

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Carmen T. Mullen, Circuit Court Judge

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GARY R. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000442

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PETITION FOR WRIT OF CERTIORARI

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**Oct 01 2020**

S.C. SUPREME COURT

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### **ISSUE PRESENTED**

Did the PCR court err by ruling, in petitioner's trial for criminal sexual conduct with a minor first degree (CSC, minor-1st), that petitioner was not prejudiced by defense counsel's failure to preserve for appellate review his pretrial objections to petitioner's prior conviction for CSC, minor-1st and his status as a sex offender being revealed to the jury where petitioner's pre-trial stipulations to those elements of the offense were only meant for sentencing purposes if petitioner were convicted of the underlying offense, and counsel waived the appellate issue by not objecting to publication of the stipulation before the jury?

## STATEMENT

### **Procedural history**

On November 26, 2013, petitioner was indicted by a Greenville County grand jury for disseminating obscenity to a minor and CSC, minor-1st. App. 508-11. On January 13, 2014, petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. App. 1. Randall Chambers represented petitioner, and Christy Sustakovitch, assistant solicitor, represented the state. App. 1.

On January 15, 2014, the jury found petitioner guilty as indicted. App. 375, ll. 9-17. Judge Hill sentenced petitioner to life without the possibility of parole for CSC, minor-1st and a consecutive term of five years' imprisonment for disseminating obscenity to a minor. App. 380, ll. 9-23.

Petitioner filed a timely notice of appeal. Appellate counsel, Katherine Hudgins, argued the trial court erred in failing to require the state to accept defense counsel's suggested stipulation that petitioner had a prior conviction listed under § S.C. Code 23-3-430 because the name and nature of the crime was not necessary to prove CSC, minor-1st and the jury learning that petitioner had a prior conviction for CSC, minor-1st was more prejudicial than probative. Supp. App. 2.

The South Carolina Court of Appeals issued an unpublished opinion affirming petitioner's convictions pursuant to Rule 220(b), SCACR, and *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007), "finding defense counsel's statement that he had 'no objection' to the introduction of evidence at trial constituted a waiver of any issue he previously had with the same evidence". *State v. Thompson*, Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015). Petitioner filed a petition for rehearing, and the petition was denied. Supp. App. 46-50; 52. Subsequently, petitioner filed a petition for a writ of certiorari in this Court. Supp.

App. 53-66. On November 9, 2016, the petition for writ of certiorari was denied. Supp. App. 68.

Thereafter, petitioner filed an application for PCR on October 13, 2017. App. 382-88. An evidentiary hearing was held before the Honorable Carmen T. Mullen on April 17, 2018. App. 398. Susannah C. Ross represented petitioner, and Deshawn Mitchell, assistant attorney general, represented the state. App. 398.

On July 24, 2019, Judge Mullen signed an order denying petitioner's application for PCR. App. 452-82. The court found trial counsel was not ineffective for failing to make a contemporaneous objection to the stipulation that petitioner had a prior conviction for CSC, minor-1st and petitioner's status as a sex offender being published to the jury because the probative value of the evidence, that it established an element of the offense, was not substantially outweighed by the danger of unfair prejudice. App. 468. The court found petitioner did not demonstrate that he was prejudiced by trial counsel's failure to make a contemporaneous objection to the stipulation of petitioner's prior CSC, minor-1st and status as a sex offender being published to the jury. App. 467.

The court also found trial counsel was not ineffective for failing to request to bifurcate the trial because there was no authority authorizing bifurcation of criminal charges in this context. App. 474.

On August 8, 2019, counsel for petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRPC, arguing the court's order failed to consider *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019), when it found trial counsel was not ineffective for (1) failure to contemporaneously object to the stipulation that petitioner previously had been convicted of CSC, minor-1st and petitioner's status as a sex offender; and (2) failure to request to bifurcate

petitioner's trial so as to avoid the jury knowing of petitioner's prior CSC, minor-1st conviction. In the motion, PCR counsel argued the trial court's Rule 403, SCRE analysis and limiting instruction given in petitioner's case was substantially similar to that in *Cross*. However, defense counsel failed to request that his trial be bifurcated or make a contemporaneous objection when the stipulation was entered into evidence and failed to object to the court's limiting instruction, which amounted to clear error that prejudiced petitioner. Additionally, PCR counsel contended, the order failed to address the fact that a limiting instruction did not cure the overwhelming danger of unfair prejudice arising from the introduction of petitioner's prior CSC, minor-1st conviction and status as a registered sex offender and that the court should alter its order and grant petitioner relief.

On February 26, 2020, Judge Mullen signed an order denying petitioner's motion to alter or amend the judgement in part and granting in part. App. 494-507. The court granted petitioner's motion in part, to analyze petitioner's claims in light of *Cross*. The court denied petitioner's motion and found the *Cross* decision did not require departing from its finding petitioner failed to show prejudice. App. 500. The court found the decision in *Cross* did not stand for the proposition that evidence of a prior conviction was inadmissible but, *Cross* merely regulated the timing and method of the admission of this type of evidence. Therefore, the court found the issue would not have been resolved in petitioner's favor even if defense counsel had objected contemporaneously to the stipulation of petitioner's prior conviction for CSC, minor-1<sup>st</sup>. App. 500-01.

The court found trial counsel was not deficient for failure to request that petitioner's trial be bifurcated because it was unreasonable to expect defense counsel to have anticipated the Court's decision in *Cross*. App. 505. This petition for a writ of certiorari follows.

## ARGUMENT

The PCR court erred ruling, in petitioner's trial for criminal sexual conduct with a minor first degree (CSC, minor-1st), that petitioner was not prejudiced by defense counsel's failure to preserve for appellate review his pretrial objections to petitioner's prior conviction for CSC, minor-1st and his status as a sex offender being revealed to the jury where petitioner's pre-trial stipulations to those elements of the offense were only meant for sentencing purposes if petitioner were convicted of the underlying offense, and counsel waived the appellate issue by not objecting to publication of the stipulation before the jury.

### **Relevant facts**

In 2007, minor, then six years old, was referred by the Department of Social Services (DSS) to the Children's Advocacy Center in Greenville because of concerns that minor was exhibiting sexualized behavior. App. 209, ll. 8-25. Minor was interviewed and examined by a Dr. Nancy Henderson. Minor's physical exam came back normal, and she indicated during her interview and to Henderson that nothing had happened. App. 141, l. 14-143, l. 8; 212, ll. 3-6.

In 2010, minor, now nine years old, alleged her paternal uncle had sexually abused her and was again referred to the Children's Advocacy Center for an interview and examined by Dr. Henderson. App. 281, l. 17-282, l. 5. During the course of the investigation, minor claimed her mother, Jessica Taylor, instructed her to say her uncle sexually abused her, but in fact it was petitioner, her stepfather, that was sexually abusing her. During the interview, minor told forensic interviewer, Tricia Austin, petitioner had been molesting her for three years including, oral, vaginal, and anal contact. App. 130-134; 146, l. 3-148, l. 7. Minor also alleged petitioner had shown her pornographic videos. App. 135, ll. 5-25.

During pretrial motions, defense counsel moved to preclude the state from prosecuting petitioner pursuant to S.C. Code Ann. § 16-3-655(A)(2), arguing there was no question petitioner should be prosecuted pursuant to S.C. Code Ann. § 16-3-655(A)(1) in light of the fact that minor was unquestionably under the age of eleven at the time she was allegedly abused.<sup>1</sup> App. 7-8. Defense counsel contended the state wanted the prior conviction admitted “because it makes it a virtual certainty that they are going to convict [petitioner].” App. 17, ll. 18-22. Defense counsel requested that if the court denied its motion, the defense be allowed to stipulate to the existence of petitioner’s qualifying conviction *in camera* and preclude the state from presenting the stipulation to the jury. App. 13, ll. 2-2-9.

The solicitor, in response, argued the state was entitled to proceed with its prosecution under any theory supported by the evidence just as a prosecution for first-degree burglary involving prior convictions as an aggravating circumstance would be permitted to go forward even if other aggravating circumstances could also be proven aside from the evidence of two or more prior qualifying convictions. App. 9-12.

The trial court denied the motion to preclude the state from prosecuting petitioner under S.C. Code Ann. § 16-3-655 (A)(2) and declined to prevent the jury from hearing the stipulation. The court found the probative value of petitioner’s prior conviction “essential” and found the

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<sup>1</sup> South Carolina Code § 16-3-655(A) provides:

A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

S.C. Code Ann. § 16-3-655.

situation in petitioner's case was distinct from the situation in *Old Chief v. United States*, 519 U.S. 172 (1997). The trial judge stated he would give the jury a limiting instruction to cure any potential prejudice. App. 23-25.

During the state's opening statement, the solicitor informed the jury that the evidence would show petitioner had "previously been convicted of a certain crime and is on the sex registry . . . he's been convicted, rather, of the crime of criminal sexual conduct with a minor in the first degree." App. 115, ll. 18-23.

Later the stipulation regarding petitioner's prior conviction and sex offender status was admitted without objection from the defense. App. 165. The trial court prefaced the stipulation with the following instruction to the jury:

This stipulation you're about to read can only be used by you, the jury, for a very limited purpose. And that purpose is simply on the issue of whether the state has met its burden of proof as to an element of the crime of criminal sexual conduct with a minor in the first degree. And you can give this stipulation whatever weight you decide to in that regard. You may not consider this stipulation for any other purpose. Your oath forbids you, for example, from using the evidence of this stipulation as proof of whether [petitioner] committed the acts for which he's on trial here today, except on that issue of that element of the offense. So the law doesn't allow you to use the stipulation as proof of [petitioner's] guilt for any charge that he's on trial for here today, except for deciding whether the state has met its burden of proof about a prior offense.

App. 166-67. Following the limiting instruction, the court read into evidence the stipulation to the jury, which stated, petitioner had been convicted of CSC, minor-1st and was currently on the South Carolina Sex Offender Registry. App. 167.

At the conclusion of trial, the court gave the jury the following instruction:

You have heard evidence that [petitioner] was convicted of a crime other than the one for which he is now on trial. This testimony, if you conclude it is true, may only be considered by you for the limited purpose for which I told you that it could be. And that is whether the state has met its burden of proof as to an element of the crime for criminal sexual conduct in the first degree with a minor. You may not consider it for any other reason or any other purpose. You may not

and must not consider this evidence of the commission of another offense as proof of [petitioner's] guilt of the crime that we are charging--guilt of the crime that he is on trial for here today, other than to the extent I've told you that you could do so.

App. 365.

The jury returned a guilty verdict on both CSC, minor-1st and disseminating obscenity to a minor. App. 375. Petitioner was sentenced to life without the possibility of parole for CSC, minor-1st and a consecutive term of five years' imprisonment for disseminating obscenity to a minor. App. 380, ll. 9-23.

At the PCR hearing, defense counsel Chambers testified that, in hindsight, "it would have been a good idea" to bifurcate the trial but that he had not considered requesting the court bifurcate petitioner's trial. App. 419, ll. 8-11. Chambers said that, at trial, he believed his pretrial motion preserved the issue but admitted that he should have made a contemporaneous objection to the stipulation of petitioner's prior conviction for CSC, minor-1st and his status as a sex offender. Chambers recalled he was "worried" about the prior conviction coming in. Chambers believed that there was no way petitioner could get a fair trial if the jury knew he had been convicted of a prior sex crime. Chambers went further and declared that if petitioner's convictions had been affirmed on appeal because of his failure to properly preserve the issue that petitioner "certainly deserve[d] a new trial." App. 421, l. 21-422, l. 10. Chambers also said he failed to take exception to the limiting instruction given by the trial court and he "probably should have." App. 428, ll. 8-13.

PCR counsel argued that Chambers' failure to request to bifurcate petitioner's trial and failure to contemporaneously object to petitioner's prior conviction and status as a sex offender prejudiced the jury beyond its capability to be fair and impartial in his case. App. 438-442.

## Discussion

Defense counsel was admittedly deficient for his failure to contemporaneously object when the stipulation regarding petitioner's prior conviction for CSC, minor-1st and his status as a sex offender was introduced as evidence. During pretrial motions, defense counsel correctly argued that if the jury learned petitioner had previously been convicted of CSC, minor-1st, its probative value would be substantially outweighed by its prejudicial effect. Defense counsel requested that if the court denied its motion, the defense be allowed to stipulate to the qualifying conviction *in camera* and have not have the evidence go to the jury. The court ruled against defense counsel, but all would not have been lost had defense counsel followed through and contemporaneously objected when the stipulation was admitted.

The PCR court incorrectly found defense counsel's failure to contemporaneously object to this evidence did not prejudice petitioner. If defense counsel had not failed to contemporaneously object to the stipulation, this issue would have been preserved for appellate review and petitioner would have been successful on appeal. *See Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 801 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing the "trial court's ruling through the same lens that would be applied on appeal . . .") (citation omitted).

In *State v. Cross*, the Court addressed this issue in a factually similar case. In *Cross*, the Court reversed Cross's convictions for CSC, minor-1st and lewd act on a minor and remanded the case to the circuit court for a new trial, holding the trial court had the authority to grant Cross's motion to bifurcate the trial, and the trial court committed an error of law when it denied Cross's motion to bifurcate the trial. *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019).

In that case, the Court balanced the state’s obligation to prove the elements of the crime charged and “the proper application of the South Carolina Rules of Evidence to the introduction of evidence necessary to prove one of those elements.” *Cross*, at 473-74, 832 S.E.2d at 285. The Court reasoned that, while the evidentiary issue was, on the surface, similar to evidentiary issues that are present in first-degree burglary cases, *Cross* was distinct because of the “inherently prejudicial stigma a prior sex-related offense undoubtedly carries.” *State v. Cross*, 427 S.C. 465, 478, 832 S.E.2d 281, 288 (2019). Additionally, the Court concluded, “the trial court’s limiting instruction did not cure the overwhelming danger of unfair prejudice arising from the introduction of Cross’s 1992 conviction.” *Id.* at 483, 832 S.E.2d 290.

In *Cross*, the Court found the admissibility of “Cross’s prior conviction remains subject to a trial court’s Rule 403 gatekeeping duty to determine *whether and when* that evidence should be admitted.” *Id.* at 477, 832 S.E.2d 287. (emphasis added). Rule 403, SCRE, provides the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, etc.

Petitioner was indicted in 2013, and his trial in January 2014 was three months after Cross’s October 2013 trial, where Cross moved to bifurcate the trial. The PCR court’s order noted *Cross* had not yet been decided at the time of petitioner’s evidentiary hearing and the fact that it is not a requirement of effectiveness that an attorney be a “trailblazer in the courts’ acceptance of new legal and procedural practice.” However, the requirement that an attorney timely object to evidence is not new, and petitioner’s case might have been decided on appeal in the same manner as Cross’s had defense counsel properly preserved the issue for appeal. *See* Rule 103(a)(1), SCRE.

Like Cross, petitioner was convicted of CSC, minor-1st in violation of S.C. Code Ann. § 16-3-655 (A)(2). Similarly, evidence of petitioner's prior conviction was relevant because it was an element the state had to prove beyond a reasonable doubt. Nevertheless, according to *Cross*, the evidence was still subject to the balancing of Rule, 403, SCRE and, just as the Court determined in *Cross*, evidence of petitioner's prior conviction is not probative of whether petitioner committed criminal sexual conduct in this case. The prejudicial effect of evidence that petitioner had a prior conviction for a sex crime and was a registered sex offender substantially outweighed its probative value.

Unlike Cross, petitioner's convictions were affirmed, and the same appellate issue was found to be waived due to defense counsel's failure to contemporaneously object to the introduction of the stipulation of petitioner's prior CSC, minor-1st conviction and his status as a sex offender.

In post *Cross* days, it is understood that when evidence of petitioner's qualifying conviction(s) are an element of the crime charged and the defense moves to bifurcate the trial, the court must bifurcate. The second phase of a bifurcated trial is substantially the same in that the state would be allowed to present evidence of the qualifying conviction in order to satisfy its burden. However, the jury would not learn of the prior conviction until it had deliberated on whether the state proved beyond a reasonable doubt that the defendant had committed criminal sexual conduct in the case. As such, the state would likely agree to a stipulation rather than a bifurcated trial, knowing that the Court disfavors the practice of admitting a prior sex conviction before the jury while trying to prove the offense for which the defendant is on trial.

Here, had defense counsel contemporaneously objected when the stipulation of petitioner's prior CSC, minor-1st and his status as a sex offender was admitted in front of the

jury and properly preserved the issue for appellate review there is a reasonable likelihood petitioner would have been successful on appeal.

**CONCLUSION**

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.



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Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2020.