RECEIVED
Jun 01 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County
The Honorable Kristi F. Curtis, Circuit Court Judge

McBRIDE, JUSTIN

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Appellant.

Appellate Case No. 2020-000083

Return to Petition for Writ of Certiorari

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. Petitioner's sentence, the statutory minimum for Criminal Sexual Conduct with a child under age eleven, is not a violation of the cruel and unusual clause in the state constitution, and the issue is a direct appeal issue not proper for post-conviction relief.

II. General Sessions had jurisdiction over Petitioner, and trial counsel was not ineffective for failing to object.

III. Counsel was not ineffective for failing to object to the minimum sentence as cruel and unusual punishment under the state constitution based on Petitioner's age because no authority exists finding a minimum sentence for a juvenile unconstitutional.

IV. Petitioner's sentence does not violate the Eighth Amendment and the issue is a direct appeal issue not cognizable in PCR.

V. The trial court did not instruct the jury on the full definition of sexual battery, and counsel was not ineffective.

STATEMENT OF THE CASE

The Williamsburg grand jury indicted Petitioner for 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. p. 397. The jury convicted Petitioner of Criminal Sexual Conduct with a Minor and acquitted Petitioner of the other charge at the conclusion of trial on October 28-30, 2013. The presiding judge, the Honorable John C. Hayes, III, sentenced Petitioner to the mandatory minimum twenty-five years' imprisonment.

Petitioner appealed his conviction and sentence and was represented by Wendy Keefer, Esquire. His conviction was affirmed by the Court of Appeals. State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (Ct. App. 2016). Petitioner filed a pro se petition for writ of certiorari, which this Court denied on June 16, 2017.

Petitioner filed a post-conviction relief (PCR) application on February 22, 2018. The State filed its return to the PCR application on June 27, 2018. Petitioner subsequently amended the PCR application. The Honorable Kristi F. Curtis heard the PCR on March 26, 2019. Judge Curtis denied the PCR by order dated November 22, 2019. Petitioner appealed the denial of relief and petitioned for a writ of certiorari. This return follows.

STATEMENT OF FACTS

Victim, Petitioner's cousin, was just shy of her tenth birthday when Petitioner sexually assaulted her. She was thirteen years old at the time of the trial. App. p. 89. Petitioner was sixteen years old at the time of the sexual assault. App. p. 108.

Victim attended summer school and was excited to ride the bus for the first time. It was her

second day of summer school and her second day riding the bus. However, Victim became upset because other children told her that her mom was not home. She went to her Aunt Tina's house next door. Petitioner, Aunt Tina's son, let her in. He was home alone.[1] While Petitioner watched television, Victim commented the show had bad words and they should turn the television off. That prompted Petitioner to begin a violent sexual assault. App. pp. 90-94. Petitioner took out his penis and told Victim to "jerk it." App. p. 95, lines 5-6. He grabbed Victim's hand and put it on his penis. Petitioner grabbed Victim's head and pulled her toward his penis. App. pp. 95-96. Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.
>
> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
>
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?

[1] Detective Trena Hamlet noted that Petitioner's and Victim's houses were side by side with nothing but a small patch of grass between them. App. p. 181, lines 4-6.

A: Yes, ma'am, on my shirt.

Q: What did that taste like?

A: Nasty.

Q: And it went on your shirt. Is that a yes?

A: Yes, ma'am.

App. p. 97, lines 5-16. Petitioner sprayed perfume all around the living room. **Petitioner tried to pull down her pants; he would pull them down, and Victim would pull them back up.** Victim testified Petitioner tried to put his penis in her butt and it hurt. App. pp. 100 – 101.

Victim fled to her house and kicked on the door. Her mother (Mother) was there. Victim did not reply when Mother asked what was wrong. But after Mother smelled "man perfume," she went next door. Victim testified she had deodorant on her shirt from when Petitioner had his arm around her neck. She hurt the next day when she was making a bowel movement. App. pp. 101-108. Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." App. p. 107, lines 3-8.

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. Detective Hamlet spoke with Petitioner who claimed all that happened was Victim walked in on him while he was using the restroom. App. pp. 178-181; p. 183, line 13 – p. 184, line 2.

Mother testified she arrived at home on time for the bus, or at least she thought so. However, Mother did not hear the bus. She became agitated when her daughter did not come home – more so

when the middle school and then high school buses came (Victim's bus should have arrived first). But she was startled by Victim kicking and beating on the door. Victim was not talking, even after she asked Victim where she had been. Mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Mother inquired about where she had been. Mother testified Victim also had a stain on her shirt that smelled like deodorant. App. pp. 227-234.

Mother went next door and asked Petitioner what happened. Petitioner claimed Victim walked in the bathroom on him. Mother told Petitioner she did not believe him. She left because Petitioner's mother was not home. Another of Mother's sisters (not Petitioner's mother) called police. App. pp. 236-239. Later that night, Mother heard Victim scream from the bathroom. Victim told Mother it hurt when she was trying to go to the bathroom. App. pp. 239-240; p. 245.

Law enforcement failed to take Victim's clothing during the interview. Mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. App. pp. 247-250; p. 260.

Lieutenant Thomas Dean McCrea testified the officer described by Mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was the evidence custodian at the time. Lieutenant McCrea thought the clothing was sent to SLED for testing, but found no record of this, and it appears the clothing was lost. This was not the first instance of Huckabee, a former employee, losing evidence before. No evidence intake sheet was located. App. pp. 271-277.

Samantha Cooper, Victim's aunt, testified she confronted Petitioner with Victim's

allegations, and he told her he did not mean to do it. Cooper understood Petitioner's comments to be a confession. Cooper was enraged. She went running after Petitioner, and he ran inside his house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. App. pp. 277-284.

STANDARD OF REVIEW

The post-conviction relief (PCR) court's factual findings will be upheld by the appellate courts if supported by probative evidence. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

The PCR applicant bears the burden of proving the allegations in the PCR application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel as a ground for relief must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Under the first prong of Strickland's two-prong test, the applicant must prove counsel's performance was deficient. Attorney performance is measured by its "reasonableness under

professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland). Second, counsel's deficient performance must prejudice the applicant such 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.

ARGUMENT

I. Petitioner's sentence, the statutory minimum for Criminal Sexual Conduct with a child under age eleven, is not a violation of the cruel and unusual clause in the state constitution, and the issue is a direct appeal issue not proper for post-conviction relief.

Petitioner asks this Court to find a minimum prison sentence of imprisonment for a juvenile violates the South Carolina Constitution. First, because Petitioner's argument could have been raised on direct appeal, it is not cognizable in PCR. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding an application for post-conviction relief is not a substitute for an appeal). In Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979), this Court reversed the PCR court's grant of relief on the basis that Cummings' sentence was cruel and unusual punishment. This Court explained, "At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel." Id.

Petitioner claims the PCR court addressed his direct appeal claim. However, it appears the PCR court merely addressed the merits of the claim in the context of a claim of ineffective assistance of counsel. App. pp. 844-48. Nonetheless, the issue remains inappropriate for review as a direct appeal issue.

The substance of his claim fails. Petitioner relies on State v. Kimbrough, 212 S.C. 348, 46

S.E.2d 273 (1948), in which this Court found a defendant's thirty year sentence for burglary violated the cruel and unusual punishment clause of the state constitution. However, Petitioner leaves out important facts in that case. Under the statute in effect at the time, a defendant convicted of burglary would be sentenced to life imprisonment with hard labor, "provided, however, that in each case where the prisoner is found guilty, the jury may find a special verdict, recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary, with hard labor for a term of not less than five years." Id. at 352, 46 S.E.2d at 275. The jury convicted Petitioner of burglary, but recommended mercy. The trial judge sentenced Petitioner to thirty years hard labor. Id. This Court cited authority to the effect that "the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from." This Court further noted that where the maximum punishment is not provided for by statute but punishment is left for the trial judge, it is subject to review under the abuse of discretion standard. Id. at 354, 46 S.E.2d at 276. Because no maximum penalty was provided by statute if the jury brought back a jury verdict with a recommendation of mercy, this Court then reviewed the matter for an abuse of discretion. Id. This Court opined the trial court's sentence required "some concession" to the jury's recommendation of mercy. This Court noted the absence of a prior criminal record or other aggravating circumstances; and further, without stating the age of the defendant, found the sentence imposed was "to all intents and purposes the equivalent of a life sentence, ..." This Court concluded the sentence was too severe and remanded the case for resentencing. Id. at 326-57, 212 S.C. at 277.

Petitioner's case is distinguishable from Kimbrough in two important ways. First, his

sentence is not "to all intents and purposes the equivalent of a life sentence." Petitioner will be released from prison in his forties. Second, the legislature fixed both the maximum and minimum sentences for criminal sexual conduct with a minor, so this Court would not employ the abuse of discretion standard necessary in the days when the legislature often did not fix a sentence for various crimes. Simply put, that sentence for burglary accompanied by a recommendation of mercy needed to be reviewed for an abuse of discretion in the absence of a legislatively set range of punishment. Because the legislature set a fixed sentencing range for Criminal Sexual Conduct with a minor, the sentence in the instant case would not be subject to a Kimbrough-style review. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("[T]his court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.").

In support of his argument, Petitioner relies on State v. Lyle, 854 N.W.2d 378 (Iowa 2014). The Iowa constitution contains a clause similar to S.C. art. I, section 15. See Iowa Const. art. 1, section 17. In analyzing whether a minimum seven year sentence for a seventeen year old tried as an adult for robbery was unconstitutional, the majority in Lyle admitted, "[W]e recognize no other court in the nation has held that its constitution or the Federal Constitution prohibits a statutory scheme that prescribes a mandatory minimum sentence for a juvenile offender." Id. at 386. The Iowa court further observed, "[M]ost states permit or require some or all juvenile offenders to be given mandatory minimum sentences." Id. The Iowa court admitted, "This state of the law arguably projects a consensus in society in favor of permitting juveniles to be given mandatory minimum statutory sentences." Id. at 387. The case was a close one, vote wise: the decision rendered was a 4-

3 decision finding its mandatory sentences unconstitutional for juveniles. The majority opinion was followed by two vigorous dissenting opinions. Justice Zager confirmed what the majority admitted, "In fact, no other state court has held its state constitution, nor has any federal court held the Federal Constitution forbids imposing mandatory minimum sentences on juveniles." Id. at 409-10 (J. Zager, dissenting) (collecting cases in which minimum sentences of imprisonment imposed on juveniles were upheld as constitutional).

Justice Waterman, also in dissent, opined no other appellate court had extended the cruel and unusual punishment doctrine this far and further remonstrated:

> Under the majority's reasoning, if the teen brain is still evolving, what about nineteen-year olds? If the brain is still maturing into the mid-20s, why not prohibit mandatory minimum sentences for any offender under age twenty-six? As judges, we do not have a monopoly on wisdom. Our legislators raise teenagers too. Courts traditionally give broad deference to legislative sentencing policy judgments.

Id. at 405 (J. Waterman, dissenting). The justice revisited this point again with a block quote from an earlier case, as follows:

> Furthermore, we must not forget that we are not the only guardians of justice in our government. For example, prosecutors must use sound judgment in charging and prosecuting defendants who may be swept up by broad legislative polices that were not likely intended to capture them. The governor, too, is empowered to commute a sentence viewed to be unjust. Finally, consistent with the one true strength of our democracy, the legislature can repair mistakes.

Id. at 405 (J. Waterman, dissenting) (quoting State v. Bruegger, 773 N.W.2d 862, 888 (Iowa 2009)).

The dissenting justice further warned:

> It is easy in the abstract to say we do not put constitutional rights to a vote. It is the role of the courts to say where constitutional lines are

> drawn. But, we must remember rights, by definition, are restrictions on governmental power – the government elected by the people. If our court misinterprets a statute, the legislature can amend the statute the next session. But if we misinterpret our state constitution, the people are stuck with the decision unless the decision is overruled or the constitution is amended. That is why judges must be extraordinarily careful with constitutional interpretation.

Id. at 407 (J. Waterman, dissenting).

Our own case law provides no evidence the imposition of a mandatory minimum sentence for a juvenile unconstitutional under the South Carolina constitution. Rather, case law from this Court points in the other direction. In State v. Smith, 428 S.C. 417, 836 S.E.2d 348 (2019), this Court found minimum sentences of imprisonment for juveniles tried as adults did not violate the Eighth Amendment to the federal constitution and declined to review what was determined to be a conclusory allegation that the same sentence violated Art. 1, section 15. Prior to that, the Court of Appeals found a thirty-five year sentence for murder, armed robbery, and carjacking, imposed on a juvenile who was transferred from Family Court to General Sessions, was constitutional under the Eighth Amendment. State v. Avery, 374 S.C. 524, 649 S.E.2d 102 (Ct. App. 2007).

Respondent has not found any authority to suggest the scope of Article 1, section 15 is broader than the Eighth Amendment's ban on cruel and unusual punishment in the context of a legislative range of imprisonment that is less than life imprisonment. Petitioner does not offer any such authority either. A rare example of the clause's application occurred in State v. Brown, 284 S.C. 407, 326 S.E.2d 410, 411 (1985) in which this Court found, without explanation, that castration as a condition of probation violates the State constitution's ban on cruel and unusual punishment.

The legislative provision for the application of minimum sentences of imprisonment to

juveniles committing the most violent and serious crimes is reasonable. The protection of family court for juveniles is provided by our legislature as a privilege, and not as a matter of right for the juvenile. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of proceedings against children of a specified age for particular violations or crimes . . . ."). In the instant case, Petitioner committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be punishable by up to life imprisonment. Petitioner violently assaulted a cousin living right next door to him in such a manner that evidences his danger to society. No constitutional issue exists in the legislative determination that sixteen-year-olds sexually assaulting children under the age of eleven should be prosecuted and punished as adults. The sentence was not cruel and unusual.

II. General Sessions had jurisdiction over Petitioner and trial counsel was not ineffective for failing to object.

Petitioner argues he met the legal definition of child and therefore his case should have been initiated in Family Court rather than General Sessions. Petitioner argues counsel was ineffective for failing to object to the case being tried in General Sessions. Petitioner argues S.C. Code § 63-1-40 (Supp. 2010) and its definition for child applies: "When used in this title and **unless otherwise defined or the specific context indicates otherwise**: (1) 'Child' means a person under the age of eighteen." (emphasis added).

This Court found a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000). Petitioner argues legislative

changes overruled Graham, but cannot support this assertion with case law. Counsel was not asked specifically if original jurisdiction should have been in Family Court, but Counsel testified his understanding was the case could only be tried in Family Court with the consent of the prosecutor. App. p. 684, lines 16-25; p. 705, lines 16-19. His professional judgment was reasonable.

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. Strickland requires extreme deference to counsel's strategic judgments: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Id. at 690-91.

Recently, this Court found the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) . This Court held "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Id. In reaching this result, this Court declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to

> novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."). Because this Court has not found Graham overruled, counsel was not ineffective.

Further, legislation since Graham did not alter the course of which juveniles charged with a crime fall outside the original jurisdiction of Family Court. S.C. Code § 63-5-510 (Supp. 2010) defines the cases falling within the Family Court's exclusive jurisdiction. Under paragraph (A), in relevant part: "Except as otherwise provided herein, the 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. . . ."

S.C. Code Ann. § 63-19-20(1) provides the definition for child. This statute is entitled "Definitions" and under this statute, "When used in this chapter and unless otherwise defined or the specific context indicates otherwise":

> (1) "Child" or "juvenile" means a person less than seventeen 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 year 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.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1).[2] Therefore, under the plain language of section 63-19-20(1), Petitioner was not a child when he sexually assaulted his cousin.

Petitioner argues that the definition found in section 63-1-40 should apply, which defines child as any person under the age of eighteen. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000). Petitioner argues that legislative changes have overruled Graham.

At the time Graham was charged, a nearly identical definition of child as in section 63-190-20, was contained in S.C. Code Ann. § 20-7-390, which by the time of the Court's decision, was recodified as §20-7-6605 (Supp. 1999). Graham, 340 S.C. at 354, 532 S.E.2d at 263. Further, jurisdiction was set out by the legislature in the Children's Code. At the time Graham was charged, S.C. Code § 20-7-400(A) provided, "Except as otherwise provided herein, the [family] court shall have exclusive jurisdiction and shall be the sole court for initiating action: 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

---

[2] This statutory minimum sentence was established by amendment to section 16-3-655 in 2006 Act 342 § 3.

the violation occurred . . ." (as quoted in Graham, 340 S.C. at 354, 532 S.E.2d at 263, emphasis removed).

Petitioner contends a consequence of the reclassification of the statutes found in 2008 S.C. Laws Act 361 (H.B. 4747) is the end of the exclusion of sixteen year olds charged with an A, B, C, or D felony or crimes with fifteen years or more exposure from the definition of a "child," and therefore, the action against Petitioner should have been initiated in Family Court. Petitioner's argument, that sixteen and seventeen year olds charged with A, B, C, and D felonies would no longer be automatically charged and treated as adults in General Sessions, but instead be under the jurisdiction of Family Court, would represent a major shift in legislation. However, the 2008 Act's title fails to include any language marking this significant policy change. It states the following:

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING TITLE 63 ENITLED "SOUTH CAROLINA CHILDREN'S CODE" SO AS TO TRANSFER PROVISIONS FROM CHAPTER 7, TITLE 20 TO TITLE 63, TO INCLUDE THE STATE POLICY ON CHILDREN'S SERVICE AGENCIES, CHILDCARE FACILITIES, CUSTODY AND VISITATION, PARTERNITY AND CHILD SUPPORT, AND JUVENILE JUSTICE; BY ADDING ARTICLE 5 TO CHAPTER 3, TITLE 20, RELATING TO DIVORCE, SO AS TO TRANSFER THE PROVISIONS OF ARTICLE 6, CHAPTER 7, TITLE 20, RELATING TO EQUITABLE APPORTIONMENT OF PROERTY, TO THIS ARTICLE; BY ADDING ARTICLE 4 TO CHAPTER 5, TITLE 43, RELATING TO PUBLIC AID TO CHILDREN, SO AS TO TRANSFER THE PROVISIONS OF SUBARTICLE 7, ARTICLE 13, CHAPTER 7, TITLE 20, RELATING TO PUBLIC AID, TO THIS ARTICLE; BY ADDING SECTION 44-53-378 SO AS TO TRANSFER THE PROVISIONS OF SECTION 20-7-105, WHICH CREATES A CRIMINAL OFFENSE FOR EXPOSING A CHLD TO METHAMPETHATIMINES, TO THIS SECTION; TO REPEAL CHAPTER 7, TITLE 20 RELATING TO THE CHILDREN'S CODE; TO REPEAL SECTION 43-5-585, RELATING TO REPORTING CHILD SUPPORT ARREARAGES TO CREDIT REPORTING AGENCIES, WHICH WAS TRANSFERRED TO ARTICLE 21, CHPATER 17, TITLE 63; AND TO REPEAL SECTIONS 43-5-595, 43-5-596, AND 43-5-597 RELATING TO CHILD SUPPORT ENFORCEMENT THROUGH FINANCIAL INSTITUTION DATA MATCHES, WHICH WERE TRANSFERRED TO ARTICLE 17, CHAPTER 17, TITLE 63.

Therefore, the express purpose of the act was to transfer provisions from Title 20 to Title 63,

to add an article to Title 20 regarding divorce, to recodify other custody and divorce provisions, to create a criminal offense for exposing a child to methamphetamine, and to recodify various child support and child support enforcement provisions by transferring the laws to Article 17, Chapter 17, Title 63. The Act's purpose does not reflect an intent to alter which individuals would automatically be treated as adults and which class of sixteen and seventeen year olds would be subject to the original jurisdiction in Family Court.

Title 63 is entitled the "South Carolina Children's Code. The definition of child that Petitioner contends should apply is found in the first chapter: "Chapter 1. State Policy and General Provisions." The statute provides, "When used in this title and unless otherwise defined or the specific content indicates otherwise: (1) 'Child' means a person under the age of eighteen." S.C. Code Ann. § 63-1-40. This Chapter One definition is the definition Petitioner advocates rather than the definition of child found in the Juvenile Justice Code.

However, looking at the scope and organization of the Children's Code evidences the legislative intent for the definition of child found in the Juvenile Justice Code to apply. Chapter 3 is entitled "Family Court" and it sets out the structure of Family Court in Article 1, and the administrative structure of the court in Article 3. Article 5 is entitled "Jurisdiction and Court Powers and Procedures." The first statute in this article is § 63-3-510 which sets out cases falling within the exclusive jurisdiction of Family Court, including cases in which a child is charged with a crime; but the statute does not define "child." The Children's Code then proceeds through multiple chapters: Chapter 5 (setting out the legal status of children including the parameters of the child-parent relationship and the legal capacity of minors); Chapter 7 (concerning the protection and placement of

children, including cases of child abuse or neglect, protective custody by DSS, and related judicial proceedings); Chapter 9 (regulating adoptions); Chapter 11 (concerning "Children's Services Agencies."); Chapter 13 (concerning "Childcare Facilities."); Chapter 15 (concerning "Child Custody and Visitation"); and Chapter 17, ("Paternity and Child Support;").

Chapter 19 stands as the penultimate chapter and governs the disposition of delinquent children. It is entitled the "Juvenile Justice Code." Following its short title (S.C. Code Ann. § 63-19-10), is the definition section controlling the instant case, with the definition of child that does not include sixteen year olds and seventeen year olds charged with an A, B, C, or D felony or a crime carrying exposure of fifteen years' imprisonment. S.C. Code Ann. §63-19-20.

The definition of child in Chapter 1 understandably is the operable definition across multiple chapters of the Children's Code dealing with child support, custody, adoption, abuse and neglect. However, the more specific definition found in the Juvenile Justice Code sensibly applies to those juveniles accused of committing crimes in section 63-19-20. "The general rule of statutory construction is that a specific statute prevails over a more general one." Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995).

Further, Petitioner's interpretation defies logic. The second sentence of section 63-19-20 specifically excludes those sixteen and seventeen year-olds charged with A through D felonies or facing exposure of fifteen years imprisonment or more. This is followed by the sentence specifying, "However, a person sixteen years of age who is charged with a Class, A, B, C, or D felony . . . 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." Under Petitioner's interpretation of the statutes, this clause would never become operative because a sixteen year old would always be treated as a child under section 63-3-510. It is a "well-settled rule of statutory construction, that a court is bound, if possible, to give some place and effect to **every** word found in a statute." Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1891) (emphasis added); see also Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (finding every "word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction").

Further countering Petitioner's interpretation of the statutes is S.C. Code section 63-19-1210, which provides in paragraph (4) that a child "sixteen years of age or older" charged with a class E or F felony or a charge with exposure of ten years or more may be transferred by the Family Court judge to General Sessions if the Family Court finds retaining jurisdiction is contrary to the best interests of the child or the public; and in paragraph (5) that a child of fourteen or fifteen years of age is charged with a Class A, B, C, or D felony, or a charge carrying fifteen or more years imprisonment, may also be bound over to General Sessions by the Family Court when retaining jurisdiction is contrary to the best interests of the child or the public. The result, based on Petitioner's interpretation, is a sixteen year old committing a Class A through D felony, or a crime with exposure of fifteen years or more, could not be bound over to General Sessions by the Family Court even though the Family Court could bind over a sixteen year old committing a less serious offense or bind over a child less than sixteen years of age for the same offense. This interpretation is non-sensical.

Because an interpretation of the Children's Code and Juvenile Justice Code that a sixteen year old committing the offense of Criminal Sexual Conduct with a Minor in the First Degree is not a child as defined by the Juvenile Justice Code is reasonable, counsel was not ineffective. Therefore, certiorari should be denied on this issue.

III. Counsel was not ineffective for failing to object to the minimum sentence as cruel and unusual punishment under the state constitution based on Petitioner's age because no authority exists finding a minimum sentence unconstitutional.

Petitioner argued that being sentenced to the minimum sentence for Criminal Sexual Conduct with a Minor in the First Degree was cruel and unusual punishment under the South Carolina Constitution in the first issue. Returning to the subject in Issue Three, Petitioner argues counsel was ineffective for not objecting to the sentence. Counsel testified although he would have objected if Petitioner received a life sentence, he did not think the imposition of the twenty-five year sentence was unconstitutional. App. pp. 704-05.

Petitioner relies on State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948), discussed by Respondent in its counter argument to Petitioner's Issue 1. In Kimbrough, this Court found a defendant's thirty year sentence for Burglary violated the cruel and unusual punishment clause of the state constitution. However, as explained in Issue 1, Petitioner was sentenced following a mercy verdict for burglary, and the legislature had not fixed a maximum penalty for that verdict. Without a fixed legislative penalty to defer to, this Court necessarily applied an abuse of discretion standard to sentencing. The instant case requires deference to legislative enactments and therefore, stands apart from Kimbrough. Petitioner's case is also distinguishable from Kimbrough because his sentence is not "to all intents and purposes the equivalent of a life sentence." The facts of Kimbrough, from a

vastly different era of criminal procedure, would not put an attorney acting within the professional norms of Strickland on notice as to any purported unconstitutionality of the sentence in the present case, since Petitioner was sentenced to the minimum sentence (without hard labor) required by statute. Counsel's professional judgment on the matter was reasonable and probative evidence supports the finding he did not render ineffective assistance of counsel.

IV. Petitioner's sentence does not violate the Eighth Amendment and the issue is a direct appeal issue not cognizable in PCR.

Petitioner claims that his sentence violates the 8th Amendment. The issue represents a direct appeal issue not cognizable in a post-conviction relief application. Petitioner relies on S.C. Code §17-27-20(A)(1). However, that provision is modified by S.C. Code §17-27-20(B), which provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Therefore, it is not a cognizable claim for post-conviction relief. Controlling is this Court's opinion in Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). This Court reversed the PCR court's grant of relief on the basis that Cummings' sentence was cruel and unusual punishment. This Court explained, "At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel." Id.

Petitioner relied on State v. Lyle, 854 N.W.2d 378 (Iowa 2014) in Issue 1. The dissent in that opinion noted no federal court held the Federal Constitution forbids imposing mandatory minimum prison sentences on juveniles. Id. at 409 (J. Zager, dissenting). The United States Supreme Court precedent is clear it only applies to juveniles sentenced to life without parole sentences. Graham v.

Florida, 560 U.S. 48, 63 (2011) ("The instant case concerns **only those juvenile offenders sentenced to life without parole** solely for a nonhomicide offense." (emphasis added)); see also Walle v. State, 99 So.3d 967, 970 (Fla. Dist. Ct. App. 2012) ("The Supreme Court itself limited the scope and breadth of its decision in Graham by stating that its decision 'concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.' From this statement we identify the four necessary analytical factors: (1) the offender was a juvenile when he committed his offense, (2) the sentence imposed applied to a singular nonhomicide offense, (3) the offender was 'sentenced to life,' and (4) the sentence does not provide the offender with any possibility of release during his lifetime." (brackets in original and citations omitted)).

This Court held it will narrowly interpret the holdings of Graham, Miller v. Alabama, 567 U.S. 460 (2012), and Roper v. Simmons, 543 U.S. 551 (2005) to avoid impermissibly broadening the reach of the protections found in those federal cases. State v. Smith, 428 S.C. 417, 419, 836 S.E.2d 348, 349 (2019). This Court stated in Smith, "It is clear neither the Eighth Amendment nor Miller speaks directly to the issue of the constitutionality of mandatory minimum sentences. In so holding, we join the overwhelming majority of jurisdictions that has found mandatory minimum sentences constitutional under the Eighth Amendment and Miller." Id. In the instant case, Petitioner was not sentenced to a life sentence and retains the likelihood of being released in his lifetime, that is in his forties. Therefore, his sentence does not run afoul of Graham.

V. The trial court did not instruct the jury on the full definition of sexual battery, and counsel was not ineffective.

Petitioner claims the PCR court erred in finding counsel was not ineffective for failing to object to the trial court's instructions on the elements of criminal sexual conduct with a minor and

intent to commit first degree criminal sexual conduct with a minor. Petitioner mistakenly claims the trial court instructed the jury on the full definition of a sexual battery. As to the offense for which he was convicted, the trial court only instructed the jury on fellatio – consistent with the evidence presented at trial. The trial court provided the following instruction for criminal sexual conduct with a minor:

> 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 . . . 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.

App. p. 367, lines 7-17. So for the charge for which Petitioner was convicted, the trial court only instructed the jury on fellatio as the form of battery alleged. The trial court then charged the jury the definition of the second offense (for which Petitioner was ultimately acquitted) as follows:

> 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. Here the State must prove beyond a reasonable doubt that Mr. McBride committed an assault on the victim with the intent to commit first degree criminal sexual conduct.

App. p. 368, lines 2-12. The trial court then charged the element of assault and instructed:

> Next the State must prove beyond a reasonable doubt that Mr. McBride intended to engage in a sexual battery with the victim. Intent means intending the results which occurred. Something that is intentional or something that is not accidental or involuntary. Intent may be shown by acts and conduct of an individual and other circumstances from which you may naturally and reasonably infer intent.
>
> 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.

App. p. 368, line 12 – p. 36, line 10.

Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code § 16-3-651(h). So for this offense, the trial court only instructed the jury on two of the five types of sexual battery – anal intercourse and intrusions by a body part or object into the genital or anal openings of a victim – which are the applicable provisions for the element of assault for the charge of assault with intent to commit criminal sexual conduct in the instant case.

In the instant case, the trial court's instruction made clear the type of battery alleged in the first count upon which Petitioner was convicted was fellatio. Trial counsel testified he considered the instructions for Criminal Sexual Conduct in the First Degree to be clear and proper, and he would have objected if he thought otherwise. App. p. 703, lines 7-15. On direct examination, Petitioner's PCR counsel misleadingly stated in his question posed to trial counsel that the full definition of sexual battery was charged. App. p. 678, line 21 – p. 679, line 3.

Counsel's professional judgement was reasonable and Petitioner was not prejudiced as the trial court's instructions made the jury aware that for Criminal Sexual Conduct, the battery alleged was fellatio. Strickland (requiring a showing counsel's performance fell below professional norms and that the defendant was prejudiced by the deficiency); State v. Rye, 375 S.C. 119, 123, 651 S.E.2d

321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 1, 2021