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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
The Honorable Alison Renee Lee, Post-Conviction Relief Judge

Opinion No. 5359 (Ct. App. Filed November 12, 2015)

BOBBY JOE REEVES,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Rence Lee, Circuit Court Judge

Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner, Bobby Joe Reeves, was indicted in Richland County for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On September 17-18, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by Gene Stockholm, Esquire. At the conclusion of the trial, the Petitioner was found guilty as charged. The Honorable Henry F. Floyd, presiding circuit judge sentenced the Petitioner to fifteen years' imprisonment on both charges, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. Joseph L. Savitz, III, then Acting Chief Attorney with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In an unpublished opinion filed February 10, 2005, the Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Reeves, 2005-UP-099.

On May 27, 2005, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court, which was amended on June 2, 2010. The State served its Return on January 6, 2006. An evidentiary hearing into the matter was convened on June 2, 2010, before the Honorable Alison Renee Lee, presiding circuit judge. On February 3, 2011, the PCR court filed an order captioned "Order of Dismissal" which denied relief on all of the Petitioner's claims with the exception of an allegation of ineffective assistance of counsel during sentencing. With regard to that claim, the PCR court found defense counsel ineffective and granted a new sentencing proceeding.¹ On March 1, 2011, the Petitioner timely served a Notice of Appeal indicating his intent to appeal the order issued by Judge Lee in this case. The Notice of Appeal was filed with this Court on March 8, 2011.

¹ The State did not appeal this finding, and the Petitioner does not challenge it on appeal.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

I. The PCR court erred in finding that defense counsel was not ineffective for failing to consult with and to present the testimony of a gynecological expert.

A. How the Issue Arose Below

In 1991, the Petitioner met the victim's mother Dawn and they became roommates when the victim was very young. App. p. 68, lines 3-19. After a few years of living together, Dawn moved out and ultimately settled down in Georgia. App. p. 68, line 24-p. 69, line 6. Despite the long distance between them, Dawn and the Petitioner remained in contact. On occasion, Dawn

would bring the victim back to South Carolina to stay with the Petitioner at his home. App. p. 70, lines 1-18. The Petitioner acted as a father figure to the victim. App. p. 89, lines 1-14

The charges in this case arose out of alleged sexual abuse that occurred at the Petitioner's home during the July 4, 2000, holiday weekend, which would be the last time the Petitioner would see the victim. The victim, who was ten years of age at the time of the incident, testified that the Petitioner abused her by digital penetration that weekend. App. p. 17, lines 2-7. However, she did not disclose this abuse until nearly a month later. App. p. 74, line 6-p. 79, line 18. On July 31, 2000, Dawn took the victim to the hospital, where she was examined by Dr. Dennis Bash. App. p. 112, lines 1-15. Dr. Bash testified at trial that he observed a healing scar on the membrane of the victim's hymen. App. p. 113, line 25-p. 114, line 16. Dr. Bash opined that this injury was consistent with the Petitioner's digital penetration of the victim nearly a month earlier. App. p. 114, line 23-p. 115, line 13.

A second physician, Dr. Maurcen Claiborne, also examined the victim on August 28, 2000, approximately a month following Dr. Bash's examination. App. p. 120, line 17-p. 121, line 3. Dr. Claiborne testified that there were no visible injuries to the victim's vaginal area. App. p. 122, lines 4-12. Dr. Claiborne opined that the lack of injury was consistent with the abuse described by the victim and the findings of Dr. Bash. App. p. 124, lines 6-9.

The Petitioner, testifying in his defense, stated that no abuse had ever occurred. App. p. 165, lines 1-2. However, the Petitioner did not present any expert testimony about the injury to the victim. Seizing upon this flaw in the defense strategy, the State repeatedly argued that the testimony by Dr. Bash and Dr. Claiborne could not be explained or countered by the defense. See App. p. 202, line 11-p. 203, line 1; p. 206, lines 4-12; p. 207, lines 9-17. The Petitioner was convicted of all charges and sentenced to fifteen years' imprisonment.

During the PCR hearing, the Petitioner alleged that defense counsel was ineffective for failing to consult with, and to present the testimony of, a gynecological expert to counter the State's expert witnesses. In support of this argument, the Petitioner presented the testimony of Dr. Frederick Thompson, who has been practicing gynecology for over thirty years. Dr. Thompson testified that the injury to the victim had to be "fairly substantial" in order to be seen a month after the injury occurred. App. p. 303, lines 17-21. Additionally, Dr. Thompson presented numerous examples of how the injury could have occurred, including through an accident or by self-infliction. App. p. 295, lines 14-22. Dr. Thompson also testified that he "fail[ed] to see" how Dr. Claiborne's findings were consistent with abuse to the victim. App. p. 301, line 22-p. 302, line 3. Finally, Dr. Thompson opined that

A laceration would be very difficult to date, I think exactly, as to how long it had been there, and certainly difficult to say what exactly had caused that particular injury if there was not any other evidence of trauma.

App. p. 301, lines 5-9.

Defense counsel testified that an expert "might have" been helpful to counter the State's physical evidence of abuse. App. p. 338, line 3. However, he did not recall attempting to contacting an expert on the Petitioner's behalf because "there was a question about money." App. p. 339, lines 3-4. Despite the questions about money, defense counsel could not recall if he spoke to the Petitioner about hiring an expert, and he knew that he did not personally speak to an expert. App. p. 339, lines 4-5.

The PCR court denied relief on this issue, finding that defense counsel was not ineffective because the Petitioner could not have paid for an expert and because Dr. Thompson's testimony "confirmed that the cause of the injuries was unclear." App. p. 377. The Petitioner now asserts that the PCR court's ruling is in error.

B. Discussion

A defense attorney's failure to consult with witnesses and to conduct a sufficient investigation into possible defense constitutes ineffective assistance of counsel. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Furthermore, the failure to present favorable expert testimony at trial can also constitute ineffective assistance of counsel. McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

As an initial matter, the Petitioner would note that the PCR court's ruling on this matter is predicated on its understanding that the "medical evidence described at trial was circumstantial evidence" and that the State's experts "could not state with certainty the exact cause of the injuries discovered." App. p. 377. The PCR court treats the medical evidence as little more than some evidence of guilt and that it was not an important issue at the trial. This finding underpins both the deficient performance and prejudice inquiries conducted by the PCR court. However, the State's experts never gave additional possible causes for how the injury to the victim could have occurred, and the State certainly argued that their experts had "the education and the training to take [the victim's] revelation and call it what it was; sexual abuse." App. p. 211, lines 3-5. In other words, the testimony of the State's experts was presented as conclusive evidence of sexual abuse. The Petitioner submits that the PCR court's failure to recognize the extreme importance of the testimony by the State's experts renders its reasoning fatally flawed.

Additionally, the Petitioner submits that the PCR court egregiously erred by finding that defense counsel's performance was not deficient because of the Petitioner's inability to pay for an expert. The logic underpinning the PCR court's decision is that since the Petitioner could not afford to hire an expert, then defense counsel was not obligated to consult with an expert. Defense counsel, however, never testified that the Petitioner could not have hired an expert, only

that there was a question about money. See App. p. 339, lines 3-4. Furthermore, defense counsel testified that he could not recall speaking to the Petitioner about an expert. See App. p. 339, lines 4-5. Since there is no evidence that the Petitioner was consulted about an expert, there is certainly no evidence that the Petitioner's couldn't afford to pay for an expert. Furthermore, given the extreme importance the medical testimony would play at trial, defense counsel's need to present an expert to counter the State's testimony was crucial. Inasmuch as defense counsel didn't even speak with an expert or consult with the Petitioner about an expert, there can be no question that his performance constituted deficient conduct.

Turning to the issue of prejudice, the Petitioner respectfully contends that the PCR court's ruling fails to recognize the importance of the State's expert testimony at trial. While Dr. Thompson's testimony does not categorically rule out the possibility of abuse by the Petitioner, his testimony casts serious doubt on the veracity of the victim's claims and nullifies the impact of the State's expert witnesses' testimony. Dr. Bash's examination revealed evidence of a healing scar to the victim's hymen. Dr. Thompson testified that the victim had to suffer a very damaging injury in order for a laceration to be seen a month later. Since the only evidence of abuse is digital penetration, it is difficult to see how the Petitioner could have caused an injury so damaging as to be seen a month later. Furthermore, Dr. Thompson's testimony provides other ways for the injury to have occurred, including self-infliction and an accidental injury. These alternatives were never presented to the jury. Had Dr. Thompson's testimony been presented to the jury, there can be no doubt that the jury would have discounted the State's medical evidence as evidence of actual abuse.

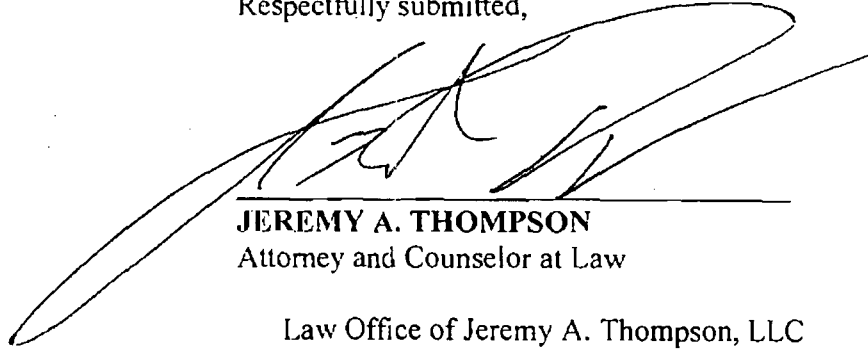
The crux of the State's case was the Petitioner's inability to explain how the victim's injury occurred. Consequently, it was paramount that other explanations be provided to the jury

be the defense. The Petitioner submits that had alternative explanations, such as those presented by Dr. Thompson, been provided to the jury, there is a reasonable likelihood that the State's argument that the medical testimony "100 percent corroborated" the victim's testimony would have fallen on the jury's deaf ears and that a not guilty verdict would have been issued by the jury. App. p. 206, line 7. The PCR court misapplied Strickland's prejudice prong in coming to the opposite conclusion. Accordingly, the Petitioner respectfully contends that the PCR court's analysis and application of both prongs of Strickland is unsupported by any probative evidence, and that the Petitioner should receive a new trial.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Thompson', is written over a horizontal line.

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ATTORNEY FOR PETITIONER.

This 28th day of September, 2011.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

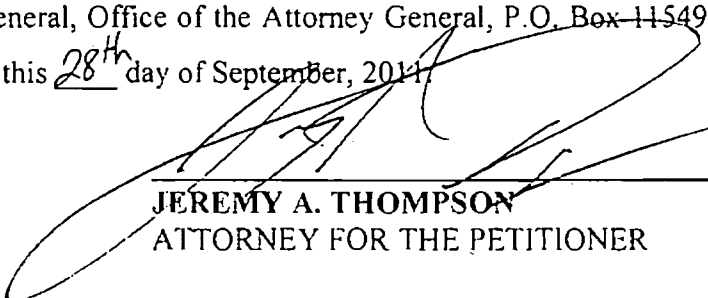
v.

STATE OF SOUTH CAROLINA,

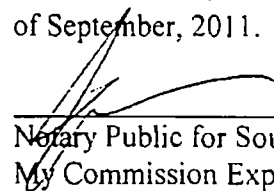
RESPONDENT.

CERTIFICATE OF SERVICE

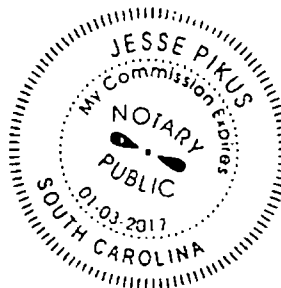
The undersigned hereby certifies that one copy of the Petition for a Writ of Certiorari and one copy of the Appendix in the above-entitled case have been served upon opposing counsel, Brian T. Petrano, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by hand-delivery, this 28th day of September, 2011.


JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 28th day
of September, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 1/3/17



**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas**

The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2005CP402551

Bobby Joe Reeves, 287423,..... Petitioner,

v.

State of South Carolina,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

**WHETHER ANY SUFFICIENT EVIDENCE OF PROBATIVE VALUE
EXISTS TO SUPPORT THE PCR COURT'S DENIAL OF RELIEF?**

STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return.

The Petitioner, Bobby Joe Reeves, was indicted in Richland County for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On September 17-18, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by Gene Stockholm, Esquire. At the conclusion of the trial, the Petitioner was found guilty as charged. The Honorable Henry F. Floyd, presiding circuit judge sentenced the Petitioner to fifteen years' imprisonment on both charges, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. Joseph L. Savitz, III, then Acting Chief Attorney with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In an unpublished opinion filed February 10, 2005, the Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Reeves, 2005-UP-099.

On May 27, 2005, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court, which was amended on June 2, 2010. The State served its Return on January 6, 2006. An evidentiary hearing into the matter was convened on June 2, 2010, before the Honorable Alison Renee Lee, presiding circuit judge. On February 3,

2011, the PCR court filed an order captioned "Order of Dismissal" which denied relief on all of the Petitioner's claims with the exception of an allegation of ineffective assistance of counsel during sentencing. With regard to that claim, the PCR court found defense counsel ineffective and granted a new sentencing proceeding.¹

The Petitioner filed a Petition for Writ of Certiorari on September 28, 2011. This return follows.

¹ The State did not appeal this finding, and the Petitioner does not challenge it on appeal. In addition, this Respondent would note that several hours after the argument regarding penalizing a defendant for going to trial was made at the PCR hearing, a follow up (Rule 3.3(a)(2)) email was sent to the PCR court and opposing counsel conceding that error of law in light of Davis v. State, 336 S.C. 329 (1999). (App. p. 358 L. 2 – 12). This is allegation "1e." (App. p. 380 – 381).

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "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, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State,

300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced 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 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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT 1

**SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO
SUPPORT THE PCR COURT'S DENIAL OF RELIEF**

The PCR Court addressed the Petitioner's medical expert claim in one paragraph, i.e. issue "1c." (App. p. 377). The PCR Court's dismissal of issue "1c" did not specifically address prejudice, the analysis instead focused on the deficient performance prong of the Strickland analysis. (App. p. 377). Nevertheless, the Petitioner's argument at the PCR hearing regarding the expert was to suggest that the injury must have been "substantial" to be visible twenty-seven (27) days later, yet the victim did not immediately report it. (App. p. 345 L. 4, 8).² The Petitioner ignores the fact that he threatened the victim not to report it. (App. p. 21, L. 9 – 11, p. 22 L. 6). The victim was afraid for the safety of her and her mother. (App. p. 134, L. 13). Even the Petitioner's own expert readily conceded that fear can prevent a victim from seeking medical attention even if the injury is substantial. (App. p. 304, L. 2 – 3). Despite the Petitioner's claim that "[t]he PCR court misapplied Strickland's prejudice prong in coming to the opposite conclusion." (PWOC, p. 10). This Court gives wide deference to the PCR Court and applies

² The Petitioner blames the victim, he claims that the victim is mentally challenged and she probably did this to herself because she is mentally challenged and cannot properly masturbate. (App. p. 298 L. 23 – p. 299 L. 15). The Respondent submits that it is not clear where in the record any evidence exists to suggest that the victim was so challenged. Similarly, the Petitioner insolently claims that his "digital penetration" could not have caused "an injury so damaging." (PWOC, p. 9). The personal information sections of the "SCDC records" are difficult to read, but the Respondent submits that the Petitioner is a fairly large man, and would have been especially large compared to the anatomy of a ten (10) year old girl.

an "any evidence" standard. Cherry, *supra*. The PCR Court's Order of Dismissal properly denied the expert witness claim as presented at the PCR hearing. (App. p. 377).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

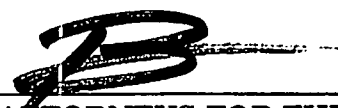
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By: 

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Columbia, South Carolina
Wednesday, December 21, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

Bobby J. Reeves, 287423,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

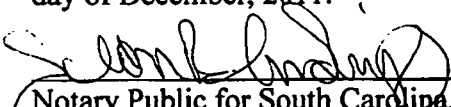
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, Jeremy A. Thompson by mailing two (2) copies addressed to: 1612 Marion Street, Suite 210; Columbia, SC 29211; with postage prepaid, this 22nd day of December, 2011.



BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 22nd
day of December, 2011.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013

The South Carolina Court of Appeals

Bobby Joe Reeves, Petitioner,

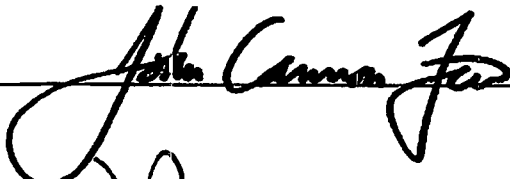
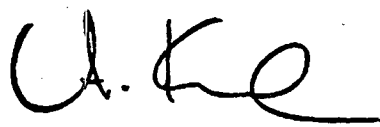
v.

State of South Carolina, Respondent.

Appellate Case No. 2011-187246

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Jeremy Adam Thompson
Brian T. Petrano

FILED

January 31, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-187246
Lower Court Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF PETITIONER

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CONSTITUTIONAL PROVISIONS

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U.S. Const. Amend. XIV	6

STATEMENT OF ISSUE ON APPEAL

I.

Whether defense counsel was ineffective for failing to investigate, and present the testimony of, a gynecological expert?

STATEMENT OF THE CASE

The Petitioner, Bobby Joe Reeves, was indicted in Richland County for one count of criminal sexual conduct with a minor in the first degree and one count of committing lewd act upon a minor. On September 17-18, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by Gene Stockholm, Esquire. At the conclusion of the trial, the Petitioner was found guilty as charged. The Honorable Henry F. Floyd, presiding circuit judge, sentenced the Petitioner to fifteen years' imprisonment on each charge, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentences to this Court. Joseph L. Savitz, III, Acting Chief Attorney with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In an unpublished opinion filed February 10, 2005, this Court affirmed the Petitioner's convictions and sentences. State v. Reeves, 2005-UP-099 (S.C. Ct. App. filed February 10, 2005).

On May 27, 2005, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court's Office, which was amended on June 2, 2010. The State served its Return on January 6, 2006. An evidentiary hearing into the matter was convened on June 2, 2010, before the Honorable Alison Renee Lee, presiding circuit judge. On February 3, 2011, the PCR court filed an order captioned "Order of Dismissal" which denied relief on all but one of the Petitioner's claims. With regard to the claim that was not denied, the PCR court found that defense counsel was ineffective during sentencing and granted a new sentencing proceeding.¹ On March 1, 2011, the Petitioner timely served a Notice of Appeal indicating his intent to appeal the order issued by the PCR court in this case. The Notice of Appeal was received by the Supreme Court on March 8, 2011.

¹ This ruling is not challenged on appeal by either party.

The Petitioner filed a Petition for a Writ of Certiorari with the Supreme Court on September 28, 2011. The State served its Return on December 22, 2011. The Supreme Court subsequently transferred the appeal to this Court. By order filed January 31, 2014, this Court granted the certiorari petition. The Petitioner now submits this Brief in support of his argument that the PCR court improperly denied his Application for Post-Conviction Relief.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

- I. The PCR court's finding that defense counsel was not ineffective for failing to investigate and present the testimony of a gynecological expert is not supported by any probative evidence.**

A. How the Issue Arose Below

The victim in this case was a ten-year old female at the time of the alleged abuse. Although the Petitioner was not the victim's father, he acted as a father figure to her as she and her mother, Dawn, lived with him while she was a young child. Even after Dawn moved to Georgia after a few years of living with the Petitioner, Dawn would frequently bring the victim

to South Carolina so that the victim could stay with the Petitioner for the weekend. See App. p. 70, lines 1-20.

The last weekend the Petitioner and the victim would spend together was the July 4, 2000, holiday weekend. The victim testified that the Petitioner abused her by digital penetration that weekend. App. p. 17, lines 2-9. The victim did not disclose the abuse to her mother until the end of July. See App. p. 74, line 6-p. 80, line 7. On July 31, 2000, Dawn took the victim to the emergency room where the victim was examined by Dr. Dennis Bash. See App. p. 112, line 1-p. 113, line 21. Dr. Bash testified that he observed a healing scar on the membrane of the victim's hymen. App. p. 113, line 25-p. 114, line 16. Dr. Bash was then asked what kind of trauma could have caused the injury:

Q. So, doctor, what kind of trauma would cause the injuries that you noted on that child on the 31st?

A. Well, certainly penetration would cause that.

Q. Penetration such as penile penetration?

A. Any kind of penetration.

Q. Digital penetration?

A. Any kind of penetration.

Q. And your findings were consistent with that?

A. Yes.

Q. And as far as dating what you observed on the 31st, you said it was healing. So at least a week or older?

A. At least a week.

Q. Would it be consistent with some kind of penetration approximately thirty days earlier?

A. Yes.

App. p. 114, line 23-p. 115, line 13. Defense counsel did not ask Dr. Bash any questions about how severe the injury must have been in order to be seen a month later, or if there were any other possible explanations for the injury. See App. p. 115, line 18-p. 117, line 10.

After Dr. Bash treated the victim, she was referred to Dr. Maureen Claiborne, a pediatrician, who examined the victim on August 28, 2000. See App. p. 120, line 17-p. 121, line 3. Dr. Claiborne testified that the victim had a normal evaluation and that there were no visible injuries to the victim's vaginal area. App. p. 122, lines 4-19. Despite the lack of injuries to the victim, Dr. Claiborne testified that her findings were consistent with the victim's allegations of digital penetration two months earlier. App. p. 124, lines 6-9; see also p. 127, lines 12-14. As with Dr. Bash, defense counsel did not ask Dr. Claiborne any questions about how severe the injury must have been to be seen a month after the abuse occurred, nor did he ask Dr. Claiborne if there were any other possible explanations for the injury.² See App. p. 124, line 13-p. 127, line 8.

Two witnesses testified for the defense. The first, Jessie Wheaton, testified that he lived in the home with the Petitioner, that he knew the victim, and that the victim wanted the Petitioner to be her father. App. p. 152, line 23-p. 155, line 18. The second, the Petitioner, testified that he never abused the victim. App. p. 165, lines 1-2. The defense did not present any expert testimony to counteract the testimony of Dr. Bash and Dr. Claiborne.

During closing argument, the State repeatedly argued that testimony of Dr. Bash and Dr. Claiborne could not be contradicted and proved that the Petitioner abused the victim. See App. p. 191, lines 10-12; p. 192, lines 3-24; p. 202, line 13-p. 23, line 1; p. 206, lines 4-12; p. 207,

² Defense counsel did ask Dr. Claiborne if the negative examination was consistent with no abuse occurring. See App. p. 127, lines 4-7. This question was immediately followed up on redirect with a reaffirmation of her testimony that her examination of the victim was also consistent with abuse. See App. p. 127, lines 12-14.

lines 9-17; p. 208, lines 7-19; p. 211, lines 1-5.³ At the conclusion of the trial, the Petitioner was convicted as charged and was sentenced to fifteen years' imprisonment.⁴

At the PCR hearing, the Petitioner alleged that defense counsel was ineffective for failing to interview, and to present the testimony at trial of, a gynecological expert. See App. p. 287, lines 22-24; see also p. 280 (Amended Application for Post-Conviction Relief). In support of this allegation, the Petitioner presented the testimony of Dr. Frederick Thompson, a gynecologist with over thirty years' experience. Dr. Thompson testified that there could have been multiple causes of the injury to the victim, including accidental injury or self-infliction. App. p. 295, lines 14-22. Dr. Thompson further testified that the injury to the victim "would have to be fairly substantial ... to see 30 days later in its various stage of healing." App. p. 303, lines 19-21. He also described how severe the injury would have to be in order to be seen a month after its infliction:

Q. Would it be something that you would expect would require—would it be an injury so severe that you would expect someone to go to a doctor about it?

A. Again, you're given someone who may or may not have the expected degree of intelligence. There's a fear involved. There's all sorts of reasons why people fail to seek medical attention, but if your child was bleeding, *I would think this would alarm them enough that they would probably want to go to a caregiver of some sort.* Again, there's a lot of pain involved. Again, there would probably be some reaction.

If it was a fairly minor laceration, perhaps it not [sic] require any medical attention at all. It would heal on its on [sic].

Q. *If it were a fairly minor laceration, would you expect to see it 30 days later?*

³ Two pages of the State's closing argument—pages 214 and 215 of the original trial transcript—are missing and cannot be located.

⁴ The two pages where the verdict is read aloud—pages 228 and 229 of the original trial transcript—are also missing and cannot be located.

A. Probably not.

App. p. 303, line 23-p. 304, line 14 (emphasis added). Additionally, Dr. Thompson testified that it would be difficult to date when the victim's injury occurred and that it would be difficult to conclude what caused the injury:

A laceration would be very difficult to date, I think exactly, as to how long it had been there, and certainly difficult to say what exactly had caused that particular injury if there was not any other evidence of trauma.

App. p. 301, lines 5-9. Lastly, Dr. Thompson testified that he "fail[ed] to see" how Dr. Claiborne could testify that a normal exam "was evidence of abuse." App. p. 301, line 22-p. 302, line 3.

Defense counsel testified that he knew that the State intended to admit evidence of physical trauma through the testimony of the doctors. App. p. 337, lines 21-23. He further testified, however, that he did not consult with an expert prior to the trial and that he could not recall if he discussed retaining an expert's services with the Petitioner. App. p. 337, line 14-p. 339, line 5. His only explanation for not doing so was that "there was a question about money." App. p. 339, lines 3-4.

The PCR court denied relief on this issue, concluding:

This Court finds that Applicant has failed to prove deficient performance of Trial Counsel for failure to interview and present a medical expert. Further, Trial Counsel testified that he had not retained a medical expert because Applicant did not have the funds to do so. Dr. Thompson testified in the PCR hearing that he could not determine the cause of the injury. The testimony at trial was the observed injury to Victim's genitals was consistent with some type of penetration. A doctor could not state with certainty the exact cause of the injuries discovered and the determination of the cause of the injury was a question for the jury. The medical evidence described at trial was circumstantial evidence. Dr. Thompson's testimony did not make it any less likely that Applicant had committed the crime, in fact, the substance of his

testimony at the PCR hearing only confirmed that the cause of the injuries was unclear. Accordingly, this Court finds that Trial Counsel was not deficient for failure to interview and present a medical expert at trial. This allegation is hereby denied and dismissed.

App. p. 377. The Petitioner now asserts that the PCR court's rulings were erroneous.

B. Discussion

The Petitioner contends that there is no probative evidence to support the PCR court's conclusion that defense counsel was not ineffective for failing to consult with a gynecological expert prior to the Petitioner's trial. As with any allegation of ineffective assistance of counsel, the Petitioner must show that the defense counsel's performance was deficient and that defense counsel's deficient performance prejudiced the Petitioner. See Strickland, supra. The Petitioner will first address Strickland's performance prong before turning to Strickland's prejudice prong.

1. Defense Counsel's Performance Was Deficient

There is no probative evidence to support the PCR court's conclusion that defense counsel was not deficient for failing to consult with a gynecological expert prior to trial. As a general rule, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, supra, 446 U.S. at 691. Our Supreme Court has recognized that the failure to present favorable expert witness testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). More specifically, a defense attorney is under an even greater obligation to consult with an expert on child sexual abuse when the allegations pertain to criminal sexual conduct:

A lesson to be learned from Lindstadt[v. Keane], 239 F.3d 191 (2nd Cir. 2001)] and Pavel[v. Hollins], 261 F.3d 210 (2nd Cir. 2001)] is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's

word over the other's, the need for defense counsel to, at a minimum, consult with an expert to become educated about the "vagaries of abuse indicia" is critical. See id. at 224; Lindstadt, 239 F.3d at 201. The importance of consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation.

Eze v. Senkowski, 321 F.3d 110, 128 (2nd Cir. 2003).

Here, the evidence is clear that defense counsel did not consult with a gynecological expert prior to trial, despite knowing that the State intended to introduce evidence of physical abuse to support the victim's claim of abuse at the hands of the Petitioner. The need to consult with an expert prior to trial was of the utmost importance given the fact that the case essentially came down to a credibility battle between the Petitioner and the victim. See Eze, supra. In such circumstances, the complete failure to consult with an expert constitutes deficient conduct. See Pavel v. Hollins, 261 F.3d 210, 224 (2nd Cir. 2001) ("Because of the importance of physical evidence in 'credibility contest' sex abuse cases, in such cases physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis of the matter. And because of the 'vagaries of abuse indicia,' such pre-trial investigation and analysis *will generally require some consultation with an expert*") (emphasis added).

The PCR court concluded, however, that defense counsel was not deficient "because Applicant did not have the funds to do so." App. p. 377. This conclusion is incorrect as a matter of fact and as a matter of law. With regard to the underlying facts, defense counsel only testified that "there was a question about money," but he conceded that he could not remember consulting with the Petitioner about an expert, and he knew that he did not consult with an expert to determine the potential cost of appearing in court. App. p. 339, lines 3-5. Defense counsel never testified that he knew the Petitioner did not have the funds to retain an expert, only that the

funding *may* have been an issue. The PCR court's conclusion that the Petitioner lacked funding, therefore, is unsupported by defense counsel's testimony, and should be reversed by this Court.

With regard to the PCR court's legal conclusion that the Petitioner's inability to pay an expert absolved defense counsel of his duty to consult with, and present the testimony of, an expert, numerous courts have held that "[a] defendant's inability to pay for necessary experts is not a trial tactic or strategy, and cannot be used to justify defense counsel's failure to consult with or call such experts as witnesses." State v. Schoonmaker, 143 N.M. 373, 382, 176 P.3d 1105, 1114 (N.M. 2008); see also Ex parte Briggs, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005) ("There is no suggestion that trial counsel declined to fully investigate [the victim]'s medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. ... The decision was made because he had not been paid for experts"). In Briggs, the Texas Court of Criminal Appeals held that retained counsel is under an obligation to take steps to protect a client's interests if the client is unable to provide funding for the expert, including, but not limited to:

If counsel was convinced that applicant could not pay for experts to assist him in preparation for trial or to provide expert testimony, [he could] withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency ... and request appointment of new counsel; ... [or] [r]emain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to Ake v. Oklahoma[, 470 U.S. 68 (1985)].

187 S.W.3d at 468 (footnotes omitted).

Here, assuming that the PCR court interpreted the facts correctly, defense counsel did nothing to protect his client's interests; instead, he merely concluded that since the Petitioner could not afford an expert, he did not have to do anything. Defense counsel did not seek to obtain indigent funding for an expert, nor did defense counsel move to be relieved as counsel to

permit the Petitioner to proceed forward with an appointed attorney so that expert funding could be provided. The Sixth Amendment's guarantee of the effective assistance of counsel required more of defense counsel. See Briggs, supra. Consequently, the PCR court's conclusion that defense counsel did not have to consult with an expert due to the Petitioner's inability to pay for one is incorrect as a matter of law, and this Court should reverse the PCR court's findings on this issue.

2. Defense Counsel's Deficient Performance Prejudiced the Petitioner

Having demonstrated that defense counsel was under a duty to consult with an expert and that he unquestionably failed to meet that duty, the Petitioner turns to the question of prejudice. The PCR court concluded that defense counsel was not ineffective, and that the Petitioner could not show that he was prejudiced, because "[t]he medical evidence described at trial was circumstantial evidence" and that "Dr. Thompson's testimony did not make it any less likely that Applicant had committed the crime, in fact, the substance of his testimony at the PCR hearing only confirmed that the cause of the injuries was unclear." App. p. 377. The Petitioner contends that the facts utilized by the PCR court to deny relief are the very facts the PCR court should have found warranted the grant of relief.

The implication of the PCR court's statement that the medical evidence was only circumstantial is that the PCR court discounted the importance of the testimony because it was circumstantial. As the Supreme Court has explained on multiple occasions, however, "circumstantial evidence carries the same weight as direct evidence." State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013); see also State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). Moreover, circumstantial evidence requires that the jury conduct the following inquiry, which would have been extremely damaging in this case:

We have previously observed that this process requires two steps: "After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from that fact? Second, if so, is there any reasonable explanation other than guilt?"

Logan, 405 S.C. at 98, 747 S.E.2d at 451 (quoting Grippon, 327 S.C. at 87-88, 489 S.E.2d at 466). Here, the *only* explanation provided to the jury for the victim's injury was penetration. There were no other explanations that the jury could have seized upon to conclude that there was "any reasonable explanation other than guilt" for the injury. Id. Consequently, the PCR court's dismissal of the expert testimony presented at trial as merely circumstantial was erroneous both for apparently viewing the evidence in a lesser light than direct testimony *and* for failing to identify how important the evidence was to the jury's evaluation of that evidence.

Furthermore, the PCR court erred in finding that Dr. Thompson's testimony did not show prejudice because his testimony "confirmed that the cause of the injuries was unclear" because that confirmation is the evidence the PCR court should have used to find prejudice. This Court need look no further than the State's closing argument to see how clear the testimony of the experts as to the cause of the injury was:

The direct evidence, victim's testimony is totally and completely corroborated by every expert we had.⁵

But I beg you in this case, think about the experts because we didn't take this child out. ... Judge [the experts'] credibility, because they are [sic] totally, completely, corroborate this child in this case.⁶

But remember what Dr. Bash said when he examined victim about three weeks after the last time she had seen Bobby Reeves. There was healing scar tissue in her hymen. *Ten year old girls who have not been sexually molested do not have healing scar tissue in their hymen. There is no other explanation other than she was penetrated.*⁷

⁵ App. p. 191, lines 10-12.

⁶ App. p. 192, lines 12-24.

⁷ App. p. 202, lines 16-22 (emphasis added).

And again, 100 percent corroborated by the medical evidence. Three weeks later when a doctor examined her, a doctor who's a pediatric specialist and finds healing scar tissue. *It just doesn't happen on its own; not on a ten year old; not in an unsexually active ten year old. It's just not going to be there.*⁸

Dr. Bash examines victim on that day and finds healing scar tissue. *Again, there's no other explanation for it other than victim had been penetrated by something. And that's undisputed testimony.*⁹

[The Petitioner] counted on the fact that there would [not] be experts up there; experts who would have the education and the training to take her revelation and call it what it was; sexual abuse.¹⁰

The Petitioner submits that it is abundantly clear that the only explanation for the victim's injury given at trial was penetration.

It was the very purpose of Dr. Thompson's testimony to show that there were other explanations for the injury to the victim and that the testimony of Dr. Bash and Dr. Claiborne did not conclusively prove that the victim was sexually abused. Dr. Thompson provided numerous examples, including self-infliction or accidental injury, to explain how the victim's hymen would have been in a healing state when the victim was examined by Dr. Bash. Additionally, Dr. Thompson opined that a normal exam, such as that conducted by Dr. Claiborne, was not probative of any abuse. The value of Dr. Thompson's testimony, in the face of the overwhelming attack by the State through its experts, would have been incalculable.

Moreover, Dr. Thompson's testimony casts serious doubt on the accuracy of Dr. Bash's conclusion that digital penetration caused the victim's injury, inasmuch as Dr. Thompson testified that the victim would have had to suffer a severe injury in order for it to be seen a month later. See App. p. 303, lines 19-21. There is no indication that the victim had to be hospitalized

⁸ App. p. 206, lines 7-12 (emphasis added).

⁹ App. p. 207, lines 13-17 (emphasis added).

¹⁰ App. p. 211, lines 1-5.

following her encounter with the Petitioner, or that there was other evidence, such as bloody clothing, that would show that the victim had been injured to the degree Dr. Thompson testified would be necessary for the injury to still be visible a month later. The importance of presenting a viable alternative to the State's version of events cannot be understated, and there is more than a reasonable likelihood that had Dr. Thompson testified at trial, the Petitioner would have been acquitted. Accordingly, the Petitioner respectfully submits that the PCR court's conclusion that the Petitioner could not demonstrate prejudice is unsupported by any probative evidence, and should be reversed by this Court.

As a final consideration, the appellate court decisions of this state are replete with conclusions that a defendant was prejudiced by the admission of inadmissible hearsay testimony that the corroborated the victim's disclosure of abuse. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). The testimony of the experts admitted here was far more damaging than the testimony admitted in Jolly, Dawkins, or Smith, because the testimony of Dr. Bash and Dr. Claiborne was treated as conclusive proof that the victim was sexually abused by the Petitioner. It is this type of testimony which has been held to be overwhelming evidence of guilt in cases involving abuse to children. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (concluding that the defendant was not prejudiced by improper corroboration testimony because "[n]umerous medical experts testified that the Child's genital wound could not have been caused by an accidental injury"). It was paramount that defense counsel have a strategy for neutralizing this damaging evidence, and testimony from a defense expert such as Dr. Thompson would have left the jury with reasonable doubt that the Petitioner inflicted the victim's wound.

Accordingly, the Petitioner respectfully contends that this Court should reverse the PCR court's denial of relief and grant the Petitioner a new trial.

CONCLUSION

The lower court's decision denying Post-Conviction Relief should be reversed. The Petitioner's convictions for criminal sexual conduct with a minor in the first degree and lewd act upon a minor should be vacated, and this case should be remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,

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This ____ day of April, 2014.

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2005-CP-40-02551
Appellate Case No. 2011-187246

Bobby Joe Reeves, ... Petitioner,

v.

State of South Carolina, ... Respondent.

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STATEMENT OF ISSUE ON APPEAL

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for failing to call a gynecological expert to testify on Petitioner's behalf?

STATEMENT OF THE CASE

Petitioner is presently incarcerated within the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted during the December 2000 term of the Richland County Grand Jury for Lewd Act upon a Child (2000-GS-40-56188) and during the August 2002 term of the Richland County Grand Jury for Criminal Sexual Conduct with a Minor in the First Degree (2002-GS-40-00211). Gene Stockholm, Esquire, (hereafter "Counsel") represented Petitioner on the charges. On September 17-18, 2002, Petitioner proceeded to jury trial before the Honorable Henry F. Floyd, where he was convicted as indicted of both offenses. Judge Floyd sentenced Petitioner to fifteen years imprisonment for both offenses, with the sentences to be served concurrently.

Petitioner appealed his convictions and sentences. Following the submission of briefs, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Reeves, 2005-UP-099 (Ct. App. filed Feb. 10, 2005). The Remittitur followed.

Petitioner subsequently filed an application for post-conviction relief on May 27, 2005. The State filed its Return on January 6, 2007, requesting an evidentiary hearing be held. Thereafter, Petitioner filed an amended application on June 2, 2010. An evidentiary hearing was convened on June 2, 2010 at the Richland County Courthouse before the Honorable Alison R. Lee. Petitioner was present and represented by Jeremy A. Thompson, Esquire. Respondent was represented by Assistant Attorney General Brian T. Petrano. At the hearing, Petitioner presented testimony from Dr. Frederick Thompson, who was admitted as an expert in gynecology without objection, as well as

testimony from Counsel and appellate counsel, Joseph Savitz, III. Following the conclusion of testimony, the court asked for proposed Orders from both parties. On February 3, 2011, the court issued an Order of Dismissal, dismissing all of Petitioner's claims except that he was entitled to a resentencing hearing.

Petitioner filed a timely notice of appeal on March 1, 2011. Petitioner filed a Petition for a Writ of Certiorari with the Supreme Court on September 28, 2011. Respondent served its Return to the Petition on December 22, 2011. The Supreme Court thereafter transferred the matter to this Court. By Order filed January 31, 2014, this Court granted certiorari. Petitioner filed his Brief on April 2, 2014. This Brief follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any* evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “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 (1984); Butler at 441, 334 S.E.2d at 813. The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. A petitioner must overcome this presumption in order to receive relief. Cherry, *supra*.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the petitioner such that “there is a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for failing to call a gynecological expert to testify on Petitioner's behalf.

Petitioner asserts that Counsel was ineffective for failing to consult with or utilize a gynecological expert to aid in his defense. Petitioner argues that this failure constitutes deficient performance and relies on McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), for the proposition that counsel can be deficient for failing to present a favorable expert witness. Petitioner further asserts that Counsel's failure to call a gynecological expert prejudiced him, as the medical testimony presented by the State at his trial was very damaging and concluded that the only cause of victim's injuries was penetration. Petitioner argues that the post-conviction relief court erred in refusing to grant relief on this ground and requests that this Court reverse. However, as there is sufficient evidence of probative value, this Court must sustain the post-conviction relief court's findings. Cherry, supra.

During Petitioner's trial, the State presented two medical doctors who both treated victim. Dr. Dennis Bash, a pediatric emergency care physician who was admitted as an expert, testified that he examined the victim at the emergency room roughly three weeks after the reported injury date and he noted a healing scar on her hymen, which was rounded over. App. p. 114. He noted that the injury was consistent with *any* kind of penetration, but could not conclude the exact cause of injury or the date of injury. App. p. 114-117. Dr. Bash also testified that his examination did not reveal any other injuries. App. p. 116. Dr. Bash testified that his examination of the victim was merely a "screening examination" and not a substitute for a comprehensive medical examination.

App. p. 116. Next, the State presented testimony from Dr. Maureen Claiborne, a pediatrician who was admitted as an expert and examined the victim nearly eight weeks after the reported injury date. Dr. Claiborne testified that she completed a physical examination of the victim and took cultures to screen her for sexually transmitted diseases per standard protocol when doing a follow-up sexual abuse examination. App. p. 121. Dr. Claiborne testified that both the physical examination and cultures came back normal. App. 122-24. She testified that although these findings were congruent with an assault weeks or months earlier, the findings were also consistent with absolutely nothing happening to the victim. App. p. 122-24; p. 127.

At the evidentiary hearing, Petitioner presented testimony from Dr. Frederick Thompson, a general gynecological expert. App. p. 292-307. Dr. Thompson testified that there are multiple ways trauma can occur to the vaginal area, including sexual assault, accidental injury, or self-mutilation. App. p. 295. He further testified that the injury reported by Dr. Bash possibly could have been caused by digital penetration approximately one month prior to the examination (App. p. 299), a finding that is *consistent* with the findings of Dr. Bash. However, he ultimately concluded that “[t]here’s no way to document what was the cause of the injury.” App. p. 299. He also opined that it would be “very difficult to date” when the injury had occurred and “certainly difficult to say what exactly had caused that particular injury.” App. p. 301 lns. 4-9.

In its Order of Dismissal, the post-conviction relief court determined that Petitioner failed to establish that Counsel’s performance was ineffective. Specifically, the court determined that testimony of Petitioner’s expert, Dr. Thompson, did not make it

more or less likely that Petitioner committed the offense, as he was unable to determine the cause of injury or an injury date. App. p. 377. The post-conviction relief court concluded that that this testimony was consistent with the testimony of the doctors at trial, who ultimately were unable to conclusively determine the cause of the victim's injuries. App. p. 377. Therefore, the court determined that there was no probable likelihood that the result of Petitioner's proceeding would have been different absent Counsel's failure to call a gynecological expert. This is supported by evidence of probative value in the record and should be affirmed.

Furthermore, Petitioner's reliance on McKnight is misguided, as McKnight is readily distinguishable from the case at hand for several important reasons. McKnight, supra. In McKnight, trial counsel called an expert witness at trial whose testimony undermined the defense and supported the State's theory to the extent that it excluded all other potential causes of death. Furthermore, McKnight's trial counsel was on full notice of the State's theory and likely witnesses, as it was McKnight's second trial after her first trial resulted in a mistrial. Id. In the present case, Counsel elected not to present a gynecological expert, but instead elicited favorable testimony on cross-examination that revealed that the State's own experts were ultimately unable to determine the exact cause of injury to the victim and that the victim had no other injuries or evidence indicative of an assault. See App. p. 116-17; p. 124-27.

Additionally, Petitioner's repeated assertions that Counsel was under a duty to consult with an expert even if Petitioner did not have the funds is not controlling. Petitioner fails to cite to any South Carolina or Fourth Circuit case law to support this position. Additionally, Counsel testified that he did not recall if he discussed an expert

with Petitioner but recalled that there was an overall concern regarding money during his representation of Petitioner.¹ App. p. 338-39.

The post-conviction relief court's findings that Counsel was not ineffective for not calling a gynecological expert on Petitioner's behalf are supported by sufficient evidence of probative value. Therefore, this Court should sustain the post-conviction relief court's ruling. Cherry, supra.

¹ Overall, Counsel testified that he recalled little about his representation of Petitioner beyond specifics of one memorable witness. App. p. 328. He testified that it had been nearly eight years since Petitioner's trial and that his file had since been destroyed, leaving him with very few materials, if any, to review before testifying at the evidentiary hearing. App. p. 327-28.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

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By: Megan E. Harrigan
ATTORNEYS FOR THE RESPONDENT

June 30, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Case No. 2005-CP-40-02551
Appellate Case No. 2011-187246

BOBBY JOE REEVES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
Post Office Box 12891
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2014.


MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



May 27, 2015

ALAN WILSON
ATTORNEY GENERAL**Via Hand Delivery**The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211Re: **Bobby Joe Reeves v. State**
Appellate Case No.: 2011-187246

Dear Ms. Kitchings,

This case is scheduled for oral argument on Monday, June 1, 2015 at 10:00 a.m. in Courtroom I. Pursuant to Rule 208(b)(7) SCACR, Respondent respectfully wishes to call to the Court's attention the additional authority of Harrington v. Richter, 562 US 86 (2011), in further support of Respondent's argument that counsel is entitled to formulate a strategy that is reasonable at the time and balances limited resources in accord with effective trial tactics and strategies and that *Strickland* does not require that every prosecution expert be challenged by equal and opposite expert from the defense. By copy of this letter, I am notifying opposing counsel of the submission of this supplemental authority.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

cc: Jeremy A. Thompson, Esquire (by U.S. Mail)

Enclosure: Harrington v. Richter, 562 US 86 (2011)

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Bobby Joe Reeves, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-187246

ON WRIT OF CERTIORARI

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5359
Heard June 1, 2015 – Filed November 12, 2015

REVERSED

Jeremy Adam Thompson, of Law Office of Jeremy A.
Thompson, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Megan Harrigan Jameson, of
Columbia, for Respondent.

SHORT, J.: Bobby Joe Reeves was convicted of first-degree criminal sexual conduct (CSC) with a minor and lewd act upon a child. He appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing the PCR

court erred in finding his trial counsel was not ineffective for failing to investigate and present the testimony of a gynecological expert witness. We reverse.

FACTS

Reeves was tried September 17-18, 2002. At the trial, during a video interview, Victim¹ testified Reeves lived with her and her mother in South Carolina. After she and her mother moved to Georgia, Victim stated she visited Reeves every other weekend. Reeves picked her up in Georgia and took her to stay at his house in South Carolina or her mother drove her to South Carolina. She testified she thought of Reeves as a father figure. Victim testified that during her visits with Reeves, he would "touch her private" with his hands and "sometimes with his private." He would "rub his private on [her] private." She was not wearing clothes when these incidents occurred and sometimes Reeves also was not wearing clothes. She explained Reeves would occasionally ask her to "suck his private" and when she did, "yellow stuff would come out." She stated the "yellow stuff" would "sometimes [go] in [her] mouth" and other times it would go "on [her] private." According to Victim, the weekend of July 4, 2000, was the last time she saw Reeves. She stated Reeves "stuck his finger up [her]" for the first time during that weekend. She testified she was four years old when Reeves began touching her. She told her mother about the sexual abuse after her last visit with Reeves.

Dawn Bridgett, Victim's mother, testified she and Victim moved in with Reeves when Victim was eight months old because they needed a place to live. Bridgett stated Victim and Reeves continued to spend time together after she and Victim moved to Georgia. She recalled the last time Victim saw Reeves was the weekend of July 4, 2000. Bridgett drove Victim to South Carolina and Victim did not want Bridgett to leave. Victim was also "very clingy" when she returned to Georgia. Reeves contacted Bridgett to schedule a visit with Victim toward the latter part of July 2000, but Victim refused to go to Reeves' home. When Bridgett questioned Victim about her decision, Victim discussed incidences that occurred in Reeves' bedroom.² After the conversation, Bridgett called her sister and the police. On the

¹ Victim was ten years old at the time of the incident and twelve years old at the time of trial.

² The trial court limited Bridgett's testimony to "date, time, place, and nature but not any names." Therefore, Bridgett did not testify regarding the specific details of her conversation with Victim, only "[she] played a game with [Victim]. [She] named events, and [Victim] told [her] whether it happened[.]"

following Monday, Bridgett took Victim for a medical examination with Dr. Dennis Bash. Several weeks later, Bridgett took Victim for a medical examination with Dr. Maureen O'Brien Claiborne.³

Dr. Bash, an expert in the field of emergency room pediatric care, testified he examined Victim on July 31, 2000. Dr. Bash stated he observed what "appeared to be a healing scar" on Victim's hymen. When asked, "Could you date or in any way tell how much earlier that time [sic] had been inflicted," Dr. Bash responded, "The only thing that you can say about that is that it had time to heal so that it was at least one week before that and probably longer." Dr. Bash opined any kind of penetration, penile or digital, would have caused the injuries. Further, Dr. Bash agreed the healing scar was consistent with some kind of penetration approximately thirty days earlier. During cross-examination, Dr. Bash admitted he did not find any bruising, bite marks, claw marks, or sperm on Victim during the examination. Further, he stated, in "cases where . . . it's been a long time period in-between the time that – whatever happened supposedly happened in that time they presented to us – we just do a basic screening evaluation and always recommend that they follow-up in the sexual abuse clinic." On re-direct examination, Dr. Bash maintained he would not have expected to see any bruising or sperm even if he had conducted the examination thirty days prior.

Jodi Lee Lashley, the Child Advocate Program Director at Children's Advocacy Center for Abused Children, testified she conducted a forensic interview of Victim on August 11, 2000. Lashley testified Victim stated she was made to "perform oral sex," "touch the private of the person," and "the person touched her private." Lashley testified Victim stated the incidents took place at a male's home and the male had a roommate named "Jessie."⁴ According to Lashley, Victim explained the sexual abuse began occurring when she was four or five years old and the last incident occurred during her last visit with the male. Lashley testified she did not observe any signs that Victim was coached to say something during her interview.

Dr. Claiborne, an expert in pediatrics, testified she examined Victim on August 28, 2000. Dr. Claiborne stated she examined Victim and took cultures because none

³ Dr. Claiborne's name is also spelled Clayborne in the record.

⁴ Victim testified Reeves had a roommate named "Jessie" who was at the home during her visits. Additionally, Jessie Wheaton testified at trial, and stated he and Reeves had been roommates, and "[they had] been living together now off and on, a couple of time[s] in different places."

were taken in the emergency room. Dr. Claiborne explained, "On [Victim's] genital exam, her hymen appeared normal. She [did not] have any tears or scars. She [did not] have any unusual discharge. And the rectal area also appeared to have normal appearance and tone." Dr. Claiborne acknowledged her examination of Victim took place one month after Dr. Bash's initial evaluation and her results were normal. Dr. Claiborne explained it is common to see normal exams in these types of cases. She elaborated,

What we know is that an awful lot of child abuse, sexual abuse in younger children, is not the violent rape kind of things that you sometimes see in adults or in older kids. A lot of the time in younger kids, it is more of a coercion kind of thing. And, you know, yes[,] penile may not leave terrible scars and stuff. But then you're also dealing with children who have never had consensual sex. So they don't know exactly what's all the way inside them, what is part of the way inside them[,] and what's trying to get inside of them. So, yes, we normally see normal exams. Most kids who have been sexually abused will have normal exams.

Dr. Claiborne opined healing would be in the process or would have taken place two months after the incident. She explained, "It would depend upon the degree of healing. If this had been a violent rape, I would [have] expect[ed] . . . bleeding and suturing, I would expect that I would see a lot of evidence." Finally, when asked if her findings, two months after the fact, were consistent with a child who had been digitally penetrated, Dr. Claiborne responded, "Yes." On cross-examination, she admitted her results were also consistent with the possibility that nothing happened to Victim.

Dr. Carl Brunie, an expert in child psychiatry and Victim's psychiatrist, testified regarding the behavioral changes he noticed in Victim before and after the alleged incident occurred. He stated he began treating Victim in 1999 because she had a history of anger, self-directed aggression, and biting herself. She had threatened to hurt herself, burned her arms with an eraser, suffered from frequent nightmares, exhibited mood swings, experienced significant anxiety, and often expressed fears of some harm coming to her mother. He explained that during his treatment "[he] felt like there was history that [he] was missing" and "the picture became considerably clearer after [Victim's] mother reported to [him] that Victim had

disclosed the history of sexual abuse." He testified Victim's condition deteriorated after the disclosure as she began to have more nightmares, became depressed and sad, and "would get in the fetal position sucking her thumb, acting like a much younger child."

During closing arguments, the State argued:

But remember what Dr. Bash said when he examined Victim about three weeks after the last time she had seen [Reeves]. There was healing scar tissue in her hymen. Ten year old girls who have not been sexually molested do not have healing scar tissue in their hymen. There is no other explanation other than she was penetrated. A ten year old. We're not talking about a grown woman, a sexually active woman. We're talking about a ten year old. That just doesn't happen on its own. And that is a fact [the defense] cannot overcome.

The State repeated:

[Victim] told you about digital penetration. . . . And again, 100 percent corroborated by the medical evidence. Three weeks later when a doctor examined her, a doctor who's a pediatric specialist and finds healing scar tissue. It just doesn't happen on its own; not on a ten year old; not in an unsexually active ten year old. It's just not going to be there. . . . Dr. Bash examines Victim on that day and finds healing scar tissue. Again, there's no other explanation for it other than Victim had been penetrated by something. And that's undisputed testimony.

The jury convicted Reeves of first-degree CSC with a minor and lewd act upon a child, and the trial court sentenced him to concurrent fifteen-year sentences. Reeves filed a direct appeal, and this court affirmed. *See State v. Reeves*, Op. No. 2005-UP-099 (S.C. Ct. App. filed Feb. 10, 2005). Reeves filed an application for PCR, which the PCR court dismissed on February 3, 2011, after a hearing. Reeves filed a petition for a writ of certiorari, which this court granted on January 31, 2014. Reeves now requests that this court grant him post-conviction relief and vacate his convictions and sentences.

STANDARD OF REVIEW

An appellate court must affirm the factual findings of the PCR court if they are supported by any probative evidence in the record. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012). "However, reversal is appropriate where the PCR court's decision is controlled by an error of law." *Id.*

LAW/ANALYSIS

Reeves argues his trial counsel was ineffective in failing to investigate and present the testimony of a gynecological expert witness. We agree.

Trial counsel must provide reasonably effective assistance under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To receive relief, the applicant must show (1) counsel was deficient and (2) counsel's deficiency caused prejudice. *Stalk v. State*, 383 S.C. 559, 560-61, 681 S.E.2d 592, 593 (2009). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

At the PCR hearing, Dr. Fredrick Morris Thompson, an expert in gynecology, testified on Reeves' behalf. Dr. Thompson testified injuries in the vaginal area do not necessarily heal quicker than any other area of the body. According to Dr. Thompson, there are multiple ways a trauma may occur in the vaginal area. He stated, "[S]ex is certainly not – or sexual play is not the only way [sic] the vagina can be injured." He explained injuries can occur through accidental injury, self-mutilation, or a fall. Further, Dr. Thompson opined that girls, more than boys, are given to masturbation, and in the course of masturbation, they could potentially injure themselves. However, he admitted there was no way to document what caused Victim's injury. He recalled he thought Dr. Bash described Victim's injuries as a minor laceration near the opening of the vaginal area. When asked about Dr. Bash's ability to see a physical injury on Victim one month after the incident, Dr. Thompson stated,

If it was a significant health-threatening injury, it probably would be fairly evident. If it was a minor laceration, a tear, it – you know, it could be in various stages of healing, and I know that there's [sic] ways of categorizing bruises to determine how long the bruise has been there. I don't think that was described in [Dr. Bash's] examination. A laceration would be very difficult to date, I think exactly, as to how long it had been there, and certainly difficult to say what exactly had caused that particular injury if there was not any other evidence of trauma.

As to Dr. Claiborne's testimony stating her findings were consistent with some kind of penetration even though the medical exam results were normal, Dr. Thompson stated, "I think it would be very difficult to make a statement as to could physical abuse [have] occurred or not if there were no signs to lead you to believe there was anything out of the ordinary." According to Dr. Thompson, the injury to Victim would have had to be fairly substantial in order to be seen a month after the injury. Further, when asked if an injury observed thirty days after the incident is something he would expect a person to seek medical attention for, Dr. Thompson responded,

Again, you're given someone who may or may not have the expected degree of intelligence. There's a fear involved. There's all sorts of reasons why people fail to seek medical attention, but if your child was bleeding, I would think this would alarm them enough that they would probably want to go to a caregiver of some sort. Again, there's a lot of pain involved. Again, there would probably be some reaction.

However, he opined he would not expect to see the injury thirty days after the incident if it was a fairly minor laceration.

Trial counsel testified he received Reeves' case from his partner in 2002. He asserted the State made an offer of five years' probation, which Reeves declined because he was adamant he had not done anything wrong. Trial counsel maintained he no longer had his notes and file for this case because the file was

destroyed, and he could not remember many details about the case. Trial counsel admitted he did not consult with an expert prior to trial even though he knew the State would attempt to admit evidence of a physical trauma. When asked if a medical expert would have been helpful to counteract the State's expert witnesses, trial counsel explained;

It might have, sir. As I remember, [Reeves] was making payments to my partner because he didn't have a lot of money at the time. I do not remember – I remember – I think I saw [Reeves], met with [Reeves] several times before we actually got ready for the trial. He had provided me with a witness list, a long list of people who, you know, would have helped him out. I do not remember whether he did that at my request or he just had it ready for me when I met with him. We decided to go that route. I started going down the list. If I'm correct, the entire defense was that [Victim's] mom had been convicted, [sic] against [Reeves] because [Reeves] had said, 'I don't like the lifestyle. You're not treating [Victim] well. I want you out of my house', if I remember correctly.

When asked again, trial counsel reiterated, "Sir, all I remember is there was a question about money. I know I never did talk to an expert, but whether [Reeves] and I talked about that, I cannot tell you."

The PCR court found Reeves failed to prove trial counsel was ineffective for failing to interview and present a medical expert at trial. The PCR court noted trial counsel testified he had not retained a medical expert because Reeves did not have the funds to do so. The PCR court stated, "A doctor could not state with certainty the exact cause of the injuries discovered and the determination of the cause of the injury was a question for the jury." Further, the PCR court stated, "Dr. Thompson's testimony did not make it any less likely that [Reeves] had committed the crime, in fact, the substance of his testimony at the PCR hearing only confirmed that the cause of the injuries was unclear." Accordingly, the PCR court denied and dismissed this ineffective assistance of counsel claim.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at

691. "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (emphasis omitted) (citation omitted). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions[.]" *Id.* at 691.

"[T]he United States Supreme Court has held that the defendant must have 'a fair opportunity to present his defense,' thereby requiring the State to provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68 (1985)). "Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense[.]" *Id.*

South Carolina Code section 17-3-50 (B) (2003) provides in pertinent part:

Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.

An applicant is only entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony. *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). The mere possibility the applicant could find a witness somewhere to support an allegation is insufficient to warrant authorization of funds. *Id.* Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. *Legare v. State*, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998).

In *Dempsey v. State*, the State called a therapist at the Low Country Children's Center to testify as an expert on child sexual abuse. 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005). The therapist opined the victim had been sexually abused. *Id.* In addition, the State presented expert testimony from a doctor who performed the victim's physical examination. *Id.* The doctor testified she found no physical evidence the victim was sexually abused, but it was likely that if someone was assaulted in the manner in which the victim alleged, there would be no physical evidence of the assault. *Id.* Dempsey's counsel did not call an expert to rebut the State's expert testimony because he believed the lack of physical evidence of abuse, by itself, was enough to rebut the State's expert testimony. *Id.* Our supreme court found Dempsey's counsel's decision not to call an expert witness to rebut the State's expert witness was a legitimate trial strategy. *Id.* Accordingly, the court held the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to call an expert witness on child sexual abuse. *Id.*

In this case, we find trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Trial counsel admitted he did not consult with an expert prior to trial even though he knew the State would attempt to admit evidence of a physical trauma. Trial counsel recalled he failed to meet with an expert witness because "there was a question about money," but he also stated he could not recall whether he discussed this issue with Reeves at all.⁵ Trial counsel could not recall much else about the case or his trial strategy, and he no longer had his notes and file for this case because the file was destroyed. We also find trial counsel did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert witness to testify at trial. *Contra Dempsey*, 363 S.C. at 370, 610 S.E.2d at 815 (finding a trial counsel's decision not to call an expert witness to rebut the state's expert witness was a

⁵ If Reeves was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness. *See* S.C. Code Ann. § 17-3-50 (B) (2003) ("Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses . . .").

legitimate trial strategy and holding the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to call an expert witness on child sexual abuse); *Legare*, 333 S.C. at 281, 509 S.E.2d at 475 (stating that where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (providing an attorney's performance is not deficient if it is reasonable under professional norms).

We further find Reeves was prejudiced by his trial counsel's deficiency. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Reeves presented evidence of prejudice through Dr. Thompson's testimony at the PCR hearing. Although Dr. Thompson admitted there was no way to document what was the cause of Victim's injury, he provided additional ways the injury could have occurred, including self-infliction or by accident. These additional theories were not presented during trial. In fact, the State, in its closing arguments, repeatedly argued, "There is no other explanation [for the injury] other than she was penetrated. . . . And that is a fact [the defense] cannot overcome. . . . that's undisputed testimony." Further, Dr. Thompson opined Victim's scars would have had to have been substantial to be seen one month after the incident. However, at trial, Dr. Bash's testimony does not indicate the injury was substantial.

CONCLUSION

Accordingly, we find the evidence does not support the PCR court's finding that Reeves failed to prove his counsel was ineffective. Further, we find counsel's ineffectiveness was prejudicial to Reeves.

REVERSED.

LOCKEMY and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
Alison R. Lee, Circuit Court Judge
Appellate Case No. 2011-187246

BOBBY JOE REEVES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Opinion No. 5359
Heard June 1, 2015 – Filed November 12, 2015

RESPONDENT'S PETITION FOR REHEARING

On November 12, 2015, this Court reversed the post-conviction relief court's denial of relief to Reeves and remanded the matter to the court of general sessions for a new trial. Bobby Joe Reeves v. State, Op. No. 5359 (Ct. App. filed November 12, 2015). In reaching this result, this Court concluded that the post-conviction relief court erred in denying relief as to Reeves's claim trial counsel was ineffective for failing to investigate and present the testimony of a gynecological expert witness. Specifically, this Court concluded "trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial." This Court further found trial counsel did not provide "a legitimate trial strategy for failing to consult with [a gynecological] expert

before trial or call a medical expert witness to testify at trial.” This Court concluded Reeves was prejudiced by this deficiency based on the testimony of Dr. Fredrick Morris Thompson at the post-conviction relief hearing concerning additional ways the injury could have occurred. Pursuant to Rule 221(a), SCACR, the State respectfully petitions for rehearing.

Misapprehension of Prejudice to Reeves

In seeking rehearing, the State respectfully submits this Court misapprehended prejudice to Reeves from trial counsel’s alleged deficiency to consult with and present a gynecological expert. In its opinion, this Court found Reeves established the requisite prejudice through the testimony of Dr. Thompson, a gynecologist who testified at the post-conviction relief hearing as a medical expert. This Court elaborates Dr. Thompson “provided additional ways the injury could have occurred, including self-infliction or by accident,” that were not presented during Reeves’s trial. This Court further found “Dr. Thompson opined Victim’s scars would have had to have been substantial to be seen one month after the accident” but then acknowledges Dr. Bash’s testimony did not indicate Victim’s injuries were substantial. However, the State respectfully submits this Court misapprehended any prejudice to Reeves as there is no reasonable likelihood that the result of Reeves’s trial would have been different had counsel consulted with or called a gynecological expert such as Dr. Thompson at trial.

To receive post-conviction relief, an applicant must prove counsel’s performance was deficient and that this deficiency prejudiced him or her to the extent that “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.115, 117-18, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S. 668 (1984)). However, these standards do not establish mechanical rules as the ultimate focus of inquiry must be on the fundamental fairness of the

proceeding being challenged. Strickland, 466 U.S. 668. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by an applicant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

In the present case, there is no reasonable likelihood the result of Reeves's trial would have been different—i.e., Reeves would have been acquitted—had counsel consulted with a gynecological expert. As the post-conviction relief court correctly found in its Order of Dismissal, Dr. Thompson's testimony was ultimately consistent with the two medical experts presented at Reeves trial and likely would have had no impact on the outcome of the case.

At trial, the State presented Dr. Dennis Bash and Dr. Maureen Claiborne. Dr. Bash, who was admitted as expert in pediatric emergency care, routinely performed pediatric sexual assault examinations as part of his duties as an emergency pediatric care physician at University Hospital in Augusta, Georgia. He examined Victim roughly one month after the abuse occurred when she came to the emergency department with her mother. Upon examination, Dr. Bash found the Victim's hymen rounded over, which he noted was a sign of healing. Dr. Bash also found a healing scar at the 5 o'clock position on Victim's hymen. Dr. Bash could not determine a specific date of injury but opined the injury occurred at least one week prior to his examination due to the healing state of Victim's hymen. Dr. Bash commented Victim's injuries were consistent with *any* kind of penetration. He also stressed his evaluation of Victim was an initial screening only and Victim needed to follow-up with a comprehensive examination.

The State also presented Dr. Maureen Claiborne, a pediatrician and the medical director of the child abuse team at the Medical College of Georgia. Dr. Claiborne, who was admitted as an expert in pediatric medicine, examined Victim approximately one month after Dr. Bash. Dr.

Claiborne testified she completed a physical examination of the victim and took cultures to screen her for sexually transmitted diseases per standard protocol when doing a follow-up sexual abuse examination. Dr. Claiborne noted Victim's examination was normal and did not report any tears or scars on Victim's hymen. Dr. Claiborne, who had vast experience treating pediatric victims of sexual assault, testified most children who have been sexually abused have normal examinations in the weeks and months following an assault. She testified unless the assault was a violent rape (which was not case here), there likely would not be any lingering medical evidence from an assault found in an examination two months later. Dr. Claiborne testified her examination results were consistent with some type of penetration two months prior but also consistent with nothing happening.

At his evidentiary hearing, Reeves presented testimony from Dr. Fredrick Morris Thompson, III, a local gynecologist who was admitted as an expert in general gynecology. However, it is important to note Dr. Thompson was not admitted as an expert in pediatrics or sexual assault and it is unclear what experience—if any—he has treating child sexual assault victims. Rather, Dr. Thompson was a former obstetrician and current gynecologist who treated adult patients at Lexington Women's Center. Furthermore, he testified that his only experience treating victims of sexual assault was when he conducted rape kits at the start of his career, which began several decades earlier. In sum, Dr. Thompson's background is starkly different than the two experts presented by the State, both whom had vast experience treating pediatric victims of sexual assault.

It is also of considerable note that Dr. Thompson merely reviewed portions of Reeves's trial transcript. Thompson never saw medical records, photographs, or anything else documenting Victim's injuries. Dr. Thompson even testified it was difficult for him reach any

conclusion because the transcript did not provide a detailed description of the healing wound on Victim's hymen.

Despite these limitations on experience and necessary background of Victim's injuries, Dr. Thompson opined as to the cause of Victim's injuries. Dr. Thompson testified there are multiple ways trauma can occur to the vaginal area, including sexual assault, accidental injury, or self-mutilation. He further testified Victim's injury as reported by Dr. Bash could have been caused by digital penetration approximately one month prior to the examination, a finding that is *consistent* with the findings of Dr. Bash. However, he ultimately concluded that "[t]here's no way to document what was the cause of the injury." He also opined it would be "very difficult to date" when the injury had occurred and "certainly difficult to say what exactly had caused that particular injury."

Ultimately, Dr. Thompson's testimony was consistent with the two experts presented at Reeves's trial. All experts—including Thompson—testified they could not opine as to the cause of Victim's injuries or the date when the injuries occurred. While Dr. Thompson did hypothesize as to other types of penetration that could have caused the injuries, these were speculative at best and were not supported by the record.¹ There is no reasonable likelihood the result of Reeves's

¹ In its opinion reversing the post-conviction relief court, this Court notes the alternative ways Victim's injury could have occurred as opined by Dr. Thompson, including self-infliction or accident. The Court further cites to Dr. Thompson's testimony "that girls, more than boys, are given to masturbation, and in the course of masturbation, they could potentially injury themselves." The State submits there is absolutely nothing in the trial transcript (the only part of the case that Thompson admittedly reviewed) to support this theory of Victim's injury as speculated by Dr. Thompson. Furthermore, the State submits Dr. Thompson is not qualified to give such expert testimony as to the masturbation frequency and variations between male and female juveniles, as he was not qualified as an expert in pediatrics or sexual assault and spent the vast majority of his career in general obstetrics and gynecology treating adult women. See *Hoard v. Roper Hosp., Inc.*, 377 S.C. 503, 661 S.E.2d 113 (Ct. App. 2008) (noting simply because testimony is uncontradicted does not render it undisputed; rather, the question of the inherent probability of the testimony and the credibility of the witness remains); *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 385, 166 S.E.2d 308, 311 (1969) ("There may be, however, inherent contradiction or improbability in the witness's statements which take the case out of the general rule and justify the fact finder in giving the testimony less than full value. Similarly, the witness manner of testifying or omissions in his statement may give rise to reasonable doubts of his sincerity or knowledge.).

trial would have been different if Dr. Thompson had testified. Therefore, the post-conviction relief court properly denied this allegation and this ruling is supported by ample evidence of probative value in the record. The State respectfully submits this Court erred in its reversal of the post-conviction relief court. Therefore, the State asks this Court to reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Misapprehension of Deficiency of Counsel

In seeking rehearing, the State respectfully submits this Court misapprehended deficiency of counsel for not consulting with or presenting a gynecological expert at Reeves's trial. In its opinion, this Court found counsel was deficient "because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial." This Court further found trial counsel did not provide "a legitimate trial strategy for failing to consult with [a gynecological expert] before trial or call a medical expert witness to testify at trial." However, the State respectfully submits Reeves failed to establish any deficiency of counsel, as counsel testified to a trial strategy focusing on attacking the credibility of Victim's claims.

Reeves's trial counsel testified at the post-conviction relief hearing as to his trial strategy to attack the veracity of Victim's claims by showing her mother's lack of credibility. Specifically, counsel testified he focused on establishing that Victim's mother fabricated the allegations in retaliation and as vengeance against Reeves for his perceived judgment of her parenting skills and asking her and her daughter to move out of his home. Counsel testified this strategy was developed after several meetings with Reeves where the two discussed case strategy. This was a logical and legitimate trial strategy based on the underwhelming amount of physical evidence in the case, which ultimately showed a cause or date of injury could not be

determined, that counsel knew would be produced and the relationship between Reeves, Victim, and Victim's mother. This trial strategy is evident throughout the record, including counsel's opening statement, his closing statement, his cross-examination of Victim and her mother, and his direct examination of Reeves and Reeves's roommate. Counsel repeatedly referenced The Crucible and made comparisons to the case at hand, including this during his opening statement:

Now you're going to hear about Victim. And Victim has several disabilities and several problems. They have been going on for a long time and have nothing to do with these allegations. Bobby Joe Reeves is the only person she could ever relate to as a father. She doesn't know her father. She rarely ever heard from her father. Her father was not a nice man. I think when you consider this case, you should go back to when you were in high school and when you had to read a book called The Crucible. It's about unfounded accusations and how they can ruin a person's life. That's what this case is about. And as tragic as it is that Victim has to suffer from what people have place in her head an what they have told her, the medical evidence and testimony is going to show it didn't happen. And again, just like The Crucible, it has almost destroyed an innocent man. Thank you very much.

(App. 64).

"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) (citing Strickland, 466 U.S. at 689). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (citing Strickland, 466 U.S. at 689). Accordingly, we must be wary of second-guessing trial counsel's tactics.

Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64 (citing Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). In this case, counsel's formulated a reasonable trial strategy in light of the evidence he knew would be presented by the State, particularly the medical evidence that did not firmly establish if or when Victim had been sexually assaulted.

Furthermore, the State submits Harrington v. Richter, 562 U.S. 86 (2011), is instructive in the present case. In Harrington, the United State Supreme Court reversed a grant of habeas corpus to an inmate convicted of murder on the basis he was denied effective assistance of counsel when his counsel failed to consult blood evidence experts in planning a trial strategy and in preparing to rebut expert evidence the prosecution might—and later did—offer. Id. Reversing the lower court, the Harrington Court held trial counsel was not ineffective for failing to consult with a blood expert in light of a reasonable trial strategy.

In reaching this determination, the Court noted:

Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, “countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Rare are the situations in which the “wide latitude counsel must have in making tactical decisions” will be limited to any one technique or approach.

Id. at 106-07 (citing Strickland, 466 U.S. 668). The Court further stated there can often be “any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful”, but “[a]n attorney can avoid activities that appear ‘distractive from more important duties.’” Id. at 107 (internal citations omitted). The Court further stated: “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Id. at 107. The Court then

warned that “reliance of the ‘harsh light of hindsight’ to cast doubt on a trial that took place now more than 15 years ago is precisely what Strickland [] [sought] to prevent.” Id. at 107.

In the present case, counsel used a similar approach, electing to focus on attacking the credibility of Victim’s allegations and strong motivation for fabrication rather than concentrate on physical evidence he already knew would be lacking. He instead combated the State’s medical evidence through his cross-examination, where he highlighted to the jury that Dr. Bash’s examination was not comprehensive and that Dr. Claiborne’s comprehensive exam was consistent with no injury or assault to Victim.

Based on the foregoing, counsel did not perform deficiently. Therefore, the post-conviction relief court properly denied this allegation and this ruling is supported by ample evidence of probative value in the record. The State respectfully submits this Court erred in its reversal of the post-conviction relief court. Therefore, the State asks this Court to reconsider its decision, rehear the matter, and affirm the lower court’s denial of post-conviction relief.

Misapprehension of Indigency

In its opinion, this Court noted “[i]f Reeves was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure and expert witness.” In support of this proposition, this Court cited to South Carolina Code Section 17-3-50 (B) (2003) and noted an applicant is “entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony,” citing Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). While the State agrees with the general proposition in regard to indigent defendants entirely dependent upon the State for representation, it respectfully submits that by finding or even suggesting Reeves was indigent, this Court misapprehended Reeves’s indigency status.

There is nothing in the record before this Court to establish Reeves was indigent or would have been entitled to funds from the Office of Indigent Defense. The only mention of possible financial hardship came during the post-conviction relief hearing, when counsel, without the aid of his file and relying on memories from nearly a decade prior, stated “Bobby was making payments to my partner because he didn’t have a lot of money at the time” and “all I remember is there was a question about money.” (App. 338-339). Neither of these passing statements indicated Reeves was indigent or could not afford an expert to assist in his defense. Furthermore, a review of the record establishes Reeves was *not indigent* at the time of his trial. Reeves retained trial counsel to represent him. He was out on bond prior to his trial and able to work during the pendency of his case. At the time of trial, Reeves had a good job and the record is replete with references of him “spoiling” Victim with toys and other gifts during their weekend visits. Furthermore, Reeves was able to retain current counsel to handle this post-conviction relief appeal. Therefore, this Court’s implication that counsel could have used indigent funds to secure a medical expert for use in Reeves’s case is not supported by the record.

Additionally, the State submits there likely would be profound detrimental consequences to both the state’s legal system and judicial efficiency if *retained counsel* had unfettered access to funds for experts, investigators, and other specialists simply based upon a bare allegation of indigency after his client has paid his retainer—the very scenario alleged in this case. This could create an unbalanced system, giving an advantage to private counsel, who having been paid their full retainer, could then move before the court for resources from the Office of Indigent Defense to fund their retained client’s defense. This would pervert the purpose of the Office of Indigent Defense, emptying their coffers to aid private counsel on retained cases at the cost of crucial funds needed to support our state’s public defender system and those truly indigent defendants

who cannot afford to retain counsel in the first place. This would create a system ripe for exploitation, where private counsel can use any monies collected from his or her client to cover attorney's fees while saddling the Office of Indigent Defense with the actual cost of funding anything else required in defending this retained client. At the very least, retention of private counsel should weigh heavily against a subsequent finding of indigency and should preclude such a finding except in the rarest of circumstance.

Here, there is nothing in the record establishing Reeves's indigency. Rather, the record establishes Reeves was not indigent at the time of trial. The State respectfully asks this Court to reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief, and remove any language implying Reeves may have been entitled to funds from the Office of Indigent Defense for retention of an expert witness.

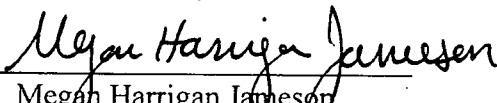
Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Brief of Respondent and raised during the oral argument before this Court, the State respectfully requests this Court reconsider its decision, rehear the matter, and affirm the decision of the lower court denying Petitioner relief.

Respectfully submitted,

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Dec. 7, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
Alison R. Lee, Circuit Court Judge
Appellate Case No. 2011-187246

BOBBY JOE REEVES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Opinion No. 5359
Heard June 1, 2015 – Filed November 12, 2015

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 7th day of Dec., 2015.


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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-187246
Lower Court Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO RESPONDENT'S PETITION FOR REHEARING

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ATTORNEY FOR PETITIONER.

NOW COMES the Petitioner in the above-captioned action, acting by and through undersigned counsel, respectfully submitting this return to the Respondent's Petition for Rehearing ("Petition"). The Petitioner would assert that this Court correctly granted his request for Post-Conviction Relief in its opinion in Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47),¹ and that rehearing should be denied.

A. The Court Correctly Determined that the Petitioner Was Prejudiced

The Respondent begins its request for rehearing by arguing that the "Court misapprehended prejudice to Reeves from trial counsel's alleged deficiency to consult with and present a gynecological expert." Petition at 2. The Respondent argues that Dr. Thompson's background was insufficient for him to testify as to the potential causes of the victim's injury because he did not have "vast experience treating pediatric victims of sexual assault." Petition at 4. See also Petition at 5 (footnote 1) ("[T]he State submits Dr. Thompson is not qualified to give such expert testimony as to the masturbation frequency and variations between male and female juveniles, as he was not qualified as an expert in pediatrics or sexual assault and spent the vast majority of his career in general obstetrics and gynecology treating adult women.") Rehearing should not be granted on this basis for several reasons.

First, this is the only time the Respondent has ever advanced this argument. No objection was made to Dr. Thompson's qualifications, nor to his testimony, at the PCR hearing. At the conclusion of the PCR hearing, the Respondent merely argued that "the expert here really didn't offer anything in the sense that it would have changed the outcome of the trial." App. p. 357, lines 14-16. In its brief, the Respondent merely argued summarily that the PCR court's findings "that there was no probably likelihood that the result of Petitioner's proceeding would have been

¹ In citing to the opinion below, the Petitioner cites to the Advance Sheet pagination.

different absent Counsel's failure to call a gynecological expert ... is supported by evidence of probative value in the record." Brief of Respondent at 10. The Petitioner submits that this Court did not "overlook[] or misapprehend[]" an argument that had never been made. Rule 221(a), SCACR.

Second, the Respondent's contention is meritless. Dr. Thompson testified that he began practicing as an OB/GYN in 1977, and that he was practicing as a gynecologist when he testified in 2010, giving him twenty-three years' worth of experience as a gynecologist at the time of his testimony. App. p. 292, line 14-p. 293, line 8. He further testified that he had experience treating trauma to the vaginal area and that he had personally performed rape kits on victims. App. p. 294, line 16-p. 295, line 5. He was clearly well-qualified to testify as an expert about the causes of trauma to the vaginal area, the other possible reasons why the victim could have suffered an injury to her vaginal area, and how long it would take for such an injury to heal. Whether or not he had a vast amount of experience specifically treating juveniles is immaterial to what he testified about at the PCR hearing.

Third, the Respondent's argument creates a completely unworkable standard and does not follow the guidance of Strickland v. Washington, 466 U.S. 668 (1984). At bottom, the Respondent's contention is that because the Petitioner did not present an expert in juvenile sexual abuse who could opine that the victim's injury was definitively not caused by the Petitioner, then the Petitioner cannot receive relief because he cannot prove that he did not commit the offense. That contention, however, is not the law. The Petitioner does not have to prove that he was innocent, only that there was a reasonable likelihood that he would have been acquitted had Dr. Thompson's testimony been presented at trial. This analysis—the proper analysis—is readily met in this case.

Fourth, this Court properly concluded that Dr. Thompson's testimony would have likely changed the result at trial. As this Court noted in its opinion, the State argued repeatedly that the Petitioner could not overcome the testimony of Dr. Claiborne and Dr. Bash regarding the injury to the victim. See Reeves, supra, at 51; 57; see also App. p. 191, lines 10-12; p. 192, lines 3-24; p. 202, line 13-p. 203, line 1; p. 206, lines 4-12; p. 207, lines 9-17; p. 208, lines 7-19; p. 211, lines 1-5. Dr. Thompson's testimony would have provided the defense with ample evidence to defuse this line of argument.

Furthermore, Dr. Thompson's testimony was particularly relevant to the degree to which the Petitioner would have had to abuse the victim in order for her injury to be seen a month later. See App. p. 302, line 21-p. 304, line 14. Specifically, he testified that he would not expect to see evidence of trauma if the victim had suffered a minor laceration as a result of the Petitioner's digital penetration. App. p. 304, lines 12-14. No testimony of this nature was ever put before the jury; indeed, the State utilized the absence of such testimony to argue that "[t]here is no other explanation other than she was penetrated" during closing argument. App. p. 202, lines 21-22. Dr. Thompson's testimony would have been invaluable during trial, and this Court was correct to conclude that the Petitioner was prejudiced by defense counsel's failure to present expert testimony at trial. Rehearing should be denied.

B. The Court Correctly Determined that Defense Counsel's Performance Was Deficient

The Respondent also argues that rehearing should be granted because "Reeves failed to establish any deficiency of counsel, as counsel testified to a trial strategy focusing on attacking the credibility of Victim's claims." Petition at 6. Rehearing should not be granted on this basis.

As with the Respondent's contentions regarding prejudice, the claim advanced now is not one that has been advanced before. In the Respondent's brief, the Respondent did not argue that

defense counsel utilized a specific trial strategy to attack the victim's credibility while eschewing the use of an expert; instead, the Respondent argued that

Counsel elected not to present a gynecological expert, but instead elicited favorable testimony on cross-examination that revealed that the State's own experts were ultimately unable to determine the exact cause of injury to the victim and that the victim had no other injuries or evidence indicative of an assault.

Brief of Respondent at 10. At best, the cited portion of the Respondent's brief raises an argument that defense counsel attacked the experts, not the victim. Notably, the Respondent did not cite to any testimony of defense counsel regarding his trial strategy in its brief. As the Respondent has not previously argued that defense counsel chose a strategy of attacking the credibility of the victim instead of utilizing expert testimony, this Court could not have "overlooked or misapprehended" this argument. Rule 221(a), SCACR.

In any event, the Respondent's argument is meritless. Defense counsel never testified that he made a strategic decision not to pursue an expert's assistance. Indeed, he agreed that it may have been helpful to have such expert testimony at trial. See App. p. 337, line 24-p. 338, line 3. He did not pursue such an investigation, however, because "there was a question about money." App. p. 339, lines 3-4. Consequently, even if the Petitioner could not afford to pay for an expert, this explanation does not constitute a valid trial strategy because "[a] defendant's inability to pay for necessary experts is not a trial tactic or strategy, and cannot be used to justify defense counsel's failure to consult with or call such experts as witnesses." State v. Schoonmaker, 143 N.M. 373, 382, 176 P.3d 1105, 1114 (2008), overruled on other grounds by State v. Consaul, ___ N.M. ___, 332 P.3d 850 (2014); see also Ex parte Briggs, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) ("Applicant's trial counsel's *financial* decision to do nothing about the obvious need to develop evidence ... did not reflect reasonable professional judgment") (emphasis in original).

Moreover, the Respondent's argument treats defense counsel's strategy as mutually exclusive to a strategy of consulting with an expert, when the two strategies are complementary. If defense counsel's strategy was to argue that the victim fabricated the Petitioner's assault, then this strategy would be strongly bolstered by an expert witness' testimony that the injury could have occurred in many different ways *and* that it would be very unusual for a minor injury to be seen a month later. Therefore, defense counsel's strategy to forego the use of an expert would not be reasonable or sound given that an expert would have supported, not defeated, his trial strategy.

For all of these reasons, this Court's conclusions that "trial counsel was deficient because he should have discussed hiring a medical expert with Reeves" and because he "did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert to testify at trial" are legally sound and correct. Reeves, *supra* at 56-57. The Petitioner respectfully submits that rehearing should be denied with regard to the Respondent's arguments pertaining to defense counsel's deficient performance.

C. The Court Correctly Applied S.C. Code § 17-3-50(B)

Finally, the Respondent petitions for rehearing based on footnote 5 of this Court's opinion, which stated that "[i]f Reeves was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness." Reeves, *supra*, at 56 (footnote 5). Specifically, the Respondent argues that there is insufficient evidence to conclude that the Petitioner was indigent at the time of his trial, and that "there likely would be profound detrimental consequences to both the state's legal system and judicial efficient if *retained counsel* had unfettered access to funds ... simply based upon a bare allegation of indigency after his client has paid his retainer." Petition at 10 (emphasis in original). The Petitioner respectfully submits that rehearing should not be granted based on these arguments.

Initially, the Petitioner would note that the analysis contained in footnote 5 of this Court's opinion has no significant bearing on the outcome of this case. The central holding of this Court's deficiency analysis is that defense counsel should have consulted with the Petitioner regarding an expert. By failing to conduct a sufficient investigation, and by failing to even discuss the matter with the Petitioner, defense counsel was deficient. Had defense counsel conducted the proper investigation, a resolution regarding funding would have occurred. It is certainly possible that the Petitioner would have secured funding on his own for an expert. As the Court of Criminal Appeals of Texas has explained, retained attorneys have several options available when their clients cannot retain experts, including withdrawing from the case and requesting that an appointed attorney be assigned to the case or requesting indigent funding to retain an expert. See Ex parte Briggs, *supra*, 187 S.W.2d at 468. What they *cannot* do is do nothing, which is what defense counsel did in this case. Whether or not the funding would have actually been available under S.C. Code § 17-3-50(B) is not dispositive of the Petitioner's claim.

Turning to the Respondent's arguments, the Petitioner submits that the Respondent's contention that defense counsel's "passing statements" regarding funding only support the grant of relief to the Petitioner. Petition at 10. Defense counsel testified that the Petitioner was making payments towards the fee and that he did not consult with an expert because "there was a question about money." App. pp. 338-339. From this testimony, two conclusions can be drawn. First, defense counsel failed to perform up to constitutionally sufficient standards because he did not sufficiently investigate the Petitioner's defense based on an assumption that the Petitioner could not pay for an expert. Second, if the Petitioner had been unable to pay for an expert, defense counsel then could have taken corrective action, including those actions outlined in Briggs, *supra*, such as requesting funding for an expert pursuant to § 17-3-50(B). While the Respondent's

argument that “[t]here is nothing in the record ... to establish Reeves was indigent” carries some sympathy upon first blush, the ostensible lack of evidence in the record is due to defense counsel’s failure to properly represent the Petitioner. Petition at 10. Had defense counsel taken the appropriate actions, including consulting with his client, consulting with experts, and seeking funding if the Petitioner could not afford the expert, then there would be a record to establish the Petitioner’s indigency. Moreover, as the record stands now, there is a substantial likelihood that the Petitioner, who was having difficulty paying for his attorney, would have been found indigent.

The Respondent also asserts that “Reeves was able to retain current counsel to handle this post-conviction relief appeal” as support for its contention that the Petitioner would not have been found indigent at trial. Petition at 10. While the Petitioner questions how his current financial status has any bearing on his financial status at the time of trial, the Petitioner, for the sake of argument, will address this contention as well. Undersigned counsel is representing the Petitioner for, ostensibly, a \$4,000.00 fee. As of the time of this filing, less than half of the fee has been paid, and no funding for expenses, of which close to \$1,000.00 has been incurred, has been paid by the Petitioner. Of the \$1,955.00 that has been paid towards the fee, \$425.00 of that total came from sources other than the Petitioner. Of the \$1,540.00 that has been paid by the Petitioner, almost all of those funds were paid by the Petitioner while he was incarcerated through his work in prison industries in \$40.00 to \$50.00 increments. Undersigned counsel, who was appointed to represent the Petitioner below, has no doubt that the Petitioner would have been declared indigent at any point in time during the course of his representation of the Petitioner, up to and including the present day despite the Petitioner’s release from prison. Despite the fact that the fee has not been paid in full, and that expenses have not been paid at all, undersigned counsel will continue representing the Petitioner in this matter until its conclusion.

Lastly, the Respondent envisions a doomsday scenario where this Court's opinion leads criminal defendants and their greedy attorneys to "pervert the purpose of the Office of Indigent Defense [by] emptying their coffers to aid private counsel on retained cases at the cost of crucial funds needed to support our state's public defender system and those truly indigent defendants who cannot afford to retain counsel in the first place." Petition at 10-11. The Petitioner submits that this concern is unfounded for several reasons. First, numerous states have systems by which criminal defendants may request funding for experts even though they are represented by retained counsel. See, e.g., State v. Burns, 4 P.3d 795, 803 (Utah 2000) ("We hold that Burns was entitled to a hearing for a determination of whether she was indigent regardless of who was paying her attorney fees"); State v. Jones, 707 So.2d 975, 977 (La. 1998) ("[W]e find that the retention of private counsel from a collateral source at no cost to defendant does not rob the defendant of his right to a fair trial and thus defendant may be entitled to State funding for auxiliary services"). Second, it is unlikely that criminal defense attorneys will seek funding through the Office of Indigent Defense for expert or other services unless absolutely necessary. Trial courts often authorize low caps for such services, and a defendant may not be able to retain the expert or investigator of his or her choice because of these restrictions. It will often be preferable for an attorney to seek funding from his client directly in order to retain the services of the individual that he or she chooses. Third, a criminal defendant who has retained counsel directly will likely not be indigent, and trial courts retain the ability to restrain abuse of the system. As the Supreme Court of Louisiana made clear in its opinion authorizing retained counsel to request indigent funding for auxiliary services, "the local indigent defense board could challenge the defendant's indigent status

and, if successful, the trial court would declare defendant no longer indigent and thus ineligible for State funded services.” Jones, *supra*, 707 So.2d at 978.²

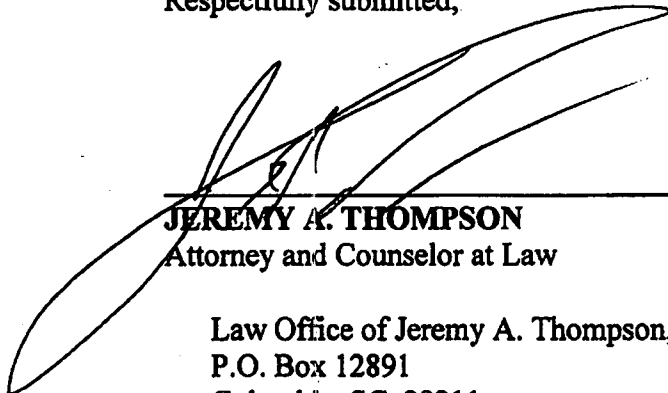
Given all of the above, the Petitioner contends that the Respondent’s concerns, both as to the Petitioner’s indigency status at trial as well as the repercussions of the Court’s opinion, are unfounded. Accordingly, the Petitioner respectfully submits that the Respondent’s request for rehearing based on its concerns about the Petitioner’s indigency status should be denied

² From numerous past personal experiences, undersigned counsel is confident that the Office of Indigent Defense will take the steps necessary to ensure that indigent funding is not unduly authorized for a criminal defendant, as that office readily contests funding requests that it does not believe are appropriate. See generally Ex parte Shurling, 408 S.C. 309, 759 S.E.2d 714 (2014).

CONCLUSION

WHEREFORE, having set forth his grounds, the Petitioner requests that this Court deny the Respondent's Petition for Rehearing.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Thompson', is written over a horizontal line.

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR PETITIONER.

This 26th day of January, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-187246
Lower Court Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

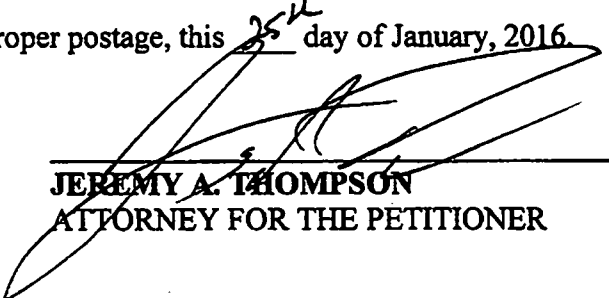
v.

STATE OF SOUTH CAROLINA,

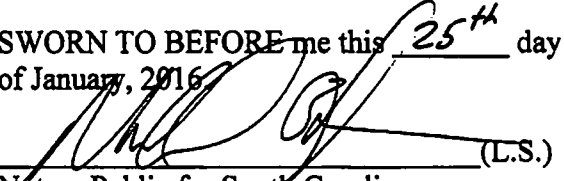
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Return to Respondent's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Megan Harrigan Jameson, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 25th day of January, 2016.


JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 25th day
of January, 2016.


(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022



ALAN WILSON
ATTORNEY GENERAL

January 26, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: Bobby Joe Reeves v State – Appellate Case No. 2011-187246

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Motion to Strike and Require Filing of Amended Return to Petition for Rehearing, along with proof of service, for filing in the above-referenced post-conviction relief appeal.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar 100108

MHJ
Enclosures

cc: Jeremy A. Thompson, Esquire
Victim Services

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
Alison R. Lee, Circuit Court Judge
Appellate Case No. 2011-187246

BOBBY JOE REEVES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO STRIKE
AND REQUIRE FILING OF
AMENDED RETURN TO PETITION FOR REHEARING**

Respondent, through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

During the December 2002 term, the Richland County Grand Jury indicted Petitioner Bobby Joe Reeves for Lewd Act upon a Child (2000-GS-40-56188). The Richland County Grand Jury Subsequently indicted Reeves during the August 2002 term for Criminal Sexual Conduct with a Minor in the First Degree (2002-GS-40-00211). Both charges stemmed from the sexual assault of the same minor victim. Reeves retained Gene Stockholm, Esquire, to represent him on both charges. On September 17-18, 2002, Reeves proceeded to jury trial before the Honorable Henry F. Floyd, where the jury convicted Reeves as indicted on both offenses. Judge Floyd

sentenced Reeves to fifteen years of imprisonment for both offenses, with the sentences to be served concurrently.

Reeves appealed his convictions and sentences and an appeal was perfected on his behalf by former Chief Appellate Defender Joseph Savitz, III. Following the submission of briefs, the South Carolina Court of Appeals affirmed Reeves's convictions and sentences in an unpublished opinion. State v. Reeves, 2005-UP-099 (Ct. App. filed Feb. 10, 2005). The Remittitur followed.

Thereafter, Reeves filed an application for post-conviction relief on May 27, 2005. The State filed its Return on January 6, 2007, requesting an evidentiary hearing be held. Reeves filed an amended application on June 2, 2010. An evidentiary hearing was convened on June 2, 2010, at the Richland County Courthouse before the Honorable Alison R. Lee. Reeves was present and represented by Jeremy A. Thompson, Esquire. The State was represented by Assistant Attorney General Brian T. Petrano. At the hearing, Reeves presented testimony from Dr. Frederick Thompson, a local gynecologist admitted as an expert in gynecology, and testimony from trial counsel Stockholm and appellate counsel Savitz. Following the presentation of all testimony, the post-conviction relief court asked for proposed orders from both parties. On February 3, 2011, the court issued an Order of Dismissal, dismissing all of Reeves's claims except that he was entitled to a resentencing hearing.

Reeves filed a timely notice of appeal on March 1, 2011. Reeves filed a Petition for a Writ of Certiorari with the Supreme Court on September 28, 2011. The State served its Return to the Petition on December 22, 2011. Subsequently, the Supreme Court transferred this case to this Court pursuant to Rule 243(l), SCACR. By Order filed January 31, 2014, this Court granted certiorari. Reeves filed his Brief of Petitioner on April 2, 2014. The State filed its Brief of Respondent on June 30, 2014. This Court heard argument of this case on June 1, 2015.

On November 12, 2015, this Court reversed the post-conviction relief court and remanded the matter to general sessions for a new trial. Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed Nov. 12, 2015) (Shearouse Adv. Sh. No. 44 at 47). In reaching this result, this Court concluded that the post-conviction relief court erred in denying relief as to Reeves's claim trial counsel was ineffective for failing to investigate and present the testimony of a gynecological expert witness. Specifically, this Court concluded "trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial." This Court further found trial counsel did not provide "a legitimate trial strategy for failing to consult with [a gynecological] expert before trial or call a medical expert witness to testify at trial." This Court concluded Reeves was prejudiced by this deficiency based on the testimony of Dr. Fredrick Morris Thompson at the post-conviction relief hearing concerning additional ways the injury could have occurred.

The State filed its Petition for Rehearing on December 8, 2015. On January 25, 2016, Reeves filed his Return to the petition. In this Return, Reeves presents numerous facts not in the record pertaining to his financial arrangement counsel, the amount that has been paid to counsel, and the source of the monies paid to counsel. (Return p. 8). Reeves did not present these factual assertions to the lower court and they are not contained within the Appendix.

Motion to Strike Factual Assertions from Reeves's Return to Petition for Rehearing

In all cases, the trial court is tasked with settling the lower court record. See China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("The issues on appeal must therefore be determined on the basis of the record as settled by the trial court."). Once a case has been appealed from the trial court, the Record on Appeal can only contain matter presented to the trial court. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not

presented to the lower court or tribunal.”). Significantly, “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. The rules for appeals from post-conviction relief actions are similar, requiring the petitioner to create an appendix containing the entire lower court record. Rule 243(f), SCACR.

In the present case, Reeves has included factual assertions regarding his fee agreement with current counsel to handle this appeal, payments to undersigned counsel on the appeal, the source of such payment, and the monies still owed to counsel. (Return p. 8). Reeves’s counsel also offers his own opinion that there is “no doubt that [Reeves] would have been declared indigent at any time during the course of his representation of [Reeves], up to and including the present day despite [Reeves]’s release from prison.” Notably, Reeves fails to cite to any portion of the record to support these factual assertions.

Because Reeves’s factual assertions regarding his fee agreement with counsel and any other financial information pertaining to the agreement are not in the record those specific factual assertions made in Reeves’s Return to Petition for Rehearing are not contained in the post-conviction record and were not presented to the post-conviction relief court to allow it to review them or determine their accuracy. Therefore, those assertions cannot appropriately be embodied in Reeves’s Return to Petition for Rehearing pursuant to our appellate court rules. See Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) (“Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record.”); South Carolina State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (“[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.”); see also Rule 210(h), SCACR (“[T]he appellate court **will not consider any fact** which does not appear in the Record

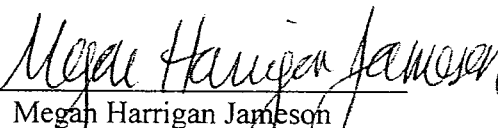
on Appeal.” (emphasis added)). Accordingly, the State asks this Court to strike the factual assertions included in the Reeves’s Return to Petition for Rehearing that do not appear in the record of the post-conviction relief court proceedings and to require the filing of an Amended Return to Petition for Rehearing omitting reference to any facts not appearing in the lower court record. See Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) (“Under our appellate court rules, we may not consider any fact that does not appear in the record.”).

WHEREFORE, the State prays that this Court will strike the portions of the Return to Petition for Rehearing containing factual assertions not appearing in the record of the post-conviction relief court proceedings and require the filing of an Amended Return to Petition for Rehearing containing no reference to the unsupported factual assertions, hold this appeal in abeyance pending a ruling on the State’s motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

By: 
Megan Harrigan Jameson

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

January 26, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
Alison R. Lee, Circuit Court Judge
Appellate Case No. 2011-187246

BOBBY JOE REEVES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

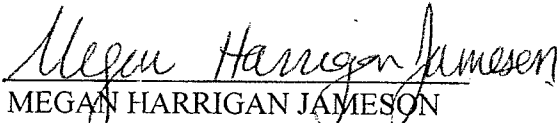
Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Motion to Strike and Require Filing of Amended Return to Petition for Rehearing on Petitioner Reeves by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 26th day of January, 2012.


MEGAN HARRIGAN JAMESON
Assistant Attorney General

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

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-187246
Lower Court Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO MOTION TO STRIKE AND REQUIRE FILING OF
AMENDED RETURN TO PETITION FOR REHEARING**

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
(803) 779-2555
(803) 779-2556 FAX

ATTORNEY FOR PETITIONER.

NOW COMES the Petitioner in the above-captioned action, acting by and through undersigned counsel, respectfully submitting this return to the Respondent's Motion to Strike and Require Filing of Amended Return to Petition for Rehearing ("motion to strike"). The Petitioner would assert that this motion should be denied.

The Respondent moves to strike portions of the Petitioner's return to the Respondent's petition for rehearing. Particularly, the Respondent argues that the Petitioner has "present[ed] numerous facts not in the record pertaining to his financial arrangement counsel [sic], the amount that has been paid to counsel, and the source of the monies paid to counsel" and that since these statements were not before the lower court, they should be struck. Motion to Strike at 3. The Respondent also moves to strike the Petitioner's argument "that there is 'no doubt that [Reeves] would have been declared indigent at any time during the course of his representation of [Reeves], up to an [sic¹] including the present day despite [Reeves]'s release from prison." Motion to Strike at 4. The Petitioner contends that no portion of his return should be struck for three reasons: (1) the arguments were made in fair response to the Respondent's petition for rehearing; (2) there is evidence in the record to rebut the Respondent's argument; and (3) the Respondent's petition for rehearing should be denied on this point because its contentions are irrelevant. Each point will be addressed in turn.

First, the Petitioner made these arguments in response to the Respondent's contention that

[A] review of the record establishes Reeves was *not indigent* at the time of his trial. ... Furthermore, Reeves was able to retain current counsel to handle this post-conviction relief appeal. Therefore, this Court's implication that counsel could have used indigent funds to secure a medical expert for use in Reeves's case is not supported by the record.

¹ This typographical error appears in the Respondent's motion to strike; the original return states "and." Return at 8.

Petition for Rehearing at 10. Consequently, the Respondent made the direct contention that the Petitioner's ability to retain counsel for this appeal demonstrated that he was not indigent at the time of his trial. It is unreasonable for the Respondent to make such an argument without affording the Petitioner the opportunity to respond. See generally Lawn v. United States, 355 U.S. 339, 359 (1958) (footnote 15) ("These comments clearly invited the reply which petitioner ... now attacks.") If the Respondent is asking this Court to grant rehearing on the basis that the Petitioner retained counsel to handle this appeal, then this Court needs to have all of the facts surrounding the decision to hire counsel before granting rehearing. Contrarily, if the Respondent's motion to strike is granted, then the Respondent has made an argument that is impossible for the Petitioner to rebut.

Moreover, the Petitioner would also note that the argument the Respondent now makes—that his contentions should be struck because they “are not contained in the post-conviction record and were not presented to the post-conviction relief court”²—are just as applicable to the Respondent's initial argument that “Reeves was able to retain current counsel to handle this post-conviction relief appeal.” That fact, too, does not appear in the lower court record; indeed, it would be impossible to have been addressed by the PCR court because the Petitioner did not hire counsel until after the PCR court reached its decision. It is disingenuous for the Respondent to move to strike the Petitioner's return on the basis that the Petitioner should not have made an argument that was not based on the facts before this Court when that argument was made in direct response to the Respondent's argument that was not based on the facts before this Court. The Petitioner respectfully requests that this Court deny the Respondent's motion to strike.

Second, the record reflects that the Petitioner was indigent at the time of the PCR hearing, as he was represented by appointed counsel at that proceeding. See App. p. 286, lines 13-15 (“For

² Motion to Strike at 4.

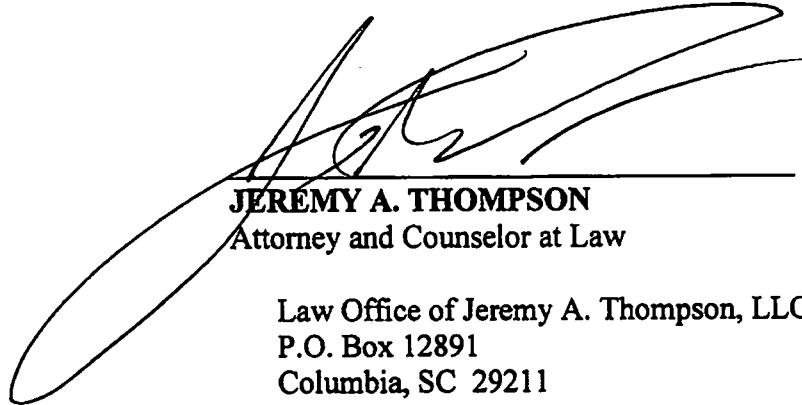
the record, my name is Jeremy Thompson. I have been *court appointed* to represent the Applicant in this action”) (emphasis added). The record also reflects that the Petitioner was indigent at the time of his direct appeal inasmuch as he was represented by appointed counsel in that proceeding. See generally State v. Reeves, Op. No. 2005-UP-099 (S.C. Ct. App. filed February 10, 2005) (listing “Acting Chief Attorney Joseph L. Savitz III” as counsel for the Appellant). Consequently, the Petitioner contends that his ability to retain counsel for this appeal has no bearing on whether or not he was indigent at the time of trial, as he clearly became indigent following his trial and remained indigent afterwards. Furthermore, the Petitioner would note that this evidence, which is contained in the record, directly rebuts the Respondent’s contention that “Reeves fails to cite to any portion of the record to support these factual assertions.” Motion to Strike at 4. Therefore, the Respondent’s motion to strike is meritless and should be denied.

Third, as the Petitioner argued in his return to the petition for rehearing, “the Petitioner questions how his current financial status has any bearing on his financial status at the time of trial.” Return at 8. As has been shown, the Petitioner was indigent following his trial and during his incarceration, so his ability to retain counsel for his PCR appeal, even if he was no longer indigent when he did so, should have no bearing on whether or not he was indigent at the time of his trial. The Petitioner contends, as he did in his return to the petition for rehearing, that the petition for rehearing should be denied on this point because it is irrelevant to this Court’s consideration of this appeal. If the petition for rehearing is denied, then this motion should be denied as moot. See Chambers v. Drywall, 324 S.C. 122, 478 S.E.2d 253 (1996) (concluding that a motion to strike an amended record on appeal was moot because the underlying appeal was without merit).

CONCLUSION

WHEREFORE, having set forth his grounds, the Petitioner requests that this Court deny the Respondent's Motion to Strike, either on the merits or as moot.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Thompson', is written over a horizontal line.

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR PETITIONER.

This 10th day of February, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-187246
Lower Court Case No. 2005-CP-40-2551

BOBBY JOE REEVES, #287423,

PETITIONER,

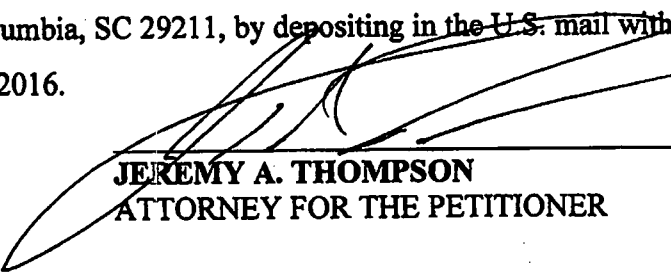
v.

STATE OF SOUTH CAROLINA,

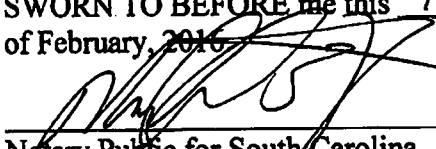
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Return to Motion to Strike and Require Filing of Amended Return to Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Megan Harrigan Jameson, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 10th day of February, 2016.


JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 10th day
of February, 2016.


(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022

The South Carolina Court of Appeals

Bobby Joe Reeves, Petitioner,

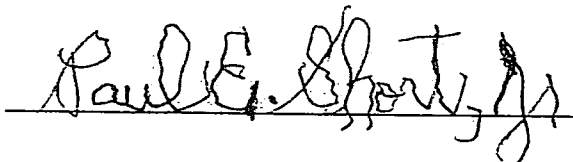
v.

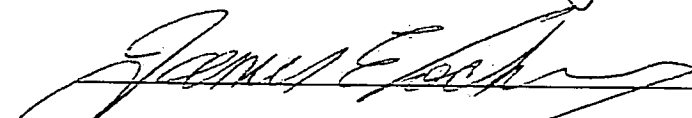
State of South Carolina, Respondent.

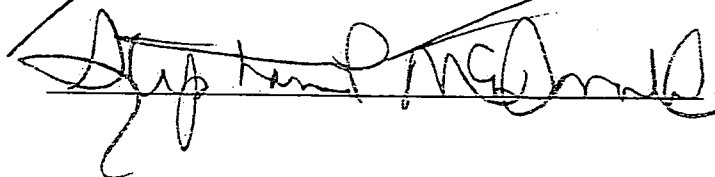
Appellate Case No. 2011-187246

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the State's petition for rehearing is denied. Additionally, the State's motion to strike and require filing of an amended return to the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Jeremy Adam Thompson, Esquire

Alan McCrory Wilson, Esquire

Megan Harrigan Jameson, Esquire

FILED

March 24, 2016