

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Aug 06 2020**

CERTIORARI TO BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable Thomas A. Russo, PCR Judge

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**S.C. SUPREME COURT**

Appellate Case No. 2019-001196

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ARTHUR FRANKLIN SMITH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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**PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI**

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to object to Investigator Florencio's testimony that he had been told by the alleged victim and his aunt that petitioner was the perpetrator of the sexual abuse, since this testimony was highly prejudicial hearsay, trial counsel erroneously believed it was within a hearsay exception, and the PCR court erred as a matter of law by ruling it was harmless error as cumulative to the testimony of the two State v. Lyle witnesses who claimed petitioner also sexually abused them?

**RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI**

The PCR court correctly concluded Petitioner was not prejudiced by trial counsel’s failure to object to Investigator Florencio’s testimony identifying Petitioner as the perpetrator where the statement was limited to background information and there is no reasonable probability Petitioner would have been acquitted even if the statement had been excluded because the victim’s siblings provided *Lyle* testimony identifying Petitioner as the perpetrator based on the existence of a common scheme or plan.

## STATEMENT OF THE CASE

Arthur Franklin Smith (Petitioner) was arrested on .... In November 2003, the Beaufort County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor (CSC) (App. 282–83).

### **I. First Trial and Subsequent Appeal**

On November 15–16, Petitioner proceeded to a jury trial before the Honorable Jackson V. Gregory and was convicted as indicted. Judge Gregory sentenced Petitioner to twenty years' imprisonment. Petitioner subsequently filed a motion for a new trial and a hearing was held on April 19, 2005. Judge Gregory granted Petitioner's motion, and the State appealed. The Court of Appeals affirmed. This Court subsequently vacated the opinion of the Court of Appeals, finding the State did not have the right to appeal the trial court's decision to grant Petitioner a new trial. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009). (Second Supp. App. 1).

### **II. Second Trial and Subsequent Appeal**

On September 19, 2011, Petitioner proceeded to a second jury trial before the Honorable Roger C. Young, Sr. Gail Lovell, Esquire, represented Petitioner. Assistant Solicitor James Bannon of the Fourteenth Circuit Solicitor's Office prosecuted the case. The jury convicted Petitioner as indicted on September 21, 2011. Judge Young sentenced Petitioner to thirty years' imprisonment. Petitioner appealed.

Appellate Defender Breen R. Stevens represented Petitioner on appeal. The following issues were briefed to the Court of Appeals:

- I. Whether the trial court reversibly erred by permitting testimony of the forensic interviewer regarding the identity of Appellant as the individual who molested the complaining witness during Appellant's trial for criminal sexual conduct with a minor where the trial court previously ruled such identification was impermissible?

- II. Whether the trial court reversibly erred by permitting testimony of the State's expert in the field of sexual deviancy regarding the relationship of the length of delay in an individual's disclosure of sexual abuse and the credibility of such disclosure?
  
- III. Whether the trial court reversibly erred by permitting the Complaining Witness to refresh his recollection by reading his testimony from the previous trial to refresh his recollection after he could not remember specific details of the alleged incident, where the Complaining Witness' prior testimony was tainted by in-court coaching and formed the basis for the first trial court's grant of a new trial?

(Second Supp. App. 9). Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences on December 17, 2014. *State v. Smith*, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). (Second Supp. App. 74). Petitioner's subsequent petition for rehearing and for writ of certiorari to this Court were denied. (Second Supp. App. 99). The case was remitted back to the circuit court on June 30, 2015. (Second Supp. App. 100).

Petitioner timely commenced the underlying PCR action on January 29, 2016. (App. 217). The State submitted its return requesting an evidentiary hearing on June 6, 2016. (App. 224). An evidentiary hearing convened on October 10, 2017, before the Honorable Thomas A. Russo. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Ruston Neely represented the State. On July 12, 2019, the PCR court denied relief and dismissed the action with prejudice. (App. 275). This appeal follows.

## STATEMENT OF FACTS

Victim and his family moved from Buffalo, New York, to Beaufort County, South Carolina in approximately 1997, when Victim was five years old. (App. 64, 80). The parents separated in 1999. (App. 64). Mrs. Smith retained primary custody of the children while Petitioner had generous visitation. (App. 64–65). Petitioner began sexual assaulting Victim during this period of separation. (App. 81–82). Victim who was nineteen at the time of the second trial, was six years old when Petitioner began abusing him and eight when the abuse ended. (App. 84).

Specifically, Victim testified that on “[m]ore than three” occasions during 1999 and 2000, his father “would make me do things to him and do things to me.” (App. 82, 84). He testified his father “would suck my penis and stick his penis in my butt . . . He made me suck his penis too and try to put my penis in his butt also.” (App. 82–83). The sexual abuse always occurred in Petitioner’s house, specifically in Petitioner’s bedroom, when the two of them were alone. (App. 82). Victim testified Petitioner threatened “to kill me or break his bones I told anybody” what was happening. (App. 84). Because he was scared, Victim testified did not tell anyone about the abuse until after he stopped having contact with Petitioner. (App. 84–85).

Victim's two siblings testified Smith also sexually abused them. Victim's older brother (Brother) testified that Petitioner also sexually abused him beginning around age six. (App. 92–93). Brother testified that “multiple times” while the family was living in Buffalo, Petitioner performed oral and anal sex on him and forced him to reciprocate. (App. 118–19). Petitioner threatened to hurt his mother if he told anyone about the abuse. (App. 122–23). Brother testified Petitioner stopped abusing him when they moved to South Carolina when Brother was about eight years old. (App. 120).

Victim's younger sister (Sister) testified Petitioner began abusing her when she was six years old after the family moved to Bluffton.<sup>1</sup> (App. 100–01). She testified that on “countless” occasions, Petitioner forced her to perform oral sex on him and would “touch” her vagina and “butt” with his hands. (App. 101–02). The abuse mainly occurred in Petitioner's bedroom. (App. 101). Petitioner also told her not to tell anyone. (App. 102). Sister testified she was seven years old when Petitioner stopped abusing her. (App. 102).

Beginning in November 2001, Victim and his two siblings lived in the custody of their aunt and her husband. (App. 65). At the time, Victim was "acting out" and exhibiting behavior that was "concerning." (App. 66). Victim then began counseling, and was sent to two different counseling centers because of these behaviors. (App. 67–68). Victim first reported his father's sexual assaults to his aunt in January 2002. (App. 69). After allowing Victim to spend more time in counseling trying to deal with his health issues, she took Victim to file a police report regarding the sexual abuse in May of 2003. (App. 68–69).

Andres Florencio, a criminal investigator for the Beaufort County Sheriff's Office (BCSO) testified Victim and Aunt came to the BCSO in May 2003 and reported that the victim's father sexually assaulted the victim in 1999 and 2000. (App. 56). Florencio testified the BCSO used forensic interviewers from Hope Cottage, a children's advocacy center, to interview child victims of crime. (App. 83). Kendra McIlvee Twitty, a forensic interviewer and counselor at Hope Cottage, explained in detail the techniques and procedures a forensic interviewer uses to interview a child, and testified that Victim disclosed he had been abused.<sup>2</sup> (App. 117–22).

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<sup>1</sup> Petitioner was indicted for first-degree criminal sexual conduct with a minor for molesting Sister and pleaded guilty to the lesser-included offense of assault and battery of a high and aggravated nature. (App. 203).

<sup>2</sup> The trial court conducted a pretrial to determine the admissibility of Victim's statements to Twitty pursuant to section 17-23-175 of the South Carolina Code. The trial court ultimately limited to

## STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court’s findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court’s conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

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Twitty’s testimony to “time and place” in accordance with Rule 801(d)(1)(D), SCRE. (App. 105, 107).

## ARGUMENT

**The PCR court correctly concluded Petitioner was not prejudiced by trial counsel’s failure to object to Investigator Florencio’s testimony identifying Petitioner as the perpetrator where the statement was limited to background information and there is no reasonable probability Petitioner would have been acquitted even if the statement had been excluded because the victim’s siblings provided *Lyle* testimony identifying Petitioner as the perpetrator based on the existence of a common scheme or plan.**

“An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; see *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

**I. Counsel’s failure to object to the challenged statement of Florencio does not constitute deficient performance because the statement was not offered to prove Petitioner sexually assaulted victim; rather, the statement was offered for the limited purpose of providing background information and explaining the investigative actions Florencio took in response.**

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption “by

proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as “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.” A statement is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE. A court may admit evidence, however, including statements made by someone other than the declarant if it is not offered for the truth of the matter asserted and is otherwise relevant. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 173 n.18 (1988); *cf. State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.”).

Here, the challenged statement occurred during the following portion of the State’s direct examination of Florencio:

Q: And when you met with Ms. Solak and [Victim] did — well, what did they report to you, in very general terms?

A: They were there to report that sometime during the time between May, I believe it was [1999] and June of the year 2000, that [Victim] had been sexually assaulted by his father.

(App. 56). Florencio then testified about the subsequent actions he took in conducting the investigation.

As an initial matter, Florencio’s testimony was not offered for its truth—that Petitioner sexually abused Victim. Rather, it was offered for the limited purpose of providing background information and explaining how and why the investigation began. *See State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (“[A]n out of court statement is not hearsay if it is offered for the

limited purpose of explaining why a government investigation was undertaken.” (citing *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985)); accord. *United States v. Dunigan*, 555 F.3d 501, 507 (5th Cir.2009) (“Out-of-court statements offered for another purpose, e.g., providing background information to explain the actions of investigators, are not hearsay.”).

Whether or not the statement was true, the fact that it was made explained the investigative activity Florencio took in response, such as contacting Hope Cottage and scheduling a forensic interview. See 31A C.J.S. Evidence § 365 (“[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said.”) (cited with approval in *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 30–31, 609 S.E.2d 506, 512 (2005)); cf. *Berry v. Warden, S. Ohio Corr. Facility*, 872 F.3d 329, 334 (6th Cir. 2017) (explaining that the detective’s testimony regarding “how he proceeded with his investigation and what he learned from one witness to the next that led him forward” was nonhearsay because it was not offered for its truth).

However, even if Florencio’s statement constitutes inadmissible hearsay, whether Counsel failed to object because she “erroneously believed” the statement fell within a hearsay exception does not in itself render her performance deficient. Rather, the “pertinent question under the first prong of *Strickland* remains whether, after considering all the circumstances of the case, the attorney's representation was objectively unreasonable.” *Bullock v. Carver*, 297 F.3d 1036, 1050–51 (10th Cir. 2002). As discussed above, Florencio did not repeat any statements Victim or Aunt actually made to him. Even if the challenged statement was considered some form of indirect hearsay, Petitioner simply cannot establish that the missed objection amounted to incompetence under “prevailing professional norms.” *Strickland*, 466 U.S. at 688; See also *Harrington v. Richter*,

562 U.S. 86, 105 (2011) (“[W]hile in some instances even an isolated error can support an ineffective assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.” (citation omitted)); *United States v. Haddock*, 12 F.3d 950, 956 (10th Cir. 1993) (“The Sixth Amendment does not guarantee an errorless trial, and prevailing professional norms do not require perfection at trial.” (citation omitted)).

**II. Even if the challenged statement constitutes inadmissible hearsay and trial counsel deficiently failed to object, the PCR court correctly determined Petitioner failed to establish any resulting prejudice because Petitioner was identified as the perpetrator through Brother and Sister’s *Lyle* testimony.**

Under the second, or “prejudice” prong of *Strickland*, the applicant must prove “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a “probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. When evaluating this probability, a reviewing court “should consider the specific impact counsel’s error had on the outcome of the trial” coupled with “the strength of the State’s case in light of . . . the [totality of the] evidence presented to the jury.” *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *accord. Strickland*, 466 U.S. at 695–96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added).

As an initial matter, Petitioner’s contention that the pattern of sexual attacks he perpetrated against each of his children “did not establish a signature crime for purposes of the identity prong of *Lyle*” is a direct appeal issue that has no bearing on whether Petitioner was prejudiced by the identification testimony of Investigator Florencio. (Pet. 10–11). The trial court made the following findings regarding the proffered *Lyle* testimony of Brother and Sister:

Well, I find that the ages of the victims are all roughly in the same age group, the places that the activities took place inside the home, inside the bedroom are the same. In each of the victim's attacks, the types of sex are remarkably similar through each of the three children.

Those are all issues that clearly show that there is a common thread of types of victims that the defendant preferred and the types of places, the types of sex. The same modus operandi, if you would, are all remarkable I [*sic*] similar.

The identity of the defendant being in question is also an issue in the case, and each of the defendants, or each of the children, were able to testify that the father was, in fact, the perpetrator of the acts. So I find that there is clear and convincing evidence that this prior conduct took place and that there is a probative value to it, which is outweighed by any prejudicial effect, so I would allow those children to testify.

(Supp. App. 40–41). Whether Petitioner likes it or not, Brother and Sister’s testimony was properly admitted as probative on the issues of common scheme or plan and identity.

In asserting the PCR court erred as a matter of law, Petitioner relies heavily on this Court’s opinion in *Jolly v. State*, which is both inapplicable to this case and no longer good law. In *Jolly*, this Court held that “[i]mproper corroboration testimony that is *merely cumulative to the victim's testimony* . . . cannot be harmless because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.” 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis in original).

This Court has since overruled *Jolly* to the extent it imposed a per se rule precluding a finding of harmless error and clarified that “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.” *Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (citing *State v. Jennings*, 394 S.C. 473, 482, 716 S.E.2d 91, 95–96 (2011) (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting)). “Similarly, in a PCR case, 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.

Petitioner contends the PCR court erred as a matter of law by finding Petitioner failed to show prejudice based on the *Lyle* testimony of Brother and Sister identifying Petitioner as the perpetrator. (Pet. 10). However, the PCR court properly considered the *Lyle* testimony in determining that, even without Florencio's alleged hearsay statement, Petitioner would have been identified as the perpetrator through evidence other than Victim's testimony. The trial court properly admitted Brother and Sister's testimony as circumstantial evidence of Petitioner's guilt as to Victim based on the common plan or scheme.

In *State v. Tutton*, the Court of appeals explained the following:

[C]ommon scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self-evident—where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.

354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003).

“In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696, 104) (stating “a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”); *cf. Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492–93 (2018) (explaining that the reviewing court must consider the strength of the State’s case apart from the inadmissible evidence in order to gauge prejudice). Accordingly, Petitioner has failed to demonstrate how trial counsel’s failure to object to Investigator Florencio’s statement “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

**CONCLUSION**

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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