STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000050

JOHN MICHAEL KIRBY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

John Michael Kirby ("Petitioner") appeals the dismissal of his application for post-conviction relief by order dated December 14, 2017. (App. p. 112). During its March 2015 term, the Spartanburg County Grand Jury indicted Petitioner for two counts of criminal sexual conduct with a minor, 2nd degree (2015-GS-42-0951, -0952). (App. p. 124). Petitioner was accused of sexually assaulting his two half-siblings. (App. p. 7). On January 24, 2014, Spartanburg County Sheriff's Department received a report from Spartanburg Regional Hospital, detailing a sexual assault involving a minor victim. (App. p. 7). This victim, a female between the age of twelve and thirteen years old, disclosed to hospital staff that Petitioner engaged in sexual conduct while at the victim's grandmother's home. (App. p. 8).

The second victim, a fourteen year old male, described witnessing the sexual acts against the female victim, his sister. (App. p. 9). The male victim described being sexually assaulted by Petitioner. (App. p.9). Both victims were interviewed and examined by the Children's Advocacy Center. (App. p. 9). Both victims live with intellectual disabilities. (App. p. 7). Petitioner was interviewed by Spartanburg County Sheriff's Department investigators and admitted to the sexual acts with the female victim. (App. p. 9).

Petitioner was represented by Matthew Shealy ("Counsel"). (App. p. 1). The State was represented by Assistant Solicitor Lindsay Overby (App. p. 1). On May 26, 2016, Petitioner appeared before the Honorable J. Mark Hayes, II, in the Spartanburg County Courthouse. (App. p. 1). Petitioner plead guilty under North Carolina v. Alford to both counts of criminal sexual conduct with a minor, 2nd degree. 400 U.S. 25 (1970). (App. p. 2). During the guilty plea proceeding, Counsel detailed Petitioner's mental health history as follows:

> As for my client, he is of limited intellectual functioning himself. I understand he's told Your Honor that he has a GED, but in dealing with him, it does take a while to speak with him. He has been in some kind of state custody for the vast majority of

> his life, not necessarily because he's been a bad child but because he has had some mental health issues again himself. Those mental health issues have been variously diagnosed as things as - - like ADHD but also to bipolar, oppositional defiant disorder, things of that nature.

(App. p. 17).

Petitioner did not appeal his conviction. Petitioner filed an application for post-conviction relief on November 7, 2016. (App. p. 24). In his application, Petitioner alleges the following grounds for relief:

1. Ineffective Assistance of Counsel/Involuntary Guilty Plea
    a. "Plea counsel coerced me to plea against my will."
    b. "Plea counsel failed to investigate my history of mental health illness."
    c. "Plea counsel failed to conduct pretrial investigation concerning the facts of the case."

Petitioner was represented at the PCR hearing by his appointed counsel Susannah Ross. (App. p. 38). Respondent was represented by Assistant Attorney General Valerie Giovanoli. (App. p. 38). An evidentiary hearing was convened before the Honorable G. Thomas Cooper, Jr., on November 14, 2017, in the Spartanburg County Courthouse. (App. p. 38). Petitioner testified on his own behalf. (App. p. 58). Counsel testified on behalf of Respondent. (App. p. 81). During the evidentiary hearing, a 2013 psychological evaluation of Petitioner by Dr. Karl Bodtorf was admitted as a court's exhibit. (App. p. 42). This evaluation was requested by U.S. Probation Officer Bryanna Rogers, as a result of Petitioner's prior felony convictions. (App. p. 103). Judge Cooper denied relief by Order of Dismissal filed on December 14, 2017. (App. p. 112).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Id.

ARGUMENT

I. Because Counsel reasonably believed Petitioner's mental health history warranted the need for a competency evaluation, and the prior mental health evaluation did not provide evidence of Petitioner's incompetency, the PCR court properly denied relief.

Petitioner asserts the PCR judge erred in denying Petitioner relief, where plea counsel failed to investigate Petitioner's mental health and request an additional competency evaluation. Based on his review and personal interactions with Petitioner, Counsel reasonably determined Petitioner was competent at the time of his guilty plea and additional mental health evaluation was unnecessary. Because there is evidence in the record to support the PCR court's finding of fact, the PCR court properly denied relief and certiorari should be denied.

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] 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. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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). The 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 unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

In the present case, Petitioner asserts the Bodtorf evaluation "provided notice to plea counsel that Petitioner was performing at below average levels of cognitively and therefore Petitioner may have been incompetent at the time he pled guilty." (Petition, p. 12). Petitioner further asserts Counsel was deficient in not requesting an additional competency evaluation. (Petition, p. 14). To support this claim, Petitioner asserts he suffered from intellectual limitations, an IQ in the double digit and was charged with a crime based on vindictive family members. (Petition, p. 14-15). The PCR court properly ruled Petitioner failed to meet his burden of proof.

"In assessing a defendant's competency, this Court has recognized that there is a presumption of continued competency once a judicial determination of a defendant's competency has been established." State v. Motts, 391 S.C. 635, 652, 707 S.E.2d 804, 812–13 (2011) (citing State v. Drayton, 270 S.C. 582, 243 S.E.2d 458 (1978) (holding failure of trial judge to order further examination and a hearing to determine defendant's competency to stand trial did not violate statute authorizing trial judge to order such examinations nor deprive defendant of due process where previous presiding judge had found, about two and a half months prior, that defendant was fit to stand trial and there were no additional facts to warrant further examination

or hearing)); see also State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) (the defendant bears the burden of proving his lack of competence by a preponderance of the evidence) (citing Dusky v. United States, 362 U.S. 402 (1960)); Medina v. California, 505 U.S. 437 (1992) (statute providing that defendants were presumed to be competent to stand trial did not violate defendant's procedural due process).

"The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Nance, 320 S.C. 501, 504–05, 466 S.E.2d 349, 351 (1996) (internal citations and quotations omitted). A defendant bears the burden of proving his or her incompetence by a preponderance of the evidence. State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).

In previous cases, this Court has held a post-conviction relief court erred in granting relief on the basis that the defendant was not competent to stand trial when (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. Hall v. Catoe, 360 S.C. 353, 360, 601 S.E.2d 335, 339 (2004) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003)).

The Bodtorf evaluation was requested by his federal probation officer to determine Petitioner's current level of intellectual and emotional functioning, as well as to determine what, if any, psychological services may be needed at this time. (App. p. 103). Petitioner asserts the Bodtorf evaluation is evidence that Counsel should have requested a competency evaluation. Nothing in the Bodtorf evaluation suggests Petitioner's competency was in question. The Bodtorf

evaluation, instead, found Petitioner was free from any apparent psychotic symptoms, his profile reflects immaturity and emotional liability, and that he is emotionally dependent on others. The evaluating doctor did not recommend Petitioner for further psychiatric evaluation. The PCR court found nothing compelling in the evaluation that could lead to a finding of ineffective assistant of counsel.

At the PCR hearing, Counsel testified that he was aware of Petitioner's mental health history. Counsel reviewed D.S.S. records and was aware of Petitioner's diagnosis for A.D.H.D. and oppositional defiant disorder. Prior to the guilty plea proceeding, Counsel received a copy of Petitioner's presentencing report from the federal probation officer, listing Petitioner's visit with Dr. Bodtorf. Counsel described Dr. Bodtorf's evaluation of Petitioner as "supportive counseling." (App. p. 85). Counsel testified based on his conversations with Petitioner, he did not believe there was any reason to further investigate Petitioner's mental health. (App. p. 100). Counsel never questioned Petitioner's competence. (App. p. 100).

"In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (199, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). Petitioner has not established he was incompetent at the time he entered his guilty plea. Petitioner instead asserts that at the time of his plea, he was "performing at below average levels of cognitively and therefore Petitioner **may have been incompetent** at the time he pled guilty." (emphasis added) (Petition, p. 12). Petitioner was able to communicate with Counsel and admits to answering the questions posed by the plea judge in the affirmative in order to proceed with the plea. (Petition, p. 13).

Petitioner's reliance on Ramirez is misplaced. Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017). In Ramirez, this Court held plea counsel was ineffective for failing to request an

independent competency evaluation after a psychological evaluation determined the applicant suffered from severe mental retardation and was functioning at the intellectual level of a four-to-seven year old child. Ramirez, 419 S.C. at 18, 795 S.E.2d at 843. At the PCR hearing, plea counsel admitted he should have moved to have the applicant's competency reevaluated. Id. The Court held the evaluation report and plea counsel's testimony clearly established a reasonable, if not strong, likelihood that the applicant was incompetent to plead guilty. Id.

Petitioner's case is distinguished from Ramirez. Plea counsel never testified that he should have moved for a competency evaluation of Petitioner prior to the guilty plea. Plea counsel never questioned Petitioner's ability to understand the charges against him or his competency to stand trial. While Petitioner's evaluation does reflect immaturity and emotional liability, Petitioner has failed to establish evidence that his diagnosis is analogous with Ramirez's severe mental retardation and the intellectual functioning of a child.

Petitioner's case is more comparable to this Court's decision in Garren v. State. 423 S.C. 1, 813 S.E.2d 704 (2018). In Garren, the applicant alleged his plea counsel was ineffective for failing to seek a competency evaluation. Id., 423 S.C. at 13, 813 S.E.2d at 710. Plea counsel testified that based on his interactions with the applicant, a competency evaluation was unnecessary, he believed the applicant was competent at the time of the plea, and continued to believe the applicant was competent. Id. The Court held plea counsel rendered effective assistance of counsel and the applicant failed to meet his burden of proof. Id. The Court further held that the applicant failed to establish prejudice, as there was no evidence that Garren suffered from identifiable mental health issues **that undermined the competency to plead guilty**. Id. (emphasis added).

In the present case, Counsel was satisfied with Petitioner's competency and felt an evaluation was unnecessary. Counsel was aware of Petitioner's mental health record, but did not believe it effected Petitioner's competency to enter his guilty plea. Petitioner failed to show this decision fell below reasonable professional norms. Petitioner further failed to show evidence that his mental health diagnosis undermined his competency to plead guilty, thus failing to show prejudice. There is evidence in the record to support the PCR court's finding of fact that Petitioner failed to meet his burden of proof.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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By:____________________
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November 30, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000050

John Michael Kirby,.. Petitioner,

v.

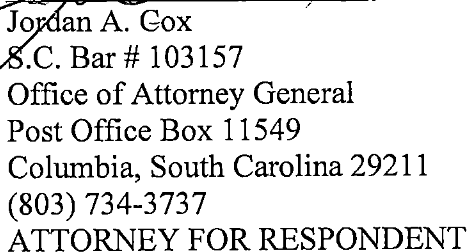
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in interagency mail and in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589

This 30th day of November, 2018.



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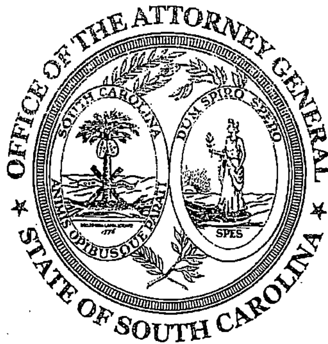

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NOV 30 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 30, 2018

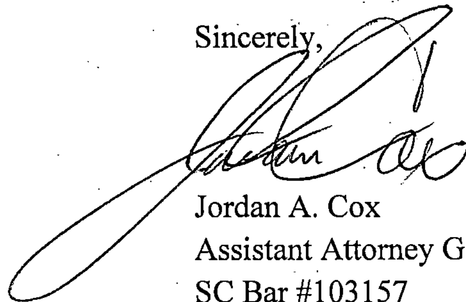
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **John Michael Kirby, #319119 v. State of South Carolina**
Appellate Case No.: 2018-000050
Lower Court Case: 2016-CP-42-3991

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,



Jordan A. Cox
Assistant Attorney General
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JAC/ck
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division

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