STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001826

Daniel Owens, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find trial counsel was not constitutionally ineffective where Counsel investigated potential defense witnesses, prepared a defense for Petitioner, and gave credible testimony about the reasonable trial strategy he employed in determining which witnesses to call in Petitioner's defense?

STATEMENT OF THE CASE

Daniel Owens, Jr., (Petitioner) is currently incarcerated with the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Petitioner was indicted by the February 2010 term of the Marion County Grand Jury for one count each of first-degree criminal sexual conduct (CSC) with a minor (2010-GS-33-0050), and committing or attempting a lewd act on a minor (2010-GS-33-0050). Thurmond Brooker, Esquire, represented him. On August 12-14, 2013, Petitioner proceeded to trial before the Honorable Steven H. John and a jury. The jury found Petitioner guilty as indicted on both charges. Judge John then sentenced him to concurrent terms of thirty-five years' imprisonment for first-degree CSC with a minor and fifteen years' imprisonment for a lewd act on a minor.

Petitioner filed a timely notice of appeal. An appeal was perfected by Benjamin John Tripp, Esquire. The South Carolina Court of Appeals dismissed Applicant's appeal by Order filed March 18, 2015. State v. Owens, Op. No. 2015-UP-154 (S.C. Ct. App. filed March 18, 2015). The case was remitted to the circuit court on April 3, 2015.

Petitioner then timely filed an application for post-conviction relief on April 28, 2015. Respondent made its Return on April 19, 2017.[1] An evidentiary hearing into the matter was convened on November 15, 2017, at the Florence County Courthouse before the Honorable Michael G. Nettles. Jonathan D. Waller, Esquire, represented Petitioner. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's sister, Doris Bryant, and trial counsel Thurmond Brooker, Esquire (Counsel), also testified. Margaret Grover, the grandmother of the victims,

[1] Respondent did not receive the application from the Marion County Clerk of Court until January 28, 2017.

testified on behalf of Respondent. The PCR court issued an order filed September 19, 2018, denying and dismissing the application with prejudice.

Petitioner then filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on May 28, 2019.

STATEMENT OF THE FACTS

Petitioner's charges stem from allegations of sexual assault made by Petitioner's two nieces, regarding two separate incidents. Minor 1, Petitioner's niece who was sixteen-years old at the time of trial, testified about an incident which occurred in July 2007, when she was ten-years old. Minor 1 testified that in July of 2007, she and her sister, Minor 2, went to bed together in the same room while their family was staying in Petitioner's three-bedroom mobile home. Minor 1 testified she and Minor 2 were alone in the room, and they locked the door from the inside before going to sleep. Minor 1 testified she awoke sometime in the night; her clothes were off, Petitioner was on top of her with his hand over her mouth, and his "private part was in [her] private part." Petitioner then threatened her that if she told anyone what happened, he would make it so she would not see her family anymore. App. pp. 92-96.

Minor 1 explained, at the time of the incident, she still wet the bed occasionally, and she had done so that night. Because of this, Minor 2 was sleeping on the floor when the assault occurred. Minor 1 testified she and Minor 2 noticed blood on the sheets the next morning, and they put them in the washing machine so Minor 1 would not be punished for wetting the bed. Minor 1 further testified she did not tell anyone what had occurred until a year and a half later when she moved into her grandmother's home from a foster home. According to Minor 1, at that time, she disclosed the abuse to her Aunt Doris, who is her grandfather's sister. App. pp. 96-97, 115-16.

Minor 2 testified she, her parents, Minor 1, and Petitioner went to her Uncle David's house in June 2004, when Minor 2 was then seven-years old. Minor 2 testified her parents and her Uncle David then left to go grocery shopping, leaving Minor 1 and Minor 2 alone in the house with Petitioner and their Uncle David's son, Donnie. Minor 2 explained Petitioner asked her if she wanted to get some toys to play with from the spare bedroom. Minor 2 testified when she went

into the room, Petitioner followed her, then locked the door, pulled down his pants, and attempted to pull down her pants. Minor 2 testified she kicked him "in his private part" and escaped the room. Minor 2 testified she returned to the living room with the rest of her family, but she did not report the incident immediately. However, when the family returned to their own home later that day, Minor 2 told her Aunt Michelle what had occurred. Minor 2 explained that as a result of her disclosure of abuse, Petitioner no longer stayed at their house. However, she testified that eventually she, her three sisters, and their parents moved into Petitioner's house. App. pp. 134-41.

Minor 2 further testified she recalled an incident in July 2007 when she was sleeping in the bedroom with Minor 1. Minor 2 testified she locked the door before they went to sleep, but when she woke up the next morning, the door was unlocked. Minor 2 testified she also noticed blood on the bedsheets when Minor 1 got out of bed that morning. Minor 2 testified she asked Minor 1 what happened, but Minor 2 did not want to talk to her about it. Minor 2 explained she helped Minor 1 put the bedsheets in the wash, and they never spoke about the incident again until Minor 1 told their Aunt Doris what happened. App. pp. 142-45.

Danna Collins, a former forensic interviewer for the Care House in Florence, testified she conducted interviews with Minor 1 and Minor 2 in August 2009. Counsel objected when the solicitor asked Collins to tell the jury what Minor 1 said in her interview. The judge held an off-the-record bench conference, then overruled Counsel's objection. Collins testified the minors told her about the alleged sexual assault at Petitioner's home and the attempted sexual assault at the home of their Uncle David, as well as the general timeframe when the assaults occurred. However, Collins did not testify as to the identity of the perpetrator of either assault, the details of either disclosure, or as to any credibility findings from her interviews. App. pp. 191-95.

The defense also put up a case and introduced evidence. The deposition of Dr. Dersun Wu, a medical doctor who specialized in obstetrics and gynecology, was read into the record. Dr. Wu physically examined both Minor 1 and Minor 2 in July and August 2009. Dr. Wu found Minor 1's hymen was not intact, but he could not determine a specific cause. He testified it could have been any number of things other than sexual assault. Dr. Wu further found no evidence of molestation in Minor 2. App. pp. 248-75.

The defense also called Kathy Saunders, who was qualified as an expert in the field of child sexual-assault examination. Saunders testified she conducted a physical examination of both children known as a "chronic sexual abuse exam." Saunders testified she found no evidence of acute or chronic injury in either girl, and both girls, physical exams were normal. App. pp. 285-98.

Finally, the defense called Aunt Michelle, who denied ever having a conversation about sexual assault with either girl. App. p. 312.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, questions of law are reviewed de novo without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, a petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

ARGUMENT

The PCR court correctly found trial counsel was not constitutionally ineffective where Counsel investigated potential defense witnesses, prepared a defense for Petitioner, and gave credible testimony about the reasonable trial strategy he employed in determining which witnesses to call in Petitioner's defense.

The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's representation. Petitioner alleges Counsel was deficient because he failed to adequately investigate the case and prepare a defense for Petitioner. PWC pp. 6-7. However, Counsel thoroughly explained his investigation and trial strategy at the evidentiary hearing, and the PCR court found Counsel's testimony credible. Appellate courts give great deference to a PCR court's credibility findings because appellate courts "lack the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). Accordingly, the PCR court correctly found Petitioner failed to meet his burden proof as to deficiency. App. pp. 464-65. Further, Petitioner did not present the testimony of the correct witnesses to support his claim, and therefore, the PCR court correctly found Petitioner had failed to meet his burden of proof as to prejudice. App. pp. 464-65. This Court should therefore deny certiorari as to this issue.

Petitioner argues Counsel was deficient because he did not make a sufficient effort to locate witnesses to testify on Petitioner's behalf – specifically, Petitioner's brother, David, and the correct Aunt Doris. PWC p. 7. However, neither of these witnesses testified in the PCR hearing. At the evidentiary hearing, Counsel testified he specifically discussed possible witnesses who could help counter the allegations with Petitioner, who gave him the names of Michelle and the girls' mother and father. App. pp. 442-43. Counsel further explained it is his standard practice to have his client or other family members contact potential witnesses and ask the witnesses to call Counsel's office. App. pp. 443-45. Counsel testified this method usually works better than attempting to contact

witnesses himself if the family already has a relationship with the potential witness. App. pp. 443-45. Counsel further testified the family was instrumental in putting him in contact with the girls' father and Michelle, but he did not recall speaking with anyone named Doris who could refute the Minor 2's statement. App. pp. 445, 449-50, 452. Additionally, although Petitioner thought the girls' mother would have helpful information, she declined to cooperate with Counsel and never spoke to him, and the girls' father refused to come to court for the trial. App. pp. 450, 455. Counsel explained it is his practice not to subpoena uncooperative witnesses because they can devastate a trial, and he does not put a witness on the stand if he does not know what the witness will say. App. pp. 446-47, 451.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)); see also Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.). Further, "[d]ecisions primarily involving trial

strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, *which witnesses should be called on the defendant's behalf*, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.'" Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (quoting Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)) (emphasis added).

Here, Counsel testified he investigated the existence of "Aunt Doris" to the best of his ability, but he did not recall ever having a conversation with her. App. pp. 442-44. He also testified he specifically asked for a statement from Aunt Doris as part of discovery, but none appeared to exist. App. p. 445. The PCR court found Counsel credibly explained why, as a matter of course, he does not subpoena witnesses who have not shown an interest in participating in the defense and when he does not know what they will say at trial. App. p. 473. Indeed, Counsel's performance arguably would have been deficient had he called witnesses at trial whom he had not spoken to beforehand. Ingle v. State, 348 S.C. 467, 471, 560 S.E.2d 401, 403 (2002)(finding trial counsel was ineffective when he called a witness at trial without interviewing her first and the witness gave testimony harmful to his client's case).

Further, the Doris who testified at the PCR hearing was not the same Aunt Doris to whom the disclosure of abuse was made – that Doris is a relative of the victims' grandfather, not Petitioner's relative. App. pp. 465, 473. Nonetheless, Counsel spoke with several witnesses and called the only cooperating witness available, Aunt Michelle, who gave helpful testimony at trial for Petitioner by denying Minor 2 had ever disclosed any abuse to her. App. pp. 312, 450. Counsel also introduced the testimony of two expert witnesses who testified they could find no physical evidence of abuse on either girl. App. pp. 261-76, 285-98. Thus, Counsel clearly investigated

potential fact witnesses and prepared a defense for Petitioner based on the physical evidence and the one cooperating witness who could directly contradict the testimony of at least one victim.

The PCR court correctly found Counsel's strategy was valid, and Counsel made a reasonable decision not to subpoena a witness whose statement he had never heard. App. p. 473. Additionally, because the witness called by Petitioner at the evidentiary hearing, Doris Bryant, was not the same "Aunt Doris" described and discussed at trial, the PCR Court also correctly found Petitioner failed to prove he was prejudiced by any deficiency in Counsel's investigation of Doris. App. pp. 115-16, 238, 460; see also Glover, 318 S.C. at 498-99, 458 S.E.2d at 540 (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.) Petitioner also did not introduce any testimony from the other two witnesses mentioned in his petition – his brother David or the girls' mother. Petitioner's speculation as to the existence of a helpful witnesses and/or testimony is insufficient to meet his burden of proof as to prejudice. Because the PCR court's decision finding Counsel was not deficient was based on Counsel's credible testimony regarding his investigation and strategy as to which witnesses to call, and because Petitioner did not produce the witness he alleges Counsel should have subpoenaed to testify, the PCR court's conclusion is supported by probative evidence in the record. Therefore, this Court should deny certiorari as to this issue.

CONCLUSION

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the PCR court's denial of Petitioner's application for relief.

Respectfully submitted,

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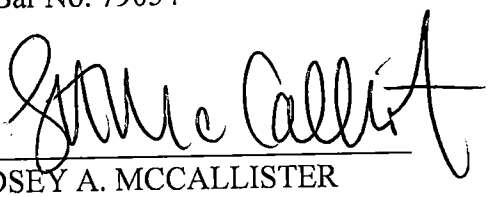
S.C. Bar No. 79054

BY: 
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The Honorable Michael G. Nettles, Circuit Court Judge

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Daniel Owens Jr.,

Petitioner,

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State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Joanna Katherine Delany, Esquire
S.C. Commission on Indigent Defense
PO Box 11433
Appellate Defense
Columbia, SC 29211

This 16th day of October, 2019

KASEY KNOX
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

October 16, 2019

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

Re: **Daniel Owens Jr., v. State of South Carolina**
Appellate Case No. 2018-001826
Lower Court Case No. 2015-CP-33-0434

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/kk
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)