STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Colleton County

Honorable Edgar W. Dickson, Circuit Court Judge

TIMOTHY ALLEN LEMACKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002387

BRIEF OF PETITIONER

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to extensive evidence of Minor's prior consistent statements and that Petitioner was not prejudiced by the admission of this hearsay when four separate witnesses testified in detail about the specific statements Minor made to them or others about the alleged sexual abuse and where Minor's credibility was crucial since there was no physical evidence that Minor was abused?

STATEMENT OF THE CASE

A Colleton County Grand Jury indicted Petitioner on January 24, 2011 for first degree criminal sexual conduct with a minor. App. 329-370. His case was called to trial on February 28, 2011 before the Honorable Perry M. Buckner, and a jury. App. 1. Assistant Solicitor Charles Balish represented the state, and David S. Mathews represented Petitioner. App. 1. The jury found Petitioner guilty as indicted. App. 299, ll. 17-23. He was sentenced to the mandatory minimum of twenty-five years imprisonment. App. 306, ll. 1-5.

On February 25, 2014, after his conviction was affirmed on direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967), Petitioner filed an application for post-conviction relief (PCR). App. 322-328. The state filed a return to this application dated August 20, 2014. App. 329-333. An evidentiary hearing was convened on October 27, 2014 before the Honorable Edgar W. Dickson. App. 334. Assistant Attorney General Ashleigh R. Wilson represented the state, and Tristan M. Shaffer represented Petitioner. App. 335. By order dated December 15, 2015, the PCR court denied Petitioner relief. App. 364-368.

On June 1, 2017, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on August 14, 2017. On October 30, 2017, the Supreme Court transferred this case to the Court of Appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules (SCACR). By order filed October 23, 2018, this Court granted the petition and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

STATEMENT OF FACTS

Petitioner was very close friends with Minor's family, especially her father who considered Petitioner to be his "best friend." App. 138, ll. 9-13; App. 139, l. 19; App. 190, ll. 21-23. The family was such good friends with Petitioner that Minor and her younger brother and sister called him "Uncle Timmy." App. 83, l. 21 – 84, l. 1; App. 144, ll. 8-10. Petitioner frequently worked with Minor's father and grandfather remodeling mobile homes. App. 137, ll. 10-12; App. 190, ll. 1-10; App. 191, l. 18 – 192, l. 2. Every Friday night, Petitioner would come over to the family's house and drink beer with Minor's father. App. 190, ll. 21-24. He often spent the night, particularly when he was working with Minor's father the next morning. App. 194, ll. 1-11.

One Friday night in August 2010, Petitioner joined the family for a cookout after work. App. 84, ll. 22-23. After Minor and her siblings ate dinner and roasted marshmallows, they went inside and got ready for bed. Their mother allowed them to sleep together on the living room floor like they were camping. App. 88, ll. 1-10; App. 135, ll. 16-22. Minor slept in the middle between her two siblings. The children eventually fell asleep after their mother made them turn off the television. App. 85, ll. 17-20; App. 136, ll. 12-18; App. 151, ll. 20-25.

Minor, who was ten years old, claimed she was woken in the middle of the night by Petitioner. She alleged Petitioner, who was lying down between her and her brother, put his hand in her pants and then put his finger inside her vagina.[1] She claimed that it "hurt really, really bad." Minor said that at first she pretended to be asleep while Petitioner was touching her, but then she started "scooting over" towards her sister and began "moaning and groaning and

[1] Minor referred to her vagina as her "Lucy." See App. 75, ll. 20-24; App. 91, ll. 17-19; App. 93, ll. 9-17; App. 94, ll. 15-16.

saying, 'Stop, stop.'" After a while, Petitioner stopped. App. 93, l. 9 – 95, l. 10. He then grabbed a cushion from the couch and laid down on the floor next to Minor's brother. App. 96, ll. 1-20. After Petitioner fell asleep, Minor said she woke up her brother and sister and made them go with her to the top bunk of the bunkbed in her bedroom. App. 96, ll. 21-23. Minor claimed she stayed up all night. App. 98, ll. 12-14. The next morning, she told her mother about the alleged abuse and her mother called the police. App. 100, l. 8 – 101, l. 3. After an investigation, where Minor gave a forensic interview, Petitioner was arrested. App. 222, l. 18 – 223, l. 14.

There was absolutely no physical evidence against Petitioner. The pediatrician at the Medical University of South Carolina (MUSC) where Minor was examined admitted there were no signs of sexual abuse during Minor's initial visit to the emergency room the morning after the alleged abuse or during a follow up appointment two weeks later.[2] App. 168, ll. 6-12. There were also no eyewitnesses to the alleged abuse and Petitioner consistently denied touching Minor. App. 224, ll. 10-12. Consequently, the only evidence against Petitioner was Minor's allegations. Her credibility was therefore crucial to the state's case.

Minor was the first witness to testify at trial. After presenting Minor's testimony, the state bolstered her claims by eliciting testimony from numerous witnesses about Minor's prior consistent statements about the alleged abuse that were not limited to time and place. For whatever reason, trial counsel never objected to this extremely prejudicial hearsay. The state

---

[2] Dr. Michelle Amaya, who was qualified as an expert in child abuse pediatrics, is a pediatrician at MUSC. She and another physician supervise a team of nurses who respond whenever any child "presents to the University" with "complaints of being sexually assaulted." App. 162, l. 21 – 163, l. 14. A nurse identified only as Ms. Kerr is the person who physically examined Minor and took her statement about the alleged abuse when Minor first came to the pediatric emergency room at MUSC. Dr. Amaya merely testified from Ms. Kerr's report. App. 163, l. 2 – 165, l. 6.

elicited Minor's prior statements about the alleged abuse from her mother, her father, Dr. Amaya, and the lead investigator, Detective Dorothea Geathers.

During the direct examination of Tiffany Davis, Minor's mother, the following exchange took place between Ms. Davis and the assistant solicitor without objection:

> A: She [Minor] gave me that look and she said, "Mama, I got something to tell you." And I said, "Okay. What is it? . . . So anyways, that's when **she proceeded to tell me what Mr. Lemacks [Petitioner] did to her**.
>
> Q: What did she say?
>
> A: She told me that when she was laying on the - - this weren't her exact words. She said, "Mama, Timmy - - ***Uncle Timmy [Petitioner] touched me.***" **And I said, "Excuse me?" And she said, "*Uncle Timmy touched me.*" I said, "What do you mean, he touched you, Minor? Explain to mama. Tell me." . . . And she said, "Mama, *he stick his hands in my pants and he moved his finger around.*"** And for about 20 seconds, I was floored." . . .
>
> So I proceeded to ask more question[s], to get further into detail with her. **"Minor, are you absolutely sure?" And she said, "Yes, ma'am."** *While she was saying all this, she was crying; she was upset.* And **I had no reason to believe she would make up anything like that**. So after we talked some more, she went into, you know, further details with it as far as **he had touched her** . . ."

App. 140, l. 18 – 141, l. 17 (emphasis added).

Despite the obvious prejudicial nature of this testimony and the fact that it was clearly inadmissible hearsay (as well as improper bolstering), trial counsel failed to object to Ms. Davis' narrative of what Minor told her about the alleged abuse on the morning that she first disclosed.

Dr. Amaya, the pediatrician from MUSC, was the next to testify. During her direct examination, the following exchange took place between Dr. Amaya and the assistant solicitor:

> A: They called the [SANE] nurse to come see her [Minor], Ms. Kerr, and Ms. Kerr talked to her [Minor] and **she [Minor] was able to say what had happened to her and *gave pretty clear evidence. She was believable, because she was tearful***, but she was - - -

App. 165, ll. 3-6 (emphasis added).

Defense counsel immediately objected.[3] After the court properly sustained the objection and struck the last response, the testimony continued as follows:

> Q: Without talking about believability, I just want you to go into what happened at the intake. Was Minor able to disclose what happened that day?
>
> A: Yes. She [Minor] made a statement *to the emergency room physicians.* But she also made [a] statement *to the [SANE] nurse*, collecting the evidence.
>
> Q: And what was that statement?
>
> A: May I check the record specifically?
>
> Mr. Mathews [Defense Counsel]: Your Honor, as to time and place of this incident, I think that's within the bounds. Anything beyond that, I do not.[4]
>
> The Court: Mr. Balish [the solicitor]?
>
> Asst. Sol. Balish: Your Honor, for purposes of medical treatment - - -
>
> Mr. Mathews: *That's all I need to say on it, Your Honor.*
>
> Asst. Sol. Balish: I can understand the nature of the objection, Your Honor.
>
> The Court: *You may continue, Dr. Amaya.*
>
> A: Okay. This was on August 14th at the Peds Emergency Room. The child was asked to give history. And *per the patient report*, the patient **[Minor] reports she was sleeping on the floor with sister and brother when she felt *her uncle* trying to touch her privates. She tried to push his hand away. And then he put his finger inside her, and that it hurt. She moved over to her sister. Then, he fell asleep. She got her sister and brother up; then went into her bunk - - went in to her bunkbed. Her dad woke patient and siblings up in the morning and put them in the mom's bed. The patient told the mom while she was in bed with mom, and mom took the patient to her grandmother's house and called 9-1-1** . . .

---

[3] See State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) ("[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.").

[4] Petitioner raised this objection on direct appeal in a brief pursuant to Anders v. California, 386 U.S. 738 (1967) presumably because trial counsel later waived the objection and the trial court never ruled on the objection. App. 311. The Court of Appeals dismissed the appeal and granted appellate counsel's motion to be relieved. App. 320-321.

App. 165, l. 22 – 167, l. 6 (emphasis added).

Despite his initial objection, trial counsel failed to object to this hearsay testimony elicited from Dr. Amaya that was both beyond time and place and not within the medical diagnosis or treatment exception found in Rule 803(4), SCRE. This testimony was actually hearsay within hearsay since Dr. Amaya did not take any statements from Minor that morning and was merely testifying from the nurse's report.

As the state's presentation continued, Minor's father, Epifanio Garcia, testified that on the morning Minor first made the accusations, he was working with his father-in-law when his father-in-law received a telephone call from Minor's mother indicating something had happened and the men needed to come home. App. 198, l. 19 – 199, l. 11. The assistant solicitor then elicited the following testimony from Garcia on direct examination:

> Q: All right. When you got there, what happened?
>
> A: Tiffany [Minor's mother] met me crying, and I said, "What's wrong? What's wrong with you?" She told me, "Minor - - **Minor was touched by Timmy [Petitioner]**." I said, "What? What do you mean? And then that time, like **"Timmy touched her."** I was like - - and I seen Minor. I said, "Where's my baby at? Where's Minor?" And *she come up crying. And that's whenever I grabbed her and told her I was sorry. Said, "I'm sorry. I'm sorry." Told her "I'm sorry."*

App. 199, ll. 12-20.

Again, trial counsel failed to object to this inadmissible hearsay, which was also hearsay within hearsay.

Lastly, during the redirect examination of Detective Dorothea Geathers, who was the lead law enforcement investigator, the solicitor elicited extensive evidence of Minor's prior consistent statements about the alleged abuse that she made during her forensic interview months prior. For

example, the following exchange took place between the assistant solicitor and Detective Geathers:

> Q: Did she [Minor] mention who did it?
>
> A: Yes, she did.
>
> Q: Who did she say did it?
>
> A: She said **"Uncle Timmy [Petitioner]."**
>
> Q: Did she say what Uncle Timmy did to her?
>
> A: Yes, she did.
>
> Q: What did she say?
>
> A: She stated that she was on the floor and **Uncle Timmy got between her and her sister and put his hand inside her panties and put his finger in her vagina; her "Lucy" she calls it.**

App. 248, l. 16 – 249, l. 1 (emphasis added).

Again, trial counsel did not object to this inadmissible hearsay.

The jury ultimately found Petitioner guilty as indicted. App. 299, ll. 17-23. Judge Buckner sentenced him to the mandatory minimum sentence of twenty-five years imprisonment. App. 306, ll. 1-5.

At the beginning of his PCR hearing, Petitioner orally amended his application without objection. App. 338, l. 7 – 340, l. 13. He asserted trial counsel was ineffective for failing to object to the extensive evidence of Minor's prior consistent statements that was elicited by the state to bolster Minor's credibility. PCR Counsel Shaffer outlined the inadmissible hearsay for the court and listed the specific page numbers from the trial transcript where the testimony appears. App. 338, l. 7 – 340, l. 3. It is this claim that is argued in this brief.

When questioned by PCR counsel during the evidentiary hearing about each specific instance of hearsay testimony, David Mathews, Petitioner's trial counsel, admitted he should have objected to the prejudicial hearsay, but did not. App. 346, ll. 11-14; App. 346, ll. 19-23; App. 348, ll. 17-25; App. 350, ll. 7-9; App. 350, l. 25 – 351, l. 3; App. 352, ll. 4-10. He also acknowledged that while he initially objected to any testimony about Minor's prior statements that were beyond time and place during Dr. Amaya's direct examination, the trial judge never ruled on his objection and he never renewed the objection. App. 344, l. 15 – 346, l. 7.

Moreover, Mathews admitted there was no physical evidence against Petitioner and that it was essentially Minor's "story" against Petitioner's "story." App. 341, ll. 17-24. Therefore, the case came down to the credibility of Minor. App. 352, ll. 11-14.

The PCR judge ultimately denied Petitioner relief. App. 364-368. The judge found Petitioner "was not deprived of effective assistance of counsel" and that "[o]verall, defense counsel's decisions and conduct were appropriate under the circumstances and did not fall below professional norms of reasonableness." App. 366. Despite this general finding, the judge asserted that "*there was some testimony during the trial that defense counsel should have objected to for hearsay.*" App. 366-367 (emphasis added). However, the judge concluded "that the evidence against [Petitioner] was overwhelming and the lack of proper objections would not have changed the outcome of the trial." App. 366-367. Therefore, the court dismissed Petitioner's application with prejudice. App. 367.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to extensive evidence of Minor's prior consistent statements and that Petitioner was not prejudiced by the admission of this hearsay when four separate witnesses testified in detail about the specific statements Minor made to them or others about the alleged sexual abuse and where Minor's credibility was crucial since there was no physical evidence that Minor was abused.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to *extensive* testimony about Minor's prior consistent statements regarding the alleged sexual abuse. To bolster her credibility, the state elicited evidence of Minor's statements to other individuals from *four* separate witnesses, including an expert, during Petitioner's trial. These witnesses testified in detail about what Minor allegedly told them or others about the alleged abuse, including Petitioner's identity as the alleged perpetrator. Significantly, despite denying relief, the PCR judge acknowledged "there was some testimony during the trial that defense counsel should have objected to for hearsay." App. 366-367.

Trial counsel's deficient performance was extremely prejudicial to Petitioner and undoubtedly affected the outcome of his trial because the admission of Minor's prior consistent statements through the testimony of her mother, Tiffany Davis, her father, Epifanio Garcia, Dr. Amaya, who was qualified as an expert, and Detective Geathers bolstered Minor's credibility, which was crucial to the state's case against Petitioner, and put her allegations before the jury on repeated occasions. The state presented no physical evidence whatsoever and no eyewitnesses. Consequently, the only evidence against Petitioner were Minor's allegations.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

All criminal defendants are entitled to a fair trial. U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14. The Rules of Evidence are designed to ensure a fair trial occurs. One of the most important Rules of Evidence concerns the rule against hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is not admissible except as provided by the South Carolina Rules of Evidence, by other rules prescribed by our Supreme Court, or by statute. Rule 802, SCRE.

Rule 801(d)(1)(D), SCRE provides, "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case ... where

the declarant is the alleged victim and the statement is *limited to the time and place of the incident.*" Rule 801(d)(1)(D), SCRE (emphasis added). This rule obviously limits corroborating testimony to the time and place of the alleged assault. Any other details or particulars, including the alleged perpetrator's identity, must be excluded. See Thompson v. State, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). If the statement goes beyond time and place, then it is hearsay, and in order to be admissible, it must fall within one of the exceptions to the general rule against hearsay. State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997) (citing Rule 802, SCRE).

The testimony regarding Minor's prior statements elicited from Tiffany Davis, Epifanio Garcia, Dr. Amaya, and Detective Dorothea Geathers was clearly inadmissible hearsay and trial counsel was ineffective for failing to object. Their accounts of Minor's statements meet the definition of hearsay under Rule 801(c) and went beyond time and place of the incident. See App. 140, l. 6 – 141, l. 17; App. 199, ll. 12-20; App. 248, l. 16 – 250, l. 24; App. 256, ll. 5-8. Moreover, none of the statements fall within any exceptions to the hearsay rule. Consequently, trial counsel was ineffective for failing to object to this clearly inadmissible and prejudicial hearsay. Any competent criminal defense attorney would have objected.

The state argues Minor's statements were admissible as excited utterances under Rule 803(2), SCRE. This exception provides "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event or condition" is not excluded by the hearsay rule. Rule 803(2), SCRE. "[T]he mere fact that a statement was made some time after the incident occurred does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability." Burroughs, 328 S.C. at 499, 492 S.E.2d at 413 (internal citation omitted). None of Minor's statements elicited

from Tiffany Davis, Epifanio Garcia, Dr. Amaya, and Detective Geathers constitute excited utterances.

The facts of State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), where this Court held the admission of the alleged victim's statements to her stepmother under the excited utterance exception to the hearsay rule was reversible error, are very similar to the facts of this case. In Whisonant, the minor complainant claimed the defendant, who was her neighbor, sexually assaulted her on the couch in his home around midnight. Id. at 152, 515 S.E.2d at 770. After the defendant went to sleep in his bedroom, the alleged victim testified that she did not immediately leave the defendant's home nor did she call her parents. Id. Instead, the victim fell asleep on the couch until 9:00 the following morning. Id. It was only then that she went to her father's house and told him the defendant had touched her where he should not have. Id. She told her father nothing else at the time. Id. A few minutes later, her stepmother arrived home. Id. They went into a separate room, and the victim told her stepmother the details of the alleged incident. Id.

This Court held the alleged victim's statement to her stepmother did not qualify as an excited utterance because the victim did not give the statements that formed the basis of the stepmother's testimony until she returned to her father's house nine hours after the incident. Id. 155, 515 S.E.2d at 772. Additionally, this Court emphasized that the victim had an opportunity to speak with the defendant's wife and daughter but did not do so. Id. The incident occurred around midnight, but rather than return to her father's house, which was just down the street, the victim went to sleep until 9:00 the next morning. Id.

Here, Minor testified that the alleged assault occurred during the middle of the night. After Petitioner allegedly fell asleep, rather than immediately telling her mother and father, who were asleep in another bedroom, Minor went to the top bunk of the bunkbeds in her bedroom. Minor had

the opportunity to tell her father the following morning when he woke the children up, but she did not do so. It was only after her father made her go into her mother's bedroom that she told her mother what allegedly occurred. Consequently, Minor's statements to her mother and the statements to her father, Dr. Amaya, and Detective Geathers that followed were not excited utterances under Rule 803(2).

Additionally, counsel was ineffective for failing to object to Dr. Amaya's testimony regarding Minor's prior statements that did not fall within the medical diagnosis or treatment exception to the hearsay rule. See Rule 803(4), SCRE. Almost all of Dr. Amaya's testimony regarding Minor's statements to the emergency room physicians and nurses fell outside this well defined exception.

One of the exceptions to the general rule against hearsay is when a statement is "'made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.'" Burroughs, 328 S.C. at 501, 492 S.E.2d at 414 (quoting Rule 803(4), SCRE). "The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy." Tracy A. Bateman, Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Uniform Rules of Evidence, 38 A.L.R.5th 433.

In Burroughs, this Court held that "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." 328 S.C. at 501, 492 S.E.2d at 414. However, the testimony of a nurse that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault "in no

way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment." Id. The Court found the testimony of the nurse prejudicial to the defendant because it corroborated the victim's testimony in an extremely important way – the prosecution had presented two witnesses to testify the defendant had assaulted them after asking for a hug. Id. at 414-415, 328 S.C. at 502-503. The Court recognized that "[w]hile the victim's statement that Burroughs asked her for a hug might be an insignificant detail when considering her story alone, it becomes a very important detail after considering the stories of the other victims." Therefore, the improper corroboration of the alleged victim's testimony resulting from the erroneous admission of the testimony of the nurse was not harmless. Id. at 415, 328 S.C. at 503.

Our Supreme Court explained that a patient's history as told to the doctor is admissible only as to the information upon which the doctor relied in reaching his professional opinion. State v. Brown, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985) (citing Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967)). In Brown, the doctor told the jury that the child-patient stated "Mr. Carl" performed certain sex acts on her. The Supreme Court held defense counsel's objection to the perpetrator's identity as not necessary for diagnosis or treatment should have been sustained. Id. at 446, 334 S.E.2d at 817. Further, the Court stated, "The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." Id. at 447, 334 S.E.2d at 817. Therefore, "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. *The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses.*" Id. (emphasis added).

Dr. Amaya's testimony concerning the statements Minor allegedly made to the emergency room physicians and nurses was inadmissible hearsay, particularly the identity of Petitioner as the

alleged perpetrator, because this information could not have been relied upon to reach any medical conclusion or diagnosis. Almost all of Dr. Amaya's testimony regarding Minor's statements fell outside this well defined exception. The state did exactly what our Supreme Court forbid in Brown: used the doctor's testimony to prove facts properly proved by other witnesses, specifically Minor herself. See Brown, 286 S.C. at 447, 334 S.E.2d at 817.

The state argued in its return that there was probative evidence to support the PCR court's finding that trial counsel employed a valid trial strategy. See Return at 6. Notably, the PCR court made no such finding. Nowhere in the order of dismissal did the PCR court find trial counsel employed a valid trial strategy. See App. 364-368. There is no way any court could reasonably find *in this case* that failing to object to such extensive evidence of Minor's prior statements was a valid strategy, particularly where there was no physical evidence against Petitioner and the only evidence were Minor's allegations.

Trial counsel's deficient performance was extremely prejudicial to Petitioner and undoubtedly affected the outcome of his trial because the admission of Minor's prior statements bolstered her credibility, which was crucial to the state's case against Petitioner, and put her allegations before the jury on repeated occasions. The state presented no physical evidence whatsoever and no eyewitnesses. Consequently, the only evidence against Petitioner were Minor's allegations.

In Jolly v. State, 314 S.C. 17, 19, 443 S.E.2d 566, 568 (1994), our Supreme Court found trial counsel provided ineffective assistance by failing to object to testimony by an uncle that the alleged victim told the uncle that Jolly had abused her. Trial counsel had objected to a social worker testifying that the child made a prior statement that Jolly had abused her, but failed to object to the uncle's testimony. Id. On direct appeal, Jolly challenged the trial judge's decision to allow

the social worker to testify to the hearsay statement. However, no decision was made as to the error of the ruling because no objection had been made to the uncle's testimony making the social worker's testimony cumulative to the uncle's testimony and to the minor complainant's testimony. Id. The Supreme Court reiterated the rule that in criminal sexual conduct cases, evidence from other witnesses that the alleged victim complained of a sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. Id. at 20, 443 S.E.2d at 568.

The Supreme Court went on to hold that "improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. at 21, 443 S.E.2d at 569 (citing State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989)) (emphasis in original). Thus, the Court held that had trial counsel properly objected to uncle's testimony, the appellate court would not have held the social worker's testimony was harmless and the outcome of the direct appeal would have been different. Id.

However, in State v. Jennings, 394 S.C. 473, 482, 716 S.E.2d 91, 95-96 (2011), a majority of our Supreme Court agreed that the bright line rule established in Jolly should no longer control and concluded that in a direct appeal, a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case. See Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (citing Jennings, 394 S.C. at 482, 716 S.E.2d at 95-96) (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toad, C.J., dissenting) (collectively overruling Jolly and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error)). The Supreme Court in Jennings ultimately held the error in admitting portions of the forensic interviewer's written

reports from interviews with the alleged minor victims, which contained inadmissible hearsay, was not harmless because "the children's credibility was the ultimate determination for the jury to make in deciding appellant's guilt." Jennings, 394 S.C. at 479, 716 S.E.2d at 94.

Extending the holding in Jennings to PCR cases, our Supreme Court in Thompson held that "trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice." Thompson, 423 S.C. at 246, 814 S.E.2d at 492. The Court continued, "As part of the prejudice analysis, the PCR court and the reviewing court must . . . consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." Id. at 246, 814 S.E.2d at 492-493.

In finding Petitioner failed to prove prejudice, the PCR court concluded "that the evidence against [Petitioner] was overwhelming and the lack of proper objections would not have changed the outcome of the trial." App. 367. This was clearly error as there is no evidence of probative value to support such a finding. Significantly, the court provided no explanation as to why it found the evidence overwhelming or any analysis to support this finding. See App. 367.

The properly admitted evidence of Petitioner's guilt was not strong enough to overcome trial counsel's failure to object to the inadmissible hearsay testimony elicited from Tiffany Davis, Epifanio Garcia, Dr. Amaya, and Detective Geathers. There was absolutely no physical evidence that Minor had been sexually abused. The *only* evidence against Petitioner was Minor's allegations.

In State v. Barrett, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989), a DSS social worker was improperly allowed to testify to the details of the sexual abuse reported to her by the alleged victim. The state relied solely upon the alleged victim's testimony to establish the details of the crime and the identity of the perpetrator. Id. at 487, 386 S.E.2d at 243. The state asserted that any error was harmless because the inadmissible testimony was "merely cumulative" to the alleged victim's

testimony. Id. Our Supreme Court held, "[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction." Id.

The Supreme Court's holding in Barrett was recently reaffirmed in Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018). In Thompson, the Court held trial counsel was ineffective for failing to object to inadmissible hearsay testimony given by a DSS caseworker and a clinical psychologist who conducted a forensic interview of the minor child. The DSS caseworker testified without objection that she spoke with the alleged victim about each allegation against Thompson and that the victim "revealed to me that she was being sexually abused by [Thompson]." Id. at 240, 814 S.E.2d at 489. The clinical psychologist, who was qualified as an expert, testified the alleged victim disclosed chronic sexual abuse by Thompson in the form of vaginal penetration, anal penetration, and oral sex. Id. Thompson's counsel did not object to any of this inadmissible hearsay. Id. Our Supreme Court held counsel was deficient because the witnesses' accounts of their conversations with the alleged victim met the definition of hearsay under Rule 801(c), and the accounts provided information outside the time and place restrictions set forth in Rule 801(d)(1)(D). Id. at 241, 814 S.E.2d at 490. Citing to Barrett, discussed above, the Court held there was no evidence to support the PCR court's conclusion that Thompson was not prejudiced by trial counsel's errors because there was not overwhelming evidence of guilt and "the cumulative effect of the hearsay testimony undeniably enhanced its devasting impact." Id. at 248-249, 814 S.E.2d at 494.

As was the case in Thompson, trial counsel's failure to object to the admission of the hearsay testimony elicited from Tiffany Davis, Epifanio Garcia, Dr. Amaya, and Detective Geathers was extremely prejudicial and certainly affected the outcome of his trial. Counsel's error allowed

the state to present testimony from four different witnesses regarding highly detailed aspects of Minor's prior statements thereby bolstering Minor's credibility before the jury. See Jenkins, 394 S.C. at 479, 716 S.E.2d at 94 ("Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless). Not only did this testimony bolster Minor's credibility, it was also damaging because it was cumulative to Minor's testimony and put Minor's statements and specific allegations before the jury on repeated occasions. The cumulative effect of this testimony mandates reversal of Appellant's conviction.

The prejudicial effect of trial counsel's deficient performance is also obvious from the assistant solicitor's closing argument. In closing, the solicitor repeatedly argued Minor was consistent in her statements. Specifically, he argued:

> She said this guy, Uncle Timmy [Petitioner], stuck his finger inside of her Lucy. Said it on the stand; a video interview of her. Detective Geathers testified that there's six interviews [of Minor]. Not 80 percent, 99 percent, everything she says made consistent every time she has told the story.

App. 265, ll. 7-11.

. . .

> Watch the little girl here; watch the little girl here. Over and over what you're going to see, she's consistent on all of the important things that you would expect somebody to remember about that night.

App. 265, ll. 19-22.

. . .

> Well, think about what we got here. Got a little girl who consistently, six times, said the same story, with the exception of maybe what she was wearing, something little here or there, time.

App. 266, ll. 16-19.

Six interviews Detective Geathers witnessed. Consistency through all of them. Consistency with mom; consistency with law enforcement; consistency with doctor after doctor after doctor, remained consistent.

This is what we ask. This is what Detective Geathers looked for before she made the arrest. Remember, they didn't arrest him that day. No, they had to do an investigation.

App. 270, ll. 4-11 (emphasis added).

In addition to the inadmissible evidence of Minor's prior statements, the state presented highly prejudicial vouching testimony from Minor's mother. In yet another effort to bolster Minor's credibility, the assistant solicitor elicited the following testimony from Tiffany Davis:

> Q: Is there any reason that your children, any of them, Minor included, would have to make this accusation that you are?
>
> A: No, sir. That's what's flooring me is I do not understand why, why she [Minor] would lie about something like that . . . She loves him [Petitioner] to death. They all love him.
>
> Q: **So you believe her?**
>
> A: **Yes, I believe her with 100 percent of what's in my body and hers. I believe everything that's coming out of that baby's mouth**.

App. 144, ll. 11-21 (emphasis added).

The testimony later continued:

> Q: Did you tell her the consequences of her lying in this situation?
>
> A: Yes, sir, I sure did. And I reassure her, not just of this situation, but any situation.
>
> Q: And **do you believe your daughter?**
>
> A: **Yes, I do believe her**.

App. 146, ll. 4-9 (emphasis added).

This improper vouching, which trial counsel also failed to object to, only enhanced the prejudice to Petitioner caused by trial counsel's failure to object to the admission of Minor's detailed prior consistent statements. The outcome of Petitioner's trial would have been different

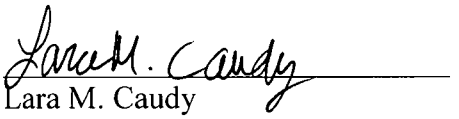
if the state was not permitted to improperly bolster Minor's credibility, which was crucial to its case against Petitioner.

Therefore, the PCR court erred by finding Petitioner failed to prove trial counsel rendered ineffective assistance of counsel and that he was prejudiced by counsel's deficient performance. Because there is no evidence of probative value to support the PCR court's ruling, this Court should reverse the order of the PCR court and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Colleton County

Honorable Edgar W. Dickson, Circuit Court Judge

TIMOTHY ALLEN LEMACKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Ruston Wesley Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Timothy Allen Lemacks, #345057, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of November, 2018.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of November, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.