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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-001973

Brandon Harley Eaton,.....Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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II. **Did Eaton meet his burden of proving Counsel was ineffective for failing to adequately investigate and consult with him where Counsel reviewed all of the discovery and discussed the case, nature of the charges, possible penalties, and potential defenses with Eaton?**

III. **Did Eaton meet his burden of proving Counsel was ineffective for failing to advise Eaton his confession could be challenged where Eaton did not present any evidence his confession was not voluntary or a basis upon which it could be challenged?**

STATEMENT OF THE CASE

Procedural History

Eaton is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Eaton was indicted at the February 2012 term of the Spartanburg County Grand Jury for first degree criminal sexual conduct ("CSC") with a minor (2012-GS-42-0798) and committing/attempting a lewd act on a minor (2013-GS-42-3441). He was also charged in Laurens County for another count of first degree CSC with a minor (2013-GS-30-1428). He was represented by Geddes D. Anderson, Esquire. Assistant Solicitor Susan Reese represented the State.

On August 7, 2013, Eaton waived venue on the Laurens County charge, waived presentment to the grand jury on two charges of first degree CSC and pled guilty to both in Spartanburg County. [1] The State recommended concurrent sentences, dismissed the lewd act charge and agreed not to pursue similar pending allegations for a second minor victim in Laurens County in exchange for Eaton's guilty plea. The Honorable Roger L. Couch sentenced Eaton to concurrent terms of twenty (20) years. Eaton did not appeal his convictions or sentences.

Guilty Plea Proceeding

The facts presented at the plea hearing were the victim was five years old at the time. (App. p. 30). The victim's mother was Eaton's half-brother and Eaton had come to live with them around April-May of 2011. At the end of July 2011, the mother noticed her daughter, the victim, was having trouble going to the bathroom and was bleeding. The mother discovered the victim had what appeared to be warts all over her anus and rectum. The mother took the victim to Doctor's Care where they determined she had a sexually transmitted disease. (App. p. 18).

[1] This PCR only applies to Eaton's Spartanburg County conviction. Eaton filed a separate PCR application for his conviction arising from Laurens County (2013-CP-30-0789). The cases were never merged. Eaton's Laurens County PCR is still pending as of the writing of this petition.

The mother took the victim to the mother's father's house, the victim's maternal grandfather. The victim told her grandfather her bottom was hurting and the grandfather saw she was in a lot of pain. The victim then disclosed to her grandfather that "her Uncle Harley (Eaton) had been dating her." The victim was immediately taken to the emergency room where she was evaluated and tested positive for the following sexually transmitted diseases: (1) genital warts, (2) the HPV virus which caused the warts, (3) Trichomoniasis, and (4) Chlamydia. (App. p. 19).

The victim was referred to the Children's Advocacy Center ("CAC") for evaluation where victim disclosed, in a lot of detail, she was "dating" her uncle, this would often happen in her bedroom. She disclosed Eaton had penetrated her vaginally and anally and on one occasion put her mouth on his penis. The victim also disclosed she had seen this happen with her cousin (also five years old), which happened in Laurens County. Though the second victim never disclosed the abuse, she did test positive for the same sexually transmitted diseases as the first victim. (App. p. 20).

When law enforcement interviewed Eaton, Eaton confessed that he did put his penis between the girls' legs and on their bottoms, but denied he penetrated them. However, the medical examiner, Dr. Nancy Henderson, opined chlamydia and trichomoniasis would have had to be injected into the cavity and could not be contracted by simply touching. Dr. Henderson's opinion was that some sort of penetration would have had to occur in order for the children to contract the STDs. (App. p. 22). Eaton agreed that all the facts presented by the Solicitor were true. (App. p. 23, ll. 3-11).

During the plea proceedings, Counsel stated to the plea judge he discussed the plea agreement with Eaton. Counsel stated to the judge Eaton had agreed to proceed on that basis. (App. p. 4, ll. 13-21). Eaton was sworn at the plea hearing. (App. p. 4, l. 25). He stated he

understood the solicitor's comments regarding the plea agreement, he discussed the agreement with his attorney, and he had agreed to proceed with the guilty plea on that basis. (App. p. 5, ll. 2-13). The plea judge reviewed Eaton's charges with him, including the sentencing range and their classification as violent and most-serious. Eaton stated he did not suffer from any mental, physical, or nervous conditions, or any kind of condition whatsoever that would, in any way, affect his ability to reason, to make good decisions or to handle his plea that day. (App. p. 6, ll. 21-25). Eaton agreed he understood what he was doing and he felt he was able to handle the plea. (App. p. 7, ll. 6-10). He indicated he understood he could be sentenced to up to sixty years on the charges to which he was pleading. (App. p. 7, ll. 12-17).

Eaton stated he was satisfied with Counsel's services, he had sufficient time to consult with Counsel, did not feel there was anything else Counsel needed to do and did not need to consult with Counsel about anything else. (App. p. 7, l. 18-p. 8, l. 11). Counsel agreed he discussed the charges with Eaton, including the nature of the charges, the possible penalties, any defenses he might have had, and his constitutional rights. (App. p. 8, l. 22-p. 9, l. 5). The plea judge inquired of Counsel whether Eaton understood what he was doing and counsel stated "he's perfectly lucid, Your Honor. He's prepared to go forward. He understands exactly what he's doing. I've talked to him at length about these cases, and he's prepared to go forward with them." (App. p. 9, ll. 13-16). Eaton denied anyone had in any way mistreated him, tried to put pressure on him, or tried to do anything to force him to plead guilty. (App. p. 10, ll. 15-18). Eaton stated he had had time to consider his case and any defenses he might have had. (App. p. 10, l. 23-p. 11, l. 4). Eaton indicated he understood his right to have his charges presented to the grand jury but indicated that he was waiving that right along with his right to a jury trial, his right to remain silent, and his right to confront his accusers. (App. pp. 13-17).

PCR

Thereafter, on July 18, 2014, Eaton filed an application for post-conviction relief ("PCR"). On or about November 18, 2014, the State made its Return, requesting an evidentiary hearing be held. An evidentiary hearing was held on January 12, 2016, at the Spartanburg County Courthouse before the Honorable R. Ferrell Cothran, Jr. J. Brandt Rucker, Esquire, represented Eaton. Alicia A. Olive, Esquire, of the South Carolina Office of the Attorney General, represented the State. Eaton testified on his own behalf. Eaton's mother, Contessa Norwood, and Geddes D. Anderson ("Counsel") also testified.

Testimony from PCR Hearing

Eaton testified he had been treated for bipolar disability, but is no longer being treated for it. (App. p. 57, ll. 5-10). Eaton testified he also had developmental delays as a child. (App. p. 57, ll. 20-22). Eaton testified he only met Counsel once for about 45 minutes at which time he informed Counsel he had mental issues. (App. p. 57, l. 23 – p. 58, l. 9). Eaton claimed he gave a confession to law enforcement because he was promised he would be on an ankle monitor. (App p. 58, ll. 13-24; p. 67, ll. 3-9). Eaton testified he did not have enough time to talk with Counsel before his plea. (App. p. 59, ll. 21-24). Eaton claimed he pled guilty because he was "really trying to go home." (App. p. 59, l. 25 – p. 60, l. 2). Eaton also indicated he believed he would only get a little prison time because he did not think the case was serious. (App. p. 60, ll. 3-11). Eaton testified that he did not review his discovery or obtain a copy until a year after his guilty plea. (App. p. 60, l. 16 – p. 61, l. 6).

Eaton testified he had no medical records showing he did not have chlamydia to give to Counsel prior to the guilty plea. (App. p. 63, ll. 22-24). Eaton testified that to his knowledge, he had no health problems. (App. p. 64, ll. 3-5). Eaton introduced a copy of test results of a

medical exam indicating Eaton's urine had been tested for gonorrhoeae[2] and chlamydia[3] on January 9, 2012[4] and the results were negative.[5] (App. p. 75).

Eaton testified he believed George Brown was the perpetrator of the crime. (App. p. 64, ll. 6-13). Eaton testified the victim did not allege Eaton did anything to her in the CAC interviews, but did say it could have been someone else. (App. p. 64, l. 22 – p. 65, l. 4). Eaton testified Counsel never talked to him about someone else being guilty, but then testified Counsel asked him who George Brown was one time. (App. p. 65, ll. 5-10). Eaton again claimed he admitted to the crime because he was trying to get home. (App. p. 67, ll. 13-16). Eaton was 16 years old at the time of the crimes. (App. p. 69, ll. 9-10).[6]

Eaton testified he completed the ninth grade and he can read and write. (App. p. 71, ll. 10-13). Eaton's mother testified Eaton had developmental delays and was more childish than a normal child his age. (App. p. 77, ll. 13-20). She claimed Eaton was slower than a regular child and she did not believe he could understand what was happening. (App. p. 77, l. 23 – p. 78, l. 3). Eaton's mother testified she met with Counsel, "like twice." (App. p. 78, ll. 4-6). She testified Eaton was receiving a disability check for "ADHD and bipolar." (App. p. 79, ll. 20-25). She also testified Counsel was hoping Eaton would only get ten years and serve less than that. (App. p. 79, ll. 11-17).

Counsel testified he had practiced law for forty-four years and 70-80% of that was criminal law. (App. p. 80, l. 21 – p. 81, l. 1). Counsel testified the State was going forward on

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[2] Gonorrhea is a curable STD.
[3] Chlamydia is a curable STD.
[4] The crimes were alleged to have occurred between September 30, 2010 – July 27, 2011 and April 10, 2011 – August 1, 2011.
[5] There were no tests performed for HPV, genital warts, or trichomoniasis – the other STDs found on both victims. Neither child was diagnosed with gonorrhea.
[6] Eaton's age at the time of the crime has been confirmed based on Eaton's date of birth and the time periods for which Eaton was indicted. However, because of redaction rules, this information cannot be referenced within the Appendix.

charges of CSC with a minor, which carries a mandatory minimum of twenty-five years and up to life. (App. p. 81, ll. 15-17). Counsel tried to get a YOA sentence deal from the Solicitor's office, but they would not agree. (App. p. 81, ll. 20-22). Counsel made a motion for discovery and received all of the discovery from the Solicitor's office. (App. p. 82, ll. 2-17). Although Counsel knew they were facing a severe sentencing framework with all of the charges, Counsel was confident that because Eaton did not have a criminal record, he would not be required to serve much time. (App. p. 82, l. 19 – p. 83, l. 4). Counsel denied promising Eaton any specific sentence, but agreed that he told Eaton he was aiming to get about ten years. (App. p. 83, ll. 5-13). Counsel testified he believed the sentence in this case was excessive

Counsel claimed he should have had Eaton evaluated for the voluntariness of his plea, but also recalls Eaton was perfectly lucid when he talked with him and appeared to understand what he was doing. (App. p. 83, l. 20 – p. 84, l. 9). Counsel also testified Eaton was very responsive when Counsel spoke with him. (App. p. 90, ll. 8-15). Based on his interaction with Eaton, Counsel did not believe a mental evaluation was necessary at that time. (App. p. 66-69).

With regard to the medical test results for chlamydia that Eaton presented, Counsel testified he was not aware of any such test results. (App. p. 86, ll. 1-23). Counsel believed the results would have been very important prior to Eaton's plea, however, Counsel was unaware whether chlamydia was a curable disease. (App. p. 86, l. 24 – p. 87, l. 12). Counsel testified he did not review the actual discovery with Eaton because he did not have the paperwork with him, but he did meet with him for a good period of time. (App. p. 87, ll. 15-22). Counsel did review the discovery himself and felt the case was too dangerous to take to trial. (App. p. 87, l. 23 – p. 88, l. 9). Although Counsel opined he may have been successful in a Jackson v. Denno motion, Counsel explained he did not want to take the risk with Eaton facing a mandatory minimum of

twenty-five years for each CSC charge and each charge qualified as a "strike." (App. p. 88, ll. 9-17).

Counsel testified Eaton never told him that he thought someone else was responsible for the crime and Eaton never gave him any names of witnesses he could interview. (App. p. 89, l. 1-14). On cross examination, Counsel recalled the victim mentioning George also doing sexual acts to her during the CAC interview. (App. p. 72-74). Counsel admitted he never tried to locate or talk to George Brown. (App. p. 94, ll. 18-22). Counsel also conceded he was "negligent" in not having a psychological evaluation conducted on Eaton. (App. p. 95, ll. 11-22). Counsel testified he did not attempt to move the case to Family Court, but the State would have moved forward as it was. (App. p. 96, l. 24 – p. 97, l. 14). Counsel negotiated with Assistant Solicitor Susan Reese. (App. p. 97, l. 22-24). Counsel denied ever telling Eaton he would file a motion to reconsider. (App. p. 99, ll. 11-14). Eaton introduced the Forensic Assessment Summary that was included in his discovery through Counsel. (App. p. 100, l. 9 – p. 102, 19). Counsel explained he was aware of the allegations against George Brown, but he did not believe that exculpated Eaton. (App. p. 100, l. 25 – p. 101, l. 7). Counsel testified he was confident they could get a mid-range sentence with a guilty plea, but he failed in that regard. (App. p. 103, ll. 4-9). Counsel also conceded he may have been able to determine if there were problems with Eaton's confession had he investigated it further. (App. p. 104, l. 14 – p. 105, l. 7).

Order Granting PCR

On June 8, 2016, Judge Cothran issued an order vacating Eaton's conviction and sentence and granting Eaton a new trial. (App. p. 118). Judge Cothran found Counsel to be ineffective and Eaton's guilty plea involuntary because Counsel failed to request a competency hearing, failed to adequately advise and consult with Eaton, and failed to advise Eaton he could challenge

his confession. On June 24, 2016, the order was filed with the Spartanburg County Clerk of Court. The State received the filed order on June 28, 2016. On or about July 8, 2016, the State filed a motion to reconsider, alter or amend pursuant to Rule 59(e), SCRCP. (App. p. 124). Judge Cothran granted the State's motion in so far as the contents of the order, specifically, the need to make specific findings as to each allegation, but did not reverse his ruling.

Thereafter, an amended order granting relief was signed by Judge Cothran on July 11, 2017 and filed July 31, 2017. (App. p. 141). The State did not receive a copy of this order or written notice of entry of judgment. However, on August 24, 2017, the State received the initial order granting relief again, but signed on August 23, 2017. This order was filed August 28, 2017. (App. p. 147). On September 5, 2017, after realizing the first order had been inadvertently signed and filed a second time, Respondent inquired regarding the second, same order. The State was informed the amended order had been filed July 31, 2017. Thereafter, the State filed a Notice of Appeal with this Court. This appeal follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). Although this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law," the Court should reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

In a PCR action, the applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); SCRCP 71.1(e). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, a defendant who pleads guilty on advice of counsel may collaterally attack his plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997)).

Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). In determining guilty plea issues, the court should consider the guilty plea transcript as well as evidence at the PCR hearing. Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011); Rolen v. Sate, 384 S.C. 409, 683 S.E.2d 471 (2009); Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000); Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

ARGUMENT

I. Eaton did not meet his burden of proving Counsel was ineffective for failing to request a competency evaluation where Eaton did not produce a competency evaluation to support his allegation he was not mentally competent and Counsel had no reason to request an evaluation at the time of Eaton's plea

Eaton did not prove by a preponderance of the evidence that Counsel was ineffective for failing to request a mental or psychological evaluation. In a PCR action, a petitioner has the burden of proving by a preponderance of the evidence that he was incompetent at the time of his guilty plea. Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004) (quoting Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992). Eaton was not evaluated as part of this PCR proceeding, nor did he introduce any records to establish that he currently or previously lacked sufficient competency to stand trial. Eaton testified he has been treated for bipolar disorder and had some developmental delays as a child. He testified he completed the ninth grade and can read and write.

Eaton's mother testified he is more childish than a normal child, in that, his mindset is a little slower than a regular child his age would be. She testified she did not think he understood his conversations with Counsel about what was happening. She testified Eaton was receiving disability money for "ADHD and bipolar." (App. p. 79, ll. 20-25). The PCR court could only have speculated as to what the results of a competency evaluation would have been because no reports of any kind were provided by Eaton. Therefore, the PCR court erred in finding Eaton had met his burden of proof.

Furthermore, Eaton did not satisfy his burden of showing Counsel was ineffective where Counsel testified Eaton was "perfectly lucid" and appeared to understand their discussions. (App. p. 83, l. 23 – p. 84, l. 9). Counsel stated the same at the guilty plea hearing. When

questioned whether he felt at any time in his conversations with Eaton that a mental evaluation was necessary, Counsel stated that he did not, although everyone charged with a crime could use an evaluation. He testified again that he felt that he was "perfectly lucid" and that he was responsive to counsel in conversation, and that right before the plea, they had another conference. Counsel testified he thought "some favorable result would have been forthcoming" from a psychiatrist or psychologist that would have helped with regard to the *sentencing procedure*. But again, Eaton nor Counsel provided any basis for how or why an evaluation could have helped with regard to sentencing.

Additionally, Applicant told the plea judge he did not suffer from any mental issues that affected his decision making and that he understood what was doing that day. Applicant failed to provide any reason to be allowed to depart from the truth of his statements made during his guilty plea, however, the PCR court allowed him to do so. Crawford. In making its findings, the PCR court did not give any consideration to the statements made during Eaton's guilty plea. Anderson.

The mental competency standard for guilty plea hearings is the same as for one who is standing trial. Godinez v. Moran, 509 U.S. 389 (1993). The appropriate inquiry is whether the defendant has sufficient and present opportunity to consult with his lawyer and has a basic, rational understanding of the facts of the case and the proceedings he is going through. Dusky v. United States, 362 U.S. 402 (per curium). The transcript of Eaton's guilty plea, in addition to the testimony at the PCR hearing, is conclusive in this regard. Both reveal Eaton bore a *reasonable degree* of *rational* understanding when he entered his plea. Therefore, even if Counsel had requested a mental evaluation, the evaluation would have shown Eaton was competent to stand trial.

Finally, Eaton faced a pending CSC allegation/investigation in Laurens County that was dropped as a result of his plea. Counsel also testified if Eaton had been tried on both charges to which he pled, he would have been faced with a two-strike situation. Meaning, Eaton pleaded guilty to two separate charges in two separate counties when he entered this plea. Had each county tried Eaton on each charge, pursuant to S.C. Code Ann. §17-25-45(A), Eaton would have been eligible for a life without parole sentence if convicted in the second county. Eaton would also have been facing an additional, third CSC charge for the second victim – the charge the State agreed not to pursue in exchange for Eaton's guilty plea. In light of these circumstances, and given that Eaton pleaded guilty to first degree CSC, but was indicted for first degree CSC with a minor[7]—a charge that carried much more severe consequences and sentencing range had Eaton gone to trial—there is no probative evidence in the record to support there was a reasonable probability that but for the alleged error of counsel, Eaton would not have pleaded guilty but would have insisted on going to trial.

II. Eaton did not meet his burden of proving Counsel was ineffective for failing to adequately investigate and consult with him where Counsel reviewed all of the discovery and discussed the case, nature of the charges, possible penalties, and potential defenses with Eaton.

Eaton did not prove by a preponderance of the evidence that Counsel was ineffective for failing to adequately investigate and consult with him. "So long as a defendant's attorney conducts a reasonable investigation, ... his performance will not be deficient." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "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." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Even if meetings with Applicant were brief, "this fact alone is not indicative of

[7] S.C. Code Ann. §§ 16-3-652, and 16-3-655(A)(1).

inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) ("[B]revity of time spent in consultation, without more, does not establish that counsel was ineffective.")). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). To establish counsel failed to adequately prepare, applicant must present evidence of what counsel would have discovered or what other defenses would have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998).

Eaton presented evidence of a medical report indicating he did not have chlamydia in January of 2012. However, according to the facts provided at the plea hearing and agreed to by Eaton, the victim tested positive for chlamydia, genital warts, HPV, and Trichomoniasis. The crimes also occurred between September 2010 and August 2011, at least five months before Eaton was tested for a curable STD. PCR Counsel questioned Eaton about whether he had medical records to provide to Counsel that he did not have Chlamydia, and even Eaton stated "not at the time." (App. p. 13, ll. 22-24).

The test results from at least five months after the sexual abuse occurred showing he no longer has a curable STD simply do not prove Eaton's allegation that Counsel was ineffective for failing to investigate this issue. This evidence provides no valid defense against the CSC charges. There is no probative evidence to prove that absent Counsel's failure to investigate the STD issue there was a reasonable probability that Eaton would not have pled guilty, and would instead proceed to trial on potentially three CSC with a minor charges.

Eaton testified he believed another individual—his sister's ex-boyfriend, George Brown—was responsible for the assault. Notably, no connection was made between this alleged third person and the second victim. He testified that to his knowledge the victim did not say Eaton did anything to her in the interviews and Counsel never discussed this with him. However, in the Forensic Assessment Summary Eaton introduced at the PCR hearing, the victim had alleged, in great detail, both Eaton and George Brown had molested her. Also, at the guilty plea hearing, the solicitor gave the facts of the case, which included facts that the victim had been interviewed by the CAC and had disclosed, in detail, that Eaton had been "dating" her. She also made this disclosure about Eaton earlier to her grandfather. The victim also indicated she had watched her uncle "date" her cousin in Laurens County and this second victim tested positive for the same STDs. Eaton admitted he agreed with the facts that the solicitor presented at his guilty plea hearing and offered no reason to depart from the truth of that statement during his PCR. Eaton indicated at his guilty plea he was satisfied with counsel and they had sufficient time to discuss his case. Counsel indicated to the plea judge that he had reviewed the case with Eaton including the nature of the charges and any defenses. Once again, the PCR court did not consider the statements made during Eaton's plea.

Counsel testified the State was going forward with CSC first with a minor, which carries a mandatory minimum of twenty-five years and up to life, if he had gone to trial. Counsel filed a motion for discovery, went through it, and felt the solicitor's office had provided complete discovery. Though at the PCR hearing Counsel stated he did not really go over the discovery with Eaton because he did not have the paperwork when they met, at the guilty plea hearing, he told the plea judge he had reviewed the case with Eaton including any defenses and had discussed the case with Eaton. Counsel testified at the PCR hearing that though he and Eaton did

not review the victim's videotaped CAC interview together, Counsel reviewed it. Counsel stated he knew there was another alleged perpetrator, but stressed that Eaton had confessed. Counsel also reviewed the victim's forensic assessment summary. Eaton failed to prove there was anything further Counsel would have discovered had he investigated any further than his review of the discovery. The evidence presented with regard to this allegation only raises a mere suspicion, at best, that something else could possibly have been discovered. Therefore, the PCR court erred in finding Eaton had met his burden of proof.

Counsel testified that a Jackson v. Denno hearing *may* have been successful, but did not offer any reason why it may have been successful. Eaton did not present any evidence to support his confession was involuntary or why it could have been suppressed. Counsel did add that he did not want to take a risk on requesting a Jackson v. Denno hearing considering the mandatory twenty-five years and that the two charges qualified for a two-strike situation. Counsel's opinion was that going to trial was "too dangerous." The State still had the victim's CAC interviews and would presumably have presented the victim's testimony at trial. The victim had also been evaluated by a sexual abuse pediatrician. Counsel testified and the plea transcript reflects that as part of the plea deal, Laurens County agreed to drop the charge with respect to the other victim. But, it was ultimately Eaton's decision to plead guilty. Based on Counsel's review of the discovery, his forty-four years of experience as an attorney, and his discussions with Eaton, he still felt it was in Eaton's best interest to plead guilty. The PCR court did not consider the "strong presumption" Counsel made this significant decision in the exercise of reasonable judgment.

Eaton failed to prove deficiency or prejudice. The PCR order overlooks the fact that there was overwhelming evidence against Eaton despite the allegation that there may have been

another man who had also abused the victim. Eaton gave a statement admitting he had assaulted the victim. The victim disclosed to her grandfather and to CAC that Eaton had molested her and provided details of the assaults. There was also physical evidence of the abuse by way of STDs. She also disclosed she had watched Eaton molest her cousin in a different county, and an examination had revealed that child had the same infections that the victim in this case did. Eaton's allegation that he is actually innocent because he tested negatively for Chlamydia and because there was allegedly some other man that was responsible is unsupported by the evidence. Therefore, the PCR court erred in finding Eaton met his burden of proving Counsel was ineffective for failing to adequately investigate and consult with Eaton.

III. Eaton did not meet his burden of proving Counsel was ineffective for failing to advise Eaton his confession could be challenged where Eaton did not present any evidence his confession was not voluntary or a basis upon which it could be challenged.

At the PCR hearing, Eaton raised the allegation that his confession was involuntary and Counsel failed to advise him he might have been able to challenge the voluntariness of the confession. Eaton waived all challenges to the evidence by virtue of pleading guilty. See State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) ("A guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses."); State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) ("A court cannot hear testimony after accepting the plea to determine either the fact or degree of the defendant's guilt because the plea admits all the elements of the offense charged.").

Regardless, Eaton made no showing Counsel was ineffective in this regard. In general, "[i]n determining whether a defendant's will was overborne in a particular case, the court[s] [have] assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226

(1973). The factors courts consider include (1) the youth of the accused, (2) his education and intelligence, (3) the lack of any advice to the accused regarding his constitutional rights, (4) the length of detention and whether questioning was prolonged or repeated, and (5) use of physical punishment including the deprivation of food or sleep. Schneckloth, 412 U.S. at 226-27 (collecting cases). However, none of these factors is determinative. Id. See also Moran v. Burbine, 475 U.S. 412, 421 (1986) (holding Miranda waiver must be voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.").

Here, Eaton testified he signed a Miranda waiver form when he spoke to police, yet denied they informed him of his constitutional rights. At the PCR hearing, the only evidence that was introduced to show Eaton's confession was involuntary was self-serving testimony from Eaton and his mother. That testimony consisted of statements that Eaton suffered from bipolar disorder and "ADHD" and that his mindset is a little slower than a regular child. Eaton claimed he was promised he was going to be on an ankle monitor for his confession. Eaton further stated he was "really trying to get home." Eaton testified he thought he would get a "little" prison time and Counsel told him that he didn't think he was going to get much time.

Eaton failed to present any evidence that his confession was the product of coercion or duress, as the order indicates. The PCR court's order expresses "true concerns regarding the alleged confession and give rise to real questions regarding the voluntariness of the alleged confession as well as whether that alleged confession was taken under undue duress." "True concerns" and "real questions" do not equate to proof by a preponderance of the evidence that there is a reasonable probability that but for Counsel's failure to challenge the confession, Eaton

would not have pled guilty. They are more akin to speculation. The evidence presented by Eaton provides questions and speculation, nothing more.

Eaton did not indicate that he was subjected to any type of physical or mental punishment or deprivations in the interview. Though he indicated he was not told his rights, he also admitted he signed a Miranda waiver and he could read and write. He did not indicate that the interview lasted for any particular amount of time or that he did not understand what was happening. Eaton was at least seventeen when he gave the confession.

Counsel admitted he told Eaton's mother that not obtaining an evaluation "was negligent" on his part. He stated that the evaluation would have been done to determine if his confession was voluntary. However, Counsel never testified that he believed a Jackson v. Denno hearing would have been successful. Eaton was not evaluated and the PCR court could only speculate as to the results of such an evaluation. Further, education and intelligence are only one factor to be considered in determining the voluntariness of a statement and is not alone determinative. Eaton failed to satisfy his burden of showing either deficiency or prejudice in this regard. For the same reasons stated above, Eaton has not shown that but for Counsel's alleged failure to consult him regarding the possibility of challenging his confession, he would not have pleaded guilty but would have insisted on going to trial. Furthermore, because Eaton has not shown a reason why he should be allowed to depart from the truth of his statements at the guilty plea hearing, Applicant waived this defense when he pleaded guilty. Accordingly, there is no evidence supporting the PCR court's finding that Eaton established his burden of proving deficiency or prejudice.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court grant certiorari to review the PCR court's erroneous findings of deficiency and prejudice.

Respectfully submitted,

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By: 
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October 17, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-001973

Brandon Harley Eaton,.....Respondent,

v.

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

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Petition for Writ of Certiorari** and **Appendix** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

John Brandt Rucker, Esquire
The Rucker Law Firm, LLC
128 Millport Circle STE 200
Greenville, South Carolina 29607

I further certify that all parties required by Rule to be served have been served. This 17th day of October, 2017.

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