

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2014-CP-32-04479

Appellate Case No. 2016-001917

State of South Carolina, Respondent,

v.

Glenn E. Vanover, Appellant.

**PETITION FOR REHEARING
And *EN BANC* CONSIDERATION**

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SC Court of Appeals

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, Petitioner asks the Court for a rehearing. Furthermore, Petitioner specifically requests *En Banc* consideration pursuant to Rule 219(b) of the South Carolina Rules of Appellate Procedure.

“The purpose of [] a petition is to aid the court in deciding correctly the case heard by it.” *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). A petition is not designed to give Petitioner an opportunity to have a second trial, and such is not what is sought herein. *Id.* Rather, to prevail on a petition for rehearing, Petitioner must demonstrate how the Court overlooked or misapprehended its arguments. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). For the reasons set forth herein, the Majority has misapprehended several of Petitioner’s arguments and Rehearing *En Banc* should properly be granted.

Rule 608

The Court’s majority Opinion concludes that Rule 608 of the South Carolina Rules of Evidence does not afford Petitioner any relief in the instant matter. Rule 608 provides that “[t]he credibility of a witness may be attacked or supported by the form of opinion or reputation.” See Rule 608(a), SCRE. “Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, ... may not be proved by extrinsic evidence.” See Rule 608(b), SCRE. The Majority acknowledges that counsel could have cross examined Daughter regarding the allegations but the Rule precludes extrinsic evidence. In making this determination, the Majority misapprehends and overlooks Petitioner’s argument that counsel, having properly been effective in representing Petitioner, would have been had knowledge of the allegations against Doe. Armed with this information, counsel would have laid the proper foundation to support the theory of the case, that Daughter utilizes false allegations of a sexual nature to avoid

punishment. Counsel would have carefully questioned regarding her conduct in class, the punishment levied by Doe against Daughter, and thereafter inquired of Daughter regarding the allegations made against Doe. If Daughter denied the punishment, her recollection could be refreshed with documentation of the same. See Rule 612, SCRE. With knowledge of the allegations against Doe, counsel could have properly injected her reputation for truthfulness into the trial even without proving the same by extrinsic evidence. Counsel was ineffective for failing to do so and Petitioner was prejudiced as a result. Because the argument presented was overlooked or misapprehended, rehearing is appropriate.

Prior Bad Act

The Majority also utilizes *State v. Boiter*, 302 S.C. 381, 383-84, 396 S.E.2d 364, 365 (1990), to determine that the prior allegation against Doe was not similar enough to the instant allegations, or the prior recanted allegations, to merit introduction and that “there is no reasonable probability a trial court would have found Daughter’s allegations against Doe to be probative evidence of motive, a common scheme or plan, or any other ground recognized by Rule 404(b).” Majority Opinion, at 8. In making this determination, the Majority misapprehends and overlooks two key points – the Daughter’s conduct in both instances was very similar and demonstrate her “intent” to avoid punishment.

Boiter notes that “[e]vidence of prior false accusations by a complainant may be probative on the issue of credibility.” *Boiter*, 302 S.C. at 383, 396 S.E.2d at 365. While the Supreme Court did determine that trial counsel should initially determine that the prior accusation was false, in *Boiter*, counsel presented no evidence of such falsity. *See id.*, 302 S.C. at 383-84; 396 S.E.2d 365. In the instant matter, however, Doe testified as to the falsity of the matter. *Boiter* instructs thereafter that the trial court evaluate the remoteness in time and the similarity of the accusations

to determine relevancy. *Id.* The Majority focuses on the “similarity” factor¹ and suggests that the “events are vastly more different than they are similar.” Majority Opinion at 9. As recognized by the Dissent, however, both the allegations against Petitioner and Doe were “allegations of inappropriate conduct of a sexual nature that Daughter claimed were directed at her.” Dissent at 2. Additionally, “Petitioner’s entire defense rested on the foundation that Daughter had made up the allegations against him to avoid punishment and that she had recanted the allegations about the conduct.” *Id.* Viewed in the manner, the allegations are extremely similar to the instant allegations, the prior recanted testimony, and consistent with the limited defense presented. Furthermore, as *Boiter* acknowledges, [t]he right to confront witnesses, guaranteed by the sixth and fourteenth amendments, includes the right of cross-examination to attack general credibility or to show possible bias or self-interest in testifying.” *See Boiter*, 302 S.C. 381, 383; 396 S.E.2d 364 (citations omitted). “Although the Confrontation Clause ‘tips the scales’ in favor of permitting cross-examination if it could reasonably be expected to have an effect on the jury, a court may prohibit cross-examination for impeachment purposes when the probative value of the evidence that the defendant seeks to elicit is substantially outweighed by the risk of prejudice.” *Id.* (citations omitted). Here, certainly it cannot be said that introduction of the accusations against Doe would not have an effect on the jury, so the Confrontation Clause “tips the scales” in favor of admission. *See id.* Nothing suggests that this probative value is “substantially outweighed” by the risk of prejudice. See Rule 403, SCRE. The Majority misapprehends this point raised by Petitioner.

Prior Inconsistent Statement

In determining that Rule 613 of the South Carolina Rules of Evidence would not allow extrinsic evidence of the prior allegations against Doe the Majority Opinion seems to return to an

¹ The Dissent acknowledges that the accusations were only between one and three years apart.

evaluation of the *Boiter* similarity factor. While certainly a trial court is a gatekeeper for the admission of evidence, Rule 613 does not impose a “similarity” restriction and as noted in the previous section, the Confrontation Clause would favor admission. The Dissent points to *Clinebell v. Commonwealth*, 368 S.E.2d 263, 266 (Va. 1988) as authority, albeit from another jurisdiction, for the proposition that a complaining witness could be cross-examined regarding a prior false accusation, and if the witness denied having made the statement, proof of such could be admitted. Such is consistent with the plain language under our Rule 613. See Rule 613(b), SCRE. No similar authority is presented by the Majority Opinion in support of the “similarity” restriction. Because of the misapprehension of the argument presented by Petitioner, and the Majority Opinion’s overlooking of the authority presented by the Dissent, rehearing is appropriate.

Failure to Investigate

The Court’s Order granting the petition for a writ of certiorari specifically outlined a request to address whether counsel was ineffective for failing to investigate the claims that the victim made unfounded allegations of a sexual nature against a former teacher. While the Dissent makes a determination that counsel was ineffective for failing to investigate, the Majority Opinion overlooks this issue. The United States Supreme Court has outlined that counsel in criminal cases is under a duty to investigate matters that are “at the very heart of the *prosecution’s* case.” See *Rompilla v. Beard*, 545 U.S. 374, 394 (2005)(*emphasis* in original). Certainly, the heart of the prosecution’s case in the instant matter was the credibility of the Daughter. Had trial counsel investigated the matter when it was brought to his attention, he could have utilized the techniques and tactics outlined herein. His failure to investigate led to his failures at trial.

As outlined in the Initial Brief of Petitioner, in *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008)(abrogated on other grounds, *State v. Smalls*, 433 S.C. 174, 810 S.E.2d 836 (2018)),

trial counsel was deemed deficient in failing to elicit through cross examination the similarities between the charged robbery and other robberies in which defendant's nephew of similar appearance had been implicated. In *Miller*, third party guilty was the limited defense that was presented, so identification was key. In the instant matter, the limited defense was the manufacturing of false accusations against authority figures to avoid punishment. Thus, it was crucial for trial counsel to investigate these allegations and illicit testimony on cross examination. Petitioner was prejudiced as a result of this failure. Because the Majority Opinion overlooks this issue, Rehearing *En Banc* is properly granted.

Conclusion

For the reasons set forth herein, the Court overlooked and misapprehended Petitioner's argument in the foregoing regards. As such, Petitioner respectfully requests Rehearing *En Banc* and suggests that Petitioner's conviction should properly be vacated and this matter remanded.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that I have served a copy of Appellant's Petition for Rehearing and *En Banc* Consideration upon Respondent electronically at the email address indicated below and by depositing a copy of the same in United States Mail, postage prepaid, on February 18, 2021 and addressed to:

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