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ATTORNEY GENERAL

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S.C. SUPREME COURT

September 6, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Robert Troy Taylor v. State of South Carolina**
Lower Court Case No. 2015-CP-45-0037
Appellate Case No. 2016-000615

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Petition for Writ of Certiorari and two copies of the Appendix in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:cey
Enclosures

cc: Tricia A. Blanchette, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County
Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2015-CP-45-0037
Appellate Case No. 2016-000615

Robert Troy Taylor, #315084,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

PETITION FOR WRIT OF CERTIORARI
PETITION OF PETITIONER-RESPONDENT

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TABLE OF CONTENTS

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 4

There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to investigate. 4

CONCLUSION 10

QUESTION PRESENTED

Whether certiorari is warranted to review the PCR court's ruling granting post-conviction relief on the basis that trial counsel was ineffective for failing to investigate witnesses.

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Respondent was true bill indicted at the May 2006 term of the Williamsburg County Grand Jury for criminal sexual conduct-second degree and kidnapping (2006-CP-45-176). Charles D. Barr, Esquire represented Respondent. Respondent proceeded to trial before the Honorable George C. James, Jr. Respondent was convicted as indicted. On July 12, 2007, Judge James sentenced Respondent to life without the possibility of parole for kidnapping and criminal sexual conduct-second degree.

A timely Notice of Appeal was filed on Respondent's behalf. Jeremey A. Thompson, represented Respondent on appeal. On June 6, 2012, the South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Taylor, Op. No. 4920 (refiled June 2012). Respondent sought certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied certiorari on April 3, 2014. The Remittitur was issued on April 7, 2014.

Respondent filed an application for post-conviction relief on December 31, 2014. App. 442. Petitioner ("the State") filed a Return on June 5, 2015. App. 452. The Honorable Tanya A. Gee convened an evidentiary hearing on the application at the Sumter County Courthouse on November 19, 2015. App. 459. Respondent was present and represented by Tricia A. Blanchette, Esquire. An Order Granting Application for Post-Conviction Relief was signed by Judge Gee on February 19, 2016 and filed on February 24, 2016. App. 711. This Petition for a Writ of Certiorari follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

ARGUMENT

There is no probative evidence to support the PCR court's finding that counsel was ineffective for failing to investigate.

The PCR court erred in finding trial counsel ineffective for failing to investigate witnesses because the evidence used to support this finding was not probative. The State submits certiorari is warranted to review and correct the PCR court's error in granting post-conviction relief.

Factual Background

Respondent is currently serving a life without parole sentence for kidnapping and criminal sexual conduct-second degree for the following incident:

> Taylor was the pastor of the church Victim attended in Murrells Inlet, South Carolina. In November 1998, when Victim was 11, Taylor organized a camping trip with Victim and a group of six or seven boys from the church. Taylor took the boys to an area "just outside [the city of) Andrews" on Highway 521 and the group hiked about a mile into the woods to a campsite "right next to the Black River." Taylor and the boys set up a tent and a large tarp, made a fire, and cooked food. At approximately 11 p.m., the boys retired to their sleeping bags under the tarp. Later that night, Taylor woke Victim, placed his hand over Victim's mouth, and carried him to the tent. Once inside the tent, Taylor removed Victim's clothes and forced Victim to touch his penis and anus. Taylor also touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to reveal the rape to anyone and returned Victim to his sleeping bag. Taylor slept next to Victim and held him throughout the course of the night.

State v. Taylor, 399 S.C. 51, 55, 731 S.E.2d 596, 598-99 (Ct. App. 2012).

The victim did not disclose the rape to the Georgetown County Sheriff's Office until seven years later when he provided a statement on June 1, 2005. The victim was seventeen years old at the time he brought the crime to the attention of the Sheriff's Office.

The trial was held in July, 2007, nearly nine years after the incident occurred. The post-conviction relief hearing was held on November 19, 2015, seventeen years after the incident occurred.

Summary of Testimony

At the PCR hearing, Respondent presented testimony from five witnesses that the PCR court held should have been investigated by trial counsel. Two of these witnesses, Charles Harrison and Zack Webster, provided their testimony through an affidavit. The other three witnesses who testified at the hearing were William Edward Brown, Chad Bernard, and Nick Everett. The Order Granting PCR summarized their testimony as follows:

> Mr. Brown testified that he has known Taylor since Mr. Brown was a child, and he recalled going on the camping trip. He provided vivid details of the trip, which included sleeping side-by-side on a tarp and no tents being set up at the camping site. He recalled Taylor's young son, Griffin, being on the trip and Griffin sharing Taylor's sleeping bag. Mr. Brown recalled waking up early the next morning and getting the fire started. Mr. Brown also remembered telling ghost stories prior to bed and sleeping very lightly. He did not witness anything strange or out of the ordinary. He confirmed that he was never contacted by trial counsel prior to trial and he willingly spoke with Taylor's private investigator prior to the PCR evidentiary hearing. Mr. Brown testified that he would have been willing to testify on behalf of the defense at trial.
>
> Mr. Bernard's testimony was similar to Mr. Brown's. Mr. Bernard testified that he attended Taylor's church and remembered going on the camping trip in question. He recalled some specifics of the campsite, which included sleeping side by side in sleeping bags and no tents being set up at the site. Specifically, Mr. Bernard testified that he had reviewed the victim's statements and disagreed that there was a separate tent set up as victim stated. Based upon his recollection of the campsite, Mr. Bernard believes it very unlikely for the assault to have occurred as the victim described it because all of the boys were sleeping so close together. Mr. Bernard testified that he believes that he would have woken up if Taylor carried away the victim from the sleeping area. Mr. Bernard testified that defense counsel never contacted him prior to trial and that he would have been willing to testify for the defense at trial.
>
> Mr. Everett also testified regarding the camping trip, which he remembered attending as a boy. He testified that he had reviewed the victim's statements and there was no tent set up at the campsite. He testified that nothing out of the ordinary happened during the trip, and he believes he would have woken up if Taylor had arisen during the nighttime because they were all sleeping side by side. Mr. Everett testified that he was not contacted by defense counsel prior to trial and that he would have been willing to testify for the defense if he had been contacted.

Additionally, the affidavits of Zack Webster and Charles Harrison were admitted. Zack Webster testified:

1. I have reviewed the Voluntary Statement of [the victim] dated June 1, 2005, and Voluntary Statement of [the victim] dated November 23, 2005. I have read the trial testimony of [the victim] from the trial of Robert Troy Taylor on July 10-12, 2007.
2. My name is listed in the Voluntary Statement dated June 1, 2005 as possibly seeing the actions at issue. I was on the camping trip on November 6-7, 1998, and I did not witness anything out of the ordinary nor any behavior by Robert Troy Taylor that was memorable. I do not remember Charles Harrison, who is also listed, on the trip.
3. I do not recall being contacted by Charles David Barr, Esquire, prior to Robert Troy Taylor's trial in July of 2007. I further do not recall receiving a subpoena for July 11th or 12th in 2007. If I had received a subpoena, I would have complied and been present as needed.
4. Prior to being shown the witness list for the State and the defense during the week of November 2nd of 2015 I was unaware that 1 had been placed on a witness list for either party. I would have been willing to testify for the defense at trial.

Charles Harrison, who the victim identified as being a possible eye witness and who victim claimed had invited him on the trip, testified:

1. I have no memory of attending a camping trip with Robert Troy Taylor and other teenage boys, including [the victim], on November 6-7, 1998 near the Black River nor do I have any memory of witnessing anything as was referenced in
[the victimj's statement dated June 1, 2005.
2. I have verified with my parents that I did not attend the camping trip on November 6-7, 1998 near the Black River.
3. I do not recall being contacted by Charles David Barr, Esquire, prior to Robert Troy Taylor's trial in July of 2007. If I had received a subpoena, I would have complied and been present as needed.

App. 721-23.

Argument

Failure to Investigate Witnesses

The PCR Court's ruling was based on an error of law and should be reversed. "The Court will reverse the PCR judge's decision when it is controlled by an error of law." Leamon v. State, 363 S.C. 432, 435, 611 S.E.2d 494, 495 (2005) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004); Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000)).

The proper standard for granting post-conviction relief is set in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), which provides a two-pronged test requiring both deficient performance from the applicant's trial counsel and a showing that the performance was so deficient that but for counsel's deficiency, the outcome of the trial would have been different. This bar is a very high one. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S.Ct. 2052 at 2064.

The evidence presented in this case—the testimony of the witnesses that the PCR court held that trial counsel should have investigated and used at trial—is not probative because it is fails to prove any deficient behavior that meets either prong of the Strickland test. Because no probative evidence supports the PCR court's findings, the order granting post-conviction relief should be reversed.

First, Petitioner asserts that counsel's failure to investigate these witnesses was not deficient. In Edwards v. State, this Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). It is reasonable for trial counsel to choose not to investigate every single child camper from a camping trip nine years prior to the trial simply based on their credibility issues. A potential witness cannot be expected to remember in detail the events from a childhood camping trip on a certain date nine years ago. It is reasonable to assume that any testimony they would present would be unreliable and speculative at best. Trial counsel should not be held to the standard of having to independently investigate every

single person in attendance at an event such as this that occurred nine years prior, especially when the names of specific witnesses are not given to him by his client or any other interested party.

Furthermore, even if the witnesses were highly credible, the testimony they presented is not probative because it would not have changed the outcome of the trial. These witnesses were speculative and unreliable. Their testimony was based on a memory from *seventeen* years before. They were children at the time. Their testimony would probably not have been credible and a jury likely would not weigh their testimony highly against the State's evidence. The witnesses' inability to recall the presence of a tent at the campsite likely would not have created a real reasonable doubt in the minds of the jurors.

More importantly, even if the witnesses were completely credible and a jury weighed highly everything they testified to, they did not contribute much to Respondent's case. None of the witnesses presented at the evidentiary hearing could say with absolute certainty that Respondent did or did not rape the victim in this case that night. The witnesses testified that they did not remember anything unusual happening on the camping trip. All of them had been asleep through at least part of the night. The witnesses testified that they had attended many different church events, including other campouts, which might lead a jury to conclude that they could be remembering a different campout from the one in question. Mr. Brown testified that he did "not recall any tents" at the campsite; he could not affirmatively say that there was definitely not a tent. Regardless of the minor detail of whether or not there was a tent in existence, no witness was able to testify that the crime definitely did or did not occur on the night in question.

The unreliable witnesses presented at the evidentiary hearing likely would not have changed the outcome of the jury's verdict, especially when facing the State's evidence against

him, including testimony from the witness, expert testimony on how the victim's suicide attempts and drug use were signs of damage from repressing this abuse against him, testimony from the victim's mother, and testimony from a Sergeant from the Williamsburg County Sheriff's Office.

The jury clearly believed beyond a reasonable doubt that Respondent was guilty of this crime, and the speculative testimony of these potential witnesses could not have changed their verdict. Therefore, Respondent can show no prejudice, the Strickland standard has not been met, and the PCR court's holding should be reversed.

Batson Issue

In addition to the reasoning explained above, the PCR court held that one of the reasons supporting its finding that trial counsel failed to investigate and prepare for trial was his improper use of a strike on a juror in order to get a personal friend on the jury. App. 724. The court found that trial counsel was not prepared for trial because he "relied on winning the trial based on seated a biased juror." App. 726. This finding is based on no probative evidence.

Even if trial counsel did improperly use a juror strike with an inappropriate motive, this proves nothing about his efforts in preparing for trial. The jury is most often not chosen until right before a trial, and often the day of. Respondent has not proven that trial counsel chose not to prepare for trial because he knew in advance that he might have a friend on the jury. This finding is meritless and should be reversed.

Venue and Cross-Examination

The PCR court further encompassed into its reasoning for finding counsel ineffective for failing to prepare and investigate an argument that trial counsel focused completely on venue rather than a more culpable defense and by failing to properly impeach and cross-examine the State's witnesses. App. 726-27. This finding is completely meritless and based on no evidence at

all. In fact, this finding directly contradicts the testimony presented at the evidentiary hearing. Regardless of Respondent's allegations that trial counsel's only strategy in this case was to attack the venue, trial counsel testified that this simply was not true. App. 643. Trial counsel testified that his strategy was to create reasonable doubt and attack the credibility of the State's witnesses. App. 643-44. He testified about several ways in which he carried out this strategy by vigorously cross-examining the State's witnesses. App. 645-49.

The PCR court's holding that trial counsel focused on an improper trial strategy of venue and failed to cross-examine witnesses is in direct contradiction to the testimony presented at the evidentiary hearing and should be reversed.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to grant certiorari, dispense with further briefing, and correct this error by reversing the PCR court's ruling granting post-conviction relief. In the alternative, the State requests this Court to grant certiorari and allow the opportunity to fully brief the issue.

[Signature page to follow]

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

September 6, 2016

STATE OF SOUTH CAROLINA
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Robert Troy Taylor, #315084,

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STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Petition for Writ of Certiorari and Appendix on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
PO Box 12725
Columbia, SC 29211

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

This 6TH day of September, 2016.

CHANDRA E. YOUNG
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