

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Aiken County
The Honorable D. Garrison Hill, Circuit Court Judge
C.A. No. 2004-CP-02-1520
Appellate Case No. 2008-097109

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S.C. Supreme Court

ERNEST PRESSLEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge
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STATE OF SOUTH CAROLINA,..... PETITIONER,

v.

ERNEST PRESSLEY,.....RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- III. Is there evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert?
- IV. Is there evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim?

STATEMENT OF THE CASE

Ernest Pressley (hereinafter "Respondent") was indicted by the Aiken County Grand Jury during the March 2002 term of General Sessions Court for Criminal Sexual Conduct with a Minor – Second Degree (2002-GS-02-340) involving victim P.H.¹ (App. pp. 563 - 564.) P. Andrew Anderson, Esquire, represented Respondent on the charge. Respondent proceeded to a jury trial before the Honorable William P. Keesley. (App. pp. 1 - 370.) Respondent was found guilty as indicted, and Judge Keesley sentenced him to twenty (20) years' confinement. (App. p. 565.)

A notice of appeal was filed on Respondent's behalf, and an appeal was perfected. A brief pursuant to Anders v. California, 386 U.S. 738 (1967) was submitted. (App. pp. 371 - 379.) The appeal was dismissed by the South Carolina Court of Appeals. State v. Pressley, Op. No. 2004-UP-569 (S.C. Ct. App. filed November 15, 2004). (App. pp. 380 - 381.) The remittitur was sent on December 16, 2004. (App. p. 382.)

Respondent filed an application for post-conviction relief (PCR) on November 22, 2004, alleging ineffective assistance of counsel and denial of due process. (App. pp. 383 - 401.) The State made its Return on or about June 9, 2005. (App. pp. 402 - 406.) An amended PCR application dated January 16, 2006, was filed on Applicant's behalf. (App. pp. 407 - 412.) An evidentiary hearing was convened of February 26, 2008, before the Honorable D. Garrison Hill. (App. pp. 413 - 503.) Respondent was present and represented by James E. Whittle, Esquire; Assistant Attorney General Lance S. Boozer appeared on behalf of the State.

By written order dated July 2, 2008, and filed July 7, 2008, Judge Hill granted Respondent's PCR application on the basis of ineffective assistance of counsel, vacated his

¹ The victim's name has been redacted from the Appendix. For the purposes of this petition, she is referred to as "P.H."

conviction, and granted a new trial. (App. pp. 544 – 562.)

This petition for writ of certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 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.

ARGUMENT

I. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert.

The PCR court found that trial counsel's failure to retain an independent DNA expert to assist him either as a consultant in preparation for cross-examination of the SLED DNA analyst or as an expert witness constituted ineffective assistance of counsel.

The charges in this case arise from an allegation of sexual assault made by the victim, P.H. The victim is mentally disabled. (See for example App. p. 47, line 22 – p. 48, line 4.) On the day of the incident P.H. and her sister, S.M., were at Respondent's home. Respondent's wife was P.H.'s godmother, and Respondent was related to P.H.'s father. (App. p. 48, lines 7 – 8 and 17 – 19.) P.H. often babysat for Respondent's children. (See for example App. p. 49, lines 22 – 25.) After a day of playing with Respondent's children at the home, P.H. and S.M. spent the night at Respondent's home; Respondent and his two children, D.P. and J.P., were also in the home that evening. (App. p. 50, lines 3 – 8; p. 68, line 21 – p. 69, line 25; p. 180, line 8 – p. 181, line 1.) P.H. slept on the couch while the other children slept in another room. (App. p. 50, lines 11 – 19; p. 70, lines 5 – 8; p. 78, lines 20 – 24; p. 164, lines 4 -5.) P.H. testified that during the night Respondent sexually assaulted her on the couch. (App. p. 50, line 24 – p. 55, line 8.) P.H. reported the incident to her sister, S.M., and Respondent's wife the next morning. (App. p. 52, line 12 – 15; p. 70, line 21 – p. 71, line 22.) The police were called, and P.H. was later taken to the hospital for an examination. (App. p. 53, lines 13 – 15; p. 71, line 20 – p. 72, line 4.) The hospital examination revealed relatively fresh bruising of the fourchette, an injury consistent with forcible sexual assault and was rarely possible otherwise.¹ (App. p. 85, lines 10 – 17; p. 86,

¹ The emergency room physician, Dr. Grant, testified that the bruising was "consistent with recent forcible sexual assault." (App. p. 86, line 18.) Dr. Grant stated that the injury was not likely to result otherwise- the only

lines 14 – 18; p. 92, line 23 – p. 93, line 10; p. 94, lines 1-6.) The bruise would have taken from several up to 24 hours to develop, and P.H. had been at Respondent’s home for nearly the entire 24 hours prior to the examination. (App. p. 93, lines 11 – 14.) P.H. gave a statement at the hospital to Officer Dwayne Derrick that she had been sexually assaulted at Respondent’s home on the couch. (App. p. 182, line 3 – 15.) At trial, the State presented testimony of the victim as well as corroborative testimony from S.M., the emergency room personnel, the investigating officer, and a DNA analyst.

Respondent had given statements to police that he and the children were in the home on the night in question and that he had only attempted to wake P.H. during the night and told her to go to bed. (App. p.185, lines 13 – 19; p. 300, lines 10 – 19; p. 302, line 22 – p. 303, line 13.) The next morning Respondent woke and went to work while the children slept. (App. p. 303, lines 11 – 13.) Respondent submitted a DNA sample to the investigating officer. (App. p. 186, line 8 – p. 187, line 23.) Respondent also testified at trial as to his version of the facts of the case and adamantly denied his guilt. (App. p. 298, line 8 - p. 318, line 21.) The defense pointed out inconsistencies in the victim’s statements and put forth the theory that the victim had a boyfriend around the time of the incident² and that the victim may have been angry at Respondent because he had disciplined her. (See for example App. p. 300, lines 12- 14; p. 479, line 23 – p. 480, line 3.)

At trial, the State presented DNA evidence through the testimony of a SLED forensic DNA analyst, Lily Gallman (hereinafter “Gallman”). (App. pp. 144 – 158; pp. 208 – 292.) Gallman was qualified as an expert in the field of forensic DNA analysis over trial counsel’s objection to her being qualified in the area of statistics. (App. p. 210, lines 5 – 10.) SLED tested

possibilities that would cause this type of injury are a blunt object or a straddle injury. (App. p. 92, line 23 – p. 93, line 10.) Dr. Grant stated that the bruise had occurred in the past 1-2 days. (App. p. 93, line 11 – p. 94, line 8.)

² P.H. denied having a boyfriend at the time of the incident and denied ever having intercourse with the boyfriend. (App. p. 66, line 9 – p. 67, line 18.)

four DNA samples³: (1) a known sample from the victim, (2) a known sample from Respondent, (3) vaginal swabs from the victim, and (4) a swab taken from an area of suspected semen.⁴ (App. p. 504.) From Gallman's analysis, a SLED report was generated and presented at trial. (App. pp. 504 – 513.) The SLED report analyzed thirteen genes. Each gene in the report bore a numeric label. For example, the first gene in the SLED report, D3,⁵ is a heterozygous 16, 17 for the victim. (App. p. 505, first column in Table 1.) In lay terms, the term "heterozygous" simply denotes that there are two alleles represented by two numbers in the report. Each gene could be heterozygous or homozygous. For example, the Respondent is a homozygous 13 at D13. (App. p. 505, column 8 in Table 1.) The report revealed that the vaginal swab and suspected semen samples taken could have come from Respondent, and Gallman testified that the samples were a possible match for the Respondent. (App. p. 221, lines 21 – p. 222, line 3; p. 283, lines 3 - 14.)

A. Respondent has presented no evidence of deficient conduct by trial counsel in failing to procure a DNA expert.

The PCR court found that "prevailing professional norms warranted that defense counsel would have consulted with a DNA expert in order to assist him in proper cross examination of the State's DNA expert, or called an expert at trial to refute and discredit the testimony of the DNA expert." (App. p. 557.) There is no credible evidence to support such a finding under South Carolina law.

South Carolina has not required counsel to retain a DNA expert in every case in which DNA evidence would be presented. Instead, our courts have required that counsel vigorously

³ Other swabs were also tested but only the vaginal swab and suspected semen swab actually contained semen and were therefore the only samples reported. (App. p. 213, lines 22 – 25.)

⁴ The PCR court's order states that Gallman "admitted she did not know the location from which the 'suspected semen swab' was taken." The swab was taken by emergency room personnel. (App. p. 111, line 19 – p. 112, line 1.)

⁵ On Table 1, the gene is labeled as D3S1358. According to expert testimony at PCR hearing the genes are referred to by shorter names, in this case D3. (App. p. 440, lines 5 – 7.) The gene in the fourth column of Table 1, D8S1179 would be called "D8" and so on.

cross-examine such witnesses. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) (trial counsel not ineffective for not retaining a DNA expert where counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence.) See also Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (citing Frasier v. State, *supra*; where counsel attacked the State's evidence through cross-examination as well as by posing objections when appropriate, counsel was not ineffective). In this case, counsel vigorously cross-examined all witnesses in the trial, including Gallman. Trial counsel quite vigorously cross-examined Gallman both out of the presence of the jury on proffer and in the presence of the jury.⁶ (App. p. 143, line 15 – p. 144, line 8; p. 147, line 1 – p. 154, line 21; p. 155, line 19 – p. 158, line 13; p. 222, line 12 – p. 235, line 7; p. 237, line 4 – p. 240, line 6; App. p. 240, line 9 – p. 288, line 20.) Prior to Gallman's testimony, counsel made an argument that the DNA evidence should be excluded based on chain of custody flaws, but the court permitted the evidence over counsel's objection. (App. p. 143, line 12 – p. 158, line 12.) Counsel also objected to Gallman's qualification as an expert in statistical analysis. (App. p. 209, line 16 – p. 210, line 10.)

Counsel's cross-examination clearly discredited Gallman's testimony before the jury. Counsel extensively cross-examined Gallman on her methodology. Counsel clearly had a grasp of DNA analysis; his questions reflected a knowledge of various DNA procedures. (See for example App. p. 243, line 10 – p. 244, line 10.) For example, counsel pointed out through cross-examination the time lag between the incident and the DNA testing. Counsel cultivated the idea that the investigation had only focused on the Respondent and never considered other possible

⁶ The PCR court's order notes that Gallman's testimony "consumed 90 pages" of the 272 pages of trial testimony. However, of this testimony, a great deal was conducted in camera, and the vast majority of Gallman's testimony was elicited on thorough cross-examination. Gallman first testified at trial completely out of the presence of the jury. (App. p. 143, line 13- p. 158, line 15.) Gallman's testimony resumes on App. p. 208. The jury was excused during this testimony as well, and an in camera proffer was conducted. (App. p. 222, line 9 – p. 239, line 3.) In sum, direct examination of Gallman in the presence of the jury occupied approximately 15 pages of the transcript. (App. p. 208, line 11 – p. 222, line 7 and App. p. 239, line 3 – App. p.240, line 6.) In contrast, cross-examination in the presence of the jury was occupied around 48 pages. (App. p. 240, line 9 – p. 288, line 20.)

suspects. (See for example App. p. 247, lines 17 – 19.) Counsel further testified that there was simply not money available to retain an expert, and Respondent was not indigent at the time of the trial. (App. p. 472, lines 8 – 19.)

Counsel clearly met the standard articulated in Frasier in that he “vigorously cross-examined the state’s DNA experts and attacked the accuracy of the evidence.” 306 S.C. 160 – 161, 410 S.E.2d 573. Counsel cannot be required to retain a DNA expert at every trial in which DNA evidence is introduced or to become a DNA expert himself; such a standard would be well beyond reasonable professional norms, especially where DNA evidence was not the sole crux of the case. The standard set in this case effectively places counsel in a situation where, in each case, even where other corroborative evidence exists such that DNA is not solely determinative of guilt, he or she must consult an expert to see if there is some angle that may prove beneficial on cross-examination. Trial counsel even testified that though he has employed experts in cases before, he had never been exposed to the information that Ostrowski presented to the PCR court. (App. p. 472, lines 14 – 19; p. 480, line 14 – p. 481, line 2.) In this case, counsel clearly performed within reasonable professional norms established by this state’s case law by vigorously cross-examining the State’s DNA expert and positing proper objections.

B. Respondent failed to carry his burden of demonstrating prejudice. There is no evidence demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

While a finding of prejudice would only be necessary if counsel’s performance could be found deficient, in the present case the evidence does not support a finding of prejudice from counsel’s alleged deficiency.

At PCR hearing, Respondent’s expert witness, Dr. Ronald S. Ostrowski (hereinafter “Ostrowski”), reviewed the SLED report which was introduced at trial. (App. pp. 416 – 469; pp.

526 – 538.) Ostrowski did not perform any DNA analysis in this case himself. (App. p. 458, line 17 – p. 459, line 1.) Ostrowski stated that the results could indeed be correctly interpreted as a match for Respondent. However, Ostrowski testified that there were interpretations of the DNA evidence whereby Respondent was not the only possible contributor, and Gallman had neglected to address such possible interpretations in her testimony. Ostrowski’s main concern with the testimony of Gallman at trial was that Gallman stated she could not “exclude” Respondent as a contributor. (App. p. 225, lines 15 – 16⁷; p. 283, lines 23 - 24.) For example, Ostrowski stated that the result for gene D3 in samples 1.7 m and 1.10 m could have been interpreted not only as implicating Respondent; the result could also be interpreted as a mixture of DNA from the victim and a person with a homozygous 15 or a heterozygous 15, 16 at gene D3. (See Table 1, column 1 on App. p. 505.) Respondent is heterozygous 15, 17 at gene D3, and this is also a valid interpretation. (App. p. 444, line 3 – p. 446, line 18; p. 463, lines 11 - 20.) According to Ostrowski, *any of these interpretations would be correct.* (App. p. 462, lines 1 – 13; p. 463, line 21 – p. 464, line 20; p. 468, lines 11 -20. See also App. p. 446, lines 22 –23; p. 460, lines 4 – 9.) Ostrowski also noted that some of the results should be interpreted “with caution” under SLED guidelines. (App. p. 450, line 7 – p. 451, line 1; p. 451, line 21 – p. 452, line 13.) In sum, Ostrowski testified that there were legitimate interpretations that would exclude Respondent as a contributor; however, the interpretation that Respondent could be a contributor, or a *match*, to this sample is just as valid. (App. p. 462, lines 1 – 13; App. p. 463, line 21 – p. 464, line 20; p. 468, lines 11 -20.) Therefore, even though there are many alternate theories that could have been presented, Respondent remains a possible *match* for the samples taken from the victim, and no interpretation consistent with the Respondent could be excluded.⁸

⁷ Given outside the presence of the jury.

⁸ As Ostrowski noted, “exclusion is 100 percent.”

The court's order notes that under gene D13 for item 1.7 "[Respondent] can be completely excluded altogether." (App. p. 553) *This was not Ostrowski's testimony and is therefore not a proper finding. Ostrowski did not testify as to this result at PCR hearing at all.* Ostrowski did testify that with regard to the result in D7 there are 2 plausible explanations as to why no results contained the number 12 from Respondent: (1) the presence of the victim's DNA which didn't separate out nicely and (2) that the perpetrator is a homozygous ten. (App. p. 468, lines 9 –24.)

Ostrowski also stated at PCR hearing that Gallman's testimony at trial that only identical twins have identical DNA is misleading. (App. p. 441, lines 9 –16.) Ostrowski emphasized that identical twins do indeed share the same entire strand of DNA. However, individuals may share some identical strands of DNA. Because the SLED report does not analyze the entire strand of DNA, multiple individuals could have the same profile generated by the SLED report (See App. p. 442, line 24 – p. 443, line 13.) Respondent argues that this misleading testimony prejudiced him when Gallman stated that he was a match for the samples taken. However, it is clear from the probability testimony given at trial that Gallman was not claiming that the DNA results matching Respondent with the samples were absolute. For example, the report states (and Gallman testified) that the probability of selecting an unrelated individual having a DNA profile *matching* item 1.7 is 1 in 139.⁹ As the PCR court noted, that number would mean that in South Carolina, some 11,000 unrelated individuals would be likely to *match* item 1.7. (App. p. 442, lines 11 – 23.) The report also notes that the probability of selecting an unrelated male who

⁹ Ostrowski notes that the 1 in 139 number is incorrect because this number reflects an incidence among the southwestern Hispanic population. (App. p. 442, lines 19 – 23) The correct number does not appear to have been given at PCR hearing. If the number were higher than 139, this would not have been beneficial to Respondent.

would contribute to the mixture found in item 1.10 was 1 in 3,500.¹⁰ It is highly unlikely that Gallman's remark about identical twins had any effect on the outcome of the trial.

Respondent also took issue with counsel's failure to cross-examine the statistical data given at trial. Ostrowski testified that there would more likely be a match among related males as opposed to unrelated males. The only male related to Respondent mentioned in the case is Respondent's son, D.P. At the time of the incident D.P. was nine (9) years old. Because no males who could be potential perpetrators and were related to Respondent were in the home at the time of the incident, statistical analysis as to similarities between the DNA of related males would not have been of exculpatory value to Respondent. Therefore, counsel's failure to cross-examine Gallman on the statistics of a match among related males or present evidence that related males had a higher probability of matching the DNA found on the victim was in no way prejudicial to Respondent.

As Respondent and trial counsel noted, Gallman's testimony was difficult to follow. Respondent himself argued that it was unlikely that the jury understood Gallman's testimony.

Trial counsel testified that:

...[Gallman's] testimony was terrible. ...[Trial counsel didn't] think anybody in the courtroom understood [Gallman's] testimony... It was honestly difficult for her to get anything across. [Counsel thought] that was the one thing she could say, she said it matched. And then [counsel] kept trying to say, well how do you know it matched. And then [Gallman] would try to explain it and she couldn't explain it.

(App. p. 485, lines 9 – 18.) Counsel later added that Gallman's testimony lacked credibility on its own. (App. p. 491, line 14 – p. 492, line 1.) The only evidence before the PCR court was that Gallman's trial testimony was difficult to follow, and even Respondent argued that the testimony

¹⁰ Ostrowski notes that this number is correct. (App. p. 454, lines 22 – 24.)

was difficult to follow. Given the other evidence in the case tending to show Respondent's guilt, it is unlikely that Gallman's testimony was the linchpin in the jury's determination of guilt.

Further, the testimony of a victim need not be corroborated in a criminal sexual conduct case. S.C. Code Ann. §16-3-657 (1976). In the case at bar, the jury was so instructed. (App. p. 357, lines 5 – 14.) The DNA evidence in this case was corroborative of the victim's testimony and was not essential to the jury's determination of guilt. This makes the possibility that the outcome of the proceeding would have been different with assistance from an expert such as Ostrowski even more remote. Moreover, the corroborating evidence without the DNA evidence was strong: the jury also had medical testimony that the victim's physical injury was most likely caused by sexual assault, corroborative testimony from S.M., and corroborating testimony from the investigating officer to consider in rendering their verdict.

Respondent has clearly failed to carry his burden of showing prejudice from failure to procure expert witness testimony. While as trial counsel noted, this information may have been helpful to the defense, it is unlikely that the result of the proceeding would have been any different.¹¹ As Orstrowski noted, the interpretations of the DNA which would have excluded the Respondent are just as correct as the interpretation which is consistent with the Respondent. No interpretation of Respondent as the contributor could be excluded. Had counsel had access to Ostrowski's expertise, counsel may have been able to suggest alternative explanations for the DNA profile obtained from the victim, but an equally valid interpretation implicating Respondent was available at each site.¹² Therefore, even with the expert testimony from the PCR hearing, the DNA evidence in this case is not per se exculpatory. Given the victim's testimony

¹¹ Though counsel initially opined that he "[couldn't] say we were prejudiced, but I think there's a very good chance there might could have been a different result." (App. p. 481, lines 20 – 23), counsel later added that he was as prepared as he could be with what he had at the time of trial and that he did not know if the doctor's testimony would have made a difference. (App. p. 489, line 15 – p. 490, line 3.)

¹² The DNA results in this case were of the form commonly used in criminal trials. Though no testimony was provided as to whether every DNA "match" derived from reports of this type would be subject to other interpretations, it would seem that to find prejudice in this case would likely affect a large number of convictions.

and the other corroborative testimony, notably the discovery of an injury inflicted within 24 hours of the examination by sexual assault, the jury could have reached their guilty verdict without DNA evidence.

Because Respondent has failed to carry his burden of demonstrating prejudice such that the outcome of the proceeding would have been different, the State respectfully asks that the PCR court's order be reversed.

II. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim.

The PCR court found that trial counsel should have sought an evaluation of the victim pursuant to In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004) (court may order a child complainant in a sexual assault to submit to a psychological evaluation on a showing of compelling need). However, In re Michael H. was not decided until 2004, long after Respondent's trial in 2002.¹³ When In re Michael H. was decided in 2004, "[w]hether a court has the authority to order a victim in a sexual assault prosecution to submit to a psychological examination [was] an issue of first impression in South Carolina" and there was a split in authority in other jurisdictions on the issue. 360 S.C. 546, 602 S.E.2d 732. It is well settled that an attorney is not required to anticipate or discover changes in the law or facts, which did not exist at the time of trial, to render ineffective assistance of counsel. See for example Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial). His failure to make such a

¹³ See In re Michael H., Op. No. 25529 (S.C. Sup. Ct. filed Sept. 16, 2002), rehearing granted October 9, 2002. The case was reheard on December 3, 2002, approximately one week prior to Respondent's trial. The opinion was not refiled until August 20, 2004.

motion when the issue had yet to be decided in this state cannot be said to be outside the range of competence required in criminal cases.

Furthermore, there is no evidence of prejudice to support the PCR court's ruling on this issue. At PCR hearing, a forensic evaluation of P.H. dated June 13, 2002, approximately six months prior to Respondent's trial, was entered into evidence. (App. pp. 540 – 543.) In the evaluation, it was determined that P.H. was not competent to stand trial on a family court charge. Because no evidence was presented at PCR hearing that had P.H. been evaluated for her ability to testify as a witness, she would have been found incompetent to testify, any assertion as to P.H.'s competence as a witness is merely speculative. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). The competence required of a witness is a far different standard from the competence required of a criminal defendant. See Rule 601, SCRE. At trial, P.H. communicated with the solicitor, defense counsel, and the court, and there is no evidence that P.H. did not understand her duty to tell the truth as required by Rule 601, SCRE.¹⁴ The DJJ forensic evaluation for criminal responsibility is not a substitute for expert testimony that P.H. was incompetent as a witness.

Even if counsel should have known to seek an evaluation of the victim, it is unlikely such a motion would be successful. Trial counsel stated that at the time of trial he did not see any reason to challenge the victim's competence to testify. Counsel was able to communicate with the victim on cross-examination. (App. p. 487, line 22 – p. 488, line 8.) See Rule 601, SCRE (witness may be disqualified if incapable of expressing himself). In In re Michael H., our court adopted the guidelines in State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992). These guidelines include the age of the victim and the evidence already available for the defendant's use. In contrast to the complainant in In re Michael H., supra, P.H. was seventeen (17) years old

¹⁴ P.H. was not questioned as to telling the truth at trial. Her sister, S.M., stated that she had never known P.H. to lie "about serious matters." (App. p. 78, line 25 – p. 79, line 2.)

by the time of trial. By the forensic evaluation, mild mental retardation was a previous diagnosis, but the examiners “believe this is a gross under-estimation of her true ability.” (App. p. 542.) P.H.’s limited mental ability was already in evidence. Where the complainant in In re Michael H. heard voices who told him that he should have raped someone, P.H.’s examiners “noted no evidence of visual or auditory hallucinations during either examination session” though P.H. claimed she heard voices calling her name and saw spirits. (App. p. 541.) In considering the effects of an examination related to this case on the victim under Delaney, it should be noted that P.H. attempted to commit suicide following the sexual assault and became very emotional at trial. (App. p. 48, lines 8 – 10; p. 55, lines 4 – 14.)

Finally, trial counsel articulated a valid trial strategy with regard to this issue. See for example Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (where counsel articulates valid reasons for employing a certain strategy, counsel’s choice of tactics will not be deemed ineffective assistance). Trial counsel also testified that it was his strategy “not to make a big deal about the competency.” (App. p. 488, lines 12 – 13.) During trial, counsel was able to point out several inconsistencies with the victim’s story. (App. p. 487, lines 8-9.)

Because there is no evidence to support the PCR court’s ruling that counsel was ineffective in failing to secure a psychological examination of the victim, the PCR court’s ruling should be reversed.

CONCLUSION

For the foregoing reasons, the petitioner submits that this Court should grant the Petition and reverse the findings of the lower court. If this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Jan. 7, 2009

STATE OF SOUTH CAROLINA

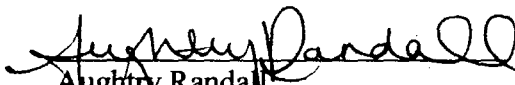
IN THE SUPREME COURT

PROOF OF SERVICE

I, Aughtry Randall, certify that I have served the Petition for Writ of Certiorari on Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to the Office of Appellate Defense.

I further certify that all parties required by Rule to be served have been served.

This 9th day of January, 2009.


Aughtry Randall
Administrative Assistant
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
D. Garrison Hill, Circuit Court Judge

ERNEST PRESSLEY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATE'S QUESTIONS PRESENTED

1.

Is there evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert?

2.

Is there evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim?

STATEMENT OF THE CASE

Respondent agrees with the state's procedural history of the case as set forth in its petition for writ of certiorari. The Honorable William P. Keesley was the trial judge. P. Andrew Anderson represented appellant, and Brenda Brisbin was the assistant solicitor. Respondent also agrees the proper standard of review of a post-conviction relief evidentiary ruling is whether there is "any evidence" of probative value to sustain the PCR court's finding. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Respondent also agrees that an applicant must prove that counsel's performance was deficient, and that he was prejudiced by that deficiency to obtain relief. See Strickland v. Washington, 466 U.S. 668 (1984).

Relevant Facts

The alleged victim,¹ P.H., was fifteen-years-old at the time of the alleged incident. She was mentally disabled and in special education classes. She said she thought respondent was her father's cousin. App. 47, l. 13 – 48, l. 21. Her competence to testify, and the incompetence of SLED DNA analyst Lily Gallman became the heart of respondent's PCR proceeding.

At trial, the complainant testified that on July 12, 2001, while she was sleeping on the couch, at respondent's house, that respondent "stuck his private part in me." App. 48, l. 7 – 52, l. 17. She claimed respondent "told me not to tell nobody." App. 52, ll. 9 – 12.

The complainant also said she told her sister and respondent's wife the next morning. App. 52, ll. 12 – 15; App. 70, l. 21 – 71, l. 22. Dr. Kevin Grant, of the Aiken Regional Medical Center, testified the bruising to the teenager was "consistent with recent forcible sexual assault." App. 82, l. 14 – 86, l. 24.

¹ For ease of reference, hereinafter she is referred to as "the complainant."

Respondent submitted a DNA sample to the investigating officer. App. 186, l. 8 – 187, l. 23. Respondent testified at trial and he emphatically denied his guilt. Respondent said he did not understand the DNA evidence or how it could allegedly link him to the crime. App. 298, l. 21 – 299, l. 1. Respondent repeatedly said he was not guilty of sexually assaulting the alleged victim and he did not know who had assaulted her, if anyone. App. 318, ll. 4 – 16.

At trial SLED Forensic DNA Analysis Lily Gallman testified over trial counsel's objection that she was not qualified in the area of statistics. He later withdrew that motion after an in camera hearing. App. 144 – 158, App. 208-234, l. 13.; App. 238, ll. 22-23; App. 292. Gallman testified that the DNA samples showed "there was a match between him [appellant] and the semen that was found on the vaginal swabs and the suspected semen." App. 221, l. 21 – 222, l. 3; App. 283, ll. 3 – 14. Defense counsel Andy Anderson said at one point that he did not understand Gallman's testimony that it was a match, "and I hopin the jury doesn't understand frankly." App. 234, l. 7 – 237, l. 24.

At the post-conviction relief hearing respondent presented the testimony of Dr. Ronald Ostrowski. Ostrowski gave the PCR court his background as follows:

Q. Dr. Ostrowski, what is your educational background?

A. I have a bachelors degree in biology with a minor in chemistry, a masters degree in biology with a dissertation in population genetics and a Ph.D. in biology with a dissertation in molecular genetics.

Q. Would you explain to us in lay terms what a masters in population genetics means?

A. As in law where you have subspecialties, tax law, criminal law, et cetera, geneticists have the same kinds of subspecialties. And two of them, these in particular, are - - the molecular genetics is self – explanatory, I think that's the laboratory work, white lab coats, test tubes, et cetera.

And population genetics is strictly a mathematical science. In a forensic situation, once it's a so-called match, the next question is a population genetics question, how many other people on the face of the earth would also match the evidence.

Q. Could you explain to us what your degree, your doctorate, in developmental molecular genetics means?

A. It was involved with analyzing DNA synthesis in a cellular situation.

Q. And would that have been the first time when you started dealing with the testing of DNA?

A. Yes, sir, that was 1968.

Q. And have you been involved in that since that time?

A. Yes, sir.

Q. Have you been - - what is your professional experience? Where have you worked?

A. I was a - - until three years ago, I was a professor in the biology department at the University of North Carolina Charlotte where I taught genetics, genetics labs, medical genetics and DNA profiling.

App. 418, l. 9 - 419, l. 20.

Dr. Ostrowski had worked on over four hundred DNA cases in six different states. App. 420, ll. 13 - 18.

Dr. Ostrowski said that SLED Agent Gallman's testimony was inaccurate where she stated on numerous occasions that there was nothing to exclude respondent as the DNA donor. App. 456, ll. 21 - 24. Dr. Ostrowski also said Gallman was not a statistician, she was not a geneticist, and he strongly questioned her credentials. App. 455, l. 6 - 457, l. 24.

Dr. Ostrowski also said that Gallman's claim of the odds of respondent not being the donor as one and one hundred thirty nine was not accurate. App. 442, l. 4 - 446, l. 18. Ostrwoski noted that different individuals share some identical strands of DNA. Dr. Ostrowski explained in great detail to the PCR judge how Gallman's testimony was misleading the jury. App. 426, l. 12 - 457, l. 13.

Defense counsel Paul Andrew Anderson testified the alleged victim "was a terrible witness." She had a full scale IQ in October 1999 of fifty-seven. App. 473, l. 12 - 475, l. 14. Anderson also offered that respondent "did a great job testifying" and he thought his cross-examination of the complainant should have shown the jury the problems with her testimony. The following occurred regarding the DNA evidence:

- Q: Obviously, you did the best you could with what you had?
- A. I feel like I did.
- Q. Had you had Dr. Ostrowski or another expert, could you have done better?
- A. Yes. Obviously, yes.
- Q. The PCR case law makes you take another step and that step is was he prejudiced by that. Do you feel, as the individual that was most intimately involved in all of this, that had Dr. Ostrowski or someone like him testified, there could have been a different result?
- A. I mean, I'm under oath. I think Ms. Gallman did a terrible job in that she works for the State of South Carolina, that's - - I mean, she did a terrible job. The doctor today was much more eloquent. I don't see how he couldn't have helped. I think I can say under oath - - I mean, I can't say we were prejudiced, *but I think there's a very good chance there might could have been a different result.*

Q. Were you the only court official concerned about Ms. Gallman's testimony and her expertise?

A. No. Judge Keesley stopped the cross-examination, and, again, I thought I was doing a good job cross-examining her, and he basically said, Ms. Gallman, if you don't get it together, I'm going to exclude the DNA. And Ernest and I were very excited about that because we really did feel like that was the key to their case because I really felt like we had poked a lot of holes in the state's case, you know, leading up to the DNA. And then they took a break and when we came back, she tied it up good enough for Judge Keesley and he let it in.

App. 481, l. 3 – 482, l. 12. (emphasis added).

Anderson also said he thought “that I did a pretty good job with her [Gallman] . . . “for not having an expert.” Anderson also said and I know with what he [Dr. Ostrowski] said today, which you brought out on cross, it could be Ernest's DNA or it could be, you know, not Ernest's DNA and I didn't understand the stuff well enough to [have] asked that question. And to me, that was my biggest shortcoming was not being able to ask her that question. The questions you just asked him I should have asked her.” App. 484, ll. 13 – 20.

Anderson admitted SLED agent Gallman “said it matched. And then I kept trying to say, well how do you know it matched. And then she would try to explain it and she couldn't explain it.” App. 485, ll. 4 – 18. On redirect examination Anderson also acknowledged that Gallman's DNA testimony “obviously hurt.” App. 490, l. 17 – 491, l. 8.

As to whether or not the complainant was competent to testify, Anderson also said “I think it was trial strategy to not make a big deal about the [alleged victim] competency.” App. 488, l. 1 – 490, l. 13.

Order granting relief

In the order granting PCR the court wrote that “due to its nearly infallible accuracy, DNA is the most powerful forensic evidence heard in courtrooms.” App. 550. The PCR court noted Gallman’s testimony “that Pressley’s DNA was a ‘match’ for semen found in the victim’s vagina, and that ‘nothing’ excluded Pressley’s as a suspect.” App. 551. The PCR court found Dr. Ostrowski’s testimony “highly credible and compelling.” He demonstrated that Gallman’s assertion “that nothing excluded Pressley as a suspect was simply wrong in several fundamentally important respects.” App. 551.

The judge concluded that the jury was left with inaccurate information about respondent’s DNA from Gallman’s testimony. These included her testimony that nothing excluded respondent as a suspect, and her overbroad “expert opinion” that respondent’s DNA was a “match.” The judge also found the Gallman’s statistical frequency testimony regarding “the match” failed to disclosed significant facts. App. 556.

The judge wrote that the courts have “recognized what scientists have long urged: that due to the similarity of most human DNA, a bare statement that one’s DNA ‘matches’ is meaningless. As one federal court has remarked, “without the probability assessment, the jury does not know what to make of the fact that the [DNA] patterns match, the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa.” United State v. Yee, 134 F.R.D. 161, 181 (N.D. Ohio 1991).” App. 556, n.

The PCR judge rejected the state’s reliance on Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) finding that defense counsel Anderson’s cross-examination was insufficient in the absence of defense expert testimony. The PCR court noted that the DNA evidence in Frasier’s

trial did not implicate him, but did implicate his co-defendant. App. 558. The court found “under these specific circumstances here, the cross-examination of Gallman was not an adequate substitute for a defense expert.” App. 558. The PCR concluded “trial counsel’s failure to obtain a DNA expert **for consultation** or to testify at trial rose to the level of deficient performance to prejudice the applicant.” App. 559. (emphasis added).

The PCR judge also found trial counsel ineffective for not moving to have the complainant evaluated for competency. The judge noted that the teenager had recently been found incompetent to stand trial in a juvenile case. Her full scale IQ was found to be fifty-two and also fifty-seven. App. 559. That forensic evaluation found the complainant to be incompetent and mildly retarded. It also noted she suffered from emotional and behavioral problems and that she had reported voices calling her name and she had stated that she sees “the spirits of dead people walking around my house.” App. 559. The PCR court found the failure to request a mental evaluation under these circumstances could not be deemed a valid “strategy.” App. 560.

The order noted that if the complainant was incompetent and could not testify, “the state’s case is crippled.” If the alleged victim was found competent “the defense lost nothing.” App. 560.

ARGUMENT

1.

There was evidence to support the PCR court's finding that defense counsel was ineffective for failing to **consult** or retain a DNA expert to testify.

The PCR court correctly found Dr. Ostrowski's testimony was very creditable. Defense counsel was also correct to admit that Ostrowski's testimony was very convincing and that it would have assisted him at trial. He also acknowledged there was a good chance the outcome of the trial would have different. Defense counsel also admitted at the time of the trial he was not sufficiently prepared to totally discredit Gallman's testimony as Dr. Ostrowski did at the PCR hearing. Counsel admitted after listening to Dr. Ostrowski that he now had a much better grasp on DNA evidence.

The state correctly acknowledges the standard on appeal here is whether there is any evidence to support the judge's findings. See *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624, 626 (1989). Here, there was not only evidence to support the PCR judge's findings, but strong evidence showing defense counsel was deficient in his handling of the DNA evidence, and that its deficiency prejudiced respondent. See *Strickland v. Washington*, 466 U.S. 668 (1984).

It is difficult to imagine more prejudicial testimony than a DNA expert's testimony that respondent's DNA – his semen – “matched” that found in the complainant's vagina. That testimony was very misleading as Dr. Ostrowski explained at length at the PCR hearing. Since there was evidence to support the PCR court's ruling, the granting of certiorari respectfully is not necessary to the interests of justice.

2.

There was evidence of probative value to support the PCR court's finding that defense counsel was ineffective for not moving to have an independent evaluation of the complainant.

The PCR court correctly held trial counsel should have sought an evaluation of the victim pursuant to In Re Michael H., 360 S.C. 540, 602, S.E.2d 729 (2004). The state's argument that defense counsel could not have anticipated the decision In Re Michael H. at respondent's trial in 2002 ignores the fact that there was a case law from other jurisdictions allowing such an evaluation as this Court recognized in the case of In Re Michael H.

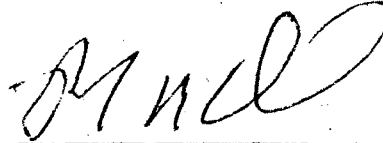
There was probative evidence to support the PCR court's decision. The complainant had been found incompetent in a recent criminal domestic violence case after Family Court Judge C. David Sawyer, Jr. ordered her evaluated by the Department of Disabilities and Special Needs. Her IQ scores of fifty-two or fifty-seven were strongly indicative of the fact that she was mentally retarded. The prior evaluation also noted her behavioral and emotional problems, that the teenager heard voices, and that she saw dead people walking around her house.

The PCR court correctly found that the defense did not have "anything to lose" by having the complainant evaluated, and everything to gain. If the child was found incompetent to testify, the state did not have a case against respondent without her testimony. Since there was evidence to support the PCR judge's ruling, certiorari should be denied. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989).

CONCLUSION

For the forgoing reasons, certiorari is not warranted in this case.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR RESPONDENT.

May 26, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

D. Garrison Hill, Circuit Court Judge

ERNEST PRESSLEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

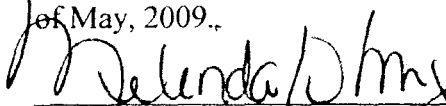
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Mary S. Williams, Esquire, this 26th day of May, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 26th day
of May, 2009.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2018

John Cannon Jr

C.J.

Columbia, South Carolina

FILED

March 22, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County
The Honorable D. Garrison Hill, Circuit Court Judge
C.A. No. 2004-CP-02-1520

ERNEST PRESSLEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF PETITIONER

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A. Respondent has presented no evidence of deficient conduct by trial counsel in failing to procure a DNA expert.

B. Respondent failed to carry his burden of demonstrating prejudice. There is no evidence demonstrating a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different.

II. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim.

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STATEMENT OF ISSUES ON APPEAL

- III. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert.**
- A. Respondent has presented no evidence of deficient conduct by trial counsel in failing to procure a DNA expert.
 - B. Respondent failed to carry his burden of demonstrating prejudice. There is no evidence demonstrating a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different.
- IV. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim.**

STATEMENT OF THE CASE

Ernest Pressley (hereinafter “Respondent”) was indicted by the Aiken County Grand Jury during the March 2002 term of General Sessions Court for Criminal Sexual Conduct with a Minor – Second Degree (2002-GS-02-340) involving victim P.H.¹ (App. pp. 563 - 564.) P. Andrew Anderson, Esquire, represented Respondent. Respondent proceeded to a jury trial before the Honorable William P. Keesley. (App. pp. 1 – 370.) Respondent was found guilty as indicted, and Judge Keesley sentenced him to twenty (20) years’ confinement. (App. p. 565.)

A notice of appeal was filed on Respondent’s behalf, and an appeal was perfected. A brief pursuant to Anders v. California, 386 U.S. 738 (1967) was submitted. (App. pp. 371 – 379.) The appeal was dismissed by the South Carolina Court of Appeals. State v. Pressley, Op. No. 2004-UP-569 (S.C. Ct. App. filed November 15, 2004). (App. pp. 380 – 381.) The remittitur was sent on December 16, 2004. (App. p. 382.)

Respondent filed an application for post-conviction relief (PCR) on November 22, 2004, alleging ineffective assistance of counsel and denial of due process. (App. pp. 383 – 401.) The State made its Return on or about June 9, 2005. (App. pp. 402 – 406.) An amended PCR application dated January 16, 2006, was filed on Applicant’s behalf. (App. pp. 407 – 412.) An evidentiary hearing was convened of February 26, 2008, before the Honorable D. Garrison Hill. (App. pp. 413 – 503.) Respondent was present and represented by James E. Whittle, Esquire; Assistant Attorney General Lance S. Boozer appeared on behalf of the State.

By written order dated July 2, 2008, and filed July 7, 2008, Judge Hill granted

¹ The minor victim’s name has been redacted from the Appendix. For the purposes of this appeal, she is referred to as “P.H.” All other minors’ names have likewise been redacted for purposes of this action and each minor’s name is reduced to by two letters in this brief.

Respondent's PCR application on the basis of ineffective assistance of counsel, vacated his conviction, and granted a new trial. (App. pp. 544 – 562.)

This petition for writ of certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, *supra*. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, *supra*. The applicant must overcome this presumption in order to receive relief. Cherry v. State, *supra*.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington, *supra*. 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 v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert.

The PCR court found that trial counsel's failure to retain an independent DNA expert to assist him either as a consultant in preparation for cross-examination of the SLED DNA analyst or as an expert witness constituted ineffective assistance of counsel.

The charges in this case arise from an allegation of sexual assault made by the victim, P.H. The victim is mentally disabled. (See for example App. p. 47, line 22 – p. 48, line 4.) On the day of the incident P.H. and her sister, S.M., were at Respondent's home. Respondent's wife was P.H.'s godmother, and Respondent was related to P.H.'s father. (App. p. 48, lines 7 – 8 and 17 – 19.) P.H. often babysat for Respondent's children. (See for example App. p. 49, lines 22 – 25.) After a day of playing with Respondent's children at the home, P.H. and S.M. spent the night at Respondent's home; Respondent and his two children, D.P. and J.P., were also in the home that evening. (App. p. 50, lines 3 – 8; p. 68, line 21 – p.69, line 25; p. 180, line 8 – p. 181, line 1.) P.H. slept on the couch while the other children slept in another room. (App. p. 50, lines 11 – 19; p. 70, lines 5 – 8; p. 78, lines 20 – 24; p. 164, lines 4 -5.) P.H. testified that during the night Respondent sexually assaulted her on the couch. (App. p. 50, line 24 – p. 55, line 8.) P.H. reported the incident to her sister, S.M., and Respondent's wife the next morning. (App. p. 52, line 12 – 15; p. 70, line 21 – p. 71, line 22.) The police were called, and P.H. was later taken to the hospital for an examination. (App. p. 53, lines 13 – 15; p. 71, line 20 – p. 72, line 4.) The hospital examination revealed relatively fresh bruising of the fourchette, an injury

consistent with forcible sexual assault and rarely possible otherwise.² (App. p. 85, lines 10 – 17; p. 86, lines 14 – 18; p. 92, line 23 – p. 93, line 10; p. 94, lines 1-6.) The bruise would have taken from several up to 24 hours to develop, and P.H. had been at Respondent's home for nearly the entire 24 hours prior to the examination. (App. p. 93, lines 11 – 14.) P.H. gave a statement at the hospital to Officer Dwayne Derrick that she had been sexually assaulted at Respondent's home on the couch. (App. p. 182, line 3 – 15.) At trial, the State presented testimony of the victim as well as corroborative testimony from S.M., the emergency room personnel, the investigating officer, and a DNA analyst.

Respondent had given statements to police that he and the children were in the home on the night in question and that he had only attempted to wake P.H. during the night and told her to go to bed. (App. p.185, lines 13 – 19; p. 300, lines 10 – 19; p. 302, line 22 – p. 303, line 13.) The next morning Respondent woke and went to work while the children slept. (App. p. 303, lines 11 – 13.) Respondent submitted a DNA sample to the investigating officer. (App. p. 186, line 8 – p. 187, line 23.) Respondent also testified at trial as to his version of the facts of the case and adamantly denied his guilt. (App. p. 298, line 8 - p. 318, line 21.) The defense pointed out inconsistencies in the victim's statements and put forth the theory that the victim had a boyfriend around the time of the incident³ and that the victim may have been angry at Respondent because he had

² The emergency room physician, Dr. Grant, testified that the bruising was "consistent with recent forcible sexual assault." (App. p. 86, line 18.) Dr. Grant stated that the injury was not likely to result otherwise- the only possibilities that would cause this type of injury are a blunt object or a straddle injury. (App. p. 92, line 23 – p. 93, line 10.) Dr. Grant stated that the bruise had occurred in the past 1-2 days. (App. p. 93, line 11 – p. 94, line 8.)

³ P.H. denied having a boyfriend at the time of the incident and denied ever having intercourse with the boyfriend. (App. p. 66, line 9 – p. 67, line 18.)

disciplined her. (See for example App. p. 300, lines 12- 14; p. 479, line 23 – p. 480, line 3.)

At trial, the State presented DNA evidence through the testimony of a SLED forensic DNA analyst, Lily Gallman (hereinafter “Gallman”). (App. pp. 144 – 158; pp. 208 – 292.) Gallman was qualified as an expert in the field of forensic DNA analysis over trial counsel’s objection to her being qualified in the area of statistics. (App. p. 210, lines 5 – 10.) SLED tested four DNA samples⁴: (1) a known sample from the victim, (2) a known sample from Respondent, (3) vaginal swabs from the victim, and (4) a swab taken from an area of suspected semen.⁵ (App. p. 504.) From Gallman’s analysis, a SLED report was generated and presented at trial. (App. pp. 504 – 513.) The SLED report analyzed thirteen genes. Each gene in the report bore a numeric label. For example, the first gene in the SLED report, D3,⁶ is a heterozygous 16, 17 for the victim. (App. p. 505, first column in Table 1.) In lay terms, the term “heterozygous” simply denotes that there are two alleles represented by two numbers in the report. Each gene could be heterozygous or homozygous. For example, the Respondent is a homozygous 13 at D13. (App. p. 505, column 8 in Table 1.) The report revealed that the vaginal swab and suspected semen samples taken could have come from Respondent, and Gallman testified that the samples were a possible match for the Respondent. (App. p. 221, lines 21 – p. 222, line 3; p. 283, lines 3 - 14.)

⁴ Other swabs were also tested but only the vaginal swab and suspected semen swab actually contained semen and were therefore the only samples reported. (App. p. 213, lines 22 – 25.)

⁵ The PCR court’s order states that Gallman “admitted she did not know the location from which the ‘suspected semen swab’ was taken.” The swab was taken by emergency room personnel. (App. p. 111, line 19 – p. 112, line 1.)

⁶ On Table 1, the gene is labeled as D3S1358. According to expert testimony at PCR hearing the genes are referred to by shorter names, in this case D3. (App. p. 440, lines 5 – 7.) The gene in the fourth column of Table 1, D8S1179 would be called “D8” and so on.

A. Respondent has presented no evidence of deficient conduct by trial counsel in failing to procure a DNA expert.

The PCR court found that “prevailing professional norms warranted that defense counsel would have consulted with a DNA expert in order to assist him in proper cross examination of the State’s DNA expert, or called an expert at trial to refute and discredit the testimony of the DNA expert.” (App. p. 557.) There is no credible evidence to support such a finding under South Carolina law.

South Carolina has not required counsel to retain a DNA expert in every case in which DNA evidence would be presented. Instead, our courts have required that counsel vigorously cross-examine such witnesses. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) (trial counsel not ineffective for not retaining a DNA expert where counsel vigorously cross-examined the State’s DNA experts and attacked the accuracy of the evidence.) See also Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (citing Frasier v. State, *supra*; where counsel attacked the State’s evidence through cross-examination as well as by posing objections when appropriate, counsel was not ineffective). In this case, counsel vigorously cross-examined all witnesses in the trial, including Gallman. Trial counsel quite vigorously cross-examined Gallman both out of the presence of the jury on proffer and in the presence of the jury.⁷ (App. p. 143, line 15 – p. 144, line 8; p. 147, line 1 – p. 154, line 21; p. 155, line 19 – p. 158, line 13; p. 222,

⁷ The PCR court’s order notes that Gallman’s testimony “consumed 90 pages” of the 272 pages of trial testimony. However, of this testimony, a great deal was conducted *in camera*, and the vast majority of Gallman’s testimony was elicited on thorough cross-examination. Gallman first testified at trial completely out of the presence of the jury. (App. p. 143, line 13- p. 158, line 15.) Gallman’s testimony resumes on App. p. 208. The jury was excused during this testimony as well, and an *in camera* proffer was conducted. (App. p. 222, line 9 –p. 239, line 3.) In sum, direct examination of Gallman in the presence of the jury occupied approximately 15 pages of the transcript. (App. p. 208, line 11 – p. 222, line 7 and App. p. 239, line 3 – App. p.240, line 6.) In contrast, cross-examination in the presence of the jury was occupied around 48 pages. (App. p. 240, line 9 – p. 288, line 20.)

line 12 – p. 235, line 7; p. 237, line 4 – p. 240, line 6; App. p. 240, line 9 – p. 288, line 20.) Prior to Gallman’s testimony, counsel made an argument that the DNA evidence should be excluded based on chain of custody flaws, but the court permitted the evidence over counsel’s objection. (App. p. 143, line 12 – p. 158, line 12.) Counsel also objected to Gallman’s qualification as an expert in statistical analysis. (App. p. 209, line 16 – p. 210, line 10.)

Counsel’s cross-examination clearly discredited Gallman’s testimony before the jury. Counsel extensively cross-examined Gallman on her methodology. Counsel clearly had a grasp of DNA analysis; his questions reflected knowledge of various DNA procedures. (See for example App. p. 243, line 10 – p. 244, line 10.) For example, counsel pointed out through cross-examination the time lag between the incident and the DNA testing. Counsel cultivated the idea that the investigation had only focused on the Respondent and never considered other possible suspects. (See for example App. p. 247, lines 17 – 19.) Counsel further testified that there was simply not money available to retain an expert, and Respondent was not indigent at the time of the trial. (App. p. 472, lines 8 – 19.)

Counsel clearly met the standard articulated in Frasier in that he “vigorously cross-examined the state’s DNA experts and attacked the accuracy of the evidence.” 306 S.C. 160 – 161, 410 S.E.2d 573. Counsel cannot be required to retain a DNA expert at every trial in which DNA evidence is introduced or to become a DNA expert himself; such a standard would be well beyond reasonable professional norms, especially where DNA evidence was not the sole crux of the case. The standard set in this case effectively places counsel in a situation where, in each case, even where other corroborative

evidence exists such that DNA is not solely determinative of guilt, he or she must consult an expert to see if there is some angle that may prove beneficial on cross-examination. Trial counsel even testified that though he has employed experts in cases before, he had never been exposed to the information that Ostrowski presented to the PCR court. (App. p. 472, lines 14 – 19; p. 480, line 14 – p. 481, line 2.) In this case, counsel clearly performed within reasonable professional norms established by this state's case law by vigorously cross-examining the State's DNA expert and positing proper objections.

B. Respondent failed to carry his burden of demonstrating prejudice. There is no evidence demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

While a finding of prejudice would only be necessary if counsel's performance could be found deficient, in the present case the evidence does not support a finding of prejudice from counsel's alleged deficiency.

At PCR hearing, Respondent's expert witness, Dr. Ronald S. Ostrowski (hereinafter "Ostrowski"), reviewed the SLED report which was introduced at trial. (App. pp. 416 – 469; pp. 526 – 538.) Ostrowski did not perform any DNA analysis in this case himself. (App. p. 458, line 17 – p. 459, line 1.) Ostrowski stated that the results could indeed be correctly interpreted as a match for Respondent. However, Ostrowski testified that there were interpretations of the DNA evidence whereby Respondent was not the only possible contributor, and Gallman had neglected to address such possible interpretations in her testimony. Ostrowski's main concern with the testimony of Gallman at trial was that Gallman stated she could not "exclude" Respondent as a contributor. (App. p. 225, lines 15 – 16⁸; p. 283, lines 23 - 24.) For example, Ostrowski stated that

⁸ Given outside the presence of the jury.

the result for gene D3 in samples 1.7 m and 1.10 m could have been interpreted not only as implicating Respondent; the result could also be interpreted as a mixture of DNA from the victim and a person with a homozygous 15 or a heterozygous 15, 16 at gene D3. (See Table 1, column 1 on App. p. 505.) Respondent is heterozygous 15, 17 at gene D3, and this is also a valid interpretation. (App. p. 444, line 3 – p. 446, line 18; p. 463, lines 11 - 20.) According to Ostrowski, *any of these interpretations would be correct.* (App. p. 462, lines 1 – 13; p. 463, line 21 – p. 464, line 20; p. 468, lines 11 -20. See also App. p. 446, lines 22 –23; p. 460, lines 4 – 9.) Ostrowski also noted that some of the results should be interpreted “with caution” under SLED guidelines. (App. p. 450, line 7 – p. 451, line 1; p. 451, line 21 – p. 452, line 13.) In sum, Ostrowski testified that there were legitimate interpretations that would exclude Respondent as a contributor; however, the interpretation that Respondent could be a contributor, or a *match*, to this sample is just as valid. (App. p. 462, lines 1 – 13; App. p. 463, line 21 – p. 464, line 20; p. 468, lines 11 - 20.) Therefore, even though there are many alternate theories that could have been presented, Respondent remains a possible *match* for the samples taken from the victim, and no interpretation consistent with the Respondent could be excluded.⁹

The court’s order notes that under gene D13 for item 1.7 “[Respondent] can be completely excluded altogether.” (App. p. 553) *This was not Ostrowski’s testimony and is therefore not a proper finding. Ostrowski did not testify as to this result at PCR hearing at all.* Ostrowski did testify that with regard to the result in D7 there are 2 plausible explanations as to why no results contained the number 12 from Respondent: (1) the presence of the victim’s DNA which didn’t separate out nicely and (2) that the perpetrator is a homozygous ten. (App. p. 468, lines 9 –24.)

⁹ As Ostrowski noted, “exclusion is 100 percent.”

Ostrowski also stated at PCR hearing that Gallman's testimony at trial that only identical twins have identical DNA is misleading. (App. p. 441, lines 9 –16.) Ostrowski emphasized that identical twins do indeed share the same entire strand of DNA. However, individuals may share some identical strands of DNA. Because the SLED report does not analyze the entire strand of DNA, multiple individuals could have the same profile generated by the SLED report (See App. p. 442, line 24 – p. 443, line 13.) Respondent argues that this misleading testimony prejudiced him when Gallman stated that he was a match for the samples taken. However, it is clear from the probability testimony given at trial that Gallman was not claiming that the DNA results matching Respondent with the samples were absolute. For example, the report states (and Gallman testified) that the probability of selecting an unrelated individual having a DNA profile *matching* item 1.7 is 1 in 139.¹⁰ As the PCR court noted, that number would mean that in South Carolina, some 11,000 unrelated individuals would be likely to *match* item 1.7. (App. p. 442, lines 11 – 23.) The report also notes that the probability of selecting an unrelated male who would contribute to the mixture found in item 1.10 was 1 in 3,500.¹¹ It is highly unlikely that Gallman's remark about identical twins had any effect on the outcome of the trial.

Respondent also took issue with counsel's failure to cross-examine the statistical data given at trial. Ostrowski testified that there would more likely be a match among related males as opposed to unrelated males. The only male related to Respondent mentioned in the case is Respondent's son, D.P. At the time of the incident D.P. was nine

¹⁰ Ostrowski notes that the 1 in 139 number is incorrect because this number reflects an incidence among the southwestern Hispanic population. (App. p. 442, lines 19 – 23) The correct number does not appear to have been given at PCR hearing. If the number were higher than 139, this would not have been beneficial to Respondent.

¹¹ Ostrowski notes that this number is correct. (App. p. 454, lines 22 – 24.)

(9) years old. Because no males who could be potential perpetrators and were related to Respondent were in the home at the time of the incident, statistical analysis as to similarities between the DNA of related males would not have been of exculpatory value to Respondent. Therefore, counsel's failure to cross-examine Gallman on the statistics of a match among related males or present evidence that related males had a higher probability of matching the DNA found on the victim was in no way prejudicial to Respondent.

As Respondent and trial counsel noted, Gallman's testimony was difficult to follow. Respondent himself argued that it was unlikely that the jury understood Gallman's testimony. Trial counsel testified that:

...[Gallman's] testimony was terrible. ... [Trial counsel didn't] think anybody in the courtroom understood [Gallman's] testimony... It was honestly difficult for her to get anything across. [Counsel thought] that was the one thing she could say, she said it matched. And then [counsel] kept trying to say, well how do you know it matched. And then [Gallman] would try to explain it and she couldn't explain it.

(App. p. 485, lines 9 – 18.) Counsel later added that Gallman's testimony lacked credibility on its own. (App. p. 491, line 14 – p. 492, line 1.) The only evidence before the PCR court was that Gallman's trial testimony was difficult to follow, and even Respondent argued that the testimony was difficult to follow. Given the other evidence in the case tending to show Respondent's guilt, it is unlikely that Gallman's testimony was the linchpin in the jury's determination of guilt.

Further, the testimony of a victim need not be corroborated in a criminal sexual conduct case. S.C. Code Ann. §16-3-657 (1976). In the case at bar, the jury was so instructed. (App. p. 357, lines 5 – 14.) The DNA evidence in this case was corroborative

of the victim's testimony and was not essential to the jury's determination of guilt. This makes the possibility that the outcome of the proceeding would have been different with assistance from an expert such as Ostrowski even more remote. Moreover, the corroborating evidence without the DNA evidence was strong: the jury also had medical testimony that the victim's physical injury was most likely caused by sexual assault, corroborative testimony from S.M., and corroborating testimony from the investigating officer to consider in rendering their verdict.

Respondent has clearly failed to carry his burden of showing prejudice from failure to procure expert witness testimony. While as trial counsel noted, this information may have been helpful to the defense, it is unlikely that the result of the proceeding would have been any different.¹² As Orstrowski noted, the interpretations of the DNA which would have excluded the Respondent are just as correct as the interpretation which is consistent with the Respondent. No interpretation of Respondent as the contributor could be excluded. Had counsel had access to Ostrowski's expertise, counsel may have been able to suggest alternative explanations for the DNA profile obtained from the victim, but an equally valid interpretation implicating Respondent was available at each site.¹³ Ostrowski's proffer of alternative interpretations offered no conflict with the data elicited from Gallman. Therefore, even with the expert testimony from the PCR hearing, the DNA evidence in this case is not exculpatory. Had counsel asked additional questions in consultation with Ostrowski or obtained his testimony, the fact that the DNA matches

¹² Though counsel initially opined that he "[couldn't] say we were prejudiced, but I think there's a very good chance there might have been a different result." (App. p. 481, lines 20 – 23), counsel later added that he was as prepared as he could be with what he had at the time of trial and that he did not know if the doctor's testimony would have made a difference. (App. p. 489, line 15 – p. 490, line 3.)

¹³ The DNA results in this case were of the form commonly used in criminal trials. Though no testimony was provided as to whether every DNA "match" derived from reports of this type would be subject to other interpretations, it would seem that to find prejudice in this case would likely affect a large number of convictions.

Respondent remains unchanged; Petitioner submits that the verdict would likewise be unchanged. See for example McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) (had counsel asked specific questions, verdict would not likely be different). Moreover, given the victim's testimony and the other corroborative testimony, notably the discovery of an injury inflicted within 24 hours of the examination by sexual assault, the jury could have reached their guilty verdict without DNA evidence.

Because Respondent has failed to carry his burden of demonstrating prejudice such that the outcome of the proceeding would have been different, the State respectfully asks that the PCR court's order be reversed.

II. There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim.

The PCR court found that trial counsel should have sought an evaluation of the victim pursuant to In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004) (court may order a child complainant in a sexual assault to submit to a psychological evaluation on a showing of compelling need). However, In re Michael H. was not decided until 2004, long after Respondent's trial in 2002.¹⁴ When In re Michael H. was decided in 2004, "[w]hether a court has the authority to order a victim in a sexual assault prosecution to submit to a psychological examination [was] an issue of first impression in South Carolina," and there was a split in authority in other jurisdictions on the issue. 360 S.C. 546, 602 S.E.2d 732. It is well settled that an attorney is not required to anticipate or discover changes in the law or facts, which did not exist at the time of trial, to render ineffective assistance of counsel. See for example Robinson v. State, 308 S.C. 74, 417

¹⁴ See In re Michael H., Op. No. 25529 (S.C. Sup. Ct. filed Sept. 16, 2002), rehearing granted October 9, 2002. The case was reheard on December 3, 2002, approximately one week prior to Respondent's trial. The opinion was not refiled until August 20, 2004.

S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial). His failure to make such a motion when the issue had yet to be decided in this state cannot be said to be outside the range of competence required in criminal cases.

Furthermore, there is no evidence of prejudice to support the PCR court's ruling on this issue. At PCR hearing, a forensic evaluation of P.H. dated June 13, 2002, approximately six months prior to Respondent's trial, was entered into evidence. (App. pp. 540 – 543.) In the evaluation, it was determined that P.H. was not competent to stand trial on a family court charge. Because no evidence was presented at PCR hearing that had P.H. been evaluated for her ability to testify as a witness, she would have been found incompetent to testify, any assertion as to P.H.'s competence as a witness is merely speculative. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). The competence required of a witness is a far different standard from the competence required of a criminal defendant. See Rule 601, SCRE. At trial, P.H. communicated with the solicitor, defense counsel, and the court, and there is no evidence that P.H. did not understand her duty to tell the truth as required by Rule 601, SCRE.¹⁵ The DJJ forensic evaluation for criminal responsibility is not a substitute for expert testimony that P.H. was incompetent as a witness.

Even if counsel should have known to seek an evaluation of the victim, it is unlikely such a motion would be successful. Trial counsel stated that at the time of trial he did not see any reason to challenge the victim's competence to testify. Counsel was able to communicate with the victim on cross-examination. (App. p. 487, line 22 – p.

¹⁵ P.H. was not questioned as to telling the truth at trial. Her sister, S.M., stated that she had never known P.H. to lie "about serious matters." (App. p. 78, line 25 – p. 79, line 2.)

488, line 8.) See Rule 601, SCRE (witness may be disqualified if incapable of expressing himself). In In re Michael H., our court adopted the guidelines in State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992). These guidelines include the age of the victim and the evidence already available for the defendant's use. In contrast to the complainant in In re Michael H., supra, P.H. was seventeen (17) years old by the time of trial. By the forensic evaluation, mild mental retardation was a previous diagnosis, but the examiners "believe this is a gross under-estimation of her true ability." (App. p. 542.) P.H.'s limited mental ability was already in evidence. Where the complainant in In re Michael H. heard voices who told him that he should have raped someone, P.H.'s examiners "noted no evidence of visual or auditory hallucinations during either examination session" though P.H. claimed she heard voices calling her name and saw spirits. (App. p. 541.) In considering the effects of an examination related to this case on the victim under Delaney, it should be noted that P.H. attempted to commit suicide following the sexual assault and became very emotional at trial. (App. p. 48, lines 8 – 10; p. 55, lines 4 – 14.)

Finally, trial counsel articulated a valid trial strategy with regard to this issue. See for example Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). Trial counsel also testified that it was his strategy "not to make a big deal about the competency." (App. p. 488, lines 12 – 13.) During trial, counsel was able to point out several inconsistencies with the victim's story. (App. p. 487, lines 8-9.)

Because there is no evidence to support the PCR court's ruling that counsel was ineffective in failing to secure a psychological examination of the victim, the PCR court's ruling should be reversed.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the order of the PCR court denying post-conviction relief be reversed.

Respectfully submitted,


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June 22, 2011.

STATE OF SOUTH CAROLINA

COURT OF APPEALS

Certiorari to Aiken County
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge
Case No. 2004-CP-02-1520

ERNEST PRESSLEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 22nd day of June, 20 11.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Aiken County

D. Garrison Hill, Circuit Court Judge

ERNEST PRESSLEY,

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v.

STATE OF SOUTH CAROLINA,

PETITIONER

BRIEF OF RESPONDENT

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STATE'S ISSUES PRESENTED

1.

There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where counsel did not retain a DNA expert to assist him as a consultant or expert.

2.

There is no evidence of probative value to support the PCR court's finding of ineffective assistance of counsel where trial counsel did not move for an independent psychological examination of the victim.

STATEMENT OF THE CASE

Respondent agrees with the state's procedural history of the case as set forth in its brief of petitioner. The Honorable William P. Keesley was the trial judge. P. Andrew Anderson represented appellant. Petitioner's brief at 4.

Respondent also agrees that the Honorable D. Garrison Hill granted PCR relief in his written order dated July 2, 2008 and filed July 7, 2008. Brief of Petitioner at 4-5. In addition, respondent agrees that the proper standard of review of a post-conviction relief evidentiary ruling is whether there is "any evidence" of probative value to sustain the PCR court's finding. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

Finally, respondent also agrees that an applicant must prove that counsel's performance was deficient, and that he was prejudiced by that deficiency to obtain relief. See Strickland v. Washington, 466 U.S. 668 (1984). See Brief of Petitioner at 6.

Relevant Facts

The alleged victim,¹ P.H., was fifteen-years-old at the time of the alleged incident. She was mentally disabled and in special education classes. She said she thought respondent was her father's cousin. App. 47, l. 13 – 48, l. 21. Her competence to testify, and the incompetence of SLED DNA analyst Lily Gallman became the heart of respondent's PCR proceeding.

At trial, the complainant testified that on July 12, 2001, while she was sleeping on the couch, at respondent's house, that respondent "stuck his private part in me." App. 48, l. 7 – 52, l. 17. She claimed respondent "told me not to tell nobody." App. 52, ll. 9 – 12.

The complainant also said she told her sister and respondent's wife the next morning. App. 52, ll. 12 – 15; App. 70, l. 21 – 71, l. 22. Dr. Kevin Grant, of the Aiken Regional Medical

Center, testified the bruising to the teenager was “consistent with recent forcible sexual assault.”

App. 82, l. 14 – 86, l. 24.

Respondent submitted a DNA sample to the investigating officer. App. 186, l. 8 – 187, l. 23. Respondent testified at trial and he emphatically denied his guilt. Respondent said he did not understand the DNA evidence or how it could allegedly link him to the crime. App. 298, l. 21 – 299, l. 1. Respondent repeatedly said he was not guilty of sexually assaulting the alleged victim and he did not know who had assaulted her, if anyone. App. 318, ll. 4 – 16.

At trial SLED Forensic DNA Analysis Lily Gallman testified over trial counsel’s objection that she was not qualified in the area of statistics. He later withdrew that motion after an in camera hearing. App. 144 – 158, App. 208-234, l. 13.; App. 238, ll. 22-23; App. 292. Gallman testified that the DNA samples showed “there was a match between him [appellant] and the semen that was found on the vaginal swabs and the suspected semen.” App. 221, l. 21 – 222, l. 3; App. 283, ll. 3 – 14. Defense counsel Andy Anderson said at one point that he did not understand Gallman’s testimony that it was a match, “and I hopin the jury doesn’t understand frankly.” App. 234, l. 7 – 237, l. 24.

At the post-conviction relief hearing respondent presented the testimony of Dr. Ronald Ostrowski. Ostrowski gave the PCR court his background as follows:

- Q. Dr. Ostrowski, what is your educational background?
- A. I have a bachelors degree in biology with a minor in chemistry, a masters degree in biology with a dissertation in population genetics and a Ph.D. in biology with a dissertation in molecular genetics.
- Q. Would you explain to us in lay terms what a masters in population genetics means?

¹ For ease of reference, hereinafter she is referred to as “the complainant.”

- A. As in law where you have subspecialties, tax law, criminal law, et cetera, geneticists have the same kinds of subspecialties. And two of them, these in particular, are - - the molecular genetics is self - explanatory, I think that's the laboratory work, white lab coats, test tubes, et cetera. And population genetics is strictly a mathematical science. In a forensic situation, once it's a so-called match, the next question is a population genetics question, how many other people on the face of the earth would also match the evidence.
- Q. Could you explain to us what your degree, your doctorate, in developmental molecular genetics means?
- A. It was involved with analyzing DNA synthesis in a cellular situation.
- Q. And would that have been the first time when you started dealing with the testing of DNA?
- A. Yes, sir, that was 1968.
- Q. And have you been involved in that since that time?
- A. Yes, sir.
- Q. Have you been - - what is your professional experience? Where have you worked?
- A. I was a - - until three years ago, I was a professor in the biology department at the University of North Carolina Charlotte where I taught genetics, genetics labs, medical genetics and DNA profiling.

App. 418, l. 9 - 419, l. 20.

Dr. Ostrowski had worked on over four hundred DNA cases in six different states. App. 420, ll. 13 - 18.

Dr. Ostrowski said that SLED Agent Gallman's testimony was inaccurate where she stated on numerous occasions that there was nothing to exclude

respondent as the DNA donor. App. 456, ll. 21 – 24. Dr. Ostrowski also said Gallman was not a statistician, she was not a geneticist, and he strongly questioned her credentials. App. 455, l. 6 - 457, l. 24.

Dr. Ostrowski also said that Gallman's claim of the odds of respondent not being the donor as one and one hundred thirty nine was not accurate. App. 442, l. 4 – 446, l. 18. Ostrowski noted that different individuals share some identical strands of DNA. Dr. Ostrowski explained in great detail to the PCR judge how Gallman's testimony was misleading the jury. App. 426, l. 12 – 457, l. 13.

Defense counsel Paul Andrew Anderson testified the alleged victim "was a terrible witness." She had a full scale IQ in October 1999 of fifty-seven. App. 473, l. 12 – 475, l. 14. Anderson also offered that respondent "did a great job testifying" and he thought his cross-examination of the complainant should have shown the jury the problems with her testimony. The following occurred regarding the DNA evidence:

- Q. Obviously, you did the best you could with what you had?
- A. I feel like I did.
- Q. Had you had Dr. Ostrowski *or another expert, could you have done better?*
- A. *Yes. Obviously, yes.*
- Q. The PCR case law makes you take another step and that step is was he prejudiced by that. Do you feel, as the individual that was most intimately involved in all of this, that had Dr. Ostrowski or someone like him testified, there could have been a different result?
- A. I mean, I'm under oath. I think Ms. Gallman did a terrible job in that she works for the State of South Carolina, that's

- - I mean, she did a terrible job. The doctor today was much more eloquent. I don't see how he couldn't have helped. I think I can say under oath - - I mean, I can't say we were prejudiced, *but I think there's a very good chance there might could have been a different result.*

Q. Were you the only court official concerned about Ms. Gallman's testimony and her expertise?

A. No. Judge Keesley stopped the cross-examination, and, again, I thought I was doing a good job cross-examining her, and he basically said, Ms. Gallman, if you don't get it together, I'm going to exclude the DNA. And Ernest and I were very excited about that because we really did feel like that was the key to their case because I really felt like we had poked a lot of holes in the state's case, you know, leading up to the DNA. And then they took a break and when we came back, she tied it up good enough for Judge Keesley and he let it in.

App. 481, l. 3 – 482, l. 12. (emphasis added).

Anderson also said he thought “that I did a pretty good job with her [Gallman] . . . “*for not having an expert.*” Anderson also said and I know with what he [Dr. Ostrowski] said today, which you brought out on cross, it could be Ernest's DNA or it could be, you know, not Ernest's DNA and I didn't understand the stuff well enough to [have] asked that question. And to me, that was my biggest shortcoming was not being able to ask her that question. The questions you just asked him I should have asked her.” App. 484, ll. 13 – 20.

Anderson admitted SLED agent Gallman “said it matched. And then I kept trying to say, well how do you know it matched. And then she would try to explain it and she couldn't explain it.” App. 485, ll. 4 – 18. On redirect-examination Anderson also acknowledged that Gallman's DNA testimony “obviously hurt.” App. 490, l. 17 – 491, l. 8.

As to whether or not the complainant was competent to testify, Anderson also said “I think it was trial strategy to not make a big deal about the [alleged victim] competency.” App. 488, l. 1 – 490, l. 13.

Order granting relief

In the order granting PCR the court wrote that “due to its nearly infallible accuracy, DNA is the most powerful forensic evidence heard in courtrooms.” App. 550. The PCR court noted Gallman’s testimony “that Pressley’s DNA was a ‘match’ for semen found in the victim’s vagina, and that ‘nothing’ excluded Pressley’s as a suspect.” App. 551. The PCR court found Dr. Ostrowski’s testimony “highly credible and compelling.” He demonstrated that Gallman’s assertion “that nothing excluded Pressley as a suspect was simply wrong in several fundamentally important respects.” App. 551.

The judge concluded that the jury was left with inaccurate information about respondent’s DNA from Gallman’s testimony. *These included her testimony that nothing excluded respondent as a suspect, and her overbroad “expert opinion” that respondent’s DNA was a “match.”* The judge also found the Gallman’s statistical frequency testimony regarding “the match” failed to disclose significant facts. App. 556.

The judge wrote that the courts have “recognized what scientists have long urged: that due to the similarity of most human DNA, a bare statement that one’s DNA ‘matches’ is meaningless. As one federal court has remarked, “without the probability assessment, the jury does not know what to make of the fact that the [DNA] patterns match, the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa.” United State v. Yee, 134 F.R.D. 161, 181 (N.D. Ohio 1991).” App. 556, n.

The PCR judge rejected the state's reliance on Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) finding that defense counsel Anderson's cross-examination was insufficient in the absence of defense expert testimony. The PCR court noted that the DNA evidence in Frasier's trial did not implicate him, but did implicate his co-defendant. App. 558. The court found "under these specific circumstances here, the cross-examination of Gallman was not an adequate substitute for a defense expert." App. 558. The PCR concluded "trial counsel's failure to obtain a DNA expert **for consultation** or to testify at trial rose to the level of deficient performance to prejudice the applicant." App. 559. (emphasis added).

The PCR judge also found trial counsel ineffective for not moving to have the complainant evaluated for competency. The judge noted that the teenager had recently been found incompetent to stand trial in a juvenile case. Her full scale IQ was found to be fifty-two and also fifty-seven. App. 559. That forensic evaluation found the complainant to be incompetent and mildly retarded. It also noted she suffered from emotional and behavioral problems and that she had reported voices calling her name and she had stated that she sees "the spirits of dead people walking around my house." App. 559. The PCR court found the failure to request a mental evaluation under these circumstances could not be deemed a valid "strategy." App. 560.

The order noted that if the complainant was incompetent and could not testify, "the state's case is crippled." If the alleged victim was found competent "the defense lost nothing." App. 560.

ARGUMENT

1.

There was evidence to support the PCR court's finding that defense counsel was ineffective for failing to **consult** or retain a DNA expert to testify.

Petitioner essentially raises two purported points to argue there is "no evidence" to support the PCR judge's finding that defense counsel was ineffective. First, it argues that there is no support in South Carolina law that counsel was deficient for not consulting with or calling a DNA expert at trial. It then overstates its position by adding "[i]n every case is which DNA evidence would be presented." Brief of Petitioner at 6.

Second, Petitioner notes that "counsel stated there was simply not money available to retain an expert, and Respondent was not indigent at the time of trial." Brief of Petitioner at 11.

The PCR court correctly found Dr. Ostrowski's testimony was very credible. Defense counsel was also correct to admit that Ostrowski's testimony was very convincing and that it would have assisted him at trial. Counsel also acknowledged there was a good chance the outcome of the trial would have different. Defense counsel also admitted at the time of the trial he was not sufficiently prepared to totally discredit Gallman's testimony as Dr. Ostrowski did at the PCR hearing. Counsel admitted after listening to Dr. Ostrowski that he now had a much better grasp on DNA evidence.

The state correctly acknowledges the standard on appeal here is whether there is any evidence to support the judge's findings. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989). Here, there was not only evidence to support the PCR judge's findings, but strong evidence showing defense counsel was deficient in his handling of the DNA evidence, and that its deficiency prejudiced respondent. See Strickland v. Washington, 466 U.S. 668 (1984).

It is difficult to imagine more prejudicial testimony than a DNA expert's testimony that respondent's DNA – his semen – “matched” that found in the complainant's vagina. That testimony was very misleading as Dr. Ostrowski explained at length at the PCR hearing.

As to Petitioner's argument that it simply was not necessary for defense counsel to consult with a DNA expert in this case, and that the money was not available because respondent was not indigent, in South Carolina Standard Criminal Defense Practice Manual, at p. 99 (2008), the Honorable Ralph King Anderson, Jr. noted:

Counsel will often have to retain experts due to the complexity of many areas of forensic evidence (e.g. DNA, ballistics, psychiatry, pathology, blood spatter, fingerprints, drug dogs). Counsel should be mindful that merely cross-examining a state's expert witness without a thorough understanding of the subject matter of his testimony is neither diligent nor effective representation. Experts are necessary to help counsel prepare for trial and gain a proper understanding of particular technical evidence. Experts also convey understanding to both the court and the jury. Counsel must make a tactical informed decision if expert testimony is required at trial on a matter or is necessary to rebut the state's expert. When retaining an expert, counsel needs to consult with experienced counsel regarding the reputation, credibility, and past courtroom performances of a potential expert witness in a relevant field. Credible experts are vital while unqualified or disreputable experts can only harm counsel's defense of the client.

Here, there was certainly evidence to support the PCR court's finding that counsel provided ineffective assistance of counsel in this case, and Petitioner's assertion there was “no evidence” to support the PCR court's ruling, respectfully, must be rejected. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989).

2.

There was evidence of probative value to support the PCR court's finding that defense counsel was ineffective for not moving to have an independent evaluation of the complainant.

The PCR court correctly held trial counsel should have sought an evaluation of the victim pursuant to In Re Michael H., 360 S.C. 540, 602, S.E.2d 729 (2004). Petitioner's argument that defense counsel could not have anticipated the decision In Re Michael H. which came only two years after respondent's trial in 2002 ignores the fact that there has long been a procedure in place to challenge the child's competency. Harris v. Campbell, 293 S.C. 85, 358 S.E.2d 719 (Ct.App. 1987); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); State v. Summer, 55 S.C. 32, 32 S.E.2d 771 (1899). There was a case law from other jurisdictions allowing such an evaluation as this Court recognized in the case of In Re Michael H.

There was probative evidence to support the PCR court's decision. The complainant had been found incompetent in a recent criminal domestic violence case after Family Court Judge C. David Sawyer, Jr. ordered her evaluated by the Department of Disabilities and Special Needs. Her IQ scores of **fifty-two or fifty-seven** were strongly indicative of the fact that she was mentally retarded. The prior evaluation also noted her behavioral and emotional problems, that the teenager heard voices, and that she saw dead people walking around her house. See Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003), on the generally boundaries of mental retardation which this witness clearly fell within.

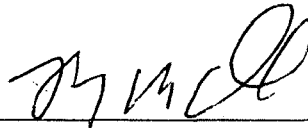
The PCR court correctly found that the defense did not have "anything to lose" by having the complainant evaluated, and everything to gain. If the child was found incompetent to testify, the state did not have a case against respondent without her testimony. Since there was evidence to support the PCR judge's ruling, Petitioner's challenge to the PCR judge's ruling on this

competency issue should also be rejected. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989).

CONCLUSION

For the forgoing reasons, the grant of post-conviction relief by the circuit court should be upheld under the “any evidence” standard since there was an abundance of evidence supporting the circuit court’s rulings on these two issues.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR RESPONDENT.

This 17th day of November, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County

D. Garrison Hill, Circuit Court Judge

ERNEST PRESSLEY,

RESPONDENT,

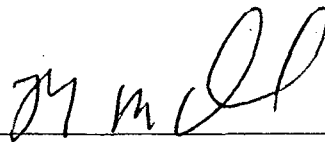
V:

STATE OF SOUTH CAROLINA,

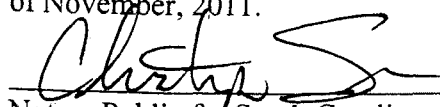
PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on Mary S. Williams, Esquire, this 17th day of November, 2011.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of November, 2011.
 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ernest Pressley, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2008-097109

Appeal From Aiken County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2012-UP-587
Heard October 2, 2012 – Filed October 31, 2012

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Megan Elizabeth Harrigan, all of
Columbia, for Petitioner.

Chief Appellate Defender Robert Dudek and Appellate
Defender David Alexander, both of Columbia, for
Respondent.

PER CURIAM: The State of South Carolina appeals the grant of post-conviction relief (PCR) to Ernest Pressley based on trial counsel's ineffectiveness for not hiring or consulting a DNA expert and for failing to seek a competency evaluation of the victim witness. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether trial counsel was ineffective for not hiring or consulting a DNA expert resulting in prejudice to the defendant: *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."); *id.* (stating an appellate court gives great deference to the PCR court's findings of fact and conclusions of law); *Pauling v. State*, 350 S.C. 278, 283, 565 S.E.2d 769, 772 (2002) ("The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value.").
2. As to whether trial counsel was ineffective for failing to seek a competency evaluation of the victim: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

AFFIRMED.

SHORT, KONDUROS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORARI TO AIKEN COUNTY

The Honorable D. Garrison Hill, Circuit Court Judge

ERNEST PRESSLEY,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

S.C. Ct. App. Op. No. 2012-UP-587
Heard October 2, 2012 – Filed October 31, 2012

PETITION FOR REHEARING

Petitioner, petitioning this Court for rehearing pursuant to Rule 221, SCACR, would respectfully submit the following points that this Court may have overlooked or misapprehended in its decision:

1. Respondent was indicted by the Aiken County Grand Jury during the March 2002 term for Criminal Sexual Conduct with a Minor in the First Degree (2002-GS-02-0340). Respondent proceeded to trial before the Honorable William P. Keesley and a jury, where he was found guilty as indicted. Judge Keesley sentenced Respondent to twenty years' imprisonment. A notice of appeal was filed on Respondent's behalf and an appeal was perfected. Following the

submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal. State v. Pressley, Op. No. 2004-UP-569 (S.C. Ct. App. filed November 15, 2004). (App. pp. 371– 381.) The Remittitur was sent on December 16, 2004. (App. p. 382.)

2. Respondent filed a timely application for post-conviction relief, asserting that trial Counsel (herein “Counsel”) was ineffective for failing to retain a DNA expert to assist him and for failing to seek a competency evaluation of the victim. An evidentiary hearing was held on February 26, 2008, before the Honorable D. Garrison Hill. (App. pp. 413 – 503.) By written order dated July 2, 2008, and filed July 7, 2008, Judge Hill granted Respondent’s post-conviction relief application on the basis of ineffective assistance of counsel, vacated his conviction, and granted a new trial. (App. pp. 544 – 562.)

3. This case is on appeal from grant of post-conviction relief.

4. This Court granted Petitioner’s Petition for Writ of Certiorari and full briefing by the parties followed.

5. On October 31, 2012, this Court filed its opinion affirming the grant of post-conviction relief and remanding the matter for a new trial. Ernest Pressley v. State, Op. No. 2012-UP-587 (S.C. Ct. App. filed October 31, 2012).

6. Specifically, this Court found that there was evidence of probative value in the record to support the post-conviction relief court’s decision that Counsel was ineffective for not hiring or consulting a DNA expert, resulting in prejudice to Respondent. This Court did not address the issue as to whether Counsel was ineffective for failing to seek a competency evaluation of the victim, finding that the disposition of the prior issue was dispositive.

7. This Court affirmed the post-conviction relief court based upon the finding that there was evidence of probative value to support a finding of ineffective assistance of counsel for failing to consult with or retain a DNA expert, despite a complete lack of probative evidence in the record that Counsel was ineffective. Specifically, there is no probative evidence to show that Counsel's performance was deficient in this regard. South Carolina has not required counsel to retain a DNA expert in every case in which DNA evidence would be presented. Instead, our courts have required that counsel vigorously cross-examine such witnesses. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) (trial counsel not ineffective for not retaining a DNA expert where counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence.) See also Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (citing Frasier v. State, supra; where counsel attacked the State's evidence through cross-examination as well as by positing objections when appropriate, counsel was not ineffective). In this case, Counsel vigorously cross-examined all witnesses in the trial, including the State's DNA expert Gallman. Counsel vigorously cross-examined Gallman both out of the presence of the jury on proffer and in the presence of the jury for more than forty-eight pages; as compared to the fifteen pages of the State's direct examination. (App. p. 143, line 15 – p. 144, line 8; p. 147, line 1 – p. 154, line 21; p. 155, line 19 – p. 158, line 13; p. 222, line 12 – p. 235, line 7; p. 237, line 4 – p. 240, line 6; App. p. 240, line 9 – p. 288, line 20.) Additionally, Counsel made an argument that the DNA evidence should be excluded based on chain of custody flaws, but the trial court permitted the evidence over Counsel's objection. (App. p. 143, line 12 – p. 158, line 12.) Counsel also objected to Gallman's qualification as an expert in statistical analysis. (App. p. 209, line 16 – p. 210, line 10.) Counsel's cross-examination clearly discredited Gallman's testimony before the jury. The record shows that Counsel had a grasp of DNA analysis; his questions reflected knowledge of

various DNA procedures. (See for example App. p. 243, line 10 – p. 244, line 10.) Counsel clearly met the standard articulated in Frasier in that he “vigorously cross-examined the State’s DNA experts and attacked the accuracy of the evidence.” 306 S.C. 160-61, 410 S.E.2d 573. Here, the record shows Counsel performed within reasonable professional norms established by this state’s case law by vigorously cross-examining the State’s DNA expert and posing proper objections. The record is devoid of any probative evidence that Counsel was deficient in this regard.

8. Furthermore, there is no evidence of probative value in the record to support the post-conviction relief court’s finding that Counsel’s alleged deficiency in not conferring with or retaining a DNA expert prejudiced Respondent. At the post-conviction relief hearing, Respondent’s expert witness, Dr. Ronald S. Ostrowski (hereinafter “Ostrowski”), reviewed the SLED report which was introduced at trial (App. pp. 416-69; pp. 526-38) but did not perform any DNA analysis in this case himself. (App. p. 458, line 17 – p. 459, line 1.) Ostrowski testified that there were legitimate interpretations that would exclude Respondent as a contributor; however, the interpretation that Respondent could be a contributor, or a *match*, to this sample is just as valid. (App. p. 462, lines 1 – 13; App. p. 463, line 21 – p. 464, line 20; p. 468, lines 11 - 20.) Therefore, even though there are many alternate theories that could have been presented, Respondent remains a possible *match* for the samples taken from the victim, and no interpretation consistent with the Respondent could be excluded. Additionally, Respondent and Counsel noted, Gallman’s testimony was difficult to follow. Respondent himself argued that it was unlikely that the jury understood Gallman’s testimony. Counsel later added that Gallman’s testimony lacked credibility on its own. (App. p. 491, line 14 – p. 492, line 1.) The only evidence before the post-conviction relief court was that Gallman’s trial testimony was difficult to follow.

Given the other evidence in the case tending to show Respondent's guilt, it is unlikely that Gallman's testimony was the linchpin in the jury's determination of guilt. The record shows that Respondent failed to carry his burden of showing prejudice from failure to procure expert witness testimony.

9. Although this Court determined it was unnecessary to address the second issue due to its finding on the first issue, there is no evidence of prejudice to support the post-conviction relief court's ruling that Counsel was ineffective for failing to seek a competency evaluation of the victim. At the post-conviction relief hearing, a DJJ forensic evaluation of the victim dated June 13, 2002, approximately six months prior to Respondent's trial, was entered into evidence. (App. pp. 540-43.) In the evaluation, it was determined that the victim was not competent to stand trial on an unrelated family court charge. Because no evidence was presented at the post-conviction relief hearing that if the victim would have been found incompetent to testify if she had been evaluated, any assertion as to the victim's competence as a witness is merely speculative. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). The competence required of a witness is a far different standard from the competence required of a criminal defendant. See Rule 601, SCRE. Further, the record shows that at trial, the victim communicated with the solicitor, defense counsel, and the court, and there is no evidence that the victim did not understand her duty to tell the truth as required by Rule 601, SCRE. The DJJ forensic evaluation for criminal responsibility is not a substitute for expert testimony that the victim was incompetent as a witness. Therefore, no evidence was presented by Respondent that such a motion for a competency evaluation would have been granted, defeating any claim of prejudice by Counsel's alleged deficiency in this regard. Because there is no evidence to support the post-conviction

relief court's ruling that Counsel was ineffective in failing to secure a psychological examination of the victim, the post-conviction relief court's ruling should be reversed.

10. For all of the foregoing reasons, the State asks this Court to reconsider its ruling, rehear the case, and reverse the post-conviction relief court's grant of a new trial.

CONCLUSION

For the foregoing reasons, the State requests that this Court grant this Petition for Rehearing and reverse the post-conviction relief court's grant of a new trial for Respondent.

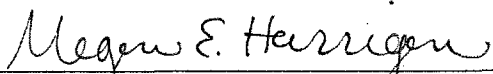
Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
SC BAR No. 100108

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

By:


ATTORNEYS FOR THE PETITIONER

November 7, 2012

STATE OF SOUTH CAROLINA

COURT OF APPEALS

—————
 Certiorari to Aiken County
 The Honorable D. Garrison Hill, Circuit Court Judge
 Case No. 2004-CP-02-1520
 Appellate Case No. 2008-097109
 —————

ERNEST PRESSLEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

—————
PROOF OF SERVICE
 —————

I, Lauren Meara, certify that I have served the within **Petition for Rehearing** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
 South Carolina Commission on Indigent Defense
 Division of Appellate Defense
 Post Office Box 11589
 Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 7th day of November, 2012.

Lauren Meara
 LAUREN MEARA
 Legal Assistant

Office of Attorney General
 Post Office Box 11549
 Columbia, SC 29211
 (803) 734-3737



86

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 22, 2013

The Honorable Liz Godard
PO Box 583
Aiken SC 29802-0583

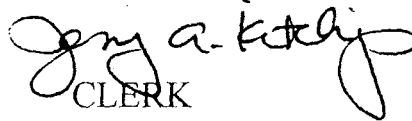
REMITTITUR

Re: Pressley, Ernest v. The STATE
Lower Court Case No. 2004CP0201520
Appellate Case No. 2008-097109

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,


CLERK

Enclosure

cc: Megan Elizabeth Harrigan
David Alexander
Ernest Pressley, 00289489

The South Carolina Court of Appeals

Ernest Pressley, Respondent,

v.

State of South Carolina; Petitioner.

Appellate Case No. 2008-097109

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Bauer G. Spivey

J.

[Signature]

J.

James E. [Signature]

J.

Columbia, South Carolina

cc:

Megan Elizabeth Harrigan

David Alexander

Ernest Pressley, 00289489

FILED

Dec. 5, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2004-CP-02-1520
Appellate Case No. 2008-097109

Ernest Pressley,

Respondent,

v.

State of South Carolina,

Petitioner.

EXPEDITED MOTION TO RECALL REMITTITUR

Petitioner, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

On October 31, 2012, this Court filed an opinion affirming the lower court's findings granting Respondent post-conviction relief. Pursuant to Rule 221, SCACR, Petitioner served and filed its Petition for Rehearing on November 7, 2012.

II.

Petitioner was never served with a copy of the Order of the Court of Appeals denying Petitioner's Petition for Rehearing. The undersigned counsel has checked her incoming mail log, any unfiled mail, and the file associated with this appeal, and has been unable to find any indication of being served with a copy of the Order denying the Petition for Rehearing.

III.

Petitioner contacted the docketing office of the Court of Appeals and was informed the Order was sent on or around December 5, 2012, and correctly listed the undersigned as counsel of record. However, the undersigned rechecked her mail log and mail and was unable to find any Order denying the Petition for Rehearing. Additionally, as the filings for this case have also included Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Attorney General Salley W. Elliott, the legal assistants for checked the mail logs and mail for Mr. Wilson, Mr. McIntosh, and Mrs. Elliott and could not locate any Order received by our office related to this appeal. Petitioner has attached affidavits from undersigned counsel and Salley Elliott.

Further, it has come to the undersigned's attention that items from the Court, including recent Orders, have been received by the Office of Appellate Defense even though they were intended for receipt by this office. Other individuals in the office have indicated similar circumstances. The undersigned counsel has spoken with Respondent's counsel regarding this matter and asked that Respondent's counsel check his file to see if Petitioner's copy of the Order was inadvertently delivered to Respondent. Respondent's counsel indicated that his office did not receive a copy of the Order denying Petition for Rehearing as well.

IV.

As a result of never receiving the Order denying the Petition for Rehearing, Petitioner never received notice that the time for serving and filing the intended Petition for Writ of Certiorari had begun to run. In the event the Petition for Rehearing was denied, it has always been the intention of the undersigned to seek certiorari in the South Carolina Supreme Court.

V.

The undersigned asks the Court to recall the remittitur because it was sent without the undersigned receiving a copy of the Order denying the Petition for Rehearing, and as a result, the undersigned cannot Petition for Writ of Certiorari as intended. See Wise v. S. Carolina Dept. of Corr., 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (citing State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893)).

WHEREFORE, Petitioner asks the Court to recall the remittitur because Petitioner was never served a copy of the Order denying the Petition for Rehearing, and for such other relief as the Court deems appropriate.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

BY: Megan E. Harrigan
MEGAN E. HARRIGAN
S.C. Bar No. 100108

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ATTORNEYS FOR PETITIONER

January 28, 2013

STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

—————
 Certiorari to Aiken County
 The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2004-CP-02-1520
 Appellate Case No. 2008-097109

Ernest Pressley,

Respondent,

v.

State of South Carolina,

Petitioner.

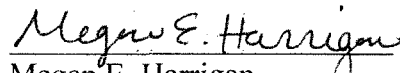
—————
AFFIDAVIT OF MEGAN E. HARRIGAN, Assistant Attorney General
 —————

PERSONALLY APPEARED before me, Megan E. Harrigan, who upon oath, deposes and says:


1. I, Megan E. Harrigan, am employed as an Assistant Attorney General at the South Carolina Attorney General's office; specifically, I am the attorney who represents the State of South Carolina in post-conviction matters for the First, Second, and Third Judicial Circuits, including appeals of these matters.
2. I am the counsel of record for Petitioner, the State of South Carolina, in Ernest Pressley v. the State of South Carolina, Appellate Case No. 2008-097109;
3. On October 2, 2012, I appeared for oral argument of this matter before the South Carolina Court of Appeals. On October 31, 2012, the South Carolina Court of Appeals filed an opinion affirming the lower court's findings granting Respondent post-conviction relief. On November 7, 2012, I served and filed a Petition for Rehearing Pursuant to Rule 221, SCACR. On January 23, 2013, I received the Remittitur for this matter.
4. I was not served with a copy of the order of the Court of Appeals denying Petitioner's Petition for Rehearing. I have diligently searched my mail logs, unfiled mail, and the file for this matter and have been unable to find any indication of being served with a copy of the Order denying the petition for Rehearing.

5. On January 24, 2013, I contacted Respondent's counsel regarding this matter. Respondent's counsel informed me that he also was not served with a copy of the Order denying Petitioner's Petition for Rehearing.
6. In the event that the Petition for Rehearing was denied, it was my intention for seek certiorari in the South Carolina Supreme Court.

I have this day been provided a copy of this Affidavit, and hereby acknowledge receipt thereof.


Megan E. Harrigan
Assistant Attorney General

SWORN to and subscribed before me
this 24th day of January, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5-11-2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

Appellate Case Number 2008-097109

Ernest Pressley,

Respondent,

v.

State of South Carolina,

Petitioner.

AFFIDAVIT OF SALLEY W. ELLIOTT

PERSONALLY APPEARED before me, Salley W. Elliott, who upon oath, deposes and

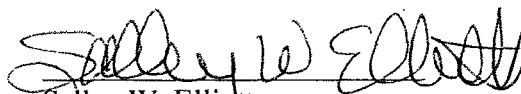
says:

1. I, Salley W. Elliott, am employed by the South Carolina Attorney General's Office, in Columbia, South Carolina, as Senior Assistant Deputy Attorney General and, in that capacity, supervise the Criminal Appeals and the Post-Conviction Relief Sections of the Office;
2. The appeal in the matter listed above is assigned to and being handled by Assistant Attorney General Megan E. Harrigan. I am also listed as one of the attorneys for the Respondent in my supervisory capacity;
3. On information and belief, Respondent filed and served a petition for rehearing in this matter following the issuance of an opinion by the Court of Appeals affirming

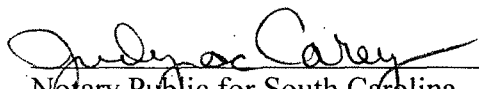
the circuit court's grant of post-conviction relief. Also on information and belief, the South Carolina Court of Appeals issued the remittitur in this matter which was received by the South Carolina Attorney General's Office on January 23, 2013.

4. The Criminal Appeals Section and the Post-Conviction Relief Section of the South Carolina Attorney General's Office lists all incoming mail on a daily mail log for each attorney;
5. I reviewed the items listed on my mail log from November 30, 2012 through December 31, 2012 and did not receive an order of the South Carolina Court of Appeals denying the petition for rehearing in this appeal.
7. The failure to receive orders or other documents from the Court of Appeals has occurred several times in the past and was a matter the former clerk of the Court of Appeals and I were monitoring.

I have this day been provided a copy of this Affidavit, and hereby acknowledge receipt thereof.


Salley W. Elliott

SWORN to and subscribed before me
this 28th day of January, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/11/2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2004-CP-02-1520
Appellate Case No. 2008-097109

Ernest Pressley,

Respondent,

v.

State of South Carolina,

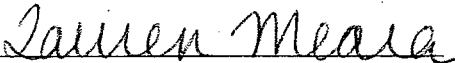
Petitioner.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within Expedited Motion to Recall Remittitur by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 28th day of January, 2013.


Lauren Meara
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

The South Carolina Court of Appeals

Ernest Pressley, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2008-097109

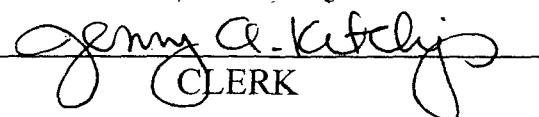
The Honorable D. Garrison Hill
Aiken County
Trial Court Case No. 2004CP0201520

ORDER RECALLING REMITTITUR

This Court's remittitur was sent to the Clerk of Aiken County on January 22, 2013. It is now necessary for this Court to recall the remittitur. The Clerk of Aiken County is, therefore, directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten (10) days from the date of this order.

FOR THE COURT

BY


CLERK

Columbia, South Carolina
February 5, 2013

cc: Megan Elizabeth Harrigan
David Alexander
Ernest Pressley, 00289489