

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County
Jean H. Toal, Post-Conviction Relief Judge
Kristi L. Harrington, Plea Judge
Appellate Case No. 2018-001168

DAVID LEON STEPHENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

I. Whether the PCR court erred in denying Petitioner relief, where the State failed to comply with the Petitioner's request under the Interstate Agreement on Detainers Act (IAD), where after Petitioner was transported to South Carolina, the State dismissed the arrest warrant upon which Petitioner sought final disposition, and where the State then indicted him on three different charges before dismissing the arrest warrant, and where plea counsel never moved for dismissal or sought relief on the State's failure to bring Petitioner's case to trial within on hundred and eighty days as required by the IAD?

II. Whether the PCR court erred in granting the State's Motion to Reconsider under Rule 59(e), SCRCP, when the State raised new arguments at the motion hearing, where the State sought to distinguish between different variations of second degree criminal sexual conduct charge, and where that argument was not made prior to the filing of the motion?

III. Whether the PCR court erred in denying relief, where Petitioner's guilty plea was involuntary following his realization that an IAD violation has occurred and where plea counsel's inaction with regard to the IAD violation rendered his entire plea involuntary?

Respondent's Counterstatement of Issues on Certiorari

I. The post-conviction relief court properly reconsidered its prior order and denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the violation of the Interstate Agreement on Detainers Act (the IAD Act) applied only to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place.

A. The post-conviction relief court properly reconsidered its prior grant of post-conviction relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the arguments raised by Respondent were preserved for review and the post-conviction relief court's prior order needed to be amended to properly address all issues before the court.

B. The post-conviction relief court properly denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the violation of the IAD Act applied only to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor

victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place.

II. The post-conviction relief court properly denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where Petitioner failed to establish his guilty plea was involuntary.

STATEMENT OF THE CASE

On September 7, 2010, a report was filed with the Berkeley County Sheriff's office in reference to a sexual assault committed by Petitioner David Leon Stephens against a twelve-year-old minor victim. (Arrest Warrant M-333205). On February 16, 2011, the Berkeley County Sheriff's Office sought and obtained a warrant for Petitioner's arrest for second-degree criminal sexual conduct with a minor. (Arrest Warrant M-333205). The accompanying affidavit specifically alleged the following:

That on or between 05/21/10 and 06/17/2010 the defendant did commit the above stated offense in that he did willfully, unlawfully, and feloniously engaged in sexual intercourse with a female victim date of birth 12/30/07, and said offense having occurred at 236 Horseshoe Road, Goose Creek, SC located in the County of Berkeley. Facts to establish the aforesaid: On 09/07/10 a report was filed with the Berkeley County Sheriff's Office in reference to a sexual assault committed by the defendant. The victim was seen at Lowcountry Children Center and disclosed sexual abuse by defendant. The twelve-year old victim disclosed **vaginal/penile intercourse** by the defendant. The victim became pregnant as a result of the sexual assault. The victim knows the defendant by sight and sound. The victim was twelve years old and the defendant was over the age of twenty-one at the time of the sexual assault. The affiant and the victim are witnesses to prove the same.

(Arrest Warrant M-333205) (emphasis added).

On August 22, 2012, Petitioner began serving a term of imprisonment within the Commonwealth of Pennsylvania Department of Corrections following his guilty plea to "Unsworn Falsifications to Authorities." (App. 84-93). While incarcerated in Pennsylvania, Petitioner became aware of Arrest Warrant M-333205 for second-degree criminal sexual conduct with a minor based on his genital penetration and resulting impregnation of the minor victim. On April

12, 2013, Petitioner partially¹ filled out an IAD Act request form, which was forwarded to the Ninth Circuit Solicitor's Office. (App. 84-93). However, this form was never filed with the Berkeley County Clerk of Court.²

On September 18, 2013, Petitioner was brought to South Carolina. App. 18). Shortly thereafter, Petitioner was appointed Debra K. Littlejohn, Esquire, to represent him on the charges arising out of the conduct contained within Arrest Warrant M-333205. Littlejohn was aware of the Petitioner's request pursuant to the IAD Act and she brought Petitioner's IAD Act request for a speedy disposition of his charge to the attention of the State. (App. 13). In response, Anne Williams, the prosecuting Assistant Solicitor, informed Littlejohn that SLED DNA results to determine paternity of the twelve-year-old minor victim's aborted fetus were still pending and she would move for a continuance of the case until such results were obtained.³ (App. 13-16, 66, 74). However, the State never sought a continuance.

On June 18, 2014, Assistant Solicitor Williams dismissed Arrest Warrant M-333205 and directly presented three new indictments against Petitioner based on additional information she gathered during interviews with the minor victim, including additional felonious conduct and a slight variation in the dates the incidents occurred. The three new indictments, all which were true

¹ In Respondent's motion and at the hearing on this motion, Respondent noted numerous locations on Petitioner's IAD Act form are blank and Petitioner's signature is not on any of the numerous pages of the form. See App. 84-93.

² At the evidentiary hearing, plea counsel Littlejohn testified she was unable to locate a copy of the IAD Act request on file with the Berkeley County Clerk of Court. (App. 58). Respondent contacted the Berkeley County Clerk's Office on November 22, 2017, and after a review of the entirety of Applicant's General Sessions files, the Clerk's office confirmed no copy of the IAD Act form was on file.

³ Results of the paternity test revealed Petitioner was the biological father of the twelve-year-old minor victim's aborted fetus. (App. 16, 53).

billed by the Berkeley County Grand Jury on May 13, 2014, were as follows: second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (2014-GS-08-0644); second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (2014-GS-08-0645); and lewd act (2014-GS-08-0646).

On June 19, 2014, Petitioner, who had concluded his Pennsylvania sentence, was released on bond on the three indictments.

On September 17, 2014, Petitioner appeared in the Berkeley County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge, and pled guilty to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (2014-GS-08-0644) and second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (2014-GS-08-0645). At the plea proceeding, the State and Littlejohn both referenced Petitioner's IAD Act request and noted they were awaiting the SLED DNA results to determine paternity of the aborted fetus before bringing Petitioner's case to trial. Pursuant to plea negotiations between Petitioner and the State for a sentence cap of fifteen years, Judge Harrington sentenced Petitioner to fifteen years imprisonment; the remaining lewd act indictment (2014-GS-08-0646) was dismissed pursuant to the plea agreement. Petitioner did not file an appeal.

On March 11, 2015, Petitioner filed an application for post-conviction relief alleging a violation of the IAD Act and ineffective assistance of counsel. Respondent made its return on March 28, 2016, requesting an evidentiary hearing be convened on the application. Thereafter, on September 6, 2016, Petitioner, through counsel Lance S. Boozer, Esquire, filed an amended application alleging an additional ground for relief that his guilty plea counsel was involuntary. A

hearing on this application was held in the Berkeley County Court of Common Pleas before the Honorable Jean H. Toal, former Chief Justice of the South Carolina Supreme Court and acting circuit court judge. Petitioner was present and represented by counsel Boozer. Respondent was represented by John Ard, a third-year law student at the Charleston School of Law, practicing under Rule 401, SCACR, and supervised by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office. At the hearing, testimony was taken from Petitioner and his former plea counsel Littlejohn. At the conclusion of the hearing, the court took the matter under advisement and requested proposed orders from both parties.

By written order filed November 9, 2017, the court granted post-conviction relief, finding plea counsel was ineffective for failing to move for dismissal of Petitioner's charge based on a violation of the IAD Act. Specifically, the court found:

Here, Applicant was deprived of the rare opportunity to have his **charge** dismissed with prejudice due to Counsel's ineffectiveness. This Court is aware that the State could have certainly requested a continuance, however, had Counsel made a motion to dismiss, the burden would have been placed upon the State to show it was "necessary and reasonable" to continue the case. This Court finds Applicant complied with the IAD provisions. This Court finds Counsel's thoughts that the IAD was not properly filed are incorrect. Additionally, this Court finds that Applicant was not brought to trial within the time restrictions imposed by the IAD. Based on this violation, this Court finds Applicant could have made a valid request to have the **charge** dismissed with prejudice.

(App. 100) (emphasis added). The court vacated both of Petitioner's convictions and remanded the matter to the Berkeley County Court of General Sessions for a new trial.

Thereafter, on November 27, 2017, Respondent filed a Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCP, asking the court to reconsider its ruling and deny relief as to the second-degree criminal sexual conduct with a minor based on digital penetration of the

minor victim (2014-GS-08-0645). In its Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCPP, Respondent moved for the court to reverse its earlier decision and deny post-conviction relief as to Petitioner's conviction for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (2014-GS-08-0645), asserting the court improperly vacated both of Petitioner's convictions based on the court's ruling that an IAD violation had occurred when the relief should only apply to the conviction that was subject to the initial detainer—the second-degree criminal sexual conduct with a minor based on the genital penetration of the minor victim based on Arrest Warrant M-333205 (2014-GS-08-0644). Respondent also argued the court improperly determined Petitioner had properly filed a request for the speedy disposition of his charges within 180 days pursuant to Article III of the IAD Act, although Respondent conceded there was an IAD violation pursuant to Article IV because Applicant was not brought to trial (and the State did not move for a continuance) within 120 days of being brought to South Carolina based on the detainer for Arrest Warrant M-333205. See S.C. Code Ann. § 17-11-10.

On November 28, 2017, Petitioner filed a return to this motion, asking the court to summarily deny Respondent's motion without a hearing.

A hearing on Respondent's Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCPP, was held on April 4, 2018 at the Richland County Courthouse.⁴ Respondent was present alongside counsel Boozer. Respondent was present and represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson.

⁴ By consent of all parties, this hearing was held in Richland County. A scheduling order vesting the court with jurisdiction to hear this PCR action was signed by the Honorable Donald W. Beatty, Chief Justice of the South Carolina Supreme Court, on March 9, 2018.

Following arguments from counsel, the court granted Respondent's motion to reconsider its previous order and found the IAD Act violation was only applicable to Petitioner's guilty plea for second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (2014-GS-08-0644). The court further found Petitioner's arguments that Respondent's motion to reconsider was improper because it raised new issues was without merit. Additionally, the court denied relief as to Petitioner's claims that his guilty plea was involuntarily entered as to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (2014-GS-08-0645). An order to this effect was filed on June 15, 2018. Petitioner did not file any motions challenging the court's new order.

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). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court properly reconsidered its prior order and denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the violation of the Interstate Agreement on Detainers Act (the IAD Act) applied only to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place.

On appeal, Petitioner argues the post-conviction relief court erred in granting Respondent's motion to reconsider its prior grant of post-conviction relief and erred in denying relief based on an IAD Act violation as to his guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645). Specifically, Petitioner contends the court erred in granting reconsideration because the arguments raised in Respondent's motion and at the subsequent hearing were new and had not been raised to the court previously. Petitioner also asserts the IAD Act violation should apply to both of Petitioner's guilty pleas for second-degree criminal sexual conduct with a minor because the additional charge for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) "could have been avoided had Petitioner received a final disposition on the [original] charge (the second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644)) as provided by the IAD [Act]." (PWC 8). However, these arguments are without merit, as the post-conviction relief court properly reconsidered its prior grant of post-conviction relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the arguments raised by Respondent were preserved for review and the post-conviction relief court's prior order needed to be amended to

properly address all issues before the court and the court properly denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the violation of the IAD Act applied only to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place. This Court should deny certiorari.

A. The post-conviction relief court properly reconsidered its prior grant of post-conviction relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the arguments raised by Respondent were preserved for review and the post-conviction relief court's prior order needed to be amended to properly address all issues before the court.

Petitioner argues the post-conviction relief court erred in granting Respondent's motion to reconsider its prior grant of relief and ultimate decision to deny relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) because Respondent "raised new arguments at the motion hearing," specifically asserting "the State sought to distinguish between different variations of a second degree criminal sexual conduct charge [] where that argument was not made prior to the filing of that motion." Petitioner, both before the post-conviction relief court and now on appeal, concedes the lower court's initial order failed to distinguish between the two separate second-degree criminal sexual conduct with a minor charges. Petitioner also concedes it is a party's responsibility to file a motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, when the court has "misunderstood, failed to fully consider, or perhaps failed to rule upon an argument or issue, and the party wishes for the court to reconsider or rule on it." (PWC 11-12). Despite this

and despite the readily-apparent confusion in the post-conviction relief court's order as to whether the IAD Act violation applied to only one or both of Petitioner's guilty pleas, Petitioner argues it was somehow improper for Respondent to seek clarification from the lower court as to whether the IAD Act violation applied to both second-degree criminal sexual conduct with a minor guilty pleas. The post-conviction relief court properly rejected this argument and this Court should as well.

In its order granting reconsideration and amending its prior order granting relief, the post-conviction relief court specifically found the arguments presented by Respondent were not contradictory or new, and accordingly, were properly before the court. The court, noting that it was mindful that new issues could not be raised for the first time in a motion to reconsider, specifically found the issues raised in the motion to reconsider had previously been raised by Respondent at the evidentiary hearing. The court further found,

The record establishes that Respondent has consistently argued any purported IAD Act violation would not apply to new indictments issued after Applicant was brought to South Carolina, including second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (2014-GS-08-0645). See PCR Tr. 42 (“[W]here it comes down to, the solicitor dismissed those charges in accord with, you know, her rightful authority to do so, and at that point, the IAD issue has no bearing on this case and there is no prejudice on behalf of the defendant.”). Additionally, there is conflicting testimony and argument from Applicant as to whether any IAD violation would impact both of his convictions, as Applicant argues any violation would apply to his single conviction or both convictions, as evidenced by his interchangeable use of “charge” and “charges” throughout the evidentiary hearing. See e.g. PCR Tr. 13, 41-42. Furthermore, the witnesses were questioned as to whether any IAD Act violation would apply to the new indictments obtained after Applicant was delivered to South Carolina. See e.g. PCR Tr. 22-23, 25, 38. Clearly, these arguments and issues were raised to this Court prior to Respondent's Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRPC.

(App. 204). These findings are legally correct and supported by the record. Respondent consistently argued, both before and after the evidentiary hearing, that any purported IAD Act violation would not apply to any new charges or indictments arising after the detainer was placed on Petitioner. Accordingly, the post-conviction relief court properly determined the arguments raised in Respondent's motion to reconsider were not new or contradictory.

Moreover, the post-conviction relief court also properly recognized its prior order granting relief had several deficiencies, including failing to specifically address the particular provision of the IAD Act that was violated or whether this IAD Act violation applied to all of Petitioner's charges, as well as whether the appropriate relief was a remand back to the court of general sessions or a dismissal of the impacted plea or pleas. For example, in its original order, the court found

Here, Applicant was deprived of the rare opportunity to have his **charge** dismissed with prejudice due to Counsel's ineffectiveness. This Court is aware that the State could have certainly requested a continuance, however, had Counsel made a motion to dismiss, the burden would have been placed upon the State to show it was "necessary and reasonable" to continue the case. This Court finds Applicant complied with the IAD provisions. This Court finds Counsel's thoughts that the IAD was not properly filed are incorrect. Additionally, this Court finds that Applicant was not brought to trial within the time restrictions imposed by the IAD. Based on this violation, this Court finds Applicant could have made a valid request to have the **charge** dismissed with prejudice.

(App. 100) (emphasis added). Despite numerous references to a violation of the IAD Act in reference to Petitioner's **charge** (presumably the second-degree criminal sexual conduct for genital penetration based on Arrest Warrant M-333205), the original order from the post-conviction relief court inexplicably vacated **both** of Petitioner's convictions and remanded the matter for a new trial on both indictments (including the digital penetration indictment that was unrelated to Petitioner's IAD Act request).

Based on these omissions in the original order granting relief, the post-conviction relief court properly granted reconsideration and issued new order that fully and appropriately addressed all issues and convictions subject to the action as required by the Post-Conviction Procedure Act. See S.C. Code Ann. § 17-27-80 (“If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.”). See also Simmons v. State, 416 S.C. 584, 788 S.E. 2d 220 (2016) (noting to preserve issues for appellate review, after an order is filed, counsel has an obligation to review the order and file a motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by the Uniform Post-Conviction Procedure Act and the civil procedure rules); Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (“We take this opportunity to reiterate our admonition that “[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRPC.”) (citing Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992)). The post-conviction relief court properly recognized deficiencies in its prior order and appropriately corrected these deficiencies through a subsequent order making the proper findings of fact and conclusions of law.

B. The post-conviction relief court properly denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where the violation of the IAD Act applied only to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place.

Petitioner also argues the post-conviction relief court erred in denying relief based on an IAD Act violation, presumably as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645).⁵ Petitioner asserts, without any evidence in the record to assert such an allegation, that the "additional charges . . . could have been avoided had Petitioner received a final disposition on the charge as provided by the IAD Act. He would have had grounds to exclude potentially damaging testimony p anything the State sought to further indict him for." (PWC 8). These arguments are wholly without merit. The post-conviction relief court properly determined the IAD Act violation only pertained to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and had no bearing on the digital penetration indictment as this indictment was based on new conduct discovered by the State well after the detainer on Petitioner was in place.

⁵ In his petition, other than a fleeting reference in his "statement" section, Petitioner fails to acknowledge the post-conviction relief court did grant relief as to his second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and repeatedly argues the post-conviction relief court improperly denied him relief as to his claim of an IAD Act violation without any reference or argument differentiating between the two separate indictments or why the post-conviction relief court improperly denied relief as to his guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645).

The IAD Act is a “compact entered into by 48 States, the United States, and the District of Columbia to establish procedures for resolution of one State’s outstanding charges against a prisoner of another State.” New York v. Hill, 528 U.S. 110, 111 (2000) (citations omitted). Critically, the IAD Act was designed to create “cooperative procedures” between the states and the federal government in order to “encourage the expeditious and orderly disposition of” outstanding charges and detainers against prisoners incarcerated in other jurisdiction based on the “uncertainties” caused by such charges and detainers. S.C. Code Ann. § 17-11-10, art. I; see State v. Finley, 277 S.C. 548, 550, 290 S.E.2d 808, 809 (1982) (“The purpose of I.A.D. is to foster the expeditious disposition of charges outstanding against prisoners so as to eliminate uncertainties which accompany the filing of detainers.”).

Based on the IAD Act, two distinct deadlines are imposed upon the State after a detainer against a defendant held in another jurisdiction is filed—a 180-day deadline and a 120-day deadline. See S.C. Code Ann. § 17-11-10, art. III(a) (setting out a 180-day deadline for the commencement of trial); S.C. Code Ann. § 17-11-10, art. IV(c) (setting out a 120-day deadline for the commencement of trial). Specifically, when a defendant files a request complying with the IAD Act’s requirements⁶ for final disposition in connection to a filed detainer, the defendant “shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered

⁶ Regarding the IAD Act’s requirements, the defendant must have written notice of the place of his imprisonment and his request for a final disposition delivered to both the prosecuting officer **and** “the appropriate court of the prosecuting officer’s jurisdiction.” S.C. Code Ann. § 17-11-10, art. III(a). Significantly, if the defendant fails to comply with those express requirements, the IAD Act’s 180-day deadline will **not** be triggered and will **not** begin to run. See State v. Johnson, 278 S.C. 668, 671, 301 S.E.2d 138, 140 (1983) (“We hold appellant’s letter did not comply with the IAD requirements and thus did not trigger the running of one hundred eighty day period during which a prisoner must be brought to trial under Article III of the IAD.”).

to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint." S.C. Code Ann. § 17-11-10, art. III(a). Likewise, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state" when a defendant is transferred pursuant to a detainer regardless of whether the defendant ever requested final disposition. S.C. Code Ann. § 17-11-10, art. IV(c). Ordinarily, if a defendant is not brought to trial within the applicable statutory period, the IAD Act requires the trial judge to dismiss the pending indictment, information, or complaint with prejudice. S.C. Code Ann. § 17-11-10, art. V(c).

In the present case, Petitioner did not properly comply with the IAD Act's requirements because he did not properly file or otherwise cause to be delivered a copy of his IAD Act request with the Berkeley County Clerk of Court. Because he did not comply with those express requirements, the IAD Act's 180-day deadline was **not** be triggered and did **not** begin to run. See State v. Johnson, 278 S.C. 668, 671, 301 S.E.2d 138, 140 (1983) ("We hold appellant's letter did not comply with the IAD requirements and thus did not trigger the running of one hundred eighty day period during which a prisoner must be brought to trial under Article III of the IAD."). Therefore, Petitioner's partially filled-out IAD Act request form, dated April 12, 2013, did not trigger the IAD Act's 180-day deadline and is not dispositive in this case.

However, notwithstanding Petitioner's failure to comply with the express requirements of the IAD Act, Petitioner was delivered to South Carolina on September 18, 2013, thereby triggering the 120-day timeline pursuant to S.C. Code Ann. § 17-11-10, art. IV(c), as to the second-degree criminal sexual conduct with a minor charge for which Arrest Warrant M-333205 was issued and

for which the State lodged a detainer against Petitioner. Importantly though, regardless of which timeline was applicable and regardless of whether either timeline was violated, any grant of relief based on an IAD Act violation **only** applies to the second-degree criminal sexual conduct with a minor charge for Petitioner's genital penetration of minor victim based on the information contained in Arrest Warrant M-333205 and **not** the other, unrelated second-degree criminal sexual conduct with a minor charge based on Petitioner's digital penetration of minor victim (Indictment No. 2014-GS-08-0645). The second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) is based on conduct separate and apart from the conduct giving rise to the charge upon which Arrest Warrant M-333205—the basis for the detainer lodged against Petitioner—was founded. This indictment was based on information the State gleaned from additional interviews with the minor victim, not any sort of action pertaining to Petitioner's detainer or return to the state. See App. 13 (“The whole argument became moot when I realized after talking to the victim, that the dates were actually wrong based on the original warrant and actually had three counts instead of one.”).

Petitioner was not aware of this additional charge for criminal sexual conduct with a minor based on his digital penetration of the minor victim or that the State was aware of the underlying conduct giving rise to it (digital penetration) until after he was directly indicted for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) on May 13, 2014, well after he was brought to the state pursuant to the IAD Act (and in fact, after he had completed serving his sentence on the Pennsylvania charges). See App. 84-93 (Court's Exhibit 1 listing Petitioner's parole eligibility as “2/23/13” and maximum expiration of the present sentence as “5/23/14” for the Pennsylvania charge).

Therefore, the IAD Act is inapplicable to these two charges and any violation of the act should not result in the dismissal of the other second-degree criminal sexual conduct with a minor charge based on digital penetration based on the express language from the IAD Act:

The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction.

S.C. Code Ann. § 17-11-10, Art. V(d). The plain reading of Article V(d) makes it clear the IAD Act only applies to the charge or charges subject to the detainer, which in Petitioner's case, is only the second-degree criminal sexual conduct with a minor charge for Petitioner's genital penetration of minor victim based on the information contained in Arrest Warrant M-333205. See also United States v. Sanders, 669 F.2d 609, 610 (9th Cir. 1982) (holding, without discussion, that where a one-count complaint, upon which the detainer was based, was dismissed for failure to comply with the prescribed time period and a new complaint was filed containing the dismissed count and two new but related counts, the trial court properly dismissed only the original count); Espinoza v. State, 949 S.W.2d 10, 12 (Tex. App. 1997) (noting that "[b]y its terms, [the IAD] limits dismissal to a charge forming the basis of the detainer" and holding that conviction, even though on a related charge, was not on the charge on which the detainer was lodged; Commonwealth v. Boyd, 451 Pa. Super. 404, 679 A.2d 1284, 1287 (1996) (holding that speedy trial provisions of IAD did not apply where charges for which detainer was lodged were "separate and apart" from new charges that were subject of conviction); People v. Greenwald, 704 P.2d 312 (Colo.1985) (holding statute requiring trial within 120 days of defendant's return to state relates only to the charges underlying the detainer by which state secured temporary custody of prisoner incarcerated in another state);

People v. Oiknine, 79 Cal. App. 4th 21, 93 Cal. Rptr. 2d 720 (1999) (holding although a dismissal with prejudice of the five counts from the original complaint satisfied the requirements of the IAD, nothing in the IAD suggests that new charges, which were not specified in the detainer, can or should be dismissed along with the older charges that were listed in the detainer).

After hearing arguments from both parties, the post-conviction relief court properly determined the IAD Act violation only pertained to the Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644) and properly denied relief based on the IAD Act claim as to Petitioner's other guilty plea for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645).⁷ This ruling is legally correct and supported by the record. This Court should deny certiorari as to this issue.

⁷ Petitioner appears to be making an argument that a double jeopardy violation argument could have or should have been made "against future indictments on the same charge." However, this argument was not raised to nor was it ruled upon by the lower court, and therefore, is not preserved for this Court's review. Marlar, 375 S.C. at 410, 653 S.E.2d at 267; Pruitt v. State, 310 S.C. at 256, 423 S.E.2d at 128. The failure to specifically rule on the issues precludes appellate review of the issues. Id. Because Petitioner never raised this issue to the lower court nor did the court rule on it, it is unpreserved for appellate review.

Moreover, Petitioner's argument that his indictment for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) was based on the same conduct is patently false and not supported by the record. This indictment was based on information the State gleaned from additional interviews with the minor victim, not any sort of action pertaining to Petitioner's detainer or return to the state. See App. 13 ("The whole argument became moot when I realized after talking to the victim, that the dates were actually wrong based on the original warrant and actually had three counts instead of one.").

II. The post-conviction relief court properly denied relief as to Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) where Petitioner failed to establish his guilty plea was involuntary.

Petitioner also argues the post-conviction relief court erred in denying relief on his claim that his guilty plea was involuntarily entered based on the IAD Act violation. As previously discussed above, the IAD Act violation only pertained to Petitioner's indictment for second-degree criminal sexual conduct with a minor based on genital penetration of the minor victim (Indictment No. 2014-GS-08-0644), not his indictment for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645). On appeal, Petitioner asserts he had no other choice than to plead guilty or risk "the threat of maxing him out under consecutive sentences." After reviewing the thoroughly plea colloquy conducted by the plea court, listening to the testimony of Littlejohn and Petitioner, and reviewing the record, the post-conviction relief court properly denied relief as to this ground, finding Petitioner's guilty plea to second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645) was knowingly, voluntarily, and intelligently entered. These findings are not premised on any errors of law and are supported by the record. This Court should deny certiorari as to this issue.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). Petitioner 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 Petitioner 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, the 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).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. 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.” Id. at 690.

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

In the present case, the only two grounds upon which Petitioner claimed his guilty plea was involuntary was that counsel failed to move for dismissal of his charges based on an IAD Act violation and that counsel failed to speak on his behalf during his plea. As addressed thoroughly above, the post-conviction relief court properly found the IAD Act violation did not have any

impact on his indictment for second-degree criminal sexual conduct with a minor based on digital penetration of the minor victim (Indictment No. 2014-GS-08-0645). Accordingly, Petitioner's guilty plea was not rendered involuntarily based on a claim his attorney failed to move for relief upon which he was not entitled and would not have been granted on this particular indictment. As to Petitioner's second claim upon why his guilty plea was involuntary based on counsel's failure to speak on his behalf—which he has not raised in his petition for certiorari—the post-conviction relief court properly found counsel presented appropriate mitigation on his behalf. See App. 20-22.

The record supports the post-conviction relief court's conclusion that Petitioner failed to meet his requisite burden of establishing his guilty plea was involuntarily entered. Accordingly, this Court should deny certiorari as to this ground.

CONCLUSION


For the foregoing reasons, this Court should deny this petition for a writ of certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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July 3, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to Berkeley County
Jean H. Toal, PCR Judge
Kristi L. Harrington, Plea Judge
Appellate Case No. 2018-001168

RECEIVED
JUL 03 2019
S.C. SUPREME COURT

DAVID STEPHENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

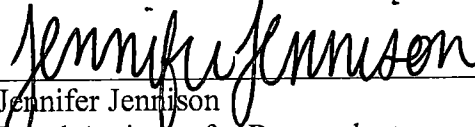
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 3rd day of July, 2019.



Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

July 3, 2019

RECEIVED
JUL 03 2019
S.C. SUPREME COURT

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

RE: David Stephens v. State of South Carolina
Appellate Case No.: 2018-001168

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jj
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division