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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-001498

JAMES BENJAMIN IRBY, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
S.C. Bar No. 8729
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3305

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

Whether the post-conviction relief court properly denied relief on grounds that Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to utilize the services of a false confession expert at trial where Counsel articulated valid strategic reasons not to do so and where the evidence presented from the alleged expert at the PCR hearing failed to demonstrate prejudice.

STATEMENT OF THE CASE

James Benjamin Irby (Petitioner) was charged with second-degree criminal sexual conduct with a minor for his sexual abuse of an eleven to fourteen year old female victim. He was subsequently indicted by the Spartanburg County Grand Jury for second-degree criminal sexual conduct with a minor (2008-GS-42-1536). Petitioner was represented by Christopher Brough, Esquire, of the Spartanburg County Bar. The State was represented by Assistant Solicitor Jennifer Jordan of the Seventh Circuit Solicitor's Office. Petitioner made a pretrial motion to suppress multiple statements he made to law enforcement. On January 29, 2011, an extensive Jackson v. Denno hearing was held before the Honorable J. Derham Cole on Petitioner's motion. At the conclusion of the hearing, Judge Cole found Petitioner's statements were voluntarily given and denied his motion to suppress. On November 18-19, 2012, Petitioner proceeded to trial by jury before Judge Cole, pursuant to which he was found guilty as indicted. (App.p.100-p.351). Judge Cole sentenced Petitioner to eighteen (18) years' imprisonment. (App.p.351-p.352).

Petitioner timely filed a notice of intent to appeal his conviction and sentence and a direct appeal was perfected by Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. Petitioner raised the following issue on appeal:

> The court erred by ruling appellant's confession was admissible where Detective Danny Morgan admitted he told appellant he could be "thrown to the wolves" if he continued to maintain his innocence and Morgan also acknowledged he told appellant of another defendant who allegedly received the maximum sentence because he only belatedly admitted his guilt since appellant's confession was induced by threats and the promise of a lesser sentence if he confessed and it was not admissible.

(App.p.354-p.371). The State submitted a brief in response and in an unpublished opinion filed January 14, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Irby*, Op. No. 2015-UP-021 (S.C. Ct. App. filed January 14, 2015). The remittitur was issued on March 3, 2015. (App.p.372-p.400).

On March 9, 2015, Petitioner filed an application for post-conviction relief (PCR) alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
   a. Counsel failed to investigate, in that:
      i. Counsel failed to "interview witnesses and victim" prior to trial
      ii. Counsel "failed to go over or even consider possible defenses with petitioner"
      iii. Counsel failed "to prepare for case and trial by not investigating evidence"
      iv. Counsel failed to investigate the background of the witnesses and victim
      v. Counsel "failed to obtain expert witnesses"
      vi. Counsel "failed to contact, interview and subpoena potential witnesses"
      vii. Counsel failed to present character witnesses and evidence of Applicant's good character
   b. Counsel abandoned trial strategy
   c. Counsel "failed to motion [sic] for in camera hearing"
   d. Counsel "failed to object to hearsay and perjury testimony"
   e. Counsel failed to impeach witnesses and victim
   f. Counsel "failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial comments and motion for mistrial"
   g. Counsel "failed to prepare and present mitigation [sic] evidence at trial"
   h. Counsel "failed to disclose and go over discovery material with" Applicant
   i. Counsel failed to objected to irrelevant testimony and evidence
   j. Counsel failed to object to the bolstering of witnesses and victim's testimony
   k. Counsel failed at *Jackson v. Denno* hearing to submit relevant evidence to the judge

1. Counsel failed to file a motion to reconsider Applicant's sentence.

2. "Involuntary Assistance of Appeal Counsel," in that:
   a. Counsel "failed to present all available relevant and admissible mitigating evidence in brief"
   b. Counsel "failed to brief all coercion issues on DVD and their time frames of events"
   c. Counsel "failed to have records saved after he was informed testimony was missing"
   d. Counsel "failed to brief direct verdict of acquittal issue which was preserved for Applicant review"
3. "Prosecutor Misconduct," in that:
   a. Prosecutor vouched for the credibility of government witnesses and victims;
   b. Prosecutor presented and failed to correct perjured testimony of victims and witnesses;
   c. "Prosecutor making misstatements of law and facts";
   d. "Prosecutor made unfair improper prejudicial biased and burden-shifting statements at trial;
4. Rule 5/Brady Violation
   a. "Prosecutor violated Rule 5/Brady Motion for Discovery"

On or about October 16, 2017, Petitioner, through counsel, filed a supplemental application[1] alleging Ineffective Assistance of Counsel, in that:

1. Trial counsel rendered ineffective assistance regarding the admission and defense of Applicant's interrogation and statements, including but limited to:
   a. Failure to properly utilize Dr. Richard Leo (or an expert in the area of false confessions) in trial preparation and as an expert witness at the suppression and trial stages. See Reeves v. State. 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
   b. Failure to properly prepare Applicant to testify at the suppression and trial stages regarding his interrogation and statements.
   c. Failure to properly utilize the video evidence at the suppression and trial stages.

[1] Petitioner was initially appointed J. Brandt Rucker, Esquire, as PCR counsel. Subsequently, Petitoner retained Mrs. Blanchette. At the start of the hearing, Petitioner informed this Court he would only be proceeding on the amended allegations as filed by Mrs. Blanchette. Therefore, the PCR Court considered the *pro se* allegations withdrawn and not part of this action.

2. Trial counsel rendered ineffective assistance for failing to object to the qualification of Lynn McMillian as an expert and failing to object to her testimony thereafter. Trial Transcript p. 101.
3. Trial counsel rendered ineffective for failing to further cross-examine Dr. Nancy Henderson.
4. Trial counsel rendered ineffective assistance for failing to further cross-examine the victim.
5. Trial counsel rendered ineffective assistance in his handling of the decision to utilize Lillian Collins as a witness at trial and his handling of her trial testimony, to include but not limited to the following:
    a. Failing to properly prepare for and handle impeachment of Ms. Collins.
    b. Failing to advise Applicant that Ms. Collins testimony may open the door to otherwise inadmissible testimony from the State's witness regarding the victim's disclosure(s).
    c. Opening the door to otherwise inadmissible testimony from the State's witness regarding the victim's disclosure(s). Trial Transcript pp. 185-191.
6. Trial counsel rendered ineffective assistance for failing to utilize an expert in the area of sexual abuse to assist in trial preparation, assist in trial and potentially be utilized as an expert at trial.
7. Trial counsel rendered ineffective assistance when he failed to utilize available evidence and witnesses, to include Bernadette Smith, for the defense.
8. Pursuant to Rule 1 5(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

(App.p.401-p.427). On December 18, 2015, the State filed a Return requesting that an evidentiary hearing be held.

An evidentiary hearing into the matter was convened on November 16-17, 2017, at the Spartanburg County Courthouse before the Honorable G. Thomas Cooper. Petitioner was present at the hearing and represented by Tricia A. Blanchette, Esquire. The State was represented by Assistant Attorney General Valerie Giovanoli, Esquire, of the South Carolina Office of the Attorney General. At the evidentiary hearing, Petitioner

called four witnesses to testify on his behalf. (App.p.449-p.646; p.711-p.755). Petitioner also testified on his own behalf. (Tr.p.647-p.708). The State called two witnesses in response. (App.p.708-p.710; p.761-p.811). The PCR court had before it a copy of the Spartanburg County Clerk of Court records, Petitioner's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, Petitioner's supplemental application and all exhibits admitted during the hearing. (App.p.1053). At the conclusion of the evidentiary hearing, the PCR court took the matter under advisement. On May 31, 2018, Judge Cooper issued a twenty-eight (28) page written order finding counsel provided effective assistance in this case and denying relief. (App.p.1053-p.1080). On June 12, 2018, Petitioner filed a motion to reconsider pursuant to Rule 59, SCRCP, and by Order dated June 20, 2018, the PCR court denied the motion. (App.p.1081-p.1110). On August 14, 2018, Petitioner filed a Notice of Appeal appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on January 14, 2019. This Return on behalf of the State now follows.

STATEMENT OF FACTS

On January 29, 2011, the trial judge held a *Jackson v. Denno* hearing. (App.p.1).

Testimony of Brenda Azzara: On November 14, 2007, Brenda Azzara, an employee with the Department of Social Services, met with Petitioner. Detective Tonya Aldridge and Petitioner's wife were both present during the interview. Petitioner was not under arrest. Detective Aldridge read Petitioner his rights under *Miranda*. Petitioner gave a written statement denying Victim's allegations of sexual abuse. Petitioner claimed

Victim got mad at him when he told her that she could not go on a field trip unless she cleaned her room, and the next thing he knew the police were at his home. (App.p.11-p.14; p.23).

Testimony of Detective Aldridge: On November 30, 2007, Detective Aldridge met with Petitioner at the detention center. Petitioner was at the detention center for a family court issue. Aldridge read Petitioner his rights under *Miranda*. According to Aldridge, Petitioner agreed to take a polygraph examination, which was eventually scheduled for December 5, 2007. On December 5, 2007, before the polygraph was administered, Aldridge read Petitioner his rights under *Miranda*, and Petitioner gave another statement denying the allegations. Detective Danny Morgan administered the polygraph examination. After the polygraph examination, Aldridge transported Petitioner to the courthouse for a family court hearing. After the hearing, which lasted approximately one hour, Aldridge stopped at McDonald's in order to get Petitioner something to eat. Thereafter, Aldridge took Petitioner back to the sheriff's office to see Morgan. According to Aldridge, she did not witness any threats or coercion by Morgan. Moreover, Petitioner never requested an attorney or asked to stop the interview. Petitioner apologized for not being completely truthful. After the interview, Aldridge transported Petitioner back to the detention center. According to Aldridge, Petitioner never told her that he was threatened or coerced by Morgan. (App.p.21-p.29).

Testimony of Detective Morgan: On December 5, 2007, Morgan performed a polygraph examination on Petitioner. Before Morgan began the examination, he read Petitioner his rights under *Miranda* and went over the waiver of rights form with

Petitioner. According to Morgan, Petitioner was not under the influence of drugs or alcohol at that time. Further, Petitioner's speech was coherent, and Petitioner seemed to understand Morgan's questions. Additionally, Petitioner did not appear to have any mental health issues. (App.p.43-p.45).

After Petitioner completed the polygraph examination, Petitioner went to a family court hearing. After the family court hearing, Petitioner returned to the sheriff's office in order to discuss the results of his polygraph examination. Morgan testified that he did not threaten Petitioner, coerce Petitioner, or promise Petitioner anything. In addition, Morgan offered Petitioner breaks throughout the course of the interview. Morgan also testified that he never offered Petitioner four years if Petitioner would just confess to the crime. (App.p.48-p.58). In fact, Morgan told Petitioner that he did not have the power to make any deals. In addition, Morgan told Petitioner that he was not making Petitioner any promises and not threatening Petitioner. (App.p.70).

Testimony of Petitioner: Petitioner claimed that he was not advised of his rights under *Miranda* when Aldridge picked him up from the detention center on December 5, 2007. Petitioner claimed he "felt threatened" during his interview with Morgan. Petitioner claimed that he felt threatened because Morgan allegedly said to him that "if [Petitioner] didn't tell [Morgan] something they would give [him] so many years, and if [he] did tell [Morgan] something, then they would only give [him] like five or four years."[2] Further, Petitioner claimed he felt threatened when Morgan stated that he did not want to see Petitioner thrown to the wolves. But when defense counsel asked Petitioner

[2] Nowhere in the video does Morgan tell Applicant that he would get four or five years if he confessed. In fact, Morgan denied making that statement. (App.p.58).

why he felt threatened by Morgan's wolves comment, Petitioner stated: "Well, I mean, in the video, I mean, he told me about, you know, if I told him something he would give me five years, but if I didn't tell him something he would give me 20 years." Further, Petitioner admitted that one of the officers got him lunch that day. (App.p.71-p.75).

On cross-examination, the solicitor asked Petitioner what Morgan said to make Petitioner feel threatened. In response, Petitioner stated: "I believe he told me if I tell him something they would give me only five years or four years, but if I didn't tell him something, then they was going to give me the maximum." Petitioner did not mention the wolves comment. Petitioner admitted that Morgan read him his rights under *Miranda*, and Petitioner knew he had the right to an attorney and could stop the interview. In addition, Petitioner admitted that he signed a form waiving his rights. (App.p.79-p.82).

Notably, after Petitioner gave the five page statement, Morgan questioned Petitioner regarding another allegation involving a different minor ["Victim 2"]. Petitioner refused to make any admissions regarding the allegations made by Victim 2 and repeatedly denied all allegations made by Victim 2. Interestingly, Petitioner testified: "If [Morgan] asked me anything about [Victim 2], nothing happened with [Victim 2], so I had no reason to, you know, go into that." (App.p.84-p.85).

State's Exhibits 2 & 3: During the *Jackson v. Denno* hearing, the State introduced a video of the polygraph examination and a video of the interview that occurred on December 5, 2007. (State's Ex. 2 from Hearing (DVD); State's Ex. 3 from Hearing (DVD).) Before the polygraph examination began, Petitioner told Morgan that he was not under the influence of drugs or alcohol and was in good mental health.

Approximately two hours and thirty minutes later, Petitioner had to take a break in order to go to family court. (State's Ex. 2).

After Petitioner returned from family court, Morgan told Petitioner that he failed the polygraph examination. Thereafter, Petitioner implied that Victim was involved in sexual activities with someone else. Approximately twenty-five minutes into the second video, Morgan told Petitioner that Victim probably turned to Petitioner because she either liked him and wanted to feel that way with him or Victim turned to Petitioner because she is devious and wanted to have something over Petitioner to hang him. A few seconds later, Morgan stated: "James, there has been sexual contact between you and [Victim]. You have been involved in having sex with her. The thing is I don't want to just see you being thrown to the wolves on this . . . I think it needs to be clear what she was doing – how she did this. . . ." (State's Ex. 3). Around twenty-eight minutes into the interview, Petitioner stated that he and Victim never had sex. However, Petitioner claimed Victim came into the living room where Petitioner was sleeping. Petitioner's penis was exposed. When Petitioner woke up, Victim had her mouth on his penis. Petitioner told Victim to go to her room. Petitioner claimed he did not tell anyone of this event because he wanted to protect his family. (State's Ex. 3).

Morgan told Petitioner that it was important to be honest. Around thirty-one minutes into the second video, Morgan told Petitioner that this alleged living room incident could have caused Petitioner to fail the polygraph examination. However, it was unlikely. Morgan reminded Petitioner that the question Petitioner failed on the polygraph examination was "did you put your penis in [Victim's] vagina." And the second question

was "did you put your penis in [Victim's] vagina in her bedroom." Thus, according to Morgan, Petitioner's living room story did not explain why Petitioner failed the polygraph examination considering the question was so specific. (State's Ex. 3). Around thirty-two minutes into the second interview, Morgan reminded Petitioner that it was important for Petitioner to be completely honest. "I'm not telling you that if you do this then you're going to get this kind of deal . . . I do not have any kind of power at all to make deals." Morgan explained that he was going to tell Petitioner about things he had seen in his experience. Morgan stated: "None of this is designed to tell you that you should do this or you should do that. Those are choices you are going to have to make." Thereafter, Morgan told Petitioner that he believed that more sexual activity occurred between Victim and Petitioner. (State's Ex. 3).

Approximately thirty-nine minutes into the second interview, Morgan told Petitioner he "really [does not] believe that [Petitioner] would have done these things without [Victim] initiating it. But the fact is there has been a lot more happened between you." Thereafter, Morgan urged Petitioner to tell the truth. Approximately forty-one minutes into the second interview, Morgan told Petitioner about a defendant who eventually told the truth. However, that defendant molested children that were six and seven years old. That defendant ultimately got the maximum sentence for each child, and the sentences ran consecutively. (State's Ex. 3). Thereafter, Petitioner denied committing the alleged acts while blaming Victim for any inappropriate behavior. Petitioner did not confess to any involvement on his part. In response, Morgan told Petitioner that there was more sexual contact between Petitioner and Victim than what Petitioner claimed

occurred. Morgan stated: "I know you had sex with her. I know your penis has been inside her vagina." (State's Ex. 3). Around forty-four minutes into the second interview, Petitioner told Morgan that he was going to tell Morgan what really happened. Petitioner claimed that he was sleeping naked in the living room. He claimed he had a "hard on." When Petitioner woke up, Victim was on top of and straddling Petitioner, and his penis was on the lips of her vagina. Petitioner claimed he whipped Victim and sent her to her room. (State's Ex. 3).

Approximately fifty-eight minutes into the second interview, Morgan stated: "I believe that there's been an ongoing sexual relationship here." Morgan told Petitioner that he believed there has been more sexual activity that occurred than what Petitioner described. However, Morgan explained that Petitioner's best bet was to tell the truth about everything and get everything out in the open. Once again, Petitioner blamed Victim. Petitioner did not admit to any culpability on his part. Petitioner stated that he never had "full force vaginal sex with [Victim]." (State's Ex. 3).

Around one hour and eight minutes into the second interview, Morgan offered Petitioner water. Approximately one hour and twenty-four minutes into the interview, Morgan asked Petitioner if he wanted to provide a corrected statement. Petitioner stated he wanted to provide a corrected statement, and that he was "not trying to do no 30 or 60 years. . . ." Morgan told Petitioner he was not threatening Petitioner with 30 or 60 years and explained the case he described earlier involved younger girls. Petitioner indicated he understood and asked what the sentence for what he was charged with carried. Petitioner stated he was "going to get pinned with this anyway." (State's Ex. 3).

Before Petitioner gave a written statement, approximately one hour and twenty-seven minutes into the second interview, Morgan offered Petitioner water, but Petitioner refused. Morgan left the room to get himself some water for a few minutes. Morgan brought back Petitioner water and asked if he needed anything else. Thereafter, Petitioner asked if he would be charged even though he did not initiate any of the sexual activity. Petitioner wrote a statement, which blamed Victim for the sexual activity that occurred. Petitioner denied any culpability on his part. (State's Ex. 3).

Approximately two hours and thirty-five minutes into the second interview, Petitioner stated that he had been treated professionally, not coerced or threatened, and was offered breaks. About nine minutes later, Petitioner stated that he told the truth because it was the right thing to do not because he was coerced or threatened. Around two hours and fifty-five minutes into the second interview, Petitioner took a break for approximately five minutes. (State's Ex. 3). When Petitioner returned from the break, Morgan brought up the allegations made by Victim 2. Petitioner repeatedly denied touching or doing anything sexual with Victim 2, despite Morgan's attempts to elicit an admission. (State's Ex. 3).

Approximately three hours and ten minutes into the second interview, Morgan reminded Petitioner he could not offer Petitioner a deal. Additionally, Morgan stated he was not threatening Petitioner in any way. Thereafter, Morgan told Petitioner that Victim gave a different story. Thus, Morgan believed there was more sexual activity that occurred than what Petitioner admitted. Once again, Morgan reminded Petitioner that he needed to be truthful. Around three hours and sixteen minutes into the second interview,

Morgan reminded Petitioner of the other case he worked on where the defendant molested six and seven year old girls and received the maximum sentence. However, Morgan assured Petitioner he was not saying that would happen to Petitioner. (State's Ex. 3). Thereafter, Petitioner continued to deny the allegations made by Victim 2. When Morgan tried to end the interview, approximately three hours and eighteen minutes into the second interview, Petitioner stated that he wanted to tell him one more thing. He then admitted he let Victim perform oral sex on him in Victim's bedroom. However, Petitioner once again denied the allegations made by Victim 2. Towards the end of the second interview, Petitioner denied having sex with Victim; he only admitted to oral sex. (State's Ex. 3).

Trial

On November 18, 2012, Petitioner proceeded to trial. Before the trial began, the trial court denied Petitioner's motion to suppress his statements. (App.p.104).

Testimony of Victim: On one occasion, Petitioner forced Victim to the floor and performed digital penetration on Victim. Victim told her mother, but Petitioner continued to live in the house with Victim. On another occasion, Petitioner came into Victim's room, pulled her clothes down, and touched her legs. Victim told her mother of this occurrence, but Petitioner continued coming into Victim's room. At one point, Victim started placing a dresser in front of her door and wearing blue jeans to bed so that Petitioner could not bother her. (App.p.152-p.155). In November of 2007, Petitioner came into Victim's room while Victim was sleeping and pulled down her clothes. Thereafter, Petitioner put his penis inside Victim's vagina. Victim told Petitioner to stop

and called out for her mother, but Petitioner hit her, covered her mouth, and told her to "shut up." (App.p.163). Victim called her aunt to tell her what happened, and Victim's aunt called the police. (App.155-p.156).

Testimony of Jennifer Turner: Turner is Victim's aunt. Turner received a phone call from Victim disclosing a sexual assault that occurred in Victim's home. Victim was very upset and crying. Turner maintained contact with Victim and since that time, Victim has disclosed sexual abuse that occurred in Victim's home. (App.p.164-p.167).

Testimony of Brenda Izarra: At the time of Petitioner's arrest and investigation, Izarra worked for the Spartanburg Department of Social Services (DSS). There was an ongoing DSS case involving the same allegations of abuse. On November 14, 2007, Izarra interviewed Petitioner. Izarra was present when Detective Aldridge read Petitioner his rights under Miranda. Petitioner denied the allegations Victim made against him. In fact, Petitioner grabbed his crotch and said he was not an average sized man so if he had touched Victim, she would have been "torn up." Izarra also interviewed Victim's mother, Lillian (Dannette) Collins. Izarra understood Dannette did not believe any sexual abuse had occurred. (App.p.173-p.179).

Testimony of Tanya Aldridge: Aldridge was an investigator of juvenile sexual assault cases with the Spartanburg County Sheriff's Office. On November 14, 2007, Aldridge was present during an interview with DSS. Petitioner, his wife, Aldridge and Izarra were present during the interview. Aldridge read Petitioner his Miranda rights from a pre-interrogation waiver form and witnessed Petitioner sign the waiver.

(App.p.180-p.183). On December 5, 2007[3], Aldridge saw Petitioner again met with Petitioner at the Sheriff's Office. Aldridge informed Petitioner of his Miranda rights again, but did not have a signed waiver form. Petitioner then wrote a statement which accused Victim of fabricating allegations because she misbehaved regularly and did not like being punished. The statement also accused Victim of making inappropriate comments to him like asking him if he "wanted to smell her cookies" and telling him she had smelled his underwear. Petitioner did not mention this information during his previous interview with DSS. After giving the statement, Petitioner agreed to speak to another investigator. Although Aldridge did not stay in the room during the subsequent interview, Petitioner did receive an extended break during which time Aldridge transported him to a family court hearing and then to McDonald's for lunch. During the interview with Morgan, Aldridge was asked to notarize two other written statements signed by Petitioner. (App.p.183-p.191).

Testimony of Lynn McMillian: McMillian was qualified as an expert witness in the field of child abuse assessments. McMillan interviewed Victim on two occasions at the Children's Advocacy Center. Victim disclosed sexual abuse that had occurred in her home between 2006 and 2007. (App.p.198-p.203).

Testimony of Dr. Nancy Henderson: Dr. Henderson is a child abuse pediatrician employed by the Greenville Hospital System. Dr. Henderson was qualified as an expert witness in the field of child sexual abuse. Dr. Henderson explained that the common myth that if a child is sexually abused, a physical exam will show evidence of

[3] The transcript reads December 15th, but this appears to be in error given the surrounding testimony and evidence.

that abuse by damage to the hymen, is not true. Dr. Henderson opined a physical exam of a child who has alleged sexual abuse can appear normal. Dr. Henderson's opinion was based both on her experience and on the medical literature in the field, and made specific reference to a landmark paper from 1994 entitled, "It is Normal to be Normal," authored by Joyce Adams. (App.204-p.212).

Testimony of Danny Morgan: Detective Morgan was working for Spartanburg Sheriff's Office at the time of Petitioner's investigation. Morgan interviewed Petitioner on December 5, 2007. Morgan read Petitioner his Miranda rights which Petitioner appeared to understand. Morgan described his interview with Petitioner in detail. He used the first couple hours to get to know Petitioner and his background to establish a rapport with him. After the initial interview, Petitioner left for a family court hearing and lunch, then returned to complete the interview. During the second phase of the interview, Morgan began directly questioning him regarding the allegations made by Victim. Petitioner then gave Morgan a statement describing an event in which Petitioner was sleeping in his living room in boxer shorts and awoke to Victim performing oral sex on him. Later, Petitioner made another disclosure indicating he was sleeping naked in the living room another time and had awoken to Victim straddling him and beginning to have vaginal intercourse with him. Morgan reduced Petitioner's statements to writing which Petitioner reviewed, initialed, and signed. Morgan read Petitioner's full statement into the record. (App.p.218-p.236). After Petitioner signed the first statement, Morgan continued to question him regarding the location Victim alleged the sexual abuse occurred. (Tr. p. 139). Petitioner made another disclosure in which he stated that during

the summer when he went to Victim's bedroom to turn off her TV, that she offered to perform oral sex on him and he allowed her to. (Tr. p. 140). This statement was again reduced to writing, reviewed, initialed, and signed by Petitioner. (Tr. p. 141).

Testimony of Lillian Dannette Collins: Petitioner called Collins to testify for the defense. Collins is the mother of Victim. Collins testified that during one of Victim's sessions with a counselor, Victim recanted the allegations and claimed nothing happened. On cross-examination, Collins testified Petitioner had admitted sticking his finger in Victim's vagina. Collins also testified that on one occasion, she caught Petitioner standing naked in the hallway of their home in the middle of the night. (App.p.264-p.265).

Testimony of Petitioner: Petitioner testified in his own defense. During direct examination, he testified he never did anything sexually inappropriate with Victim. Petitioner testified Victim was upset with him because he would not allow her to go on a field trip after she failed to clean her room. On cross-examination, Petitioner claimed he felt threatened during Morgan's questioning so he told him "what they wanted." Petitioner also testified about the inappropriate overtures Victim made toward him. (App.p.273-p.281).

Testimony of Gina Odom: Victim's mother testified that during the therapy session with Gina Odom, a contract therapist with the Children's Advocacy Center in Spartanburg, Victim denied the sexual abuse by Petitioner. However, at trial, Odom testified that Victim never recanted the allegations she made against Petitioner. In fact, according to Odom, Victim disclosed the sexual abuse to her and Victim's mother during

the counseling session. Further, Odom testified that Victim's mother did not support Victim in this matter. (App.p.282-p.285).

PCR Hearing

At the November 16-17, 2017, evidentiary hearing Petitioner presented testimony from child and family therapist Gaye Allen-Cook; his former girlfriend, Bernadette Melissa Smith; trial counsel Christopher Brough (Counsel); and false confession expert Dr. Richard Leo. (App.p.449-p.646; p.711-p.755). Petitioner also testified on his own behalf. (Tr.p.647-p.708). The State called Assistant Solicitor Jennifer Jordan and Special Agent Michael J. Prodan of SLED's behavioral sciences unit in response. (App.p.708-p.710; p.761-p.811).

Of particular note, Counsel gave detailed testimony describing the steps he took to try to keep Petitioner's "confession" from being admitted at trial, and to then to imply it was a "false confession" once it was admitted. He explained how he retained Dr. Leo as a consultant and all the reasons he ultimately elected not to offer Dr. Leo's expert testimony at trial. (App.p.541-p.544). Most critical was Counsel's explanation that the story Petitioner gave to Counsel, which was consistent with the story given to Morgan, was that on multiple occasion he sleeping nude on the couch and awoke to the Victim performing sex acts on him, *which he did not stop right away*. Counsel testified that where these "admissions" were not in fact confessions to the alleged conduct from the Victim, it would not have been fruitful to utilize Dr. Leo, particularly where he could not give an opinion the admissions were in fact false. (App.p.542). Counsel also noted the difficulty he had refuting Victim's allegations of abuse where her mother, in a recantation

from her previous story, testified about coming out of her room in the middle of the night and finding Petitioner standing in the hallway naked. (App.p.543). Counsel acknowledged the cost of Dr. Leo's additional services was a factor in his and Petitioner's decision not to use him, but Counsel emphasized that under the circumstances of the case and Petitioner's inconsistent statements, he concluded Dr. Leo would have little to no impact on swaying the trial court on the issue of voluntariness. (App.p.550-p.551). Counsel also faced an ethical dilemma in specifically pushing the narrative of a false confession where his own client had given the same story to Counsel on a separate occasion. On cross-examination Counsel described how rare it was for any defense attorney to consult with a false confession expert. (App.p.567-p.568). He also explained that while he initially considered using Dr. Leo at trial, his opinion later changed as he gathered more evidence and he chose not to call Dr. Leo as a witness at either the *Jackson v. Denno* hearing or trial. (App.p.576-p.577).

In an Order of Dismissal dated May 31, 2018, and filed June 4, 2018, Judge Cooper denied and dismissed Petitioner's PCR Application with prejudice. The PCR court addressed the individual allegations, finding each to be without merit. Ultimately, the PCR court concluded: "[Petitioner] has not established any violations that would require this Court to grant his application" and denied and dismissed the application with prejudice. (App.p.1053-p.1080). Specifically in regard to the allegation at issued in this petition for certiorarti, that Counsel did not properly utilize Dr. Richard Leo, an expert in the area of false confessions, the PCR court found as follows.

Dr. Leo testified as to the contents of his report, which was admitted into the record. Dr. Leo then testified several police interrogation tactics that increase the likelihood of eliciting false confessions were present during Petitioner's interrogation. Some of the tactics he discussed were "presumption of guilt" and "investigative bias," lengthy interrogation, fatigue and exhaustion, false evidence ploys, minimization, threats, and promises. The PCR court noted that although Dr. Leo testified that these tactics increase the likelihood of eliciting a false confession, he also conceded that they increase the likelihood of eliciting true confessions. Notably, he could not determine at what rate the likelihood for each increases or if the likelihood of eliciting a false confession is higher or lower than the likelihood of eliciting a true confession. (App.p.1069-p.1070).

The PCR court found Dr. Leo did not consider either the legal distinction or the practical distinction between confessions and statements from which guilt can be inferred, in either his decision to testify in this case or his analysis. The PCR court held the distinction noteworthy, because Petitioner never confessed to the crime he was accused of having committed. Rather, Petitioner gave statements calculated to deflect guilt while supplying Morgan information he presumably believed would justify his failing the polygraph examination. So, while Dr. Leo's report states,

> Detective Alridge's (sic) and Detective Morgan's pre-polygraph and post-polygraph interrogation of James Irby were guilt-presumptive, accusatory, and theory-driven rather than evidence driven. The interrogations were not structured to find the truth but, instead, to intentionally incriminate Mr. Irby **by pressuring and persuading him to repeat back the alleged victim's allegations,** which Detective Alridge (sic) and Morgan assumed must be true but never sought to independently verify with actual evidence[,]

Petitioner never did repeat back the victim's allegations – far from it. (App.p.1043-p.1044) (emphasis added). The victim alleged Petitioner digitally penetrated her and vaginally raped her in her bedroom. Notwithstanding the fact Petitioner vehemently and repetitively denied digitally penetrating the victim eight times in four separate points of the interrogation, demonstrating his control and in-tact will, Petitioner told Morgan the twelve year-old victim had been coming onto him for a while (following him into the bathroom with no top, walking around with no panties making sure he would see her, asking him if he wanted to "smell her cookies," and telling him she had smelled his underwear), that he woke up while sleeping to find her performing fellatio on him once and another time he awoke to find her straddling him with her vagina on his hard penis, and that both times he immediately stopped and chastised her. The PCR court noted this is hardly a confession in the practical sense or the legal sense – for in those versions, no crime has been committed. Furthermore, Petitioner never once made an acknowledgment of guilt, rather he consistently projected blame on the twelve year-old girl allegedly instigating sexual contact with a grown man, and her mother's husband nevertheless. (App.p.1070).

The PCR court found Dr. Leo's testimony was simply a criticism of interrogation tactics used to elicit confessions. The PCR court then recounted the expert testimony offered by the State to rebut Dr. Leo's criticisms of police interrogations. Captain Michael Prodan testified that all of the tactics criticized by Dr. Leo have been practiced, studied, analyzed, and perfected over many, many years. Without such tactics, law enforcement would be left simply "interviewing" (as opposed to "interrogating") suspects in the hopes they would spontaneously confess without any sort of technique or tactic applied to encourage confessions. The PCR court concluded this was a dangerous proposition, especially in cases in which there is no forensic evidence (as is

often the case in sexual abuse cases, a crime predominantly committed in private). It noted that without confessions from the prime suspects, many sex offenders would go unpunished and free to continue their deviant, criminal behavior. The PCR court further noted that our criminal justice system offers ample protections for those instances of police misconduct during interrogations, without the need for expert testimony. (App.p.1071).

The PCR court found not only that Counsel was not deficient for not calling Dr. Leo to testify, but that Counsel's performance, by even consulting with him, went above and beyond what was reasonable – and certainly more than what is required by prevailing professional norms. The PCR Court held that to find Counsel ineffective for failing to utilize a false confession expert in this case would require a different standard be applied to Counsel than that which *Strickland* requires. If Counsel's performance is analyzed based on a reasonable standard in light of prevailing professional norms, then calling false confession experts to testify in cases where there is a confession would have to be the accepted and prevailing norm. The PCR court concluded this is simply not the case and if it were, it would be cause for concern for the entire defense bar. The PCR court found that not only is it not the *prevailing* professional norm, but our appellate courts have not even decided the issue of whether or not this type of expert testimony is admissible in a criminal jury trial. (App.p.1071).

The PCR court went on to find that, notwithstanding its finding that Counsel went above and beyond expectations by consulting with Dr. Leo, he also had valid strategic reasons for not further retaining him to testify. The court found Counsel had a valid strategy for four reasons. First, although Petitioner could afford to retain Counsel and pay Dr. Leo $2,500 to "consult," he and his family could not afford to hire Dr. Leo to testify. Secondly, Counsel discussed the case

with Dr. Leo who advised Counsel of what he could testify to at trial. Counsel did not believe his testimony would sway that court in the suppression hearing or the jury in the trial. Thirdly, Dr. Leo could not testify to the ultimate conclusion that Petitioner's statements were false or coerced. Dr. Leo's testimony would criticize Morgan's performance based on the indicators he saw present in the interview, rather than identify which of Petitioner's statements were untrue. Lastly, Petitioner never even recanted to Counsel and therefore, the whole notion of Dr. Leo's testimony would be a farce. The PCR court concluded these were all legitimate concerns and that as a result, Counsel's decision was reasonable, even in hindsight. (App.p.1071-p.1072).

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

ARGUMENT

The post-conviction relief court properly denied relief on grounds that Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to utilize the services of a false confession expert at trial because Counsel articulated valid strategic reasons not to do so and because the evidence presented from the alleged expert at the PCR hearing failed to demonstrate prejudice.

Petitioner asserts Counsel provided ineffective assistance for failing to utilize the services of a false confession expert, with whom defense counsel had consulted, at trial. He claims "the PCR court's rulings on this issue are erroneous, not supported by any probative evidence and are

controlled by an error of law with regard to *Strickland*'s prejudice prong. (Petition, p.9-p.10). The State disagrees and submits Petitioner's argument is entirely without merit. Despite Petitioner's attempts to isolate each of the four reasons the PCR court found Counsel employed a valid trial strategy, Counsel's decision and the reasons therefore much be considered as a whole in the context of the entire record. This is a relatively straightforward case based upon this Court's standard of review. The PCR court's detailed ruling addressing the relevant allegation is supported by ample probative evidence in the record and therefore, certiorari should be denied.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an Applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An Applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and 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. *Strickland*, 466 U.S. at 689. In assessing counsel's performance, counsel's decisions must be evaluated at the time in which they were made and "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). 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. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside *the wide range* of professional competent assistance" required of a criminal defense attorney." *Strickland*, 466 U.S. 668. 690 (emphasis added).

Here, the PCR court reviewed the testimony and evidence presented at the evidentiary hearing and weighed the evidence accordingly. (App.p.1068). It concluded Petitioner had failed to meet his burden of proving Counsel was ineffective for failing to call an expert witness in false confessions. This conclusion was based primarily on the finding that: "Counsel went beyond expectations by consulting with Dr. Leo, and he also had valid reasons for not further retaining him to testify." (App.p.1072). The PCR court's findings of fact and conclusions of law are supported by evidence in the record. In light of the circumstances of the case, Counsel's

decision not to utilize the services of Dr. Leo was within the wide range of professionally competent assistance required of a criminal defense attorney. Counsel strategically chose to not to use Dr. Leo as an expert at trial. This strategy must be considered in the context of Petitioner admitting he allowed the twelve-year-old victim to continue performing sex acts on him when he woke up. Simply because the strategic choice did not result in acquittal does not warrant either the PCR court or this Court second guessing Counsel's tactics through the distorting lens of hindsight. Because Counsel articulated a valid strategic reason for his advice, his performance was properly found not to be ineffective. Further, Dr. Leo's report and testimony did not support a finding of prejudice. As Petitioner failed to meet his burden of proof in this PCR action, his application was properly denied and dismissed with prejudice, and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully submits this Court should deny the 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,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

May 1, 2019

RECEIVED
MAY 01 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-001498

JAMES BENJAMIN IRBY, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, J. Benjamin Aplin, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
Post Office Box 1834
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served. This 1st day of May, 2019.

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 01 2019
S.C. SUPREME COURT

May 1, 2019

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

Re: **James Benjamin Irby v. State of South Carolina**
Appellate Case No. 2018-001498
Lower Court Case No. 2015-CP-42-0996

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
SC Bar #8729

JBA/ck
Enclosures

cc: Jeremy A. Thompson, Esquire
Trisha Allen, Director - Victim Advocacy Division

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283