

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

George M. McFadden, Jr., Circuit Court Judge

Case No. 2018-001224

Reco Antonio Godbolt,

Appellant

Vs.

State of South Carolina,

Respondent,

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective for failing to object to the introduction of prior bad act testimony at trial?
2. Did the circuit court err in holding that petitioner's trial counsel was not ineffective for failing to object to the admission of false or perjured testimony by a witness and prosecutorial misconduct for eliciting false testimony?
3. Did the circuit court err in holding that petitioner's trial counsel was not ineffective for failing to object to the introduction of testimony at trial in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On December 3, 2012 Petitioner was tried by jury on one count each of attempted murder, kidnapping, burglary first degree, armed robbery, criminal conspiracy, and possession of a weapon during a violent crime. (Appendix p. 10; hereinafter App. P. ___).

On December 5, 2012 the jury returned a verdict of not guilty for attempted murder, and guilty on all remaining counts. (App. P. 475 – 476). Petitioner was sentenced the trial court to five years each for criminal conspiracy and possession of a weapon during a violent crime and twenty-five years each for kidnapping, armed robbery, and burglary first degree, with all sentences to run concurrent. (App. P. 505). Petitioner's appeal to the South Carolina Court of Appeals was dismissed by unpublished opinion dated May 6, 2015, after considering Petitioner's pro se brief and counsel for Petitioner's *Anders* brief.

Defendant filed an application for post-conviction relief ("PCR") on May 20, 2016 with the Sumter County Court of Common Pleas. (See, App. P. 510). Petitioner's PCR application alleged that trial counsel was ineffective for failing to object to the introduction of bad act evidence; failing to object to ten separate violations of the Confrontation Clause; failing to subpoena Detective Richburg to testify at trial; and

ineffectiveness based on the number of cumulative errors made at trial which compromised due process and fairness. (App. P. 516-517). On November 16, 2017, Petitioner filed a memorandum supplementing and amending his original PCR application. (App. P. 518). In the memorandum Petitioner additionally alleged ineffective assistance of trial counsel for failing to object to the introduction of testimony relating to Petitioner's participation in other unrelated burglaries; failing to object to the introduction of false or perjured testimony by Detective Kelly and prosecutorial misconduct for eliciting such false testimony; and failing to object to testimony introduced at trial in violation of the Confrontation Clause of the Sixth Amendment. (App. P. 518).

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AT TRIAL?

Petitioner was separately indicted for two home invasions that occurred on the same day, within the same neighborhood, and within hours of each other. (App. P. 10-11). Petitioner was indicted for second degree burglary for the first home invasion (hereinafter "Widgeon Way home invasion"); and first degree burglary, attempted murder, armed robbery, kidnapping, criminal conspiracy, and possession of a weapon during a violent crime for the second home invasion (hereinafter "Canvasback home invasion"). (App. P. 10-11). Prior to jury selection, Petitioner's trial counsel joined a motion to sever the trials of the Widgeon Way and Canvasback home invasions. (App. P. 10-15). After oral arguments, the trial judge found that the Widgeon Way and Canvasback home invasions were not provable by the same evidence, and granted Petitioner's

motion to sever the trials of the two home invasions. (App. P. 78-79; 567). The State elected to proceed to trial on the Canvasback home invasion. (App. P. 15; 567).

During trial evidence to two other criminal act by Petitioner were improperly admitted into evidence without objection by Petitioner's trial counsel: Petitioner's confessed participation in the Widgeon Way home invasion; and Petitioner's confessed participation in another home invasion that occurred approximately four months prior to the Canvasback and Widgeon Way home invasions (hereinafter "unindicted home invasion"). (App. P. 266-270). Shortly after his arrest for the Canvasback home invasion, Petitioner gave a written confession to Detective Richburg during interrogation, which included his participation in the Widgeon Way home invasion, and the unindicted home invasion. The entire confession was published to the jury as follows during direct examination of Detective Kelly:

Q. And after you went over it, did Mr. Godbolt (Petitioner) sign on the back?

A. Yes, Sir.

Q. And on the front page did he sign his name at the bottom?

A. He did.

Q. Now, would you publish this to the jury?

A. "On today, 10-31-2011, I (Petitioner) woke up about seven o'clock a.m. I got dressed and caught a ride with my friend Shanika, unknown last name, who drives a black Maxima to my girlfriend and my baby momma mother house Jessica Hodge, unknown address, in Maysville.... I rode with Jessica in her 2006 gold Nissan Altima to drop my daughter off to Ruby J. Johnson School in Sumter.... We left there and I took Jessica to Goldkist to orientation.... Shortly after this Jamal Helton ..."called me

from a 220 phone number and asked me to pick him up from Southside.... "Mall" got in the car with me wearing a black sweatshirt, unknown shoes, and a black stocking cap covering his hair.... *We ended up in Idlewild subdivision and "Mall" told me to drop him off. I dropped him off near a house with a black SUV parked in the roadway and I circled around the area (Widgeon Way home invasion). "Mall" called me back to pick him up about twenty minutes later. When I picked "Mall" up he was walking down the road. He was still in Idlewild Subdivision. "Mall" had something under his hoodie sweatshirt. "When "Mall" got in the car he pulled a laptop from under his sweater and put in the back seat of the car. I told "Mall" I was about to ride because I had to pick my girlfriend up. "Mall" told me that he needed to make one more stop. "Mall" pointed me in the direction to go and we ended up at a house where the police got me (Canvasback home invasion).... About four months ago I dropped Javan Pearson and Jamal Helton off in Twin Lakes Subdivision on Treadmore Circle (unindicted home invasion). They told me that they were going to give me money if I dropped them off. They gave me \$50 when I dropped them off. They called me about an hour later and told me to come and get them from Twin Lakes Subdivision. They were near the same area I dropped them off at. When I picked them up - - "*

Q. Hold on a second, detective.

Okay.

A. *"- - they had a laptop and some jewelry on them. The stuff was stashed by some bushes. When I pulled up Javan got the laptop out of the bushes. I don't know exactly which house they hit, but I knew where I dropped them off at and it was on Treadmore Circle. When they got into the car I asked them where is my money and Javan handed me \$50. I took the both of them on Southside and dropped them off by Southside Gym and then I left."*

(App. P. 266-270)

"Generally, evidence of prior crimes is not admissible to prove the crime for which the defendant is charged." *State v. Campbell*, 317 S.C. 449, 450-451, 454 S.E.2d 899 (S.C. App. 1994), *citing*, *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923); *See also*, Rule 404 (b), SCRE. "Evidence of other crimes is admissible when that evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each that

proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial.” *Id.* (Citations omitted). “However, the evidence of prior bad acts must be relevant to prove the alleged crime.” *Id.* at 451 (Citations omitted). “In deciding to apply the Lyle exception for the admission of prior crimes evidence, the court must always determine if the probative value of the prior acts evidence outweighs its prejudicial effect.” *Id.* (Citations omitted).

The trial court ruled that there was not sufficient connections between the Canvasback and Widgeon Way home invasions to try the cases together; therefore, the Widgeon Way home invasion was a prior bad act crime, and was not admissible in the Canvasback trial. Furthermore, the confession by Petitioner that detailed his involvement in the unindicted home invasion had no relevant connection with the Canvasback or the Widgeon Way home invasions, and did not fit into any of the five *Lyle* exceptions.

Although prior bad act evidence can be admitted under one or more of the five exceptions identified in *Lyle*, the court must endeavor to complete a three step analysis to determine whether a *Lyle* exception exists; if so, whether the exception can be proven by clear and convincing evidence; and if so, the trial court must further determine whether the probative value of the bad act evidence is outweighed by its prejudicial effect to the defendant. However, a *Lyle* analysis was never performed because Petitioner’s trial counsel failed to object to the admission of such evidence at trial, which was necessary to trigger the analysis. *See, State v. King*, 416 S.C. 92, 784 S.E.2d 252 (S.C. App. 2016) (The trial court’s failure to conduct a proper *Lyle* analysis of bad character evidence the defendant volunteered in a statement to law enforcement constituted reversible error).

Furthermore, Petitioner's trial counsel could not articulate any reasonable strategy when questioned at the PCR trial regarding his failure to object to testimony regarding the Widgeon Way home invasion:

Q. And, of course, you correct me if I read it incorrectly. It says, "Mal was giving me directions to drive. We ended up in Idlewild subdivision and Mal told me to drop him off. I dropped him off near a house with a black SUV parked in the roadway and I circled around the area. Mal called me to pick him up about 20 minutes later. When I picked Mal up, he was walking down the road. He was still in Idlewild subdivision. Mal had something under his hoodie sweatshirt. When Mal got into the car, he pulled a laptop from under his sweater and put in the back seat of the car. I told Mal I was about to ride because I had to pick up my girlfriend."

So that's the incident at Pidgeon -- Excuse me. That's the incident that we're talking about at Widgeon Way; is that correct?

A. More than likely from what we know about - not -- not on its face from that statement but we know combined with what we know about the case and discovery and what was presented at trial, we can certainly imply that. Yeah. Infer that.

Q. We certainly know that that statement was not referencing the burglary, the home invasion that took place at Canvasback Cove which was the subject of the trial; is that correct?

A. That is correct. Yeah.

Q. So because if it was not, you know, whether it was - whether it was Widgeon Way or whether or not it was some other home invasion other than Widgeon Way, regardless of it, that would constitute prior bad act evidence and that is not admissible within the trial. Would you agree with me on that?

A. It is very likely you're correct. Uhm, it's very possible you're correct. I mean, the only reason I'm not just saying yes or no, I'm not trying to give you a hard time, but I don't know that that even is a bad act, just the driving around a neighborhood at the request of someone else. That's why I'm -- I don't want to just give you a (sic) easy yes or no on that. I hate to take up more of the Court's time, but if that is - if someone deems that act as bad that he admitted to and it was prior to that, if it is bad, then it was a prior bad act I suppose. Yes.

Q. Did you make an objection to that portion of Mr. Godbolt's statement and ask the court to have it stricken because of that reason?

A. I did not.

Q. Was there a strategy in you not making an objection? Why didn't you make an objection?

A. *Honestly I don't recall. Uhm, I don't want to, you know, speculate. It may have, you know, to the extent that I will speculate, it may have been the reason I just said. But I don't want to give an answer because I really don't know. I wish I did but I don't.*

(App. P. 573-575).

When questioned about his failure to object to the admission of testimony at trial regarding the unindicted home invasion, Petitioner's trial counsel admitted it was a mistake not to object to the admission of the bad act crime and he would have objected if given the opportunity again:

Q. Okay. It says, "About four months ago I dropped", it looks like, "Javon Pearson and Jamal Helton off in Twin Lakes subdivision on Treadmore Circle. They told me that they were going to give me money if I dropped them off. They gave me \$50.00 when I dropped them off. They called me about a half an hour later and told me to come and get them from Twin Lakes subdivision. They were near the same area I dropped them off at. When I picked them up" and then, of course, I'm gonna skip to, we're on page 270, line 9, "they had a laptop and some jewelry on them. The stuff was stashed by some bushes. When I picked up Javon, got the laptop out of the bushes. I don't know exactly which house they hit but I know where I dropped them off at and it was on Treadmore Circle. When they got into the car, I asked them where is my money? And Javon handed me \$50.00. I took the both of them on the south side and dropped them off by Southside Gym and then I left."

So in that particular portion of his statement he is actually confessing to being an accessory, a part of a home invasion that occurred four months earlier; is that correct?

A. Yes. That's correct.

Q. Would you agree with me that that is a prior bad act that has absolutely no relevancy in the trial of the home invasion at Canvasback Cove that y'all were presently involved in?

A. I probably would agree with you on that one more so than the other one but definitely that one. I think you're right on that one. Yes.

Q. Yet you still did not make an objection?

A. No. I didn't.

Q. Okay. Do you know, was it a part of some sort of strategy that you decided not to make an objection? Do you know why you didn't object to that even if it was prior bad act evidence?

A. Uhm, you know, I hate to speculate, uhm, as to what I didn't do, you know, five years ago. If you would like me to speculate, I would, uhm, but I don't recall specifically.

* * *

Q. *In hindsight today if you were trying the case all over again and under those exact same circumstances, do you think it would have been prudent to make an objection at that particular period of time so that the jury would not hear that the defendant who is on trial for burglary to hear evidence where the defendant is confessing to being involved with another burglary four months earlier? Do you think it would be prudent to object to that so that that sort of information was not heard by the jury?*

A. *Uhm, probably. Yes. I believe I probably would hopefully make that objection at this point.*

(App. P. 576-578)

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSION OF FALSE OR PERJURED TESTIMONY BY A WITNESS AT TRIAL AND PROSECUTORIAL MISCONDUCT FOR ELICITING THE FALSE TESTIMONY.

The State called Detective Kelly as its sole witness in connection with the *Jackson v. Denno* hearing on Petitioner's motion to suppress his confession. (App. P. 81) Detective Kelly testify she and Detective Richburg interview Petitioner at the Sumter Police Department after his arrest on October 31, 2011 for the Canvasback home

invasion. (App. P. 82-83) Detective Kelly further testified as follows regarding a waiver of rights form Petitioner signed before the start of the interrogation that lead to his confession:

Q. Were y' all both together when these rights were read?

A. That's correct.

Q. And actually Detective Richburg read these rights in this case, correct?

A. That's correct.

Q. But you were present?

A. I was.

(Tr. p. 83)

Furthermore, Detective Kelly continued to testify at other times during the *Jackson v. Denno* hearing that it was Detective Richburg that read and explain to Petitioner the Miranda rights waiver form.

Q. Did he (Petitioner) appear to understand your words?

A. Yes, sir.

Q. Or Richburg's when these were read to him?

A. Yes, sir.

Q. After that on there is what is referred to as the Waiver of Rights?

A. That's correct.

Q. And was that also read to Mr. Godbolt?

A. It was.

Q. And were you present when they were read?

A. Yes, sir.

Q. Please read them as they were read to Mr. Godbolt on October the 31st 2011.

Q. And were you present when that was read to the defendant?

A. Yes, sir, I was.

(App. P. 86-87)

At trial, Detective Kelly's testimony first affirmed her *Jackson v. Denno* testimony that it was Detective Richburg whom had read and explain to Petitioner the waiver of Miranda rights form he signed before interrogation, and she was merely present to witness; however, as direct examination continued Detective Kelly changed her testimony to state that she in fact had read and explain the waiver of Miranda rights form to Petitioner when she was prompted to change her testimony by leading questions from the State's attorney.

Q. *Did you* have an occasion to read the Miranda - - what is known as Miranda Rights to Reco Godbolt?

A. I did.

Q. Or were you present when they were read?

A. Yes, sir.

Q. Which? Did you read them to him or where you present?

A. It was Detective Robbie Richburg, but I was in the room with him the entire time.

Q. And so you were present when they were read to him?

A. That's correct.

(App. P. 256)

Q. *Do you read him these rights?*

A. That's correct.

Q. Okay. *What's the first right that you read him?*

A. "You have the right to remain silent."

Q. And *when you are reading him this right*, did he indicate to you that he understood it?

A. He did.

Q. How did you (sic) indicate that he understood?

A. He initialed it.

Q. And did he orally initialed it. Is this what this is right here, and RG, are those his initials?

A. That's correct.

Q. What's the next thing *that you read to him?*

A. "Anything you say can be used against you in court."

Q. And *when you read him that right*, did he appear to understand that?

A. Yes, he did.

Q. When the rights was read to him by Detective Richburg, you were present?

A. That's correct.

Q. And did he indicate by signing his initials that he understood it?

A. He did.

(App. P. 259)

Q. *What's the next right that you read to him?*

A. "You have the right to talk to a lawyer for advice before we ask you any questions and to have him or her with you during questioning."

Q. *What's the next right that you read to him?*

A. "If you decide to answer any questions now without a lawyer present, you still have the right to stop answering at any time until you talk with a lawyer."

Q. And *when you read him that*, or after it was read to him by Detective Richburg, did he appear to you to understand it?

(App. P. 260-61)

Q. Okay. Now, next is what's referred to as State's 42 on the Miranda Rights as the Waiver of Rights, correct?

A. That's correct.

Q. Tell the jury about that. Was the Waiver of Rights read to defendant Reco Godbolt?

A. It was.

Q. And please read it as it was read that day to defendant Reco Godbolt.

A. "Before any questioning I was furnished the above statement of my rights at 1:43 p.m. on 10-31-2011 at Sumter P.D., "which is, which is (sic) Sumter Police Department, "by officer Richburg of the Sumter Police Department."

Q. And you were present?

A. That's correct.

(App. P. 261)

Q. *Did he appear to understand the questions as you read him and did you understand his answers when he gave them to you?*

A. Yes, sir.

(App. P. 263)

Q. *At any time during the reading of these rights, Detective Natalie Kelly, or the reading of this Waiver of Rights, did you threaten, coerce, hold out (sic) any hope of reward to Mr. Godbolt in exchange for him talking to you?*

A. No, sir.

(App. P. 264).

“A prosecutor’s deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.” *Riddle v. Ozmint*, 631 S.E.2d 70, 75, 369 S.C. 39 (S.C. 2006), *citing*, *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763 (1972). “The failure to correct false evidence is as reprehensible as its presentation. *Id.* (Citation omitted)

In *Riddle*, the State’s star witness against the defendant, Jason, gave a second statement to law enforcement on January 22, 2006 in reference to the murder Riddle was charged, and he had been taken to the site of the murder and questioned by several law enforcement officers, the solicitor, and an assistant solicited three days before the beginning of Riddle’s trial. *Riddle v. Ozmint*, 631 S.E.2d at 75. The solicitor failed to

correct Jason's false testimony when he testified that he talked with no one about the case after given his first statement to law enforcement. *Id.* The South Carolina Supreme Court held that: "[t]he PCR judge erred in concluding that the State was not obligated to correct Jason's false testimony, and in failing to hold that this violation of petitioner's due process rights required that he be granted a new trial. *Id.* The *Riddle* Supreme Court further stated that, "[t]he Constitution requires only that a defendant received a fair trial, not a perfect one." *Id.* (Citations omitted). "Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct." *Id.*

In the case at hand, Detective Kelly specifically testify at the *Jackson v. Denno* hearing, and initially during trial, that it was Detective Richburg that read and explained to Petitioner his Miranda rights prior to waiving his Fifth Amendment right of silence and Sixth Amendment right to legal counsel before giving a confession. However, Detective Kelly falsely testified in response to at least ten (10) questions before the jury that she, not Detective Richburg, had in fact read and explain to Petitioner the waiver of Miranda rights forms when prompted to in response to leading questions by the State attorney.

Petitioner was prejudice because it was a factual question for the jury to determine if Petitioner's confession was legally obtained because Petitioner had been explained his Miranda rights under the Fifth and Sixth Amendments to the United States Constitution, and that he voluntarily and intelligently waived such rights before the interrogation that lead to his confession. Although Detective Kelly could have testify to Detective Richburg's explanation of the waiver of Miranda rights form to Petitioner at the *Jackson v. Denno* hearing, because hearsay testimony is admissible at such pre-trial suppression hearings; however, the same testimony by Detective Kelly was not

admissible at trial because it offended the Confrontation Clause of the Sixth Amendment to the United States Constitution and Rule 802 of the South Carolina Rules of Evidence. Because Detective Richburg was not present at trial, testimony of his explanation to Petitioner of his Miranda rights before his interrogation and confession was not admissible through Detective Kelly. Therefore, the ability to publish Petitioner's confession at trial would have been substantially frustrated, if not inhibited.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO HEARSAY TESTIMONY ADMITTED AT TRIAL IN VIOLATION OF THE CONFRONTATION CLAUSE.

In *State v. Davis* our State Supreme Court thoroughly explain the jurisprudence of the Confrontation Clause to the Sixth Amendment of the Constitution of the United States. The Court explained as follows:

Among other protections, the Sixth Amendment assures: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965); *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct.App.2004). The primary interest secured by the Confrontation Clause is the right to cross-examination. *Gillian* at 450, 602 S.E.2d at 71 (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001); *Starnes v. State*, 307 S.C. 247, 414 S.E.2d 582 (1991)); see also *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525 (1994) (observing that specifically included in defendant's Sixth Amendment right to confront a witness is the right to meaningfully cross-examine an adverse witness).

Certain hearsay statements traditionally have been admissible against a defendant even though the declarant was unavailable at trial and even though the defendant did not have a prior opportunity to cross-examine the declarant. Under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980), abrogated by *Crawford v. Washington*, 541 U.S. 36,

124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), hearsay statements were admissible if they bore "adequate `indicia of reliability' " — a test that could be met by showing the evidence (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness. *Roberts* at 66, 100 S. Ct. 2531; *State v. Sanders*, 356 S.C. 214, 588 S.E.2d 142 (Ct.App.2003). However, in *Crawford*, the United States Supreme Court broke away from *Roberts* and radically changed the Confrontation Clause landscape.

* * *

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), Michael Crawford was convicted of assault for stabbing Kenneth Lee, who allegedly tried to rape Crawford's wife, Sylvia. At trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing. Sylvia did not testify at trial due to Washington's marital privilege, which "generally bars a spouse from testifying without the other spouse's consent." *Id.* at 40, 124 S. Ct. at 1357 (citing Wash. Rev. Code § 5.60.060(1) (1994)). This privilege, however, does not extend to a spouse's out-of-court statements admissible under a hearsay exception. Whether Crawford saw a weapon in Lee's hands was a critical fact for his claim of self-defense. Because Sylvia was unable to testify at trial, Crawford claimed the admission of Sylvia's statement was a violation of his federal constitutional right under the Sixth Amendment to be confronted with the witnesses against him.

Following *Roberts*, the trial court allowed Sylvia's statement on the ground that it bore guarantees of trustworthiness. The Washington Court of Appeals reversed. The Washington Supreme Court then reinstated the conviction, and the Supreme Court of the United States granted certiorari.

Justice Scalia, writing for the seven-Justice majority, announced a fundamental change in Confrontation Clause jurisprudence:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendments protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... To be sure, the Clauses ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.* at 61, 124 S. Ct. at 1370 (emphasis added). Crucial to the Courts decision was its emphasis on testimonial hearsay. "[I]f the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53, 124 S. Ct. at 1365 (footnote omitted). Thus, [w]here

nontestimonial hearsay is at issue, it is wholly consistent with the Framers design to afford the States flexibility in their development of hearsay law — as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

State v. Davis, 613 S.E2d 760, 764-766, 364 S.C. 364 (S.C. 2005).

Detective Kelley testified that it was Detective Richburg that read and explained to Petitioner his Miranda rights and waiver of those rights before he gave a confession. However, Detective Richburg was not present or testify at trial, nor did Petitioner had a prior opportunity for cross-examination. To the contrary Detective Kelly testify to the content of Detective Richburg's conversation with Petitioner about the waiver of his Miranda rights before he gave a confession. Detective Kelly could have only testify to Detective Richburg's conversation after proving that Detective Richburg was legally unavailable, and that Defendant had a prior opportunity to cross-examine Detective Richburg under oath. *See, State v. Davis*, 613 S.E2d at 764-766.

When questioned about his failure to object to Detective Kelly testifying at trial regarding the conversation that took place between Detective Richburg and Petitioner prior to Petitioner signing a waiver of Miranda rights form before giving a written confession, Petitioner's trial counsel gave an explanation that demonstrated a misunderstanding of the law:

Q. And I'll just ask this last question and I'll move on to my next point. And so what you're saying is is that if Detective Richberg was the one who basically discussed and read the Miranda form, waiver of Miranda Rights to Mr. Godbolt, then, of course, also given an explanation of those waivers as Mr. Richberg (sic) (Petitioner) testified that he did during that day in which he was interrogated, it's your position that at trial is that anyone who is in the room at the time in which Mr. - Detective Richberg goes through that interrogation, anyone that hears that

interrogation by Detective Richberg can be substituted in place of Detective Richberg at trial and can repeat what Detective Richberg said without violating hearsay or either without violating the confrontation clause? Is that your position?

A. Honestly probably yes. I hate -- I wish it wasn't. My understanding of the law, I wish we had more protections for statements. Lord knows I do, uhm, and I hate to say that but that is kind of my understanding that if there was a witness to that, uhm, you know, they can testify to that. Yes. I wish it wasn't though.

(App. P. 584-585).

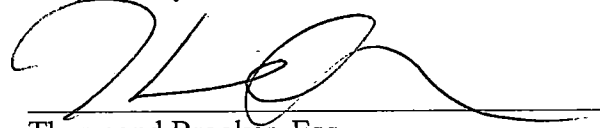
Petitioner's counsel was ineffective and Petitioner was fundamentally prejudice by his deficiency, because the most important evidence in Petitioner's trial, his confession, would have been inadmissible had trial counsel objected to Detective Kelly testifying to Detective Richburg's conversation with Petitioner regarding waiver of his Miranda rights.

In order to establish a claim of ineffective assistance of counsel offensive to the Sixth Amendment to the United States Constitution, the applicant must prove: (1) counsel's performance was deficient; and (2) applicant was prejudice by counsel's deficient performance. *See, Strickland v. Washington*, 466 U.S. 668. 105 S. Ct. 2052 (1984). Petitioner's trial counsel was ineffective and Petitioner was fundamentally prejudice where trial counsel failed to object to the admission at trial of evidence of prior crimes Petitioner had admitted to in his confession; where trial counsel failed to object to Detective Kelly's testify falsely at trial and the State's attorney's failure to correct such testimony; and where trail counsel failed to object to Detective Kelly's testimony at trial to the conversation between Petitioner and Detective Richburg regarding Petitioner's Miranda rights and waiver of such rights.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Brooker', written over a horizontal line.

Thurmond Brooker, Esq.
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Attorney for Petitioner

January 30, 2019

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 31 2019

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

George M. McFadden, Jr., Circuit Court Judge

Case No. 2018-001224

Reco Antonio Godbolt,

Appellant

Vs.

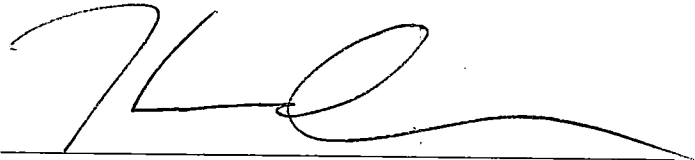
State of South Carolina,

Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Petitioner's Petition for Writ of Certiorari and the Appendix was served on the below identified person, by hand delivery on this 31st day of January 2019:

Megan Harrigan Jameson, Senior Deputy Assistant Attorney General
South Carolina Attorney General's Office
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Columbia, SC 29201



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