

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Greenville County

RECEIVED

Honorable Alex Kinlaw, Circuit Court Judge

SEP 16 2019

S.C. SUPREME COURT

MICHAEL EDWARD WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002280

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PETITION FOR WRIT OF CERTIORARI  
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JESSICA M. SAXON  
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### **ISSUE PRESENTED**

Did the PCR court err in finding that trial counsel provided effective representation where counsel failed to object to the introduction of the forensic interview pursuant to S.C. Code § 17-23-175(A)(3) where the state could not elicit any testimony from the minor about the elements of the offense or the making of the videotape thereby failing to establish the foundation for admission of the videotape as required by statute?

## STATEMENT OF THE CASE

### *Procedural History*

Petitioner was indicted by a Greenville County grand jury for Criminal Sexual Conduct with a Minor, First Degree and Criminal Sexual Conduct with a Minor, Third Degree. On October 6, 2014 the state, represented by Lisa Bentley, called the case to trial before the Honorable Steven H. John, and a jury. App. 1. Dorothy Manigault represented Petitioner. App. 1.

The jury acquitted Petitioner of Criminal Sexual Conduct, First Degree but found him guilty of Criminal Sexual Conduct, Third Degree. App. 318. Judge John sentenced Petitioner to fifteen years imprisonment. App. 324.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Williams, Op. No. 2017-UP-026 (filed January 11, 2017). App. 439. This Court denied certiorari. Id.

An application for post-conviction relief was filed by Petitioner on January 8, 2018. App. 327-338. The state made its return on May 9, 2018. App. 339-349. Petitioner amended the application on October 18, 2018 through PCR counsel Susannah Ross. App. 350-353.

An evidentiary hearing was held on October 24, 2018 before the Honorable Alex Kinlaw, Jr. App. 354. Susannah C. Ross represented Petitioner, and Sherrie Butterbaugh appeared on behalf of the state. Id. Petitioner and trial counsel, Dorothy Manigault, testified at the hearing.

Judge Kinlaw's Order of Dismissal was filed on December 14, 2018. App. 438-465. He found that Petitioner had not demonstrated any error and prejudice warranting relief and dismissed the action.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred in finding that trial counsel provided effective representation where counsel failed to object to the introduction of the forensic interview under S.C. Code § 17-23-175(A)(3) where the state could not elicit any testimony from the minor about the elements of the offense or the making of the videotape thereby failing to establish the foundation for admission of the videotape as required by the statute.

### *Introduction*

Petitioner's novel challenge is based on the state's failure to meet the foundational elements required by the statute for admission of the taped interview. Specifically, when a minor cannot testify on direct about the elements of the offense and the making of the videotape, as required by the statute, then the state has failed to meet the foundational requirements and the videotape is not admissible.

### *Relevant Facts*

At a pretrial hearing the state made a motion to admit an out of court statement of the five-year-old minor girl pursuant to S.C. Code § 17-23-175. App. 67-82. Sarah Davis testified at the hearing that she was a forensic interviewer and had interviewed the minor in this matter. App. 68-70. She also testified to the general format of the interview, the setup of the interview room, her background and the speech problems minor had at the time of the interview. App. 70-73. On cross examination defense counsel pointed out the inconsistencies in the statement given by minor. For example, minor stated during the forensic interview, which was conducted on April 30, 2012, that Petitioner had "touched her bottom" yesterday, but then said later in the interview that she had not seen petitioner since the alleged incident date of March 31, 2012.

App. 76, ll. 4-14. Minor also stated that she was wearing shorts during the alleged incident and then later said she was wearing a dress. App. 76, ll. 15-22.

Defense counsel objected to the admission of the videotape arguing that Petitioner had not had any opportunity to cross-examine the minor and that the statement contained in the videotape went beyond the time and place exception to hearsay.<sup>1</sup> App. 74, ll. 21-25 – App. 75, ll. 1-2. Additionally, defense counsel argued that leading questions were used, and the interviewer appeared to be soliciting answers. App. 78, ll. 6-22.

The state countered that pursuant to S.C. Code § 17-23-175 they only had to make the minor available for cross examination to satisfy both the statute and the confrontation clause, and the minor would be called to testify at the trial. App. 75, ll. 4-8. The state further argued that the statement was made during an investigative interview, it was audio and video recorded, it was detailed, had internal coherence, that no leading questions were used and therefore the statement should be admitted under S.C. Code § 17-23-175. App. 77-78.

The court made a detailed ruling on each of the four requirements of admissibility pursuant to S.C. Code §17-23-175. Regarding subsection (A)(3) the court noted that:

“Three, the child testifies at the proceeding and is subject to cross examination on the elements of the offense and the making of the out of court statement. I’ve been assured by the assistant solicitor prosecuting this case that such will take place during the trial of this matter against the Defendant. And, therefore I am taking that as an affirmative statement that will take place. And I find that has been so properly covered.”

App. 79-82.

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<sup>1</sup> Although the rule was not specifically cited, it was apparent trial counsel was challenging the content of the videotape pursuant SCRE 801(d)(1)(D) which limits the admission of consistent prior statements of alleged victims in criminal sexual conduct cases to the time and place the incident is alleged to have occurred.

The court found that pursuant to S.C. Code § 17-23-175 the videotape of the statement was proper and could be presented to the jury “with the assertion by the solicitor that the alleged victim in this matter will testify and be subject to cross examination in this particular case.” App. 82, ll. 17-24.

During the trial the state called the minor to the stand. App. 157. At no point in the direct questioning of the minor was she asked about the elements of the offense or the making of the videotape. App. 157-162. The minor’s testimony was limited to who she lives with and the fact that the only people in the court room she recognized were her mother and the investigator on the case. Id. When specifically asked if she recognized the defendant she responded that she did not. App. 162, ll. 1-3.

On cross examination, trial counsel limited questions to those topics raised on direct examination and lightly probed the minor’s ability to remember things from the time around the alleged incident. App. 162-166. The minor, who was in kindergarten at the time of the alleged incident, was able to testify that she remembered her kindergarten teachers, Mr. and Ms. Tucker, and playing centers during school. App. 165, ll. 9-16.

The state then called forensic interviewer Sarah Davis and sought to admit the forensic interview of the minor pursuant to S.C. Code § 17-23-175. App. 167-172. Defense counsel again objected to the admission of the videotape on confrontation grounds and challenged the constitutionality of the statute. App. 172-173. The court found the statute was not unconstitutional, that the minor had testified and been subjected to cross examination, therefore the objection was overruled, and the videotape of the forensic interview was played for the jury. App. 173-174; App. 179.

Trial counsel made a directed verdict motion arguing that there was no trial testimony from the minor as to the elements of the crime and therefore the case should be dismissed. App. 232, ll. 22-25. The state countered that the jury had seen the interview of the minor and it was up to the jury to decide *whether that interview alone was enough for a guilty verdict.*<sup>2</sup> App. 233, ll. 4-12. The court denied the directed verdict motion on the basis that the recorded interview was evidence that the jury could consider and use to find Petitioner guilty. App. 233-235.

In his amended PCR application Petitioner alleged, inter alia, that trial counsel was ineffective for failing to argue that the foundational requirements of the statute were not met. Specifically, the fact that minor was unable to remember the incident or identify Petitioner meant her testimony did not meet the S.C. Code § 17-23-175(A)(3) requirement that the minor testifies and is subject to cross examination on the elements of the offense and the making of the videotape. App. 350.

At the PCR hearing trial counsel testified that she did object to the admission of the forensic interview on constitutional grounds both during a pretrial argument and contemporaneously when the state moved to admit the videotape. App. 404-406. Trial counsel stated that her argument was based in part on the fact that Petitioner was denied a chance to cross-examine the minor after reviewing the videotape in court.<sup>3</sup> App. 406. On cross examination trial counsel admitted that she did not make any argument or objection regarding the

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<sup>2</sup> Here the state acknowledges that but for the improperly admitted videotape there was no evidence from which a jury could find Petitioner guilty.

<sup>3</sup> The constitutional objections, as well as the order of presentation of the video and minor's testimony objection, have been repeatedly held without merit by both this Court and the Court of Appeals. See, State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015); State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011).

foundation for admissibility of the videotape pursuant to S.C. Code § 17-23-175(A)(3). App. 419-420.

In the order of dismissal, the PCR court ruled that trial counsel was not deficient “where the record shows counsel objected to the admission of the videotaped interview pursuant to S.C. Code Ann. § 17-23-175 during trial on confrontation grounds – the very issue now raised to this court.” App. 454. The court found trial counsel “adequately addressed the forensic interview and did what she could to prevent its admission at trial.” App. 455.

### *Discussion*

The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by this Court. It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); *see also* Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001); State v. Johnson, 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct.App.2001); *accord* Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the

statute.” State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) (quoting Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

S.C. Code §17-23-175(A) states in relevant part:

(A) In a general sessions court proceeding...an out of court statement of a child is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview if the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) **the child testifies at the proceeding *and* is subject to cross-examination on the elements of the offense and the making of the out-of-court statement;** and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(Emphasis added).

Under the plain meaning of the statute it requires that the minor testifies on direct examination to the elements of the offense and the making of the out of court statement *and* be subject to cross-examination on the elements of the offense and the making of the out of court statement. It is illogical to conclude that the intent of the statute is to simply call the minor to stand, elicit no direct testimony regarding the allegation or the making of the videotape, submit the minor for cross-examination and expect defense counsel to produce the necessary testimony to establish the foundation for the videotape.

In State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014), then Chief Judge Few acknowledged that while prior inconsistent statements are generally inadmissible as improper bolstering, the intention of the legislature in the creation of S.C. Code § 17-23-175 was to specifically allow for bolstering in sexual assault cases. He wrote:

S.C. Code § 17-23-175 “reflects our General Assembly’s recognition that the central issue in the trial of almost any sexual assault case involving a child is whether the victim’s testimony is truthful and accurate. *It represents our General*

*Assembly’s policy determination that a forensic interview should be admissible to enhance the credibility of a child sexual assault victim’s trial testimony – bolster – if it meets the criteria of the statute. Under section 17-23-175 and the policy underlying it, therefore, the tendency of a forensic interview to enhance the credibility of the victim’s testimony is precisely the reason that admission of the interview is proper.”*

Perry, 410 S.C. at 209, 763 S.E.2d at 612 (Few, C.J. concurring in part, and dissenting in part) (Emphasis added). However, the credibility of the minor’s testimony cannot be bolstered if the minor never testifies about the alleged offense.

The record shows that trial counsel only objected to the admission of the videotape on various constitutional grounds. At no time did trial counsel raise the specific objection to the foundation for admissibility. The onus cannot be on a defendant to elicit potentially harmful testimony from the minor for the first time on cross examination and thereby satisfy the foundational requirements in the statute. The state, in seeking to admit the videotape, has the burden of proving the admission meets the statutory safeguards enacted in S.C. Code § 17-23-175, one of which is that the minor testifies to the elements of the offense and the making of the videotape.

The legislature has made “specific allowances” for the admission of out-of-court statements by child victims in criminal sexual conduct cases when the requirements of section 17-23-175 are satisfied. Perry, 410 S.C. at 205 (citing State v. Whitner, 399 S.C. 547, 558-59, 732 S.E.2d, 861,867 (2012)). A thorough review of the cases addressing S.C. Code § 17-23-175 over the past decade reveal that in every instance the minor testified, on direct, to the alleged abuse and the making of the forensic interview as required by the statute.<sup>4</sup> If the state is unable to bring out the necessary facts on direct examination, then the videotape is not admissible.

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<sup>4</sup> (See, e.g., State v. Legg, 785 S.E.2d 369 (2016); State v. Anderson, 776 S.E.2d 76 (2015); State v. Whitner, 732 S.E.2d 861 (2012); State v. Jennings, 716 S.E.2d 91 (2011); State v.

The videotapes at issue in these cases are still hearsay and it is only through the narrow statutory creation of S.C. Code § 17-23-175 that their admissibility is allowed under precise circumstances. To suggest that a videotape is admissible in such circumstances as the one in the present action would pervert the intent of the legislature and allow unsworn pre-recorded testimony to replace the need for sworn, in court testimony that is subject to cross-examination and other due process safe guards.

The trial court made its pretrial ruling allowing admission of the recorded interview based exclusively on the assertion by the solicitor that the minor would testify and be subjected to cross-examination as required by the statute. If the minor were not to testify or, as occurred in this case, could not testify as a competent witness because she had no memory of the defendant or the alleged incident, then the trial court must exclude the recorded interview because it fails to meet one of the four requirements of admission, specifically S.C. Code § 17-23-175(A)(3). To allow a videotape into evidence when it did not meet the foundational requirements would be an abuse of discretion by the trial court. Unfortunately, the trial court did not have the opportunity to make this ruling because trial counsel failed to raise the proper objection.

The PCR court's order of dismissal erroneously found that Petitioner was challenging the constitutionality of the statute. That is incorrect. The specific challenge was that the statutory conditions required for admission of the recording were not met because the minor did not testify at the proceeding to the elements of the offense and the making of the out-of-court statement. This foundational argument should have been made after the minor testified on direct

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Stahlnecker, 690 S.E.2d 565 (2010); State v. White, 784 S.E.2d 695 (2016); State v. Perry, 763 S.E. 2d 603 (2014); State v. Hill, 715 S.E.2d 368 (2011); State v. Russell, 679 S.E.2d. 542 (2009); State v. Bryant, 675 S.E.2d 816 (2009)). Counsel for Petitioner would also note that there are numerous unpublished opinions dealing with S.C. Code § 17-23-175 where the child testified to the elements of the offense. See, e.g., The State v. Mozeak, No 2018-UP-209.

examination and failure to do so on the part of trial counsel constitutes ineffective assistance of counsel.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether 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.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Both prongs of the Strickland test were met in this case. Failure to make the proper objection to the admission of the videotape where the foundation was not properly raised was ineffective assistance of counsel. The error on the part of trial counsel was ineffective assistance of counsel that resulted in extreme prejudice to Petitioner because the minor never testified to the allegation at trial. The state sought to convict Petitioner solely through the admission of the prior consistent statement in the forensic interview which was improper and inconsistent with the intent of the legislature in enacting S.C. Code Ann. § 17-23-175 with explicit foundational requirements.

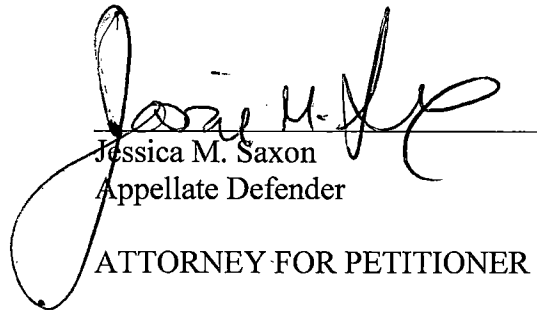
During the directed verdict motion the state acknowledged that the only piece of evidence against Petitioner was the videotape that was entered pursuant to S.C. Code Ann. § 17-23-175.

The state argued the forensic interview was the format for allowing some children to make the disclosure to the jury. This statement flies in the face of the legislative intent of the statute which is to permissibly bolster the live trial testimony of the minor. However, in this case there was no live trial testimony of the minor because she clearly did not remember Petitioner or the alleged incident. Consequently, the only evidence presented against Petitioner to the jury was *the unsworn, unchallenged interview and that is what the jury based its verdict on*. If trial counsel had made the proper objection to the foundation, the videotape would not have been admitted and the state would not have been successful on a directed verdict motion, much less have been able to secure a conviction. It is without question then that Petitioner was highly prejudiced by trial counsel's failure to make the foundational objection.

In sum, counsel was deficient for failing to object to the forensic interview on foundational grounds, specifically failure to meet the requirements of S.C. Code Ann. § 17-23-175(A)(3). Petitioner was prejudiced because the videotape was the only evidence presented against him which allowed the state to impermissibly secure a conviction through the improper admission of the forensic interview. See, Strickland v. Washington, 466 U.S. 668 (1984).

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

  
Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of September, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

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MICHAEL EDWARD WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

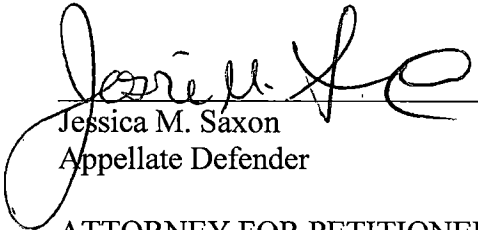
RESPONDENT

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CERTIFICATE OF SERVICE

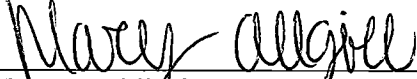
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, 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 Michael Edward Williams, #283356, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 16th day of September, 2019.

  
Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 16th day of September, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.