

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Tanya A. Gee, Circuit Court Judge

Case No.: 2015-CP-43-0037
Appellate Case No.: 2016-000615

Robert T. Taylor,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

RETURN TO
PETITION FOR WRIT OF CERTIORARI
FILED BY PETITIONER-RESPONDENT

Tricia A. Blanchette
Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

Attorney for Respondent-Petitioner

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STATEMENT OF THE ISSUE ON APPEAL

- I. 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.

RESTATEMENT OF THE ISSUES ON APPEAL

- I. Whether the lower court's granting of relief should be upheld since trial counsel rendered ineffective assistance when he failed to properly prepare and investigate prior to trial resulting in an unreasonable trial strategy and deficient defense.
- II. Whether the lower court did committed reversible error as a result of her findings regarding venue and failure to cross-examine witnesses.
- III. Whether the lower court did erred in her findings regarding counsel's deficient performance that evidenced itself due to counsel's handling of the "Batson Motion" and the related evidentiary hearing testimony.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

STATEMENT OF THE CASE

Respondent-Petitioner hereby incorporates Petitioner-Respondent's Statement of the Case providing the procedural history.

FACTUAL STATEMENT OF THE CASE

The following factual background is taken directly from the Order Granting Application for Post-Conviction Relief. Am. App. pp. 712-17.

The Court of Appeals provided this succinct explanation of the allegations against Taylor:

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. Next, Taylor raped victim. After raping Victim, Taylor instructed Victim to not 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).

This allegation will hereinafter be referred to as the "Williamsburg County incident," and it is the crime for which Taylor is serving a life without parole sentence and from which he seeks post-conviction relief.

As with many cases involving allegations of child sexual abuse, Victim did not disclose the Williamsburg County incident until many years later, when he was seventeen years old. On June 1, 2005, Victim provided the following written statement to the Georgetown County Sheriff's Office:

Sometime between February and April LC3 Youth Groups went on a camping trip to Andrews, S.C. It was very cold outside and it rained a little bit. My friend Charles Harrison asked me if I wanted to go. We went back in the woods about a mile and a half. There were corn fields all around with two houses on either side of the street. We set up camp around like 7:30 PM. We made a bonfire then we went to bed around 11:00. About 2 to 3 hours later, Troy woke me up by putting his hand over my mouth and telling me to be qui[et]. He took me to a sep[a]rate tent and started touching my penis. He was honestly rubbing and fondling it. He did this for like 30 minutes continuously touching me. I told him to stop numerous times he just told me to be qui[et]. After that he took me back to the other tent and made me sleep beside him. I g[ue]ss so I wouldn't say nothing. I'm really not sure if anyone say anything but if they did Zack Webster and Charles Harrison would be the ones that saw.

Six months after disclosing the abuse from the 1998 Williamsburg County incident, Victim disclosed another incident of abuse at the hand of Taylor. This incident occurred in 1999 in Georgetown County. The Court of Appeals described it as follows:

In August 1999, Taylor and a few other adults from the church organized a trip to the beach. After leaving the beach, the group returned to the church to use the showers. Once all the showers were occupied, Taylor asked victim and another boy if they would like to use the showers at his house. Victim and the other boy accompanied Taylor to his home near the church. While Victim was showering, Taylor entered the bathroom, removed his clothes and entered the shower. Taylor forced Victim to touch his penis and Taylor touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to divulge the rape to anyone. Taylor drove Victim and the other boy back to the church.

State v. Taylor, 399 S.C. at 55-56, 731 S.E.2d at 599.

Taylor pleaded guilty in Georgetown County to the 1999 incident on April 20, 2006. The Honorable Edward B. Cottingham sentenced Taylor to eight years, suspended to five years of active time and three years' probation.

In March of 2007, approximately four months before Taylor was tried for the 1998 Williamsburg incident, the State served Taylor with a notice of intention to seek a sentence of life without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code. The State relied on Taylor's 2006 Georgetown County conviction for second degree criminal sexual conduct to enhance Taylor's punishment.

At Taylor's trial, the State moved to strike the first jury that was selected, arguing that defense counsel had used eight of ten strikes against white jurors. The trial judge found that defense counsel violated Batson v. Kentucky, when he struck juror number 146. Mr. Barr purportedly struck her because she was too educated, yet he sat a black, female juror with more education than juror number 146. A new jury was then selected, and juror number 146 was seated on the jury that convicted Taylor.

At trial, the State called four witnesses: (1) Gayle Allen Cook of the Durant's Children Center, who was qualified as an expert in the field of counseling and treatment of childhood sexual abuse; (2) Victim's mother; (3) Victim; and (4) Sergeant Laura Rogers of the Williamsburg County Sherriff's Office. Ms. Cooke testified that generally that a person who has been abused as a child may be withdrawn and have suicidal tendencies. She further explained that was "pretty normal" for abused children to turn to alcohol or drugs that that it was very common for them to have difficulties with the law. She also testified that 69% of child victims wait to disclose abuse until adulthood.

Victim's mother testified that her son attended the church camping trip in November 1998, when he was 11. She further testified that at the age of 14, Victim began abusing drugs and alcohol, and at some point prior to disclosing the abuse, he attempted to kill himself with an overdose of Xanax. On cross-examination, defense counsel asked Victim's mother a series of questions about the location of the camping trip, apparently attempting to demonstrate that she did not have firsthand knowledge that the campsite was located in Williamsburg County. (p.90-2) Counsel also elicited testimony from her that Victim's behavior was not noticeable different between the ages of eleven and fourteen, when Victim began abusing drugs and alcohol. Victim's mother also admitted that she and her husband (Victim's father) were experiencing a "little bit" of marital difficulty when she "started noticing [Victim's] somewhat unwholesome behavior."

Victim, who was 19 years old at the time of the trial, also testified, describing both the 1998 Williamsburg County incident and the 1999 Georgetown County incident. Victim testified that after being abused, he was too scared to tell anyone. At 14, Victim admitted he began smoking marijuana, and a year later, he began drinking alcohol. He testified that he did this in an effort to drown out memories of the abuse, and by age sixteen he graduated to more serious drugs, such as cocaine and pills. At the age of 17, he took nine Xanax pills because he wanted to hurt himself. After that, Victim testified that he told a male friend about being abused by Taylor as a child. Victim then disclosed the 1998 Williamsburg incident to law enforcement, and six month later, he disclosed the 1999 Georgetown incident. Victim specifically identified the location of the campsite as being in Williamsburg County. On cross-examination, defense counsel pointed out discrepancies between Victim's initial statement and his testimony in court. For instance, defense counsel pointed out that Victim first identified the trip happening sometime

between February and April, yet he testified it happened in November only after finding a church bulletin listing the actual date of the youth camping trip. Defense counsel also questioned Victim about whether the other boys saw Taylor waking up next to Victim, and Victim acknowledged that they did but none of them said anything. Victim also testified that Taylor did not bring his son on the camping trip.

The State's final witness was Sergeant Laura Rogers, a victim's advocate for the Williamsburg County Sheriff's Office. She testified that the incident occurred in Williamsburg County, and at the time of the incident, Victim was 11 years old and Taylor was 39 years old. On cross examination, defense counsel focused on the location of the incident, pointing out that Black Ricker [River] runs through both Georgetown and Williamsburg counties.

The defense called one witness, Trevor Morton. Mr. Morton is Taylor's nephew and participated in the camping trip. According to Mr. Morton, he slept next to Taylor under the tarp, and Taylor had his three-or-four-year-old son with him, sleeping in the same sleeping bag. Mr. Morton testified that he knew Taylor remained next to him all night because Mr. Morton did not sleep well due to being cold and feeling scared from the ghost stories told earlier in the evening. Mr. Morton confirmed that another tent was set up, but testified that the tent had everyone's gear stored in it. Mr. Morton did not remember Taylor sleeping next to Victim, nor did he remember anything unusual happening that night. On cross-examination, the State pointed out that Mr. Morton loved his uncle and did not want anything bad to happen to him. After Mr. Morton's testimony, the defense rested.

Defense counsel successfully requested that the trial judge charge the jury on the issue of venue, so that issue would be part of the jury's deliberation. As a result, counsel spent a fair amount [of] time arguing venue in his closing statement, though he also questioned the Victim's

credibility in an effort to create a reasonable doubt. Ultimately, the jury convicted Taylor, and the judge sentenced him to life without the possibility of parole. Am. App. p. 712-717.

ARGUMENT

I. The lower court's granting of relief should be upheld since trial counsel rendered ineffective assistance when he failed to properly prepare and investigate prior to trial resulting in an unreasonable trial strategy and deficient defense.

A. Summary of the Testimony Offered at the Evidentiary Hearing

At the evidentiary hearing, R-P provided the Affidavits of Zack Webster and Charles Harrison.¹ R-P also called William Edward Brown, Chad Bernard and Nick Everett as witnesses to the camping trip at issue.

At the evidentiary hearing, the Affidavit of Zack Webster was admitted and read as follows:

1. I have reviewed the Voluntary Statement of [Victim] dated June 1, 2005, and Voluntary Statement of [Victim] dated November 23, 2005. I have read the trial testimony of [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, 2005² 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.

¹ As the record reflects, the parties agreed to the admissibility of the Affidavits in lieu of live testimony having to be provided on a separate day due to scheduling conflicts for the witnesses. Am. App. p. 465.

² At the evidentiary hearing, a scanned copy of the Affidavit was introduced since counsel did not receive the mailed copy prior to the evidentiary hearing. Am. App. pp. 465-6. Upon receipt of the scanned copy, PCR counsel noticed a typo on #2, which read "Voluntary Statement dated June 1, 2015." With permission of Mr. Webster and knowledge of Daniel Gourley, Assistant Attorney General, PCR counsel corrected the typo as the Statement, which was introduced at the trial and evidentiary hearing, was clearly dated 2005. Upon receipt of the original Affidavit, PCR counsel submitted it to the Clerk and asked that it be substituted in for the scanned copy introduced as Applicant's Exhibit 1, a copy of both Affidavits are included in the Amended Supplemental Appendix. After sending the original, PCR counsel realized the typo was not corrected. Thereafter, PCR counsel asked the lower court to take judicial notice that the Affidavit of Zack Webster marked as Applicant's Exhibit 1 should read "June 1, 2005" as was stated at the evidentiary hearing and reflected on the scanned copy introduced at the evidentiary hearing. Therefore, the proper date is reflected in the lower court's order. Am. App. p. 722, Am. Supp. App. pp. 1-3.

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 resent 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 I had been placed on a witness list for either party. I would have been willing to testify for the defense at trial.

Am. App. pp. 465-6, Am. Supp. App. pp. 1-3.

The Affidavit of Charles Harrison was also admitted and read as follows:

1. I have no memory of attending a camping trip with Robert Troy Taylor and other teenage boys, including [Victim], on November 6-7, 1998 near the Black River nor do I have any memory of witnessing anything as was referenced in [Victim]'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. pp. 465-6, Am. Supp. App. p. 4.

At the evidentiary hearing, William Edward Brown, testified that he has known R-P pretty much all of his life, and he recalled going on the camping trip in question. Am. App. pp. 489-9. He vividly recalled the layout of the campsite and how everything was set up. Am. App. pp. 499-500. He recalled putting sleeping bags side by side on an awning and sleeping in the open air. Am. App. p. 500. When asked about a tent, he said: "I don't recall any tents." Am. App. p. 500, lns. 20-21. He recalled R-P's young son being on the trip and sharing R-P's sleeping bag. He recalled waking up early the next morning and getting the fire started. Am. App. p. 501. When he heard about the allegations, he recalled thinking it was nearly impossible for such to occur since you could see from one end of the campsite to the other. Am. App. pp.

501-2. He did not witness anything strange or out of the ordinary. Am. App. p. 501-2. He recalled sleeping very lightly due to it being his first camping trip and being aware of his surroundings. Am. App. p. 502-3. He remembered being woken during the night when a dog ran through the campsite. Am. App. p. 501. He confirmed that he was never contacted by Mr. Barr or anyone prior to trial and he willingly spoke with R-P's private investigator prior to the evidentiary hearing.³ Am. App. p. 502. He indicated that he would have been willing to testify at trial. Am. App. p. 502.

Mr. Bernard testified that he attended R-P's church and went on the camping trip in question. Am. App. p. 510. On cross-examination, he provided further details of his memories of the trip when he was fourteen years old. Am. App. pp. 515-16. He recalled R-P's young son being on the trip, and he described the sleeping conditions, as follows: "I do believe we slept under a tarpaulin that was laid on the ground and then rolled upon over a tree branch or something like that. We all slept side-by-side in our sleeping bags." Am. App. p. 511, lns. 5-8. He explained that he had reviewed the victim's statements and there was no tent set up as victim stated and R-P slept with everyone under the tarp. Am. App. pp. 511, 519-20. Based upon his recollection of the campsite, he believes it was very unlikely for the assault to have occurred without waking anyone up since they all were "snuggled together pretty much." Am. App. pp. 511-12. He made it clear that he was not contacted by Mr. Barr prior to trial and that he would have been willing to testify for the defense at trial. Am. App. pp. 512-13.

Mr. Everett testified that he is currently a high school teacher and coach. Am. App. p. 522. He explained how he knew R-P, that he attended R-P's church and was a member of the

³ Pete Skidmore, private investigator, also testified at the evidentiary hearing about the investigation he undertook at the request of R-P and PCR counsel. He testified about locating each witness and speaking with them prior to the evidentiary hearing. Am. App. pp. 548-550.

youth group. Am. App. p. 523. He recalled going on the camping trip in question. Am. App. p. 523. He testified that he had reviewed victim's statements and there was no tent set up at the campsite. Am. App. p. 523-4. He also testified about a tarp being set up and putting sleeping bags side by side under it. Am. App. p. 525. He did not see what victim alleged occurred or anything out of the ordinary. Am. App. p. 524. When asked about the alleged conduct waking him up, he responded: "Yes, ma'am. We were all sleeping pretty close together. Troy is not a small guy. If he had got up – I am a pretty light sleeper. I am pretty sure I would have woken up." Am. App. p. 524, lns. 3-7. He affirmed that he was not contacted by Mr. Barr prior to trial and he would have been willing to testify for the defense at trial. Am. App. pp. 525-6. He recalled hearing about the allegations from his mom, but he did not know who to contact regarding the information he had about the trip. Am. App. p. 529

At the evidentiary hearing, Jeremy A. Thompson, Esquire, was called to the stand by R-P and asked about his representation of R-P on appeal. While on the stand, Mr. Thompson addressed each of the issues he raised or strategically chose not to raise on direct appeal. Specifically, Mr. Thompson was asked about the witnesses' testimony offered at the evidentiary hearing and the Affidavits admitted in relation to his appellate argument regarding the admission of Rule 404(b), SCRE, evidence, which Mr. Barr deemed to be the real problem in the trial. Am. App. p. 643. Mr. Thompson testified that he found the Rule 404(b) argument to be the strongest on the merits and deemed it a hot topic at the time in the appellate courts. Am. App. p. 621. After hearing the witnesses' testimony and reviewing the Affidavits, Mr. Thompson explained that he could have utilized the factual testimony in his balancing test argument. Am. App. pp. 623-25. He further explained that the testimony that there was not a tent would have aided his argument

and diminished ‘the similarities between the two crimes even more’ since he could have argued that victim was not taken away R-P. Am. App. pp. 624-25.

When he took the stand, Respondent-Petitioner explained that he was incarcerated at Evans and MacDougall Correctional Institutions prior to trial and he recalled meeting with defense counsel twice. Am. App. p. 556-7. R-P recalled talking with counsel about witnesses that needed to be spoken to prior to trial but all that counsel wanted to discuss was venue – the “slam dunk.” Am. App. p. 566-7. R-P explained that he did not want to win his case on a loophole (venue), but he wanted witnesses called that could prove his innocence. Am. App. pp. 566-568. Since counsel had not set up access to his office phone via the SCDC phone system, R-P wrote to him regarding witnesses that needed to be located prior to trial. Am. App. pp. 568-72. R-P identified and introduced a letter dated January 8, 2007 from defense counsel stating that he was “ready to start personal interviews.” Am. App. p. 569, Am. Supp. App. p. 19. When he did not hear about witnesses being spoken to, he wrote counsel a letter on May 16, 2007, reminding him that “key witnesses” – Zack Webster and Trevor Morton were waiting to speak to him. He also explained in the letter that he thought “Chuck Harrelson” was a key witness since he was named by the victim as being on the trip and denies it. Am. App. pp. 571-2. Am. Supp. App. p. 20. He explained that he also asked his family to talk with defense counsel about speaking with witnesses.⁴

⁴ R-P also offered the testimony of Linda Taylor, John Pezzullo, Michelle Gallagher and Tonya Morton regarding their interactions with defense counsel, which the lower court cited as credible. Am. App. p. 720. John Pezzullo recalled accompanying R-P’s parents to meet with defense counsel. Am. App. p. 536. He remembered being asked to go since R-P’s parents were upset with counsel and wanted another person present at the meeting. Am. App. p. 536. He recalled Mr. Barr saying the State had to prove venue and they could not. Am. App. pp. 536-7. When R-P’s parents brought up locating and utilizing witnesses, he recalled counsel saying witnesses were not needed when they were arguing venue. Am. App. pp. 536-7. Linda Taylor, R-P’s mother, testified regarding several meetings with Mr. Barr that were very short and rushed. Am. App. p. 531-2. She recalled repeatedly asking him about defense witnesses prior to trial and providing him the names of the witnesses that testified at the evidentiary hearing amongst others. Am. App. p. 532. She vividly remembered him turning to the family during the trial and asking them to

While on the stand, R-P reviewed the defense witness list with Charles Harrelson (misspelled as it was in R-P's letter) and Zack Webster listed, and the State's witness list, with Zack Webster's name crossed off. Am. App. pp. 574-6, Am. Supp. App. pp. 20-22. He recalled not seeing any witnesses present at trial and counsel turning to him at the close of the State's case and telling him to write down the name of his witnesses. Am. App. p. 568. He also recalled counsel telling his family that they needed to try and locate the witnesses at that point in the trial, which resulted in his family scrambling to get his nephew to court. Am. App. p. 567-8. He was adamant that he would have wanted counsel to utilize the five witnesses from the camping trip that offered testimony and/or Affidavits at the evidentiary hearing. Am. App. pp. 572-3. During sentencing, he told the court about witnesses that were not present that could have testified regarding the camping trip. Am. App. pp. 425, 577. R-P testified that he wanted witnesses called and he never discussed a reason or strategy with counsel for not utilizing witnesses that were present at the camping trip. Am. App. p. 579.

When Charles David Barr, Esquire, took the stand he agreed that he had informed R-P and PCR counsel that R-P's file had been destroyed, but he went to his warehouse and located it after receiving a court order from counsel for it.⁵ He explained that his theory of the defense was

locate witnesses during a short break. Am. App. p. 533. She recalled only being able to locate Trevor Morton. Am. App. pp. 533-4. She further recalled that Mr. Barr did not speak to him prior to putting him on the stand and Trevor appeared very nervous and had no idea what to expect. Am. App. p. 533. Michelle Gallagher, R-P's sister, reiterated her mother's testimony about Mr. Barr failing to heed their requests to talk to witnesses and focusing solely on venue. Am. App. p. 539. She recalled scrambling to get witnesses to the courthouse during the trial. Am. App. pp. 539-40. She remembered that Trevor was the only one located, and he was the witness that they wanted the least due to possible bias that could be demonstrated since he was R-P's nephew. Am. App. p. 540. Tonya Morton, R-P's sister and Trevor's mother, also testified about being asked to get her son to the courthouse. Am. App. p. 541-2. She remembered telling her son that he may be needed, but she recalled Mr. Barr not telling them until the break in the courtroom that he was needed. Am. App. pp. 541-2. She remembered having to hurry and her son being scared and shaking due to Mr. Barr's last minute call for him. Am. App. p. 543-4.

⁵ Q: Okay. And you mentioned that Mr. Taylor had asked you for his file several months ago and do you recall that your original response to him was that the file was destroyed?

to discredit the victim and state's witnesses and create a reasonable doubt. Am. App. pp. 643-5. He recalled trying to insinuate that the assault never took place through his cross-examination of victim's mom. Am. App. pp. 645-8. When asked about utilizing a private investigator, he said he had Investigator Davis due a number of things in the case, but he conceded that he only had a bill in the file for work done relating to a conversation with a juror post trial. Am. App. p. 669. After being asked to review the victim's statement containing the names of Harrison and Webster, counsel admitted that he did not have any entry in his file regarding anyone speaking to either witness prior to trial. Am. App. p. 670. Upon reviewing the Affidavit of Harrison, he conceded that he did not contact Harrison. Am. App. pp. 671-2. In response to why he did not subpoena Harrison or Webster since they were on the witness list and why he failed to speak with Trevor Morton before he testified as a defense witness to seeing a tent, counsel explained he did speak to Morton and confusingly attempted to shift the blame to R-P, which the lower court properly found to be an invalid excuse. Am. App. pp. 674-6. Counsel further attempted to convince the lower court that R-P lacked support and he was disadvantaged by a hostile environment, which was directly refuted by the testimony of Gaye Allen-Cooke, when she recounted being struck by the standing room only support in the courtroom for R-P. Am. App. p. 473, lns. 10-19.

B. General Sessions Record

A: I told him that it was.

Q: And once I got a court order requesting it, then you sent the file to my office; is that correct?

A: My files – I keep files consistent with what the ethics rules say. After that – after six years, I think they go to the warehouse. Now, what I did is I actually went to my warehouse myself and went through the warehouse and, as much of his files as I could find – there have been people that – who have broken into the warehouse, stolen out of the warehouse, but with a court order I figured I'd better go down there and look, and I did. But I think I was well within – within – was beyond that period that I'm required to keep a file.

App. pp. 668, lns. 1-16.

Prior to trial, victim gave two statements. Notably, in his first statement given to Georgetown County on June 1, 2005, he stated that "his friend Charles Harrison asked him to go" on the trip. Am. Supp. App. p. 12. He stated that R-P woke him up two to three hours into sleeping and took him to a separate tent. He concluded the statement with the following: "I'm really not sure if anyone saw anything but if they did Zack Webster or Charles Harrison would be the ones that saw." Am. Supp. App. p. 12. In his second statement given to Williamsburg County on November 23, 2005, victim recounted the sexual acts that were committed in a separate tent. Am. Supp. App. pp. 13-14.

At trial, victim testified to the set up at the camping trip. He explained they set up a tent and had a big tarp to sleep under. Am. App. p. 160. He also testified: "Mr. Taylor had his own tent." Am. App. p. 161, Ins. 9-10. He testified that R-P picked him up from the tarp, committed the alleged acts, took him back to the tarp and made him sleep right next to him. Am. App. p. 163. During cross-examination, trial counsel introduced victim's statement dated June 2005. Am. App. p. 204. Thereafter, counsel asked several questions about his report that he went on the camping trip since Charles Harrison asked him to go.⁶ Am. App. pp. 208-9. Counsel also repeatedly asked him about what the other boys on the trip may have seen or heard. During closing argument, trial counsel stated:

Now here you have a young man, 11 years old, first of all, who decides to go on a camping trip, not because he's invited by Troy Taylor, not because Troy Taylor asked him to go, but because of his friend asking him to go, Charles Harrison. Now, I don't know where Charles Harrison is, I know that his name has been mentioned by apparently based on what Mr. Causey told us, Mr. Harrison asked him to go on this camping trip. Not Mr. Taylor.

Am. App. p. 348, ln. 21-349, ln. 4.

⁶ During his proffered testimony, victim stated: "I did go on the trip because Charles was going." Am. App. p. 112, Ins. 1-2.

C. Argument

By way of her written Order granting relief, the Honorable Tanya A. Gee provided a detailed analysis finding that trial counsel was deficient for failing to investigate and counsel's failure prejudiced R-P and affected the outcome of his trial. In contrast to the State's argument that Judge Gee committed an error of law in her findings, R-P submits that it is absolutely clear that Judge Gee properly analyzed the issue raised and evidence offered and made well-supported and clear findings that should not be reversed by this court under any standard of review.

After addressing the controlling case law⁷, Judge Gee specifically made findings on how counsel's lack of investigation fell below an objective standard of reasonableness, as follows:

Here, trial counsel acknowledged that he never interviewed the other boys that went on the camping trip. Trial counsel claims that his trial strategy was to discredit the victim's testimony in an effort to create a reasonable doubt. If this were so, there is no valid strategic reason why trial counsel would not make some attempt to interview the boys on the camping trip.

If trial counsel had spoken to the other boys, he may have been able to articulate a valid strategic reason for not calling them as witnesses; however, it is impossible for trial counsel to engage in strategic reasoning without first engaging in some type of investigation. According to trial counsel, he did not contact the other campers because he had never heard of them. This testimony is either not true or illustrative of counsel's deficient performance.

Had trial counsel properly prepared for this trial, he would have read the victim's statement, which identified Mr. Harrison and Mr. Webster as possible eyewitnesses. Additionally, trial counsel received a letter from Taylor in which

⁷ "Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). "[W]hile the scope of a reasonable investigation depends upon the number of issues, 'at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'" Id. at 331-32, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D.Fla.1986) (emphasis in original)).

Courts recognize there are as many ways to try a case as there are lawyers. Accordingly, Courts considering an application for post-conviction relief strongly presume "that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008). So long as counsel can articulate a reasonable trial strategy, he will not be deemed ineffective. Id.

Taylor named other boys on the camping trip. Furthermore, numerous members of Taylor's family credibly testified that they had provided counsel with the names of the other boys on the camping trip. Indeed, some of the other campers were listed as witnesses on Taylor's pre-trial statement. Accordingly, I find that trial counsel knew of the campers' identities. I further find that his failure to interview potential witnesses and independently investigate the facts and circumstances surrounding the allegations against Mr. Taylor was objectively unreasonable and was not the result of a valid trial strategy.

Am. App. p. 720.

Furthermore, Judge Gee addressed R-P's argument that counsel's strategy of focusing on venue was unreasonable and found that the matter of venue further supported her findings that counsel rendered ineffective assistance by failing to investigate and utilize witnesses and evidence offered at the evidentiary hearing. She explained:

Taylor argues that trial counsel's strategy was to win an acquittal because the State failed to prove the crime occurred in Williamsburg County. Taylor argues that such a strategy was unreasonable because (1) the issue of venue is one for the judge, not the jury; and (2) trial counsel would have known that the campsite was in Williamsburg County had he engaged in a minimal investigation. Taylor called several witnesses that who testified that trial counsel discussed this strategy with them, and the trial transcript reflects that trial counsel strenuously argued the issue of venue, particularly in his closing argument. However, at the evidentiary hearing, trial counsel testified that his strategy going into to trial was to discredit the victim and the issue of venue arose only when the State's law enforcement witness testified uncertainly about the location of the incident. Considering the allegations against Taylor and the sentence he faced of life without the possibility of parole, I find that trial counsel's failure to investigate witnesses was deficient because without such an investigation, counsel was unable to make valid strategic decisions.

Am. App. pp. 720-721, Order fnt. 2.

As Judge Gee correctly held, it is abundantly clear from the record before this Court that trial counsel failed to locate and interview witnesses that were critical to the defense. If this Court accepts defense counsel's position that his entire trial strategy hinged on attacking the credibility of the state's witnesses and victim's account, it is unfathomable why counsel would

not utilize the factual testimony of the five witnesses discussed above to directly refute the account given by victim.

In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), the South Carolina Supreme Court addressed counsel's failure to utilize witnesses and how to establish prejudice. The Court reasoned as follows:

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records).

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Turning to prejudice, Judge Gee held:

For a convicted defendant to receive post-conviction relief, he must not only prove that his counsel's performance was deficient, but that the defendant was prejudiced by the deficiency. "Prejudice" in this context means there is a reasonable probability that the result of the proceeding would have been different absent trial counsel's deficient performance. Franklin, 346 S.C. at 571, 552 S.E.2d at 723. The PCR applicant bears the burden of proving prejudice, and I find Taylor has met his burden.

Am. App. p. 721.

Thereafter, Judge Gee addressed the two affidavits provided and testimony from three young men that attended the camping trip in question. In discounting the testimony found to be credible by Judge Gee and summarized above, the State is now arguing that the testimony was

hindered by the passage of time and “did not contribute much to Respondent’s case.” Petition p. 8. In complete contrast, it is apparent from the record that counsel’s failure to investigate and utilize the witnesses called at the evidentiary hearing severely and prejudicially impacted the outcome of R-P’s trial. As is addressed in Judge Gee’s Order, the witnesses were not related to R-P like his nephew called by trial counsel⁸, refuted the testimony of victim, provided an account of the camping trip in question, and impeached the credibility of the victim, especially regarding his claims that Charles Harrison invited him to and was on the camping trip. Trial counsel himself testified that his trial strategy was to discredit the victim and State’s witnesses and he provided no testimony that he conducted even a minimal investigation nor did he provided a strategic reason for failing to utilize the witnesses called. As a result, R-P submits that this Court should not disturb Judge Gee’s reasoning, as follows:

At trial, the only evidence against Taylor came from the victim, who testified about the Williamsburg County incident and the Georgetown County incident. To refute that testimony, defense counsel called one witness that witness (Trevor Morton) was related to Taylor.⁹ On cross-examination, the State used the familial relationship to demonstrate bias. The other boys on the camping trip were not related to Taylor, and their account of the camping trip contradicted the victim’s testimony with regard to things like the existence of a separate tent, the absence of Charles Harrison, and whether Taylor slept in the same sleeping bag as his young son. These other boys also expressed doubt that Taylor could have carried the victim away without them noticing. At trial, the case against Taylor was basically the victim’s word against the testimony of Taylor’s nephew. Had defense counsel called these other, non-related witnesses, the jury may have doubted the victim’s story and there is a reasonable probability that the outcome of Taylor’s trial would have been different.

Am. App. pp. 723-4.

⁸ As was addressed by way of the Order, Judge Gee noted that R-P’s nephew testified at trial and that trial counsel had never spoke to him prior to the day of trial. Am. App. p. 724. R-P submits this further supports Judge Gee’s finding that counsel failed to investigate and prepare for trial.

⁹ At trial, Mr. Morton testified that he had not even spoken to defense counsel prior to the day he testified.

- II. The lower court did not commit reversible error as a result of her findings regarding venue and failure to cross-examine witnesses.

By way of the filed Petition, the State argues that Judge Gee erred in her findings regarding venue and cross-examination. Petition p. 9. As the Order states under the heading "Venue and Failure to Properly Cross-Examine State's Witnesses", Judge Gee held:

Taylor also argues that trial counsel was ineffective by focusing on venue and by failing to impeach and/or cross-examine the State's witnesses at trial. These allegations are encompassed in the above findings regarding counsel's failure to prepare and investigate, which resulted in his failure to present a reasonable defense.

Am. App. p. 726.

A proper review of the Order reflects that Judge Gee incorporated R-P's arguments regarding venue and cross-examination in her findings regarding counsel's unreasonable investigation and prejudicial presentation of a defense at trial, as is addressed above. Turning to the issue of venue in more detail, counsel's handling of the issue of venue at trial further demonstrates how Judge Gee considered the entire record, the evidence and testimony offered and reached the proper conclusion that trial counsel rendered ineffective assistance that affected the outcome of trial.

After the State rested, Mr. Barr moved for a directed verdict on venue. Am. App. pp. 264-66. After hearing argument from both sides, the trial court responded:

All right. I agree with Mr. Barr that the evidence is hazy. And I may re-visit this at the conclusion of all the evidence when you renew your motion. But at this point I'm going to deny your motion. I think that there is evidence, however weak the whereabouts of the alleged incident. I'm going to deny your motion at this time, Mr. Barr.

Am. App. p. 272, lns. 13-19.

Mr. Barr renewed his directed verdict motion, and the trial court denied it. Am. App. pp. 322, 324. Then, counsel requested that the court charge the jury on venue, and a venue charge

was given to the jury. Am. App. pp. 324-327, 385, lns. 3-20. Following the jury charge, the State entered an objection to the jury charge on venue. Am. App. p. 401.

During closing argument, Mr. Barr chose to present a detailed story about burying his soon to be ex-wife's wedding ring and digging up the yard to locate it and compared his search for the ring to the State's inability to establish venue. Am. App. pp. 338-341. He provided the jury with a lengthy argument regarding how the State and its witnesses failed to establish venue, which he argued required that the jury find R-P not guilty. Am. App. pp. 341-346.

At the reconsideration hearing, trial counsel indicated that he was renewing his grounds raised during the directed verdict motion on the issue of venue. Am. App. pp. 778-79. In the Order issued by the trial court denying R-P's motion to reconsider, the trial court addressed the issue of venue, and stated:

The defendant maintains there was insufficient evidence as a matter of law that the incident occurred in Williamsburg County. The court, upon joint request of the parties, submitted the question of venue to the jury, charging that the place of the crime had to be established by the greater weight of the evidence. The submission of this issue to the jury was error, but in and of itself is not the error claimed by the defendant. In my view, the evidence taken as a whole establishes, however slightly, that the offense occurred in Williamsburg County.

Am. App. p. 800.

At the evidentiary hearing, Mr. Barr testified that venue was not part of his trial strategy but became an issue at trial due to the officer's testimony. Am. App. p. 643, lns. 1-12. He further explained the he knew the location described was in Williamsburg County. Am. App. p. 649. In contrast to saying he did not discuss venue with the R-P or his family because he would not discuss venue with a "layperson," he boasted that he was successful in getting the trial judge to charge the jury on venue, and he argued venue to the jury – a group of laypersons. Am. App. p.

650, p. 652, lns. 3-6. He explained that if the jury would have "bought it," R-P would have been found not guilty. Am. App. p. 650.

When asked about his closing argument, he explained that his lengthy story was given to the jury to help them understand venue and the "importance of knowing what something is and knowing how to go back and find it." Am. App. p. 660, lns. 2-7.

At the evidentiary hearing, Mr. Thompson also addressed the issue of venue. He explained that he attempted to add to the trial argument by reviewing maps, hoping the appellate court could take judicial notice that the location was not in Williamsburg County, but to his disappointment it was clear from the directions given and the map he reviewed that the location described was in Williamsburg County.¹⁰ Am. App. pp. 619-20. When asked about how he chose to raise venue on direct appeal, the following took place:

Q: Let me go back and just ask you some specific questions on the issue you just talked about. For venue, in your argument you didn't focus and really didn't raise the closing argument that Mr. Barr made on venue. Was there a reason for that?

A: I did not believe that I could get into any argument dealing with what the jury was supposed to find regarding venue. I believe it's even in Judge James' order after the – in the post-trial – the post-trial motion order where he says that he improperly submitted the issue to the jury. I think venue was a question for the Court. That's all the law I could find was that venue was an issue for the Court and should be raised at a directed verdict.

App. p. 622, lns. 3-17.

As the record establishes, counsel made a strategic decision to focus on venue to attempt to obtain an acquittal from a group of "laypersons." Meanwhile, counsel failed to investigate and present a viable defense as discussed above and incorporated in Judge Gee's finding that counsel

¹⁰ During the evidentiary hearing, Pete Skidmore, private investigator, testified that he went to the location at issue with the owner of the property and it was located in Williamsburg County. Am. App. pp. 550-1.

failed to “present a reasonable defense.” Am. App. p. 727. Therefore, R-P would ask this Court to determine that Judge Gee’s brief findings that venue and cross-examination were encompassed in her overall findings regarding counsel’s deficiency for failure to investigate further support this Court upholding the granting of relief and fall completely short of any form of reversible error.

III. The lower court did not err in her findings regarding counsel’s deficient performance that evidenced itself due to counsel’s handling of the “Batson Motion” and the related evidentiary hearing testimony.

By way of the Petition, the State has raised an argument entitled “Batson Issue” that misinterprets the reasoning and finding of Judge Gee on this shocking matter that was exposed at the evidentiary hearing while addressing the Batson issue that arose at trial. Pet. p. 9. R-P submits that the lower court’s findings do not require reversal of the relief granted but merely further establish the deficient and prejudicial assistance provided by counsel that requires a new trial.

As is recounted in the Order, at the evidentiary hearing, the following testimony was elicited from Mr. Barr when asked about the reasons he provided for striking juror #146 during the Batson motion:

Q: And can you just kind of explain? I mean were those the reasons why you actually struck her.

A: I didn’t want her on the jury. That’s why I struck her. I didn’t think she would – I didn’t – I didn’t think she was – Batson is – from the standpoint of trial practice, Batson is the law, but Batson makes a whole lot of lawyers say things that are probably not exactly – and that’s just a reality of how it’s done.

Q: Uh-huh.

A: And – and anybody that won’t admit it don’t do it.

Q: Right.

A: But you – you – you decide who you want on a jury and then you develop – now, usually – usually, you know, when you strike somebody, you – you – you usually have a – try to be prepared with a race-neutral reason –

Q: Uh-huh.

A: -- so if you do get a Batson motion from the State that you can justify the strike you were taking.

Q: Right.

A: If I'm not mistaken, there were – there was – there was at least one person that I wanted an, if I had gotten that one person, it would have turned the case.

Q: Right.

A: So I took a chance on getting rid of that lady that I didn't want and maybe playing it along and getting somebody else that I – that I thought that was going to be much more favorable to our position. And when the time – when the time came, in terms of the race-neutral explanation that I attempted to give, Judge – Judge James found it, applying the law – and I agree with the young man who just testified as to the three-prong analysis that the Courts use to decide whether or not Batson has been violated, but the judge decided that Batson was violated. And as – as a result, he made us pick the jury over again.

Q: Did that provide you the opportunity to get the juror that you wanted?

A: No. No, sir.

Am. App. p. 655, ln. 20 – p. 657, ln. 6.

On cross-examination, the following exchange took place:

Q: Do you recall the juror that you wanted sat when you said that you struck the other juror trying to get to a juror? Do you recall his name?

A: David Pressley.

Q: And why did you want him sat?

A: He's – he's – he's a friend of mine from Hemingway.

Q: And we've already discussed the fact that you provided a complete copy of your file as you were able to find it in the warehouse?

A: As I was, yes.

Q: And you had actually told me over the phone about Mr. Pressley. So as we had a copy –

A: I don't know if I told you about him or not.

Q: Well, I had a note where we talked and you told me about Mr. Pressley. So I was pretty excited when I found the juror list –

A: Uh-huh.

Q: -- in your file. And so I immediately flipped to David Pressley, and can you tell me what it says by David Pressley's name there?

A: It says not -- related to Sergeant Rogers.

Q: So that would actually be the testifying officer in this case?

A: Uh-huh.

A: David Pressley is probably the only person in Williamsburg County that I would call a friend.

Am. App p. 677, ln. 9 – p. 678, ln. 15.

After hearing this testimony first hand, Judge Gee instructed counsel to order the transcript for her review. After receiving and reviewing the transcript of the evidentiary hearing,

Judge Gee held:

This Court finds that Mr. Barr's representation was deficient were he admittedly struck jurors in an effort to seat David Pressley, a friend of Mr. Barr's who Mr. Barr believed would have changed the outcome of the case. As a result of this improper purpose, Mr. Barr struck a number of white jurors and for one of them, juror #146, he provided a non-race neutral explanation. Although a trial attorney's failure to provide a race neutral explanation is not per se deficient performance, where the trial attorney admits that the true reason for striking the juror was to accomplish an improper purpose (i.e., seating a different juror who was a friend of the attorney), such behavior falls below professional norms. Mr. Barr's conduct during jury selection **reinforces** this Court's finding that trial counsel failed to investigate and prepare for this case because, according to Mr. Barr's own testimony, he relied on wining the trial based on seating a biased juror. To the extent prejudice resulted it is the same prejudice already addressed above – trial

counsel failed to properly investigate and call favorable witnesses on Taylor's behalf.

Am. App. p. 726 (emphasis added).

R-P would ask this Court to uphold Judge Gee's findings regarding counsel's attempt to seat a biased juror and admittedly improper striking of the juror at issue in the Batson motion. As Judge Gee found, R-P submits that counsel's conduct in juror selection clearly establishes his unreasonable trial strategy that resulted from his failure to properly investigate and prepare for trial. Simply put, ample eyewitnesses were available to testify and establish a viable defense, but counsel chose to forego putting any effort into investigating and preparing a defense and relied instead upon seating his friend on the jury and arguing venue to a jury of laypeople via a convoluted and ridiculous closing argument. As a result of the well-reasoned and well supported findings made by Judge Gee regarding counsel's prejudicial ineffective assistance that resulted in a life sentence for Respondent-Petitioner, Respondent-Petitioner would ask this Court to uphold the granting of a new trial.

CONCLUSION

For the reasons argued above, Respondent-Petitioner would respectfully ask that this Court decline to grant certiorari and/or otherwise uphold the granting of a new trial by the Honorable Tanya A. Gee.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Respondent-Petitioner

This 14 day of November 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 16 2016

S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Tanya A. Gee, Circuit Court Judge

Case No.: 2015-CP-43-0037
Appellate Case No.: 2016-000615

Robert T. Taylor,,,,,.....Respondent-Petitioner,

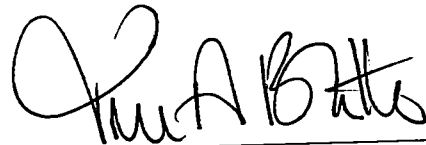
vs.

State of South Carolina,.....Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for R-P, certify that I served a Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari by depositing the same in the United States Mail this 16th day of November 2016 on the Attorney of Record for the Office of the Attorney General, addressed as follows:

Office of the Attorney General
Att: Julie Coleman, Assistant Attorney General
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

November 16, 2016