

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM WILLIAMSBURG COUNTY  
In the Court of Common Pleas

Honorable Kristi Curtis,  
Common Pleas Judge of the Third Judicial Circuit

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Case No.: 2020-000083

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Justin McBride,                      Petitioner,

v.

State of South Carolina,              Respondent.

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PETITION FOR WRIT OF CERTIORARI

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**S.C. SUPREME COURT**

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## ISSUES PRESENTED

1. Has South Carolina progressed to a point where it is unconstitutionally cruel to require a juvenile to serve a mandatory minimum 25-year adult sentence without allowing the circuit court judge to exercise discretion after considering the hallmarks of youth?
2. When the clear and unambiguous language of S.C. Code § 63-19-20<sup>1</sup> created a definition of “child” that was only applicable to Chapter 19, of Title 63, did the PCR Court err in finding § 63-19-20 controlled the definition of “child” in § 63-3-510, and thereby, finding Trial Counsel was not ineffective for failing to object Petitioner’s case originating in the Court of General Sessions?
3. Did the PCR court err in finding that Trial Counsel was not ineffective for failing to argue that the 25-year mandatory minimum sentence violated the South Carolina Constitution as applied to Petitioner?
4. Does the Eighth Amendment to the United States Constitution bar 25-year mandatory minimum sentencing scheme as applied to juvenile offenders?
5. When the Petitioner was only indicted for oral penetration, but the Trial Court instructed the jury on the full definition of sexual battery, did the PCR Court err in finding Trial Counsel was not ineffective for failing to object to the jury instruction of on Criminal Sexual Conduct with a Minor in the First Degree when it exceeded the scope of the conduct which was indicted?

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<sup>1</sup> Petitioner would note that this issue involves the version of § 63-19-20(1) in effect prior to July 1, 2019.

## STATEMENT

### **Procedural History**

On June 21, 2010, 16-year-old Petitioner was accused of sexually assaulting his cousin. He was arrested and taken to DJJ. Instead of petitioning the family court, the State proceeded with the charges in the Court of General Sessions.

On March 1, 2012, Petitioner was indicted by the Williamsburg County Grand Jury for the offenses of Criminal Sexual Conduct with a Minor in the First Degree and Assault with Intent to Commit Criminal Sexual Conduct with a Minor in the First Degree. App. 397.

On October 28, 2013, Petitioner was called to trial before the Honorable John C. Hayes, III and a jury. Petitioner was represented by Derrick Mobley and the State was represented by Kimberly Barr. App. 1. Petitioner was sentenced to the mandatory minimum of 25 years. App. 395.

Petitioner appealed his conviction. For the appeal, Petitioner was represented by Wendy Keefer. App. 401-440. The Court of Appeals affirmed Petitioner's conviction in *State v. McBride*, 416 S.C. 379, 786 S.E.2d 435 (2016). App. 534-545. Petitioner filed a pro se petition for writ of certiorari. App. 446-572. Certiorari was denied on June 16, 2017. App. 609.

Petitioner filed a post-conviction relief action was filed on February 22, 2018. App. 611-623. The State filed its return to the PCR application on June 27, 2018. App. 624-632. Petitioner amended his PCR application prior to the evidentiary hearing. App. 635-645. An evidentiary hearing was convened on March 26, 2019 before the Honorable Kristi Curtis. App. 653. For the evidentiary hearing the State was represented by Janell Gregory and Petitioner was represented by

Tristan Shaffer. App. 653. On November 22, 2019, the Judge Curtis issued an order denying PCR. App. 833-874. This appeal follows.

### **Factual History**

On June 21, 2010, 16-year-old, Petitioner was alleged to have sexually assault his younger cousin. App. 80, ll. 9-11. After returning from school on the school bus, the alleged victim found her mother was not at home. App. 91, ll. 1-20, She then went to Petitioner's house. App. 91-95.

Upon returning home, the alleged victim reported to her mother that Petitioner sexually assaulted her. App. 96, ll. 17-24;107, ll. 2-11. Petitioner was charged and the case was initiated and proceeded in Family Court. Despite this lack of any physical evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor. App. 375.<sup>2</sup>

Petitioner is currently serving a 25-year mandatory minimum sentence for a crime that allegedly occurred when he was 16 years old.

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<sup>2</sup> Petitioner's Sentencing sheet indicates that he is serving 25 years for Assault with intent to Commit Criminal Sexual Conduct with a Minor in the First Degree. However, the jury found him not guilty of Assault with Intent to Commit Criminal Sexual Conduct with a Minor in the First Degree and was instead found guilty of Criminal Sexual Conduct with a Minor in the First Degree. App. 375, l. 23—App. 376, l. 7.

## ARGUMENT

- I. South Carolina has progressed to a point where it is unconstitutionally cruel to require a juvenile to serve a mandatory minimum 25-year adult sentence without allowing the circuit court judge to exercise discretion after considering the hallmarks of youth.

### **Relevant Facts**

Prior to trial, the State believed that a fair resolution to the case was a straight up plea to lewd act upon a child. App. 726, ll. 10-16. This would have left Petitioner exposed to up to fifteen years in the discretion of the Circuit Court. Assistant Solicitor Barr went so far as to say she “wouldn’t stringently oppose probation and did not think [the victim’s mother] would either” App. 725, ll. 11-14. Assistant Solicitor Barr offered this zero-fifteen-year plea offer, in part, because she wanted to do what was right and not expose Petitioner to a harsh punishment. App. 727, l. 23—728, l. 3. When Petitioner elected to go to trial, Assistant Solicitor Barr went so far as to ask Trial Counsel to speak with Petitioner directly trying to get him to take the offer. App. 725, l. 3—App.726, l. 9.

In the words of Petitioner’s grandmother, “[If] [Petitioner] is not guilty of doing anything, he is not going to say that he is guilty of it.” App. 393, ll. 22-24. So, Petitioner elected to go to trial, but he lost.

Upon sentencing Petitioner, Judge John C. Hayes stated the following:

Well I have been doing this 20 years, and it doesn’t get any easier. This appears to be an aberration, a young man who has a lot going on. With everything I have heard, even those who were adversely affected by this, the statute is clear. I am limited as to what my alternates are. So, Mr. Petitioner McBride my sentence is the minimum; that is a sentence of 25 years in prison.

App. 395, ll. 3-11.

At the PCR Court, Applicant argued that the Petitioner's mandatory minimum sentence violated the State Constitution. App. 636-637; App. 790; App. 807. The Circuit Court recognized that Petitioner was raising challenges to his sentence under both the State and Federal Constitution and denied both challenges. App. 809-809; 872.

### **Discussion**

Article I, Section 15 of the South Carolina Constitution bands cruel punishment. The wording of South Carolina Constitution differs from the United States Constitution in that it makes clear that it prohibits either cruel punishment or unusual punishment.<sup>3</sup> Since the South Carolina constitution may provide greater protections than the United States Constitution, this Court is not bound by Eighth Amendment precedent to determine what constitutes cruel punishment. *See State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) (“It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution.”).

“[A] sentence though not cruel or unusual in kind may be so severe in duration as to be cruel and unusual.” *Stockton v. Leeke*, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977). In considering

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<sup>3</sup> The South Carolina Constitution states, “excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted...” S.C. Const. Ann. Art. I, § 15. Whereas, the Eighth Amendment states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” There appears to be some confusion concerning the effect of the language of “and unusual” in the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 598 (1958) (“Whether the word “unusual” has any qualitative meaning different from “cruel” is not clear.” (Footnote 32)). However, it ultimately does not limit this Court’s ability to interpret the meaning of “cruel” in S.C. Const. Ann. Art. I, § 15.

whether a sentence is cruel and unusual in duration the court should consider the culpability of the defendant. *See State v. Kimbrough*, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948) (finding a 30-year sentence for burglary violated the South Carolina Constitution when the jury recommended mercy and the defendant had no criminal history). Even though sentences within statutory ranges are generally not considered cruel and unusual punishment, the courts must still examine whether the sentencing range is constitutional as applied to a particular defendant. *See State v. Scates*, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948) (“We have held... that *if the statute fixing the punishment for an offense is not unconstitutional*, a sentence within the limits fixed by the statute will not be regarded as cruel or unusual.” (emphasis added)).

There is a plethora of scientific studies which supports a finding that juveniles are less culpable than adults. Much of this is recognized by the United States Supreme Court in Eighth Amendment Jurisprudence. *See e.g. Roper v. Simmons*, 543 U.S. 551, 569-75 (2005). As noted in *Roper*, young people are different from fully developed adults because of the following: (1) they are immature and have “an underdeveloped sense of responsibility;” (2) they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and (3) their characters are “not as well formed” as adults. *Id.*, at 569-70 (internal citations omitted). “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 573.

A similar issue was touched upon by this Court in *State v. Smith*, 428 S.C. 417, 836 S.E.2d 348 (2019). *Smith* failed to properly brief the issue; therefore this Court “express[ed] no opinion on the applicability of the state constitution.” *See id.*, 428 S.C. at 421, 836 S.E.2d at 350 (footnote 5).

However, this Court did comment that “[w]e are hopeful the General Assembly will continue to consider the unique difficulties inherent in juvenile sentencing and chart a legislative path forward to address this issue.” *See id.*, 428 S.C. at 421, 836 S.E.2d at 350 (footnote 7). While the General Assembly appears to be working on addressing the overly harsh sentencing of juveniles going forward,<sup>4</sup> it remains the duty of this Court to interpret whether Petitioner’s 25-year sentence is cruel under our State Constitution. *See Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 123, 691 S.E.2d 453, 461 (2010) (“It is the duty of this Court to interpret and declare the meaning of the constitution.”).

The Supreme Court of Iowa has held that mandatory minimum sentences for juvenile offenders violate their state constitutions. In *Lyle*, the Iowa Supreme Court found the following:

In the end, we conclude all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of our constitution. Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles. Furthermore, we do not believe this conclusion is inconsistent with the consensus of Iowans. Although most parents fortunately will never find themselves in a position to be in court to see their teenage child sentenced to a mandatory minimum term of imprisonment for committing a forcible felony, we think most parents would be stunned to learn this state had a sentencing schema for juvenile offenders that required courts to imprison all youthful offenders for conduct that constituted a forcible felony without looking behind the label of the crime into the details of the particular offense and the individual circumstances of the child.

*State v. Lyle*, 854 N.W.2d 378 (Iowa 2014). The Iowa basically found that the hallmarks of youth should be considered before sentencing a juvenile to any offense. In remanding the case for resentencing the *Lyle* court noted the following:

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<sup>4</sup> *See e.g.* Session 123, House Bill 3919; Session 123, Senate Bill 1018; Session 124, Senate Bill 53.

Importantly, we do not hold that juvenile offenders cannot be sentenced to imprisonment for their criminal acts. We do not hold juvenile offenders cannot be sentenced to a minimum term of imprisonment. We only hold juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme.

*Id.*, at 380-81. The reasoning of the Supreme Court in Iowa has been adopted by jurist in other jurisdictions. *See e.g. State v. Williams-Bey*, 333 Conn. 468, 479, 215 A.3d 711, 718 (Conn. 2019) ("I am of the view that mandatory minimum sentences designed for adult offenders cannot constitutionally be applied to juvenile offenders tried as adults without providing an individualized sentencing proceeding in which the sentencing judge must consider the mitigating effects of youth and its associated features.") (Ecker, J. dissenting).

It is clear from reading the sentencing hearing, at the time of sentencing, all parties believed this to be a cruel result. App. 381-395. At the PCR hearing, Assistant Solicitor Barr even testified that she thought the right thing was for Petitioner to receive between probation and 15 years. App. 727, l. 23—728, l. 3. Assistant Solicitor Barr even stated that she did not believe that the victim would stringently oppose probation. App. 725, ll. 11-14. Moreover, if a 16-year-old committed this offense today their case would have the added protection of originating in family court.<sup>5</sup>

Therefore, this Court should grant certiorari to consider whether mandatory minimums violate the South Carolina Constitution when they are applied to juveniles. Upon grant of certiorari, Petitioner will respectfully request that this Court reverse the ruling of the PCR Court and order that his case be remanded for resentencing.

II. When the clear and unambiguous language of S.C. Code § 63-19-20 created a definition of “child” that was only applicable to Chapter 19, of Title 63, the PCR Court erred in finding § 63-19-

20 controlled the definition of “child” in § 63-3-510, and thereby, finding trial counsel was not ineffective for failing to object Petitioner’s case originating in the Court of General Sessions.

At the time of the alleged offense, South Carolina Code stated the following:

The [family] court shall have exclusive original jurisdiction and shall be the sole court for initiating action...(1) Concerning any child living or found within the geographical limits of its jurisdiction:..(d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-520

S.C. Code § 63-3-510 (emphasis added).

There was no specific definition that controlled Chapter 3 of Title 63. Therefore, the general definition found in § 63-1-40 would control. At the time of the offense, Title 63 § 63-1-40 defined “child” as “a person under the age of eighteen.” This is the definition of child that should have controlled the word “child” throughout title 63, unless there was a specific definition that controls a specific chapter or section. Therefore § 63-3-510 should have read as follows:

The [family] court shall have exclusive original jurisdiction and shall be the sole court for initiating action...(1) Concerning any [“person under the age of eighteen”] living or found within the geographical limits of its jurisdiction:..(d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-520

S.C. Code § 63-3-510.

Based on the clear and unambiguous language of § 63-3-510 in affect at the time of Petitioner’s arrest and conviction, charges should have originated in Family Court. This did not happen in Petitioner’s case. Had it happened Petitioner would have been subject to waiver;

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<sup>5</sup> See S.C. Code § 63-10-20 (effective July 1, 2019).

however, if the matter stayed in Family Court, Petitioner would not have been subject to the 25-year mandatory minimum sentence. Therefore, Trial Counsel was ineffective in failing to assert that jurisdiction lies with the Family Court or moved for remand.

However, the PCR court found that Trial counsel was not ineffective by holding that §63-19-20(1)<sup>6</sup> controlled the definition of “child” in the § 63-3-510. However, this was an error of law.

At the time of the offense, §63-19-20(1) stated the following:

When used **in this chapter** and unless otherwise defined or the specific context indicates otherwise:

- (1) “Child” or “juvenile” means a person less than eighteen years of age. “Child” or “juvenile” does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

S.C. Code § 63-19-20 (emphasis added). This chapter means Chapter 19 of Title 63. Therefore, § 63-19-20 would have no control of the definition of child used in § 63-3-510.

If § 63-3-510 was contained in Chapter 19 of Title 63, then the PCR Court would be correct that Petitioner’s case could have originated in General Sessions. However, the § 63-3-510 is located in Chapter 3 of Title 63. Therefore, the definition found in S.C. Code § 63-19-20 does not control how “child” is defined in § 63-3-510.

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<sup>6</sup> Petitioner would note that this issue involves the version of § 63-19-20(1) in effect prior to July 1, 2019.

In its order, the PCR Court cited to *State v. Graham*, 340 S.C. 352, 532 S.E.2d 262 (2000). *Graham* addresses this issue prior to the enactment of the South Carolina Children's Code in Title 63. See 2008 Act No. 361. At the time relevant to the *Graham* opinion, S.C. Code § 20-7-390 stated the following:

When used in this article, unless the context otherwise requires, "child" means a person less than seventeen years of age, where the child is dealt with as a juvenile delinquent. "Child" does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

S.C. Code § 20-7-390 (repealed 1996) (emphasis added). Additionally, the family court jurisdiction statute concerning juveniles was located at S.C. Code § 20-7-400(A). Based on the 1996 code, persons sixteen years of age or older and accused of an A, B, C, or D felony were not defined as juveniles. However, between *Graham*'s offense and the Petitioner's alleged offense the children's code has been changed and recodified. As such the holding in *Graham* was superseded by the recodification and was no longer good law at the time of Petitioner's alleged offense.

Since the plain and unambiguous language of § 63-19-20 limits its definition of child to Chapter 19 of Title 63, Petitioner's case should have originated in the family court. The Court of Appeals found this matter unreserved. App. 537. Had trial counsel objected to this case originating in the court of General Sessions there is a reasonable probability that Petitioner would not have been serving a 25-year sentence. Therefore, Petitioner asserts that his Sixth Amendment rights were

violated when trial counsel failed to object to this case originating in the Court of General Sessions. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Applicant respectfully submits that the Court should grant certiorari and find that Trial Counsel was ineffective in failing to object to the case originating in the Court of General Sessions.

III. The PCR court erred in finding that Trial Counsel was not ineffective for failing to argue that the 25-year mandatory minimum sentence violated the South Carolina Constitution as applied to Petitioner.

For the reasons Stated in Issue I above, Petitioner asserts that the mandatory nature of a 25-year sentence violates the South Carolina Constitution. Petitioner submits this is currently true, but also would have been true at the time of sentencing. *See State v. Kimbrough*, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948) (Over 60 years prior to this offense, the South Carolina Supreme Court found that a 30-year sentence for burglary violated the State constitution when applying the sentence to an individual). Therefore, Petitioner also<sup>7</sup> asserts that his Sixth Amendment<sup>8</sup> right to

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<sup>7</sup> Petitioner apologizes if this Issue seems duplicative of Issue I. Both issues were raised and ruled upon by the PCR Court. App. 636-637; 839; 847. Issues I of this Petition is raised under the South Carolina Constitution. *See* S.C. Code 17-27-20(A)(1) (“Any person who has been convicted of, or sentenced for, a crime and who claims: (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State.”). Petitioner values this Court’s time and does apologize for re-raising an issue that is seemingly dependent upon this Court’s decision on Issue I. However, due to evolving standards these issues are arguably not solely dependent upon the other. Moreover, Petitioner is aware that this Petition is subject to discretionary review by this Court. In the event this Court denies Certiorari, Petitioner has also argued that his Sixth Amendment rights were violated to preserve the issue for federal review. *See Monahan v. Burt*, No. CIVA 205-2201-RBH, 2006 U.S. Dist. LEXIS 74154, 2006 WL 2796390, at 7 (D.S.C. Sept. 27, 2006) (“Reliance on a state statute, and the state constitution, as a basis for relief simply fails to present a question of federal law he extent the petitioner relies solely on state law, he has failed to present a matter cognizable under 28 U.S.C. § 2254.”); *see also Stewart v. Smith*, 534 U.S. 157, 159-60, 122 S. Ct. 1143, 1144 (2001) (certifying a question of state law to the state Supreme Court on federal habeas review).

effective assistance of counsel was violated when trial counsel failed to raise this issue at trial. App. 636-637.

To establish ineffective assistance of counsel, a petitioner must show that (1) his attorney's performance was deficient, and (2) the deficient performance was prejudicial. *See Strickland, supra*. Failing to object to an unconstitutional sentence is deficient performance and Petitioner was clearly prejudiced by this deficient performance. Therefore, Petitioner respectfully submits that this Court grant certiorari; find that Petitioner was denied his Sixth Amendment right to effective assistance of counsel; and remand the case for resentencing.

VI. The Eighth Amendment to the United States Constitution bars 25-year mandatory minimum sentencing schemes as applied to juvenile offenders.

The Eighth Amendment to the United States Constitution bars “cruel and unusual punishments.” U.S. Const. amend VIII. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). Therefore, what will or will not constitute cruel and unusual punishment will vary over time. *See Graham v. Florida*, 560 U.S. 48, 58 (2010) (“To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’”).

Although Petitioner is cognizant of this court’s decision in *State v. Smith*, 428 S.C. 417, 836 S.E. 2d 348 (2019), Petitioner would assert that Petitioner’s case is distinguishable. Unlike Smith,

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<sup>8</sup> U.S. Const. amend VIII.

Petitioner is charged with a non-homicide offense which has been treated differently by the federal courts. *Compare, Graham v. Florida*, 560 U.S. 48, 58 (2010) to *Miller v. Alabama*, 567 U.S. 460 (2012).

Petitioner raised this matter to the PCR court pursuant to S.C. Code 17-27-20(A)(1). App. 639; 839. The PCR Court denied relief. App. 844-848.

Petitioner respectfully submits that this Court should grant certiorari to determine whether a mandatory minimum 25-year sentence violates the Eighth Amendment. Upon grant of certiorari, Petitioner will request that this Court reverse the PCR court and remand the case for resentencing.

V. When Petitioner was only indicted for oral penetration, but the Trial Court instructed the jury on the full definition of sexual battery, did the PCR Court err in finding Trial Counsel was not ineffective for failing to object to the jury instruction of on Criminal Sexual Conduct with a Minor in the First Degree when it exceeded the scope of the conduct which was indicted.

Count I of the Indictment in the case reads as follows:

That Justin McBride did in Williamsburg County on about June 21, 2010, the Defendant did engage in oral sex with the victim a child who was less than eleven (11) years of age, in violation of 16-3-655, Code of Laws of South Carolina (1976), as amended.

App. 397.

However, the trial court gave the following instruction to the jury:

He is charged with criminal sexual conduct with a minor. That's the first count. It's alleged that he committed this offense by engaging in oral sex with a minor. Here the state must prove beyond a reasonable doubt that Mr. McBride engaged in sexual battery with the victim. The term sexual battery which includes fellatio, which is oral sex. The state must prove beyond a reasonable doubt the victim was less than 11 years old at the time of the sexual battery and that the sexual battery of course occurred... So as to the first charge, the state must prove that a sexual battery occurred. Mr. McBride

committed a sexual battery and that the victim, if you find it occurred, was less than 11 years of age. The second charge is assault with intent to commit first degree criminal sexual conduct with a minor by engaging in anal intercourse with the victim... The term sexual battery includes anal intercourse or any intrusion however slight of any part of a person's body or any object into the genital or anal openings of another person's body except when that intrusion is accomplished for medically recognized treatment or diagnosis. In addition to proving the attempt of a sexual battery, the state must prove as to this offense, beyond a reasonable doubt the alleged victim was under the age of 11. Again, the testimony of the victim need not be corroborated under the laws of this state.

App. 367, 1.7—369, 1. 16. Trial Counsel did not object to this jury instruction. App. 678, 1. 25—679, 1. 2.

At trial, the alleged victim testified that Petitioner made her perform oral sex on him. App. 96, ll. 17-24. The State alleged that this was supported by the white stain on the Appellant's shirt. App. 97, ll. 3-13. By the time of trial, the State's case was undercut by law enforcement losing the shirt. App. 344-359. However, the alleged victim also testified to the following:

Q What did you tell [your mother] as to why you couldn't use the bathroom?

A He put his manhood in the back of my butt.

Q Because he put his manhood in the back of your butt?

A Yes, ma'am.

Q And when you refer to manhood, are you talking about a man's penis?

A Yes, ma'am.

App. 107, ll. 2-11.

This issue was raised to the PCR Court. App. 615; 620; 840. The PCR Court found that the issue was "meritless" because the "jury was properly instructed." App. 859.

## **Argument**

This Court has found that it is deficient performance by allowing the Judge to expand the scope of an indictment. *See Bailey v. State*, 392 S.C. 422, 436, 709 S.E.2d 671, 678 (2011). In

*Bailey*, this Court found the trial court's instructions improperly enlarged the indictment by adding a "neglect" component which exceeded the original scope of the indictment. *See id.* Bailey's trial counsel did not object to this enlargement. This Court found Bailey was prejudiced by his failure to object because it created a "material variance between the State's evidence and the allegations in the indictment" which "undermined confidence in the outcome of his trial." *Id.*, 392 S.C. at 437, 709 S.E.2d at 679.

Similarly, in Petitioner's case, by instructing the jury on the entire definition of sexual battery, the Trial Court allowed Petitioner to be found Guilty of Criminal Sexual Conduct with a Minor in the First Degree for conduct which was not in the indictment. The indictment only alleges oral sex; however, the victim's testimony states that Petitioner penetrated her anus. App. 100, l. 17—101, l. 8; 107, ll. 3-11. Petitioner submits that this testimony coupled with the full definition of sexual battery would have allowed the jury to find Petitioner guilty based off an allegation that were not contained in the indictment. This "undermines confidence in the outcome of [Petitioner's] trial." *See Bailey*, 392 S.C. at 437, 709 S.E.2d at 679. Therefore, Trial Counsel should have objected to the jury instruction.

Based on the foregoing, Petitioner respectfully asserts that his Sixth Amendment right to effective assistance of counsel was violated. Therefore, Petitioner respectfully request that this Court grant certiorari; reverse the PCR Court; and grant him a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Court review the PCR Court's denial of relief.

Respectfully submitted,

s/ Tristan M. Shaffer

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