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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge

\_\_\_\_\_  
JOHN BARNES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001696

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Joanna K. Delany  
Appellate Defender

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

ATTORNEY FOR PETITIONER

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The PCR court erred when it found appellate counsel provided effective assistance where counsel failed to argue the testimony of Scarlett Murray violated the “time and place” restriction on hearsay when Murray testified the complainant identified petitioner as the perpetrator, since this testimony impermissibly bolstered the credibility of the complainant, and since the issue was properly preserved for appeal by trial counsel ..... 6

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**ISSUE PRESENTED**

Whether the PCR court erred when it found appellate counsel provided effective assistance where counsel failed to argue the testimony of Scarlett Murray violated the “time and place” restriction on hearsay when Murray testified the complainant identified petitioner as the perpetrator, since this testimony impermissibly bolstered the credibility of the complainant, and since the issue was properly preserved for appeal by trial counsel?

## STATEMENT

Petitioner was indicted by a Richland County Grand Jury for the offense of lewd act on a minor child. App. 725 – 726. He was tried before the Honorable Deandrea Benjamin and a jury from September 12 – 15, 2011. App. 1; App. 110. Petitioner was represented by Rhodes Bailey and Greg Collins. App. 1. The state was represented by Margaret Fent Bodman and Debra Barry. App. 1.

The law regarding hearsay's limitation to "time and place" in sexual misconduct cases pursuant to Rule 801(d)(1)(D), SCRE was clear when petitioner's case was tried. Nevertheless, when the solicitor questioned the complainant's sister, Scarlett Murray, about the complainant's disclosure the solicitor sought more. Impermissibly, the solicitor asked Murray the identity of the person the complainant claimed had abused him, and Murray answered that it was petitioner. App. 90, ll. 6-10.

Trial counsel immediately objected: "This is outside the time and place rule for this case, Your Honor." App. 90, ll. 11-15. Trial counsel argued that "the witness is only allowed to testify as to the time and the place that any alleged incident should occur. She cannot identify who allegedly committed the incident, otherwise it would be hearsay and she also can't talk about what happened." App. 91, ll. 11-16.

Trial counsel observed, "There's no reason for [the solicitor] to try and elicit this testimony, except to try and . . . get something in that's outside the time and place." App. 92, ll. 14-16. Trial counsel cited *Jolly v. State*<sup>1</sup> and *Sanchez v. State*<sup>2</sup> in support of his position. App. 93, ll. 23-24. The solicitor argued that the testimony was not hearsay because it was not offered for

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<sup>1</sup> *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

<sup>2</sup> *Sanchez v. State*, 351 S.C. 260, 569 S.E.2d 363 (2002).

the truth of the matter asserted, but to explain why an investigation commenced. App. 92, ll. 6-9; App. 94, ll. 17-23. Counsel responded that, “Just because [the solicitor’s] saying it’s not being offered for the truth of the matter asserted doesn’t mean it’s not being presented in that way.” App. 94, l. 24 – 95, l. 1. Counsel correctly noted that the testimony, “it’s bolstering the victim’s testimony,” and that “the answer to who should be stricken.” App. 96, ll. 22-25. However, the trial judge ruled in favor of the state, finding the testimony was not offered for the truth of the matter asserted. App. 95, ll. 3-4; App. 96, l. 15 – 97, l. 19.

Petitioner was convicted as indicted and was sentenced to fifteen years in prison. App. 561, ll. 12-13; App. 570, ll. 6-8. On direct appeal, petitioner was represented by LaNelle Cantey DuRant. App. 573. Although appellate counsel did file a merit brief, she did not brief the preserved issue of whether Scarlett Murray’s testimony impermissibly bolstered the complainant’s testimony since it went beyond time and place. *See* App. 573 – 590.

Instead, appellate counsel briefed the following two issues: 1) Did the trial court err in qualifying the ARC interviewer as an expert in child forensic interviewing when his testimony was not required to be presented by an expert witness? and 2) Did the trial court err in denying appellant’s motion for a hearing pursuant to *State v. Sanders*, 341 S.C. 386, 534 S.E.2d 696 (2000) to remove one of the solicitors from the case pursuant to Rule 3.7, Rules of Professional Conduct, SCACR because the solicitor was a necessary witness to testify to the interview of the child victim by the two solicitors on the case to determine the trustworthiness of the child’s statement given to the solicitors which contained new information? App. 576.

The first issue raised by appellate counsel was based on trial counsel’s argument the forensic interviewer should not be qualified as an expert because forensic interviewing is not a field of science subject to testing and reliable results. App. 140, l. 20 – 141, l. 5. The second

issue raised by appellate counsel was based on the solicitors meeting with the complainant for “case preparation.” App. 47, ll. 3-6. However the defense argued by meeting with the complainant prior to trial, the solicitors became “necessary witnesses.” The trial court found the solicitors were merely doing case preparation by meeting with the complainant and denied the defense’s request to remove them from the trial. App. 55, l. 24 – 56, l. 3.

The Court of Appeals affirmed petitioner’s conviction, finding as to issue number two that the trial judge properly exercised his discretion regarding the *Sanders* issue. App. 613 – 614. The Court found that as to issue number one, the expert’s qualification was “likely error,” but was harmless since petitioner did not allege the forensic interviewer vouched for the complainant’s credibility and since the testimony was cumulative. App. 613 – 614.

Petitioner timely filed an application for post-conviction relief (PCR) and alleged, inter alia, that appellate counsel was ineffective for failing to argue the ruling on admissibility of Scarlett Murray’s testimony. App. 648. A hearing was held before the Honorable J. Durham Cole on February 3, 2016. App. 651. Petitioner was represented by Anna Good and the state was represented by Clayton Mitchell, III. App. 651. Appellate counsel did not testify but trial counsel testified.

At the PCR hearing, trial counsel Bailey explained that he objected to Murray’s testimony in which she said the complainant named petitioner as the perpetrator as improper bolstering that exceeded time and place. App. 669, ll. 6-25. Bailey noted the defense “tried our best to preserve” the issue. App. 686, l. 20 – 687, l. 1. In summation, PCR counsel argued petitioner should be granted PCR based on appellate counsel’s failure to raise this issue. App. 702, l. 1-16.

The PCR court issued an order of dismissal in which it denied petitioner relief. App. 706 – 724. The order stated that petitioner failed to establish both deficiency of appellate counsel and prejudice. App. 720. The PCR court observed that appellate counsel is not required to raise every non-frivolous issue and cited *Smith v. Robbins*, 528 U.S. 259, 288 (2000), “Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome.” App. 720.

The order of dismissal stated that appellate counsel “appropriately raised two stronger, meritorious issues” on petitioner’s behalf and that there was “no reasonable likelihood that he would have prevailed on appeal” as to the issue regarding Murray’s testimony. App. 722. The PCR court concluded it was unlikely the issue would have been successful on appeal because the state “did not offer this testimony to prove that [petitioner] had molested [complainant] but rather to explain how the incident report against [petitioner] came about.” App. 723.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred when it found appellate counsel provided effective assistance where counsel failed to argue the testimony of Scarlett Murray violated the “time and place” restriction on hearsay when Murray testified the complainant identified petitioner as the perpetrator, since this testimony impermissibly bolstered the credibility of the complainant, and since the issue was properly preserved for appeal by trial counsel.

Trial counsel properly objected to the court’s ruling that allowed Scarlett Murray to testify that the complainant identified petitioner as the perpetrator. A prohibition against this exact type of improper corroboration testimony was well-settled under South Carolina law. *See Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994); *Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002). Appellate counsel’s failure to raise the issue on direct appeal was ineffective assistance of counsel.

“The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony.” *Sanchez v. State*, 351 S.C. at 275, 569 S.E.2d at 365 (internal citations omitted).

“When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator.” *Id. Accord Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); Rule 801(d)(1), SCRE; *Jolly v. State*, 314 S.C. at 20, 443 S.E.2d at 568 (*overruling recognized by Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018)).

**“Testimony from other witnesses regarding the victim’s identification of the perpetrator does not fall within this hearsay exception.”** *Dawkins v. State*, 346 S.C. at 156, 551 S.E.2d at 262-63 (*overruling recognized by Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018)) (emphasis added). “This rule obviously limits corroborating testimony . . . to the time and place of the assault(s); **any other details or particulars, including the perpetrator’s identity, must be excluded.**” *Thompson v. State*, 423 S.C. at 241, 814 S.E.2d at 490 (emphasis added).

The PCR court concluded petitioner would have been unsuccessful on appeal because the state did not offer the testimony for the truth of the matter asserted, but to explain how an incident report came to be filed against petitioner. App. 723. However, the incident report was not relevant, and it was inadmissible. No challenge had been made as to why the investigation was initiated. Because “how an incident report came to be filed” was irrelevant at trial, the only purpose served by its introduction was to improperly corroborate the complainant’s testimony.

As trial counsel correctly argued, “Just because [the solicitor’s] saying it’s not being offered for the truth of the matter asserted doesn’t mean it’s not being presented in that way.” App. 94, l. 24 – 95, l. 1. Presumably the state could make this same argument in every case to successfully circumvent the hearsay rules, since no one could contradict the solicitor about her subjective intent. The solicitor’s assertion she was not offering evidence for its truth did not magically render otherwise clearly inadmissible testimony admissible when there was no other relevant purpose for which it could be offered.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). “A defendant is constitutionally entitled to the effective assistance of appellate

counsel.” *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). “However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

“First, the burden of proof is upon petitioner to show that counsel’s performance was deficient as measured by the standard of reasonableness under prevailing professional norms.” *Southerland*, 337 at 616, 524 S.E.2d at 836. “Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel’s unprofessional errors, the result of the **proceeding** would have been different.” *Id.* (emphasis in original). *Accord Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (*overruled on other grounds by State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009)). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Petitioner’s appeal was filed in 2013. App. 590. *Sanchez*, *Smith*, *Dawkins*, and *Jolly*, *supra*, had all been decided: the law in South Carolina was clear that corroborative hearsay in a sexual misconduct case is only admissible when subject to a hearsay exception such as time and place. *See State v. Burroughs*, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (court’s ruling allowing testimony beyond time and place was “clearly in error”). This issue was raised and ruled upon below. Trial counsel cited *Jolly* and *Sanchez* in support of his objection. Appellate counsel’s failure to brief this strong issue was deficient performance.

Of the issues briefed by appellate counsel, the Court of Appeals determined the trial judge acted within his discretion when he refused to order the solcitors disqualified from

prosecuting the case simply because they met with the complainant to prepare for trial. Because abuse of discretion is such a high standard, and because the solicitors merely performed their normal actions of meeting with a witness in preparation for trial, the issue advanced by petitioner here—improperly admitted corroborating hearsay is clearly a stronger issue for direct appeal than the disqualification issue.

The other issue briefed by appellate counsel was whether the forensic interviewer's qualification as an expert was error where trial counsel argued the field was not a science. App. 580 – 581. Although the Court of Appeals acknowledged the qualification was “likely error,” the Court observed that any error was harmless since there was no claim the forensic interviewer vouched for the complainant's credibility and since the testimony was cumulative. App. 613 – 614. Given that the expert's testimony was cumulative and appellate counsel did not claim the expert vouched for the complainant's credibility, this issue too was clearly weaker than the ignored issue. Appellate counsel's performance was deficient when she ignored the clearly stronger issue.

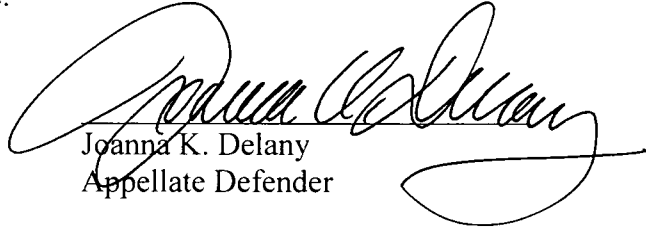
Appellate counsel's ineffective assistance prejudiced petitioner since the complainant's credibility was key and the evidence was not overwhelming. There is no longer “a bright-line rule of finding prejudice when trial counsel failed to object to inadmissible hearsay testimony identifying the defendant as the perpetrator.” *Thompson v. State*, 423 S.C. 235, 245-46, 814 S.E.2d 487, 492 (2018). “As part of the prejudice analysis, the PCR court and the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object.” *Id.* at 246, at S.E.2d at 492-93. Where the outcome of the trial hinges on the complainant's credibility and there is otherwise an

absence of overwhelming evidence of guilt, the defendant is prejudiced. *Id.* at 249-50, 814 S.E.2d at 494-95.

Here, the outcome of the trial hinged on the complainant's credibility and there was no overwhelming evidence of guilt. The only evidence that petitioner was the perpetrator of the abuse was the complainant's allegation and petitioner's disputed confession. There were no eyewitnesses, physical evidence, or DNA evidence. Petitioner's trial was infected with improper corroborating evidence, the admission of which was error, and appellate counsel failed to raise this error on direct appeal. Appellate counsel's deficient performance prejudiced petitioner and the PCR court's denial of relief should be reversed.

**CONCLUSION**

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'Joanna K. Delany', written over a horizontal line.

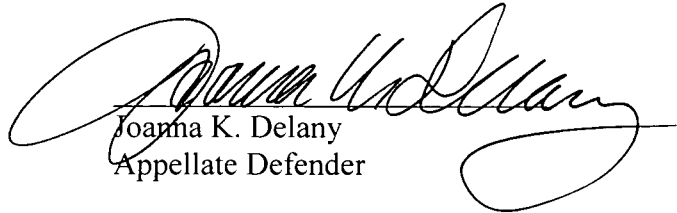
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Joanna K. Delany  
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 7th day of June, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

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JOHN BARNES,

PETITIONER

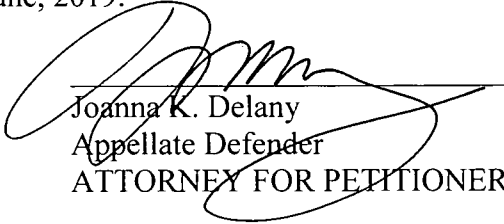
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STATE OF SOUTH CAROLINA,

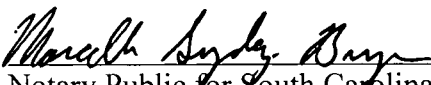
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on John Peter Barnes, #347845, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of June, 2019.

  
\_\_\_\_\_  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 7th day of June, 2019.

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

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JUN 07 2019  
S.C. SUPREME COURT