15, 501 S.E.2d at 723 (quoting State v. Melcher, 140 N.H. 823, 831, 678 A.2d 146, 151 (1996)). Petitioner took numerous photographs of the minor, none of which were criminal in nature, and drafted text messages on his phone in which Petitioner professed affection for the minor but none were ever sent. App. 52, ll. 17 – 25; App. 102, l. 6 – 103, l. 13. However, the introduction of the Yahoo! email photograph, that depicted an unrelated minor engaged in anal sex, colored that “odd” behavior as that of a sexual predator. App. 117, ll. 3 – 16.

Petitioner was prejudiced by trial counsel’s failure to sever his trials because the Yahoo! email photograph presented for the sexual exploitation of a minor charge was the only evidence that depicted a minor engaged in a sex act. That photograph influenced the jury into believing Petitioner had a propensity for child sex abuse; and thus, impermissibly convinced the jury Petitioner committed the crimes related to the minor as well.

Throughout the trial the particularly harmful photograph was referenced by both the state and the defense. In its opening statement the state referred to child pornography found on Petitioner’s computer. App. 34, ll. 12 – 16. Defense counsel stated that the photographs, “have nothing whatsoever to do with [the minor].” App. 41, ll. 16 – 20. Defense counsel referred to the photo of the unrelated minor as, “one bad photo picture... one really bad picture,” amongst the plethora of innocuous photographs that were admitted in Petitioner’s trial. App. 165, ll. 14 – 22. Defense counsel also tried to explain away the Yahoo! email account photograph by reminding the jury that the photograph was not found on Petitioner’s computer, but that it was, “out there in outer space,” because it was on an email. App. 165, ll. 22 – 25.

During the post-conviction relief hearing, defense counsel reiterated the harmful nature of the photo. “There was only one bad picture.” App. 253, ll. 5 – 6. When pressed to be specific

defense counsel opined that he was referring to the photograph of the unrelated minor engaged in a sex act and, “that was an awful picture.” App. 253, ll. 12 – 14.

On direct examination during the post-conviction relief hearing defense counsel explained that he did move to not sever Petitioner’s trial because “the exploitation, the pictures, except for one, we felt we could minimize.” App. 254, ll. 11 – 13. However, on cross-examination trial counsel reluctantly admitted, “perhaps” there would have been a reason to make a motion to sever, and that, “As [Petitioner] says, you know, perhaps one would lead the jury to believe the other.” App. 259, l. 17 – 260, l. 1. Moreover, the post-conviction relief judge directly asked trial counsel how he could have separated the cases and trial counsel responded that there was a distinction between the two sets of charges, but not a significant enough distinction to warrant separating Petitioner’s trials. App. 260, l. 18 – 261, l. 11.

The state’s theory for the set of charges related to the minor was that, although Petitioner did not send the text messages or photographs located on the cell phone, he gave the cell phone to the minor as an attempt to hand deliver the messages and photographs to her. App. 149, ll. 6 – 12. This theory was undermined by the fact that Petitioner gave that same exact phone to the minor’ *twenty-one-year-old, male, cousin* Tyquan Brown. App. 68, l. 25 – 69, l. 14.

Without the Yahoo! email account photograph, the evidence against Petitioner amounted to innocuous photographs of the minor and her sister, as well as some draft text messages on Petitioner’s cell phone where he expressed affection for the minor, but that were never sent. Therefore, had trial counsel made a motion to sever Petitioner’s trials, thereby keeping out the photograph of the unrelated minor engaged in a sex act, it is likely that the jury would believe that Petitioner was trying to simply give this cell phone away without regard to its contents nor the with intent to deliver its contents to anyone. However, once the photograph of the unrelated

minor engaged in anal sex was shown to the jury, it was unreasonable for trial counsel to think that the jury would look at Petitioner's "odd" or "creepy" conduct toward the minor as anything other than an attempt to communicate to her harmful material and to solicit her into committing sex acts with him.

Accordingly, trial counsel provided ineffective assistance when he failed to move to sever the sexual exploitation of a minor charge from the charges related to the minor. Petitioner's two sets of charges were not "of the same general nature involving connected transactions closely related in kind, place and character." State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). Petitioner was prejudiced by defense counsel's failure to move to sever his sexual exploitation of a minor case with the rest of his charges because the most damning evidence came from the unrelated sexual exploitation of a minor charge. That damning evidence biased the jury into deciding that Petitioner was guilty of the unrelated charges against the minor as well. See Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (finding "[i]t is evident the charges against appellant did not arise out of the same transaction").

**CONCLUSION**

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to allow for full briefing on this issue.



Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

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LARRY JAMES TYLER,

PETITIONER

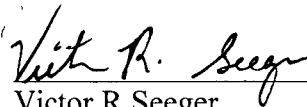
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STATE OF SOUTH CAROLINA,

RESPONDENT

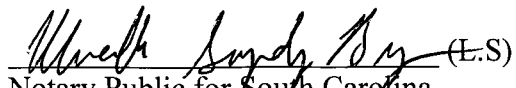
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Johnny Ellis Jamés, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari have been served on Larry James Tyler, at 2349 Rogers Road, Darlington, SC 29532, this 31st day of October, 2018.



\_\_\_\_\_  
Victor R Seeger  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 31st day of October, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028