

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge  
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**Apr 30 2020**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

PETITIONER,

V.

FREDERICK R. CHAPPELL,

RESPONDENT

APPELLATE CASE NO 2016-000283  
—————

RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
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<sup>1</sup> Thompson v. State, 432 S.C. 235, 814 S.E.2d 487 (2018).

## **QUESTION PRESENTED**

The grant of PCR relief did not translate into a faulty prejudice analysis in this case because the Court of Appeals correctly applied the approved prejudice analysis announced in Thompson<sup>2</sup> by balancing the prejudicial impact of counsel's error in failing to object to the expert's improper bolstering testimony against the state's evidence, which lacked physical proof and hinged on the testimony of the minor child (along with her video which was an extension of her testimony) and the mother's time and place testimony, and properly granted PCR relief.

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<sup>2</sup> Thompson v. State, 432 S.C. 235, 814 S.E.2d 487 (2018).

## STATEMENT OF THE CASE

Respondent Frederick Robert Chappell was convicted of lewd act upon a child and first degree criminal sexual conduct per jury trial held during the August 2012 term of the Greenville County General Sessions Court before Judge D. Garrison Hill, who sentenced respondent to imprisonment for a period of fifteen years. Susannah C. Ross represented respondent at trial, and Assistant Solicitor L. Mark Mayer appeared on behalf of the state. App. 1 - 273. Respondent appealed, and after briefs were filed, his convictions and sentences were affirmed. Supp. Appendix. 1 – 14. See State v. Chappell, Unpublished Opinion No. 2014-UP-272 (Ct. App. June 30, 2014). See Supp. Appendix 15 – 17. Assistant Appellant Defender Katherine Haggard Hudgins, of the S.C. Office of Appellate Defense, represented respondent on direct appeal.

On November 5, 2014, respondent filed a PCR application with the Greenville County Office of the Clerk of Court. App. 275 - 281. The petitioner filed a return dated March 31, 2015, requesting that a PCR hearing be held in the case. App. 282 – 285. A PCR hearing was held on December 17, 2015, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 287 – 306. Respondent was present at the PCR hearing and represented by Brian P. Johnson, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On January 14, 2016, Judge Gravely issued an Order of Dismissal therein denying and dismissing respondent's allegations of ineffective assistance of trial counsel in the case. App. 308 – 312. Respondent appealed Judge Gravely's Order of Dismissal and filed a petition for writ of certiorari on October 3, 2016, which was granted on May 2, 2018, by Order of the South Carolina Court of Appeals. After further briefing and oral argument, the Court of Appeals reversed and granted PCR relief to respondent. See, Chappell v. State, Opinion No. 5704 (S.C. Ct. App. filed December 31, 2019). Petitioner appealed. This brief of respondent follows.

## ARGUMENT

The grant of PCR relief did not translate into a faulty prejudice analysis in this case because the Court of Appeals correctly applied the approved prejudice analysis announced in Thompson<sup>3</sup> by balancing the prejudicial impact of counsel’s error in failing to object to the expert’s improper bolstering testimony against the state’s evidence, which lacked physical proof and hinged on the testimony of the minor child (along with her video which was an extension of her testimony) and the mother’s time and place testimony, and properly granted PCR relief.

At trial, the minor female testified that when she visited her grandmother, her grandmother’s boyfriend (respondent) touched her “bottom” and made her touch his “private.” App. 103, 1.24-p. 117, 1.7; App. 123, lines 18-25. The respondent did not testify at trial.

Shaun Galloway Williams answered as follows when asked if children lie about sexual abuse:

Children don’t often lie about sexual abuse incidents. They don’t often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is—you know, has been interviewed by law enforcement, and they’ve been—talked to DSS, and they’ve talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some—someone is going to—at some point, the child is going to—it’s going to become apparent among those interviewers. They’re just not sophisticated enough to carry a story out over multiple interviews like that. App. 189, 1.22--p. 190, 1.9.

On PCR appeal, the following issue was raised:

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert’s testimony that informed the jury that children do not lie about sexual abuse incidents because it constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state’s case as well.

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<sup>3</sup> Thompson v. State, 432 S.C. 235, 814 S.E.2d 487 (2018).

The Court of Appeals held that trial counsel was ineffective in failing to object when the testimony of expert witness that could **only** have been interpreted as improper and inadmissible bolstering. The Court of Appeals divided its opinion issued in this case into the following two distinct and separate sections:

- A.) Deficient Performance, and
- B.) Prejudice

Apparently, petitioner does not challenge section A of the Court's opinion and concedes that trial counsel was ineffective in failing to object to the expert's testimony that could **only** have been interpreted as improper bolstering testimony. In addition, the Court of Appeals properly held in this case that not only did the expert's testimony convey the message that she believed the minor did not lie, but further that the jurors should believe the minor also, which again meant that there was no other way to interpret the expert's testimony as anything other than improper bolstering.

However, rather than attacking the finding of ineffective legal assistance, petitioner instead attacks the Court of Appeals' prejudice analysis used in the case. A summary of petitioner's position follows:

[T]hat the Court of Appeals did not evaluate the evidence of the respondent's alleged guilt in proportion to the error of improper bolstering in assessing whether there was a reasonable likelihood of a different outcome of the trial but for counsel's error on the proposition that the improper bolstering was minimal in comparison to the respondent's guilt in light of the fact that the victim's mother testified to the jury. See Petitioner's Petition.

At the outset, the Court of Appeals acknowledged the proper prejudice standard in the case by stating the same as follows:

In an ineffective assistance case, “trial counsel’s deficient failure to object to [improper bolstering] testimony does not remove a[] [PCR] applicant’s burden to prove prejudice.” *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492. To establish prejudice, a PCR applicant must show “there is a reasonable probability that, but for [trial] counsel’s [deficient performance], the result of the trial would have been different.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596, (2007). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Then, as required, the Court of Appeals honed in on the specific error of the inadmissible bolstering testimony entered without objection and addressed the assessment of prejudice in this particular circumstance as follows:

The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim.” *Chavis*, 412 S.C. at 110, 771 S.E.2d at 341. The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or “relie[s] solely upon the victim’s testimony to establish the details of the crime....” *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494; *see also Gilchrist v. State*, 350 S.C. 211, 228, 565 S.E.2d 281, 285 (2002) (finding a PCR applicant was prejudiced by improper bolstering testimony because “believing [the bolstered witness] was the only way the jury could convict....”).

In other words, here the Court of Appeals properly found that there was no physical evidence of respondent’s guilt, and therefore, the only evidence presented by the state was the testimony of the minor and a repeat of the minor’s testimony via videotape, and the time and place testimony from the remaining witnesses, including the mother, which added nothing else to the state’s case, and which constituted the state’s case, as juxtaposed against counsel’s error in the case.

Note that in the case at bar, there was no physical evidence presented by the state. Medical Doctor Nancy Ann Henderson examined the minor and found normal results and no signs of abuse. App. 213, 1.20-p.225, 1.13. Note further that the taped interview of the minor by Christie Carlberry (forensic interviewer) was the same as the minor's trial testimony. Counsel for the respondent viewed the taped interview (state's exhibit #1) prior to oral argument and found that not only was this interview a repeat of the minor's testimony, but a far less compelling account by the minor. This tape is labelled state's exhibit #1 and filed with the Court. The minor's mother testified at trial regarding time and place, and so did the for the investigator (Cheryl Cromartie) who testified regarding time and place.

Petitioner makes much of the video and the mother's testimony as evidence that was not weighed by the Court in its prejudicial analysis. To the contrary, the state's case consisted of the minor's testimony (which was re-summarized in the video and was a lesser version of the minor's testimony), the mother's observations via time and place, and the case investigator who could only spoke of time and place, and finally the medical doctor who found no physical evidence of abuse. To conclude, the Court analyzed the state's case, which boiled down to the minor's testimony in a nutshell and time and place witnesses, versus the error of the improperly bolstering. Clearly, there was no other evidence presented by the state outside of the minor's complaint to analyze in the case Witnesses, other than the prosecutrix, who testify in sex cases are limited to the testimony of time and place. Watson v. State 370 S.C. 68, 634, S.E.2d 642 (2006); Rule 801(d)(1)(D) SCRE.

Petitioner's reliance on Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), does not sit entirely and squarely on all fours in connection to the case at bar. For example, there was physical evidence of sexual abuse of the minor in Thompson, but in this case there was no

physical evidence offered that established sexual abuse of the minor, which made the improper bolstering in the case at bar all the more prejudicial. However, to the extent that the prejudicial analysis outlined in Thompson is the current law, the Court of Appeals applied the same.

In Thompson, the Court held that the applicable prejudicial analysis would include the consideration of the overall strength of the state's case apart from the inadmissible evidence that trial counsel failed to object to at trial. In Thompson, the Court held that the properly admitted evidence of guilt was not strong enough to overcome counsel's failure to object to improper bolstering. The Thompson court relied on the same "similar circumstances" in State v. Smith, 386 S.C. 562, 689 S.E. 679 (2010), where the error of improper bolstering was weighed and the Court found no overwhelming evidence of guilt, and then reversed in light of improper bolstering because the sexual misconduct charge hinged on the victim's credibility regarding the identity of the perpetrator. In the case at bar, just as in Thompson, the Court found no evidence of guilt strong enough to overcome counsel's failure to object to improper bolstering.

Here, the Court weighed the strength of the state's case, i.e., 1) the minor's testimony and her video, which were both one in the same as her testimony; and 2) the mother's testimony, which boiled down to time and place evidence; and 3) the lack of any physical evidence presented; and thereby concluded its analysis by finding that the state's evidence in the case at bar did not possess the required overall strength needed to overcome trial counsel's failure to object to inadmissible bolstering and went on to summarize via the following holding:

[We find the outcome of Chappell's trial hinged on the jury's assessment of the victim's credibility because the state presented no physical evidence and the only evidence against [respondent] was the victim's uncorroborated testimony...[and a different outcome] had counsel objected [to improper bolstering].

Petitioner incorrectly places emphasis on the videotape and mother's testimony as shifting the balance (but the same did not) and in effect argued that this would erase the fact that the case boiled down to and hinged on the testimony of the minor. Hence, the above excerpt is proof that the Court in the instant case considered the strength of the state's case, which included a lack of physical evidence, the minor's testimony and her videotape that was a repeat of her testimony, and the mother's time and place testimony balanced against counsel's error in failing to object to the expert's improper bolstering evidence. The Court went on to acknowledge and analyze the balance between the strength of the state's case and the error of admitting improper bolstering in the following excerpt from the Court's holding:

[O]ur courts have found improper bolstering testimony was prejudicial in [cases] in which the state presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime.

With respect to the Briggs<sup>4</sup> case, there was no physical evidence of sexual abuse there so the case turned on the victim's credibility which the court balanced against the state's case, that included several incriminating statements made by the defendant, and ruled nonetheless that those statements were made to fellow inmates whose reliability was suspect, and went on to conclude that prejudice existed to the extent that the trial would have been different if the improper bolstering testimony had not been admitted at trial. Briggs supports the instant Court's ruling in respondent's case.

Clearly, the petitioner's argument that there was no proper prejudice analysis made in the instant case cannot stand simply because the prejudicial analysis resulted in PCR relief for respondent. The Court of Appeals conducted a proper prejudice analysis in the case.

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<sup>4</sup> Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017).

**CONCLUSION**

Based on the foregoing argument, counsel for the respondent requests that petitioner's petition be denied.

s/Wanda H. Carter  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2020.