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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Greenville County

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

Appellate Case No. 2015-001984

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SC Court of Appeals
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S.C. SUPREME COURT

Robert Duncan McCall, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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TABLE OF CONTENTS

CERTIFICATION OF COUNSEL2

QUESTION PRESENTED3

STATEMENT OF THE CASE.....4

ARGUMENT

 The court of appeals did not err in holding Petitioner failed to
 meet his burden of proving he is entitled to post-conviction relief.6

CONCLUSION17

CERTIFICATION OF COUNSEL

Counsel for Respondent hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals and denied by Order filed August 20, 2015.

QUESTION PRESENTED

1. Was counsel constitutionally ineffective by failing to properly investigate, prepare, present, and preserve the issue relating to the need for an independent psychological examination of the prosecutrix?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the February 2003 term of General Sessions for first-degree criminal sexual conduct (CSC) with a minor (2003-GS-23-1234) and at the October 2003 term for lewd act upon a child (2003-GS-23-7589). (App.pp.492-97). C. Timothy Sullivan, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On January 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of twenty years for first-degree CSC with a minor and fifteen years for lewd act upon a child. (App.pp.489-90).

A notice of appeal was filed at the South Carolina Court of Appeals. J. Falkner Wilkes, Esquire perfected the appeal. (App.pp.121-32). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. McCall, Op. No. 2007-UP-453 (S.C. Ct. App. filed October 10, 2007). (App.pp.118-20).

Petitioner filed an application for post-conviction relief (PCR) on April 28, 2008 (2008-CP-23-3131). (App.pp.33-41). A hearing was held at the Greenville County Courthouse on May 25, 2010. (App.pp.47-117). Petitioner was present and represented by J. Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order dated September 3, 2010. (App.pp.1-12).

A notice of appeal was filed at this Court. J. Falkner Wilkes, Esquire represented Petitioner. After a petition for writ of certiorari and return to petition for writ of certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of

appeals granted the petition for writ of certiorari. After oral argument, the court of appeals affirmed the PCR judge's denial of relief. McCall v. State, Op. No. 2015-UP-344 (S.C. Ct. App. filed July 15, 2015). Petitioner filed a Petition for Rehearing, which the court of appeals denied by order filed August 20, 2015.

ARGUMENT

The court of appeals did not err in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief.

Certiorari is not warranted in this case because the court of appeals was correct in finding and concluding that Petitioner failed to meet his burden of proof.

A.

Petitioner's charges of first-degree CSC with a minor and lewd act upon a child stemmed from his repeated sexual abuse of his physically disabled niece over a period of seven years. The victim indicated Petitioner digitally penetrated her vagina and inserted his penis into her rectum on several different occasions. (App.pp.279-82; pp.284-86; pp.291-92; pp.294-96). Further, Petitioner gave a voluntary statement in which he admitted to digitally penetrating the victim on one occasion. (App.pp.392-99; pp.421-23; pp.458-65).

At a motion hearing on October 24, 2003, trial counsel requested the court issue an order for "a psychological and psychiatric exam of the victim" because he believed the victim had fantasy issues. (App.p.237; pp.238-39; pp.242-43). Trial counsel argued the criteria set forth for such an examination of the minor victim under West Virginia v. Delaney, 417 S.E.2d 903 (W. Va. 1992) had been satisfied. (App.pp.237-41). Trial counsel stated a psychological examination was necessary because he was "not sure how much of this is the girl and how much is outside influence. I'd like to have an exam without the family there where she and somebody could talk about it." (App.p.242). The State countered the victim was competent to testify and that she was "orthopedically

handicapped” with a “speech language impairment” but made As and Bs in school and was not mentally disabled. The State also noted that Linda Hutton – a licensed social worker who provided therapeutic counseling to the victim – had not recommended the victim receive psychological testing. (App.pp.245-50). The judge denied trial counsel’s request for an order compelling an independent psychological examination of the victim. (App.pp.254-55; p.486).

At the start of trial (approximately three months later), trial counsel recounted this motion hearing for the trial judge and stated “just for the record I would like to note that I still objected to that ruling just to protect myself.” (App.pp.263-64). The trial judge stated “[a]ll right” and the trial proceeded. (App.p.264). The victim testified Petitioner touched her in her “front place” and “put his penis in [her] butt” several times. (App.pp.279-82; pp.284-86; pp.291-92; pp.294-96). The victim’s cousin testified she saw the victim and Petitioner alone in a room together after one of these incidents and that the victim “seemed scared. She was kind of upset.” (App.pp.307-11). Investigator Henderson, Sergeant Hudgins, and Petitioner testified about the statement he gave police in which he admitted to digitally penetrating the victim. (App.pp.392-99; pp.421-23; pp.458-65).

B.

At the PCR hearing, trial counsel testified he filed the motion for an independent psychological evaluation of the victim based on: the victim’s age, Petitioner’s belief that she had fantasies about him, and Petitioner’s disclosure that the victim engaged in masturbation. (App.p.54; p.62; pp.75-76). Trial counsel testified his request for an

independent evaluation was based upon what Petitioner and his family told him, not upon any records he received. (App.p.76). Trial counsel testified he did not reference the victim's medical records in the motion because they did not touch upon any potential psychological issues. (App.p.55). Trial counsel testified he did not reference Hutton's report in the motion because it was unavailable at the time of the motion hearing. (App.p.66). Trial counsel testified he did not renew his motion for an independent psychological examination of the victim at the start of trial because he did not believe the trial judge could overrule the motion judge. (App.p.76). Regardless, trial counsel testified he could not opine as to whether an independent psychological evaluation would have changed the outcome of the trial because the victim's testimony about the abuse would have still remained the same. (App.pp.76-77).

Clinical psychologist Dr. Allison Foster testified as "an expert in psychology and forensic interview techniques" at the PCR hearing. (App.p.84). Dr. Foster stated she reviewed several documents, which included information provided to the defense prior to the motion hearing, information provided to the defense prior to the trial, and the trial testimony. (App.p.104). Dr. Foster opined that, if an expert had reviewed all of these items, they would have recommended a forensic evaluation of the victim. (App.p.105). Dr. Foster stated the victim's handicaps, her school records, and comments in reports about the victim's mother all indicated an independent evaluation was necessary. (App.pp.106-07). Dr. Foster specifically stated, however, that her testimony was whether a forensic evaluation would have been necessary in her opinion, not a psychological evaluation. (App.pp.107-08). Dr. Foster also specifically stated she had no opinion as to

what the results of a forensic evaluation would have been. (App.p.113).

In denying the application for post-conviction relief, the PCR judge found Petitioner “did not meet his burden of proving trial counsel failed to make a proper, comprehensive argument in moving for a psychological evaluation of the victim.” The PCR judge also noted “there nothing in the discovery materials that could have been – but was not – argued in support of the request for an evaluation of the victim.” The PCR judge found Dr. Foster’s testimony could not be given much weight based, in large part, upon her reliance on documents not in existence at the time of the pre-trial motion and on her mischaracterization of the documents that were available at the time. (App.p.7).

C.

The court of appeals affirmed the order of dismissal. McCall v. State, Op. No. 2015-UP-344 (S.C. Ct. App. filed July 15, 2015). The court of appeals found Petitioner “failed to prove prejudice because he did not present evidence at the PCR hearing that would support an order allowing an independent psychological examination.” Id. at *3. The court of appeals found Dr. Foster’s testimony was “not relevant to the question of whether [Petitioner] was entitled to an independent psychological examination of Victim, and there is no reasonable probability the court would have ordered an independent psychological examination if trial counsel had presented the evidence that was presented at the PCR hearing.” Id. The court of appeals concluded Petitioner failed to prove prejudice. Id.

D.

For an applicant to be granted PCR as a result of ineffective assistance of counsel,

he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel improperly argued the motion for an independent psychological examination of the victim.

Trial counsel testified there was nothing in the discovery materials that led him to believe a psychological examination of the victim was necessary. Rather, trial counsel stated he decided to file this motion after comments from Petitioner and his family about the victim's conduct. At the motion hearing, trial counsel articulated each of the factors set forth in West Virginia v. Delaney¹ in arguing Petitioner's need for an evaluation of the minor victim outweighed the victim's right to privacy. Trial counsel explained his

¹ The South Carolina Supreme Court adopted the Delaney factors seven months after Petitioner's trial in the case of In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004).

rationale regarding each one of these factors. Trial counsel testified he did not offer any evidence from the victim's medical records during the motion hearing because those records did not pertain to her psychological condition. Further, trial counsel cannot be held ineffective for failing to offer evidence from Hutton's report, as that report had not been produced by the time of the motion hearing. Trial counsel is not required to be clairvoyant. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (“[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.”); cf. State v. Gilmore, 314 S.C. 453, 445 S.E.2d 454 (1994) (noting that counsel cannot be expected to be clairvoyant about changes in the law). It is unclear what else trial counsel could have argued in support of the motion with the facts and evidence known to him at that time. The motion judge considered both trial counsel's argument and the State's response in determining an independent psychological examination of the minor victim was not warranted. Petitioner failed to meet his burden of proving trial counsel did not properly present this argument to the motion judge. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

F.

Petitioner also failed to meet his burden of proving he was prejudiced as a result of how trial counsel argued the motion for an independent psychological examination. Petitioner presented Dr. Foster at the PCR hearing in an attempt to demonstrate prejudice. Dr. Foster's testimony, however, was not germane to the issue at hand. The issue at hand has always been whether trial counsel properly argued that the victim should undergo a

psychological evaluation. Yet Dr. Foster testified she was offering an opinion of whether a forensic evaluation should have been ordered. (App.pp.107-08). Dr. Foster merely opined the victim should have had a forensic evaluation that may have alerted someone to the need for a psychological evaluation. (App.p.108). Such a statement is speculation upon speculation and cannot be given any significance. As Petitioner did not present evidence that an expert witness believed the victim should have had a psychological evaluation, this Court cannot speculate as to whether such an examination would have changed the outcome of the case. See, e.g., Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”).

Regardless, Petitioner cannot prove prejudice based on Dr. Foster’s testimony because the PCR judge found Dr. Foster’s testimony could not be given much weight. The PCR judge noted Dr. Foster’s testimony was based – in part – upon her reliance on documents that were not available to trial counsel at the time of the motion hearing (such as Hutton’s report, the trial transcript, and the juror note sent during deliberations). The PCR judge also noted Dr. Foster mischaracterized the facts contained in several other documents. (App.pp.7-9). In fact, the PCR judge found Dr. Foster “improperly characterized” the following items when she stated trial counsel should have highlighted these items at the motion hearing: (1) school records (while Dr. Foster stated these records indicated the need for a forensic evaluation because the victim performed below grade level on an achievement battery test, the PCR judge noted these records indicated

the victim received As and Bs on her report card and was “working at a higher grade level than these achievement scores indicate”), (2) Dr. Henderson’s report (while Dr. Foster stated there was a troubling comment in the report that the victim’s mother had previous concerns about abuse, the PCR judge found “no such conclusion should be drawn from that document” and noted the victim said she would indicate if the information provided was incorrect), and (3) incident and supplemental reports (while Dr. Foster stated it was problematic that the victim’s mother took her to two doctors several years earlier and may have spoken about abuse in front of the victim, the PCR judge noted this was one statement in the police report and would not have assisted counsel in arguing the standard for ordering a psychological evaluation of the victim had been met). (App.pp.7-9). This Court should agree with the PCR judge’s conclusion that Dr. Foster’s testimony carries very little weight and cannot be relied upon to prove prejudice. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge’s findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners’ Ass’n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.”).

Petitioner cannot prove prejudice because the criteria necessary for ordering an independent psychological evaluation of the victim were not satisfied. As noted supra in footnote 1, the South Carolina Supreme Court adopted the factors set forth in Delaney (which were argued by trial counsel at the motion hearing) in the case of In re Michael H. In re Michael H. concerned whether the minor victim of a sexual assault should be

ordered to submit to a psychological evaluation. The Supreme Court held that, in determining whether a defendant has a compelling need for an examination of a child sexual assault victim, the court must consider:

(1) nature of examination requested and intrusiveness inherent in that examination, (2) victim's age, (3) resulting physical and/or emotional effects of examination on victim, (4) probative value of examination to issue before court, (5) remoteness in time of examination to alleged criminal act, and (6) evidence already available for defendant's use.

360 S.C. at 547, 602 S.E.2d at 732-33 (citing Delaney, 417 S.E.2d at 907). The Supreme Court noted the occasions where a judge would order a psychological evaluation of the victim would be rare. Id. at 550, 602 S.E.2d at 734. The Supreme Court found there must be a compelling need to justify an intrusion into a victim's privacy in order to protect a defendant's right to confront his accuser. Id. at 548, 602 S.E.2d at 733. The Supreme Court used the word "compelling" twelve times when discussing the relevant case law and the issue of whether the need for a psychological evaluation of a victim was warranted.

Petitioner failed to demonstrate a compelling need for a psychological evaluation of the minor victim in this case under the Michael H factors. Initially, the facts of Petitioner's case differ greatly from those in Michael H. In that case, the victim was very young (four or five years old at the time of the abuse and six years old at trial) and had reported auditory hallucinations from around the time of the abuse until right before trial. In contrast, the victim in the instant case was older (she was abused between the ages of five and twelve years old and was thirteen years old at trial) and had no documented mental health issues. Regardless, evaluation of the six Michael H factors does not

demonstrate a compelling need to subject the minor victim in this case to a psychological examination. First, an independent psychological evaluation of the victim would have been intrusive because it would have involved questioning about the victim's feelings and memories about the sustained sexual abuse by her uncle. Second, the victim was thirteen years old at the time of the trial, so her age would not be a troubling aspect in determining her competency. Third, the intrusiveness of a psychological evaluation regarding seven years of sexual abuse would have naturally left emotional effects upon the victim. Fourth, a psychological evaluation would have had little probative value because the basis for requesting said evaluation was that the thirteen year old victim may have had fantasies and masturbated – which would have had little import when Petitioner admitted he digitally penetrated the victim. Fifth, remoteness would not have been a factor in this case, as the sexual abuse happened up to approximately one year before the trial. Sixth, there was other evidence available (such as the statements in the police reports and Dr. Henderson's report about the victim's mother's previous inquiries to two physicians about whether there was sexual abuse) that could have been used to challenge the victim's credibility when she testified about the sexual abuse. As such, Petitioner cannot prevail upon his claim that he was prejudiced by the manner in which trial counsel argued the motion for an independent psychological evaluation of the victim. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

G.

Accordingly, the court of appeals did not err in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief. Dr. Foster's testimony at the

PCR hearing concerned a forensic evaluation and was thus not germane to the issue of whether trial counsel should have requested an independent psychological evaluation. As such, the court of appeals correctly found Petitioner did not meet his burden of proving he suffered any prejudice as the result of trial counsel's representation. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
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October 30, 2015

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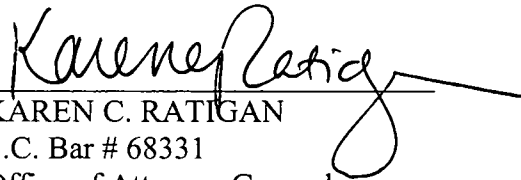
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari to the Court of Appeals upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.
This 30th day of October, 2015.


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