STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED
JAN 27 2017
S.C. SUPREME COURT

Appellate Case No. 2016-001990

Billy Shane Miller,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the record contain any evidence of probative value to support the post-conviction relief court's finding that counsel was ineffective for failing to investigate four witnesses where counsel's decision not to investigate or call any of those witnesses was reasonable; the witnesses' testimony was not probative of whether the victim was incapacitated or whether Respondent reasonably believed her to be at least sixteen years old; and the court erred in failing to make findings as to each witness individually?

STATEMENT OF THE CASE

Billy Shane Miller ("Respondent") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2008, the Spartanburg County Grand Jury indicted Respondent for contributing to the delinquency of a minor[1](2008-GS-42-2592), criminal sexual conduct with a minor ("CSC"), second degree[2] (2008-GS-42-2594), and CSC, third degree[3] (2008-GS-42-2593). Andrea Price, Esquire, ("Counsel") represented Respondent. Respondent was tried before the Honorable J. Derham Cole and a jury April 12-13, 2011, following which the jury found Respondent guilty as indicted. Judge Cole sentenced Respondent to imprisonment for concurrent terms of twenty years for CSC with a minor, second degree, ten years for CSC, third degree, and three years for contributing to the delinquency of a minor.

Respondent filed a timely notice of appeal. Dayne Phillips, Esquire, of the Office of Appellate Defense submitted an Anders[4] brief on Respondent's behalf. By Order dated September 21, 2012, the South Carolina Court of Appeals dismissed Respondent's appeal and remitted the case to the circuit court. State v. Miller, S.C. Ct. App. Order dated September 21, 2012.

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[1] It shall be unlawful for any person over eighteen years of age to knowingly and wilfully encourage, aid or cause or to do any act which shall cause or influence a minor:

(1) To violate any law or any municipal ordinance" . . . . [or] (10) "[t]o so deport himself or herself as to wilfully injure or endanger . . . her morals or health or the morals or health of others.

S.C. Code Ann. § 16-17-490 (1), (10) (1976 & Supp. 2003).

[2] "A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if [it is proven that] . . . [t]he actor *knows or has reason to know* that the victim is *mentally defective, mentally incapacitated,* or *physically helpless* and aggravated force or aggravated coercion was not used to accomplish sexual battery." S.C. Code Ann. § 16-3-654(1)(b) (emphasis added).

[3] "A person is guilty of criminal sexual conduct with a minor in the second degree if the actor engages in sexual battery with a victim who is at least 14 years of age but who is less than 16 years of age and the actor is older than the victim." *However*, at the time Respondent was charged, a person could not be convicted of the offense based upon the age of the victim if the actor was reasonably mistaken as to the victim's age and believed her to be 16 years of age or older. S.C. Code Ann. § 16-3-655(1)(b) (1976 & Supp. 2003).

[4] Anders v. California, 386 U.S. 738 (1967).

Thereafter, Respondent filed an application for post-conviction relief ("PCR") on August 12, 2013. Respondent made its Return on July 10, 2014, requesting an evidentiary hearing be held. An evidentiary hearing was convened on November 9, 2015, at the Spartanburg County Courthouse before the Honorable Larry B. Hyman, Jr. Respondent was present at the hearing and represented by Timothy Ray, Esquire. Petitioner was represented by Alicia A. Olive, Esquire, of the South Carolina Office of the Attorney General. By Order filed January 12, 2016, Judge Hyman granted relief. Petitioner submitted a Motion to Reconsider pursuant to Rule 59(e) on January 22, 2016. A hearing on Petitioner's motion was held at the Horry County Courthouse on July 7, 2016. Following the hearing, Judge Hyman asked for proposed orders from both parties. By Order dated August 4, 2016, and filed August 24, 2016, Judge Hyman denied Petitioner's motion to reconsider.

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 reviewing court will reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

ARGUMENT

The record contains no evidence of probative value to support the post-conviction relief court's finding that counsel was ineffective for failing to investigate four witnesses where counsel's decision not to investigate or call any of those witnesses was reasonable; the witnesses' testimony was not probative of whether the victim was incapacitated or whether Respondent reasonably believed her to be at least sixteen years old; and the court erred in failing to make findings as to each witness individually.

At trial, Victim testified on direct examination that Respondent came and picked her up from her parents' house around 10:00 A.M. (App. p. 63). She testified that she consumed methamphetamine through both ingesting and smoking the substance. (App. pp. 63-63). She testified this went on virtually uninterrupted from 10:00 A.M until about 6:00 P.M. (App. pp. 62-63-64). Victim testified she was under the influence of the methamphetamine that Respondent had given her. (App. p. 64). She testified that Respondent knew her age because she told him she was fourteen. (App. p. 67). Victim testified that she was "high on the drugs," and that she "felt numb" and "couldn't do anything." (App. p. 71). She testified all three men had sexual intercourse with her. (App. p. 70). She did not know what happened after that, but just knew that she "came to" on the couch and "it was just Mikey Kimbrell and [she] asked him to take [her] home." (App. p. 71). She testified she did not feel she had the ability to stop herself from the sex acts. (App. p. 72).

Counsel extensively cross-examined Victim regarding her presenting herself as eighteen and her level of intoxication. (App. pp. 90-99). Counsel vigorously impeached her with three prior inconsistent statements. (App. pp. 76-86). She pointed out that she did not tell police she was fourteen until her third statement. (App. p. 92). Counsel also questioned her about why she failed to mention the digital penetration or that she "felt numb" and she "came to" on the couch in any of her three prior statements. (App. pp. 83-85). Counsel also impeached Victim about having used methamphetamine since she was thirteen. (App. pp. 77-78). Counsel also asked

Victim about consuming Valium at Judy's. (App. p. 86). Counsel established through cross-examination that Victim did not consume Valium until after leaving Respondent's house but before her father picked her up. (App. p. 86). Further, Victim admitted on cross-examination that she lied about her age on her Myspace page. (App. p. 87). Counsel introduced Victim's Myspace page as an exhibit at trial and questioned Victim about her representation that she was eighteen. (App. pp. 87-90). Victim testified the photograph on her profile fairly and accurately depicted her appearance on March 31, 2008, the date of the offense. (App. p. 88).

Respondent was thirty-years-old at the time of the offense. (App. p. 113). Respondent's statement to police was introduced at trial. (App. pp. 113-117). He stated that he "did not know she was 14." (App. p. 117, line 14). The statement also established his version of the events. (See App. pp. 113-117). He stated Victim wanted to smoke methamphetamine on the way to his house, but he did not have a device with him to do so, and instead, Victim grabbed the drugs from his lap and they both ate it. (App. p. 114). He also stated that when they got to his house, he, Victim, and Mikey Kimbrell also smoked and snorted methamphetamine. (App. pp. 114-15). Respondent also stated marijuana "was being passed around." (App. p. 115). He stated a third male, Jeremy Miller, asked Victim if she would strip for them and that she took all of her clothes off herself. (App. p. 115). For an hour, Victim engaged in various sex acts with all three men. (App. p. 116). The statement also indicated that Victim had gotten Valium and marijuana from "some woman's house" after leaving Respondent's house. (App. p. 117).

Counsel asked the trial judge to instruct the jury that "mistake of age" was a defense to CSC with a minor, second degree. (App. p. 124). The trial judge instructed the jury that it could not find Respondent guilty if it found he "was reasonably mistaken as to [Victim's] age and believed her to be sixteen years of age or older" and that "it must be shown that the

circumstances were such that the defendant believed that victim was at least sixteen years of age and that such a belief was reasonable." (App. p. 165, line 17-p. 166, line 2). The trial judge further instructed that it must be proven beyond a reasonable doubt that Respondent "knew or reasonably should have known that the victim was less than sixteen years of age." (App. p. 167, lines 5-7).

At the PCR hearing, Respondent testified that he picked Victim up and they "were getting high" "smoking methamphetamine." (App. p. 239, lines 17-23). He said they were smoking and then Victim went back in his bedroom and they "kissed an made out and [he] went down her pants and stuff." (App. p. 240, lines 2-4). He testified Victim also smoked weed. (App. p. 240, lines 6-8). After that, the sex acts between the three men and the Victim began. (App. p. 240). Respondent testified that Victim acted like an adult and did some of the things that adults do. (App. pp. 244-45). He said he saw her driving at night, that she would "do whatever . . . kind of dope she could get her hands on," and that she and her father's twenty-eight-year-old girlfriend said they were "strippers." (App. p. 244). He also testified that Victim was never "so drugged up" that she was "out of it" and did not know what was happening. (App. p. 245).

Respondent testified that the only individuals who were present at the house that day were Jeremy, Mikey, and David Freeman, who "came later on that day." (App. p. 247). Although Respondent testified that Counsel was informed about the list of witnesses, he testified she was informed through his family, and despite having met with her prior to trial several times, presented no testimony that he ever discussed these witnesses with Counsel himself.

Counsel testified that the only defense Respondent had was mistake of age and that her strategy was based on the mistake of age defense. (App. p. 272-73). She testified there was never a dispute about the drug use. (App. p. 276). Counsel testified at the PCR hearing that she did not

think that Respondent would help himself if he testified because he was scared to death and was shaking. (App. p. 280). Counsel testified Victim had a Myspace page with pictures on it that made her look very mature, and that Victim indicated on the page that she was eighteen. (App. p. 277). She stated she met with Respondent several times while he was in jail. (App. p. 271). She testified he gave consistent statements about his version of what happened throughout her representation. (App. p. 271). She discussed with Respondent the charges against him, the elements, and the defenses. (App. p. 272). She testified she reviewed discovery with him. (App. p. 272, line 19). She testified the list prepared by Respondent's mother, Respondent's Exhibit 2, was part of discovery. (App. p. 274; p. 287). When asked whether she felt there was any information on the list that would have prompted her to reach out to the witnesses, she said, "Not in my judgment, no." (App. p. 274, lines 12-18). She stated she did not recall Respondent ever discussing with her any other potential witnesses. (App. p. 274). She testified the second list was not provided to her until the Friday prior to trial. (App. p. 273; p. 286). She did not feel that it would have been helpful to her case to pursue any of those witnesses "at that late juncture" because she "had no idea what those people were going to say." (App. p. 273). She testified that she had no notes or recollection that she received the list any earlier. (App. pp. 273-74). She also testified that she never heard Michael Kimbrell say that his testimony would be that Victim informed every witness that she was 18 years of age. (App. p. 278). Respondent's mother corroborated Counsel's testimony as to her reasoning for not investigating or calling Kimbrell as a defense witness: "she claimed she couldn't bring [Kimbrell] into the courtroom because he wouldn't testify for [the defense]." (App. p. 255, lines 10-16).

In a PCR action, the applicant has 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 show 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

To show prejudice, the applicant must affirmatively prove 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 (quoting Strickland, 466 U.S. at 690). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, 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. This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . and [Applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689. This presumption is necessary because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. (citing Engle v. Isaac, 456 U.S. 107 (1982)). This Court must "evaluate [C]ounsel's decisions at the time they were made . . . and must be wary of second-guessing defense counsel's trial tactics." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) (citations omitted) (citing Strickland, 466 U.S. at 689; Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992)). "[W]here counsel articulates a valid reason for employing certain strategy, [that] conduct will not be deemed ineffective assistance." Whitehead v. State, 308 S.C. at 122, 417 S.E.2d at 531 (citing Goodson v. United State, 564 F.2d 1071 (4th Cir. 1977)). In analyzing Counsel's conduct, the PCR Court failed to take into account the legal principle set forth in Edwards v. State:

> While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to the rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client. . . . So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses *when it is reasonable to do so*, his performance will not be deficient.

392 S.C. at 457, 710 S.E.2d at 64-65 (second emphasis added). In other words, if Counsel's decision not to interview these witnesses was reasonable at the time the decision was made, based on the circumstances known to Counsel at the time, such conduct will not be considered deficient. "The reasonableness of counsel's actions may be *determined or substantially influenced by the defendant's own statements or actions*. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. *In particular, what investigation decisions are reasonable depends critically on such information.*" Strickland, 466 U.S. at 691 (emphasis added).

According to Edwards, Counsel was not obligated to explore every single potential witness where it was unreasonable to do so. "'[T]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.'" Id. at 456, 710 S.E.2d at 64 (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Here, not only did Counsel articulate valid reasons for not further investigating these individuals as potential witnesses, the Court can also infer based on the testimony of the witnesses and Counsel that she exercised reasonable professional judgment in making the decision not to call them. Additionally, Counsel testified that the only time she recalled seeing the list was the Friday before trial when Applicant's sister gave it to her. That list contained the names of 19 individuals and a few names had descriptions beside them. Respondent submits that Counsel's performance was not deficient in failing to contact all of those witnesses or the four witnesses who testified at the PCR hearing—three of whom were incarcerated at the time of Applicant's trial. Respondent further submits that Applicant also failed to show that he was prejudiced by her failure to call these individuals to testify because there is

no reasonable probability that the jury would not have convicted Applicant had these individuals testified.

The PCR court found that Counsel was ineffective for failing to investigate or call four witnesses on Respondent's behalf. Petitioner submits there is no probative value in the record to support the PCR court's finding that Counsel was deficient for failing to investigate any of these witnesses or that Respondent was prejudiced by that alleged deficiency. Respondent also submits that the court erred in failing to make findings as with respect to deficiency and prejudice as to each of these witnesses individually. With respect to the CSC with a minor second degree conviction, the specific testimony that each witness provided at the evidentiary hearing was not probative of whether Respondent reasonably believed Victim was sixteen or older. With respect to the CSC third conviction, none of the witnesses provided any testimony at the PCR hearing that was probative of whether Victim was incapacitated at the time. Therefore, Respondent submits this Court should grant certiorari and reverse the PCR court's finding that counsel was ineffective as to either CSC conviction.

The Court was required to analyze Counsel's conduct in light of what was known to her at the time. She met with Respondent and his family several times. The lists that were provided to her were introduced at the evidentiary hearing. (See App. pp. 286-87). Though Black, Kimbrell, and Freeman were on the list, there was no contact information beside their names, except that they were housed in various state or county detention facilities. (App. p. 286). The information contained on those two sheets of paper is the information known to Counsel at the time pertaining to those witnesses (in addition to what was contained in discovery). Counsel testified generally that there was nothing contained on the list that would have induced her to further investigate these individuals.

Testimony of Bryan Black

There is no probative evidence to support the finding that Respondent satisfied his burden of proving deficiency or prejudice resulting from Counsel's failure to interview or call Black as a witness. According to the list that was provided to Counsel by mother (Exhibit No. 2) Black "was at [Respondent's] on or around 3-25-08 when Victim drove her uncle['s] White Explorer to [Respondent's] house: Jonathan was with her then. Victim and Jonathan left in the early morning hours the next morning. She later wrecked after she let Jonathan out at his house. She told Jonathan her dad had gotten the damage fixed on the car. She said she ran into a ditch at the Little Cricket going into Landrum." (App. p. 287). Counsel testified that based on the list, in her judgement, it was not necessary to contact Black or interview him as a potential witness.

At the PCR hearing, Black testified that it was *late at night* when he met Victim, that it was only for about twenty minutes or so, and that they never really talked, she just came in and went on about her business. (App. p. 259). He stated he *never really spoke to her*. He said that just by her *being there after midnight with his cousin* (Johnathan Isom) he "automatically eliminated any possibility of her being underage." (App. p. 260).

Respondent submits based on this testimony, Respondent failed to satisfy his burden of proving Counsel's performance was deficient in not interviewing Black. Black had nothing to do with the charges against Applicant, and there was nothing in the information provided to Counsel on Exhibit No. 2 to indicate Black's testimony would have been relevant or helpful. It stated nothing about any belief he held that Victim was over age sixteen. There is no evidence that during her multiple meetings with Respondent and his family Counsel was provided with any information that would have given her a reason to contact Black as a potential witness. In addition, Exhibit 1 shows that Black was in "Perry Prison." (App. p. 286). Therefore, based on

the information Counsel had at the time, it was reasonable for her to determine she did not need to further investigate Black as a witness.

Even if this Court finds Counsel rendered deficient performance by not contacting Black, the only testimony that Black provided to indicate his belief that Victim presented herself to be more than sixteen was that it was late at night when he saw her and that she walked up to the house with confidence with a man in his twenties. (App. pp. 259-60). He never testified she told him she was a certain age. He never testified to what precise age she appeared to be physically. In addition, he said he never even talked to her. Respondent has failed to show that Black's vague testimony about his brief encounter with Victim would have had *any* impact at trial. Therefore, there is no probative evidence in the record to support the PCR court's finding that but for Counsel's alleged deficiency for failing to interview Black, the jury would have had a reasonable doubt about his guilt with respect to the CSC with a minor conviction.

Black did not present testimony about Victim's state of intoxication on the date of the offense, nor was he competent to present such testimony since he did not see her that day. Accordingly, there is no probative evidence to support a finding that any deficiency prejudiced Respondent as to this witness with respect to his conviction for CSC, third degree.

Testimony of Jonathan Isom

There is no evidence of probative value to support the finding that Respondent satisfied his burden of proving either deficiency or prejudice resulting from Counsel's failure to interview or call Isom as a witness. Counsel testified that Exhibit No. 2 was in the defense file when she received it. She testified she reviewed the list and did not feel that those potential witnesses would have been beneficial at trial based on the information provided on the list. When asked whether Applicant ever discussed with her any other potential witnesses, she stated that her notes

did not indicate that he informed her of anyone else. The information on that list pertaining to Isom was as follows:

> He is 25yr. old: He was dating Victim and they thought she was pregnant. At that time.
>
> . . . .
>
> "Victim told Jonathan that she hangs out at [Rookie's] all the time. She told Jonathan that she drinks and gets high with her dad all the time. She said he buys liquor for her and that he smokes pot with her.
>
> . . .
>
> "She wasn't too messed up to tell Jonathan about the whole incident. Jonathan said he has seen Victim with Xanax, Adderall, and methadone, and Valium. Jonathan says she takes anything she can get her hands on. Victim's father knew she dated older men: he knew about her and Jonathan's pregnancy scare. . . [Her father] knew she was pretending to be a 18yr. old stripper."

Nothing in the notes on the list gave any indication that Isom could testify Victim presented herself as sixteen or that he thought she was sixteen. Rather, the list refers only to information that, if presented as testimony, would have been excluded as irrelevant, or as inadmissible hearsay or character evidence. See Rules 402, 404, 608, and 802, SCRE. Furthermore, any testimony as to other sexual behavior by Victim, such as the allegations that she was a stripper or had a "pregnancy scare," would have been excluded by the Rape Shield Statute 16-3-659.1[5]

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[5] Rape Shield Statute
(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.
S.C. Code Ann. § 16-3-659.1

This Court must review Counsel's performance based on the circumstances known to her at the time of the conduct. Counsel had this list well before trial and she stated she reviewed it but determined that in her judgment, in light of the information provided on the sheet, there was no need to contact these individuals. There has been no evidence that any information that was provided to Counsel would have indicated that Isom could provide helpful testimony. Isom testified he used to date Victim. (App. p. 256). He testified he thought she was eighteen, (App. p. 256), that she told everybody she was eighteen, and that she looked and acted eighteen. (App. p. 258). Respondent never testified that he told Counsel that Isom could testify that Victim presented herself as eighteen. Moreover, Sharon Miller told the trial judge at sentencing the following: "Jonathan should be on trial. *He knew how old that girl was.* He swore to [Applicant] she was 18. I've got it on the cell phone where he told [Respondent] she was 18. Nothing was done to Jonathan. *They had a warrant for him but they threw it away because he was working with police.*" (R. p. 179, lines 19-25). Isom was not present at Applicant's home when these events occurred. Moreover, Isom was Victim's boyfriend at the time. Based on the information she had at the time as provided by Respondent and his family, Counsel made a decision based on reasonable professional judgment that it was not necessary to contact Isom to determine whether his testimony would have been useful at trial. As to Respondent's conviction for CSC with a minor, second degree, there was no deficiency shown in Counsel's decision not to investigate or call Isom.

Moreover, there is no reasonable probability that had Isom testified at trial, the outcome would have been different. Isom testified he and Victim dated. He said she said she was eighteen, she told everyone she was eighteen, she looked eighteen, and she acted eighteen. He stated she told him at some point that she would tell the judge she told everyone she was

eighteen. However, Victim testified at the trial she told the Respondent how old she was. She testified he knew. Counsel impeached Victim about lying about her age and presenting herself to be eighteen. Counsel introduced a photo from Victim's Myspace account showing she looked mature in the photo. Counsel also impeached her with the three different statements she provided. In addition, Respondent's statement was read into the record at trial. In the statement he said he did not know she was fourteen. The jury had all of this information before it in reaching its verdict. Isom's testimony was merely cumulative to the information presented through Victim and Respondent's statement at trial. In addition, Isom was in jail at the time and there is evidence he may have been subject to prosecution for similar conduct with respect to Victim. In addition, Respondent's mother's statement at sentencing suggested Isom was cooperating with the State. There was also copious testimony that he and Victim dated and even had a "pregnancy scare." Therefore, it is likely Isom would have had serious credibility problems at trial if his testimony had been presented, and there is no reasonable probability that had this testimony been presented, the jury would have found Applicant not guilty of CSC with a minor in the second degree.

Isom's testimony had no impact whatsoever with respect to Applicant's conviction for CSC in the third degree. The only individuals who testified at the PCR hearing who were clearly with Victim that day were Kimbrell and Applicant. No one testified that Isom saw Victim that day, and he provided no testimony as to the effects of methamphetamine. Accordingly, Isom would not have been a competent witness on the issue of Victim's level of intoxication. Therefore, Applicant has failed to show that Counsel's conduct in not calling Isom to testify prejudiced him with respect to the CSC, third degree conviction.

Accordingly, there is no probative evidence to support a finding of either deficiency or prejudice with respect to Counsel's failure to further investigate or call Isom.

Testimony of Michael "Mikey" Kimbrell

There is no probative evidence to support the PCR court's finding that Counsel was deficient for not interviewing Mikey Kimbrell. Kimbrell was one of the men who participated in the sex acts with Victim. (App. p. 275). He testified at the PCR hearing that he was originally charged for the same offenses and pleaded guilty to aggravated assault and battery (the lesser included offense) on February 23, 2010. (App. p. 264). Kimbrell testified that the first time he met Victim, they were sitting around talking and "one thing led to another," and they "wind up having sex." (App. p. 265). He said that Victim said she used to strip at a club. (App. p. 265). Kimbrell said Victim did look "older." (App. p. 267). He said she acted older in the since that "it wasn't her first time doing drugs or any of that that she was doing" and he stated that they "were sitting around and getting high and everything else, she knew what she was doing. I mean you just don't start off doing anything and going the rate she was going." (App. p. 267). Kimbrell also testified that the he, Applicant, and Victim were using methamphetamine that day. (App. p. 265). He stated he finally got her ready to go home around 4:00 or 5:00 P.M. (App. p. 266). He stated that before he took her home he took her to Judy's house where Victim took Valium. (App. p. 266).

When asked why she chose not to call Kimbrell as a witness, Counsel testified that "calling codefendants, particularly those who have already pled is very, very risky because the prosecution would probably question the witness about why the jury should believe him if he had already pleaded guilty based on the same facts. She stated she "did not think that calling Mr. Kimbrell, or any of the codefendants for that matter, would have been very productive and in fact could have potentially harmed him." (App. p. 275). Because Kimbrell was incarcerated as a

result of pleading guilty to an offense arising from the same facts for which Applicant was on trial, Counsel gave a valid strategic reason for not calling him as a witness, which was largely based on her anticipation of the questions the State would ask on cross-examination. See Edwards v. State, 392 S.C. at 458, 710 S.E.2d at 65 ("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, even if that witness is a co-defendant." (citing Jackson v. State, 329 S.C. 345, 351–52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (finding counsel's decision to not call witnesses reasonable where their testimony would have been of no value to the case and they made inconsistent statements in the past))). Furthermore, Respondent even testified that the State was prepared to present Kimbrell as a witness against him at trial. If he had been called, he would have been impeached about his conviction, and Counsel testified to this effect at the PCR hearing. In addition, Counsel testified she was never informed that Kimbrell told the State he would testify that victim told everyone she was eighteen. Therefore, there is no probative evidence to support the Court's finding that Counsel's conduct in not interviewing or calling Kimbrell was unreasonable, especially where she provided a valid strategic reason for not doing so. See Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998) (finding no ineffective assistance where counsel testified he did not call a witness because the witness had credibility issues).

Even if this Court finds Counsel was deficient in not interviewing Kimbrell, there is no reasonable probability, that if Kimbrell had testified, the outcome would have been different with

respect to either conviction. Kimbrell's testimony would have been merely impeaching as to Victim's age. Victim's Myspace page was introduced at trial to show that she presented herself as mature, and she testified the picture accurately represented her appearance at the time and admitted she lied and presented herself as eighteen on her Myspace page. Furthermore, the jury had the benefit of seeing her in person at the trial even though she was approximately three years older by then. Finally, Kimbrell would have been subject to cross-examination regarding his involvement in the events resulting in his guilty plea and Applicant's trial. As a result, Kimbrell would have likely presented credibility problems for the defense. Therefore, there is no evidence of probative value to support the finding that there is a reasonable probability that but for Counsel's failure to investigate Kimbrell, Respondent would not have been convicted of CSC with a minor, second degree.

There is no evidence of probative value to support a finding that Respondent was prejudiced with respect to the CSC third conviction. Kimbrell's testimony about Victim's consumption of Valium after leaving Applicant's house was cumulative to what was introduced at trial. Both Victim and her father testified that she consumed additional drugs at her neighbor's house. Accordingly, any testimony regarding Victim's consumption of additional substances after leaving Applicant's house and the inference such consumption likely caused the state of intoxication that her parents found her in later that day would have been cumulative to testimony presented through witnesses at trial. See Edwards v. State, 392 S.C. at 457, 710 S.E.2d at 65 (citing Murray v. Griffith, 243 Va. 384, 416 S.E.2d 219, 222 (1992) (finding counsel's failure to interview a particular witness not deficient where the witness's testimony would have been cumulative and witness himself could have been harmful to the defense)).

The only testimony at the PCR hearing about the effects of methamphetamine use in general came from Respondent, and all he stated was that the drug "wires you up and makes you ready to go." Nevertheless, his testimony to the effects of methamphetamine cannot be used to show prejudice resulting from the failure of *other* witnesses to testify, especially where there was no allegation or evidence that Counsel gave deficient advice concerning Respondent's right to testify. Regardless, Respondent never denied that he and Victim were consuming methamphetamine throughout the day, and never denied that he provided her with the drug. Moreover, in his statement that was introduced at trial Applicant stated they ate, smoked, and snorted methamphetamine at various intervals throughout the day. Kimbrell's testimony would likely have done more harm than good, because it would have reinforced the testimony that Victim was under the influence of narcotics at the time of the sexual battery. Counsel impeached Victim on her testimony that she was "out of it" and asked her why she did not include that in any of her three statements. In an attempt to give an example of Victim's adult-like behavior, Kimbrell testified that she did drugs like "she knew what she was doing." I mean you just don' start off doing anything and going the rate she was going." (App. p. 267). Therefore, Kimbrell's testimony, rather than helping the defense, would have reinforced Victim's testimony and Respondent's statement that Victim had consumed copious amounts of methamphetamine that day. Therefore, there is no evidence of probative value to support the PCR judge's finding that Respondent proved ineffective assistance of counsel as to this witness with respect to the conviction for CSC third degree.

Testimony of David Freeman

There is no evidence of probative value to support the court's finding of deficiency or prejudice with respect to Counsel's failure to investigate David Freeman's as to either conviction. Respondent provided no evidence or testimony that Respondent or his family had given Counsel

any reason *at the time* why David Freeman should be called as a witness. The only witnesses who were present at Respondent's house on the date in question were Michael "Mikey" Kimbrell and David Freeman. However, Respondent himself stated that Freeman did not come until later, and Freeman testified that he was there "when it was starting to get dark." Furthermore, there was no mention of Freeman in Respondent's statement that was introduced at trial, and there is no evidence that Counsel was even made aware of Freeman until the Friday before the trial. His name simply appears on the list as follows: "David Freeman-Spartanburg County Jail." Counsel testified she was never handed that particular list until the Friday before trial and she did not try to reach out to any of the witnesses at that late juncture and did not want to call them to testify because she had no idea what they would say. This decision was reasonable in light of the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 64-65. Furthermore, it was reasonable for Counsel to infer, based on the information that *had* been provided to her, that Freeman was in jail because that was the only contact information she had for him, which would likely create credibility problems in a jury trial. Therefore, there is no evidence of probative value to support a finding of deficiency with respect to Counsel's failure to contact or call this witness.

Even if this Court finds Counsel was deficient for not interviewing Freeman, Respondent has failed to show he was prejudiced by this failure. Freeman testified he met victim for two or three minutes, and then left. (App. p. 262). He said she answered the door topless. (App. p. 262). Freeman did not specify the date on which he saw Victim, but only stated it was "right at my birthday." (App. p. 262, line 23). He also could not remember what time of day it was, but said it was starting to get dark. . (App. p. 262, lines 23-24). He said Victim said "she was like 18 or

19." (App. p. 263). Freeman testified that when he was "locked up" he told Applicant he would help him in any way he could. (App. p. 263).

Freeman's testimony was neither relevant nor credible as to either Victim's age or her level of intoxication. Freeman never testified as to how old *he actually thought* Victim was. Regardless of how old she claimed to be, it is *Respondent's belief* as to her age that was at issue, and that belief, even if held, was nevertheless required to be *reasonable*. Freeman's testimony was not probative of whether Respondent's belief as to her age was reasonable. Therefore, there is no evidence of probative value to support the finding that but for Counsel's alleged deficiency in failing to interview Freeman, the outcome of the trial as to the CSC with a minor conviction would have been different. Likewise, there is no probative evidence to support the finding that but for the alleged deficiency, the result would have been different with respect to the CSC third conviction. Freeman did not know Victim, had not been doing drugs with them that day, and even though he testified Victim did not appear sedated, he also said he "figured she was high or something," and was not clear about what date it was. In addition, his testimony that it was starting to get dark outside is inconsistent with the testimony presented by the other witnesses at both proceedings. Given his conflicting testimony about the time of day, the lack of clarity of when he saw Victim, and his testimony that she appeared "high or something," it is likely his testimony would have done more harm than good. Accordingly, there is no evidence of probative value to support a finding that but for Counsel's failure to contact or call Freeman, the result of the trial with respect to the CSC third conviction would have been different.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous finding of error and prejudice with respect to each of the four witnesses.

Respectfully submitted,

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January 27th, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001990

BILLY SHANE MILLER, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing two (2) copies of the petition and one (1) copy of the Appendix in the United States mail, postage prepaid:

Mr. Timothy M. Ray, Esquire
184 N. Daniel Morgan Ave.
Spartanburg, SC 29306

This 27th day of January, 2017.

Ashley Haworth

ASHLEY HAWORTH
PARALEGAL