

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-001696

John Barnes, # 347845,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find appellate counsel was not constitutionally ineffective for failing to raise on appeal the issue of whether Scarlett Murray's testimony violated the "time and place" exception to the hearsay rule because that issue had no reasonable likelihood of success on appeal where Petitioner gave a voluntary statement admitting to the allegation of a lewd act?

STATEMENT OF THE CASE

John Barnes (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its December 2010 term, the Richland County Grand Jury indicted Petitioner for one count of lewd act on a minor child (2010-GS-40-7545). Assistant Public Defenders J. Rhodes Bailey and Gregory B. Collins, both of the Richland County Public Defenders' Office, represented Petitioner on this charge. On September 12-15, 2011, Petitioner proceeded to a jury trial before the Honorable DeAndrea G. Benjamin, and he was convicted as indicted. Judge Benjamin sentenced Petitioner to fifteen years' imprisonment.

Petitioner filed a timely Notice of Appeal in the South Carolina Court of Appeals. Appellate Defender LaNelle C. DuRant (Appellate Counsel) of the South Carolina Commission on Indigent Defense – Appellate Defense Division perfected an appeal on Petitioner's behalf. Appellate Counsel raised two issues on appeal: (1) whether the trial court erred in qualifying the forensic interviewer as an expert witness when such qualification was unnecessary for the admission of his testimony; (2) whether the trial court erred in denying the defense's motion for a hearing under State v. Sanders,¹ when the defense alleged the solicitors should be disqualified from the case because they had made themselves necessary witnesses by interviewing Victim and obtaining the disclosure of new information. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by unpublished opinion. State v. Barnes, 2013-UP-314 (Ct. App. filed July 10, 2013). Petitioner subsequently petitioned the Court for a rehearing, which was denied on August 27, 2013. The remittitur was returned to the circuit court on October 2, 2013.

¹ 341 S.C. 386, 534 S.E.2d 696 (2000).

Petitioner filed an application for post-conviction relief on May 12, 2014, along with an amendment thereto filed May 27, 2014. Respondent submitted its return on December 19, 2014. Thereafter, Petitioner filed an additional amendment on March 26, 2015. An evidentiary hearing into the matter was convened on February 3, 2016, at the Richland County Courthouse before the Honorable J. Derham Cole. Petitioner was present at the hearing and was represented by Anna R. Good, Esquire. Assistant Attorney General J. Clayton Mitchell, III, of the South Carolina Attorney General's Office represented Respondent. By written order filed September 10, 2018, Judge Cole denied Petitioner's request for relief and dismissed his application with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On June 7, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

In April 2010, Petitioner's eleven-year old son (Victim) disclosed to his older sister Scarlett Murray that "inappropriate things" were happening to him in Petitioner's home. App. p. 90. Scarlett testified she had noticed Victim and Petitioner sleeping in the same bed during their visits with Petitioner. App. p. 89. She reported what her brother told her to her stepmother. App. p. 98. The stepmother, in turn, notified Victim's legal father,² who alerted authorities in Richland County. App. p. 98. Victim eventually disclosed to a forensic interviewer at the Assessment Resource Center (ARC) that Petitioner had given him bubble baths and masturbated Victim as Victim bathed. App. pp. 205-09. Petitioner was contacted by law enforcement, voluntarily gave an interview to law enforcement, and signed a written statement. App. pp. 369-71, 373-74. In his first statement, Petitioner admitted to bathing his son in a candle-lit bubble bath, but he said that if he had washed the boy's genitals, it was unintentional. App. pp. 371, 375-77. Petitioner later returned, on his own and without prompting from law enforcement, and gave a second statement, in which he admitted to masturbating Victim in the tub. App. pp. 382-84, 386-87.

Prior to trial, Petitioner moved to disqualify at least one of the solicitors pursuant to Rule 3.7, RPC, Rule 407, SCACR. App. pp. 43-45. Petitioner argued that because both solicitors interviewed Victim prior to trial, which resulted in the disclosure of new information about the incident, the trial court should conduct a hearing pursuant to State v. Sanders to determine the manner in which Victim was interviewed. App. p. 44. Petitioner argued one of the solicitors would need to be called as a witness by the defense and should be removed from the case. App. p. 45. Petitioner asked for a proffer and a hearing based on Sanders. App. pp. 49-50. The trial

² Petitioner is Victim's biological father, but not his legal father. Victim's mother was married to another man at the time of Victim's conception and birth. App. p. xx.

court allowed the proffer, but Petitioner objected to the form of the proffer because the trial court did not require the solicitor to be put under oath and take the witness stand. App. pp. 50-52. The trial court stated it would order a hearing if one was needed after hearing the State's proffer. App. p. 53.

Assistant Solicitor Margaret Fent-Bodman then explained they had interviewed Victim, received details from him consistent with the ARC interview, sent the ARC interview tapes home with Victim for him to review, and then interviewed Victim again. App. pp. 53-54. The State reported that after viewing the ARC videotapes, Victim relayed three new details he had not given the ARC interviewer, which the State provided to defense counsel in an email: (1) he would use the excuse that he had to urinate to stop the masturbation; (2) he remembered Petitioner playing music and remembered two songs in particular; and (3) the molestation started after he found out Petitioner was his biological father. App. p. 54. At the end of the proffer, the trial court ruled the interviews were consistent with normal trial preparation, and there was no violation of Rule 3.7. App. pp. 55-56.

In opening statements, defense counsel argued:

Number one, why would a child make something like this up? Number two, how could a father sign a statement admitting to doing it?

Now, let's talk about the first question. Why would a child make this up? You're going to hear about a family situation that isn't exactly stable. Custody fights, child support fights, stepmothers fighting with mothers, mothers fighting with stepfathers, sisters fighting with stepfathers, new fathers coming into the equation when he was eight, nine years old. How does that affect a child? Are they caught in the cross-fire? Are different people influencing him in different things? You're going to hear about repeated interviews of this child, asking him time and time again about this situation, about his father, John Barnes, by trained professionals. You're going to hear about how he was interviewed by untrained professionals even as lately as last week. How does that affect a child? Because he is a child.

App. pp. 83-84.

At trial, Victim testified Petitioner masturbated him during the bubble bath, consistent with his ARC interviews and the details disclosed during his interview with the solicitors. App. pp. 206-09. The defense cross-examined Victim concerning his interviews with the solicitors. App. pp. 257-59. Specifically, defense counsel questioned Victim about what type of questions the solicitors asked and whether they were the only other people present during the interviews. Trial App. pp. 258-59.

The State then called Raymond Olszewski, the forensic interviewer from the ARC. App. p. 261. The State moved to qualify him as an expert in child sexual abuse and child forensic interviewing. App. p. 265. Petitioner initially objected that the proper foundation had not been laid and then objected that “child sexual abuse” was too broad a category. App. p. 265. The trial court permitted defense counsel to examine Olszewski. App. p. 265. After the voir dire, the defense again objected that child sexual abuse was too broad a subject in which to be deemed an expert. App. p. 270. Defense counsel also objected to Olszewski’s being qualified as an expert in child forensic interviewing “because there is no way to test if it is actually a science.” App. p. 270. The trial court admitted Olszewski as an expert in child forensic interviewing over the defense’s objection. App. p. 270.

Olszewski testified he used the R-A-T-A-C method to interview Victim. App. p. 279. He explained the difference between purposeful and accidental disclosures; the process of delayed disclosure in children; and the commonality of tentative, incomplete disclosure in children. App. pp. 281-82, 284. He then went into further detail regarding delayed disclosure and minimization of abuse and why it is not common for children to give all details in one interview. App. pp. 291-95. Olszewski then testified about the two interviews he conducted with Victim, explaining Victim was able to give additional details in the follow-up interview. App. pp. 295-96. The video of

Victim's first interview, in which he admitted the bubble baths occurred but denied abuse, was played for the jury. App. p. 113. The second video, in which Victim disclosed the full extent of the abuse, was not played for the jury as the interview occurred after Victim's twelfth birthday. App. p. 113, 546.

Petitioner also testified at trial. App. p. 432. He admitted to voluntarily confessing to law enforcement that he had masturbated Victim in the bath tub. App. p. 442-45, 451, 454. However, Petitioner maintained he did so because he wanted to avoid Victim having to give additional ARC interviews or testify at trial. App. pp. 444, 453, 460.

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, pure questions of law will be 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, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. 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 defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness

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

ARGUMENT

The PCR court correctly found appellate counsel was not constitutionally ineffective for failing to raise on appeal the issue of whether Scarlett Murray's testimony violated the "time and place" exception to the hearsay rule because that issue had no reasonable likelihood of success on appeal where Petitioner gave a voluntary statement admitting to the allegation of a lewd act.

Petitioner contends the PCR court erred in finding Appellate Counsel was not constitutionally ineffective because Appellate Counsel failed to argue on appeal that Scarlett Murray's testimony violated the "time and place" exception to the hearsay rule and bolstered Victim's testimony, and defense counsel properly preserved the objection for appellate review. PWC p. 6.

Murray clearly named Petitioner as the perpetrator of some kind of "inappropriate" conduct towards Victim. App. p. 90. At trial, the State argued the statement was not offered for its truth, but rather to show why authorities commenced their investigation. App. p. 92, 94-95. Defense counsel argued it was being offered for its truth and to bolster Victim's testimony. App. p. 92-95. The trial court overruled the defense. App. 95, 97. Thus, to prevail on appeal on this issue, Appellate Counsel would have to show the trial court abused its discretion in finding the statement was not offered for its truth, and even if so, that the admission was not harmless error. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) ("[I]n a direct appeal, a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case."). Because of this high standard, Petitioner cannot meet his burden of showing the time-and-place exception issue was "clearly stronger" than the issues Appellate Counsel raised. See Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) (finding the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal).

Additionally, while Murray's testimony naming Petitioner exceeded the traditional time-and-place limitation, defense counsel clearly and repeatedly implied in his opening statement and throughout trial that Victim had fabricated the allegations – either through an improper motive having to do with family strife or because of the influence of repeated interviews. App. pp. 83-84, 254, 257-59, 334-35, 342-43, 345-46, 348-49, 516, 526, 530. Thus, the State could properly question Murray about the disclosure in order to rebut the charge of improper influence or motive under Rule 801(d)(1)(B), SCRE.³ Because the question was proper and the answer admissible, Appellate Counsel was not deficient for declining to raise this issue on appeal.

Petitioner's case is similar to State v. Jeffcoat, in which the Court of Appeals found testimony by the victim's mother and therapist as to the details of the sexual abuse was proper because it rebutted the defense's implication of coaching. 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002). In Jeffcoat, "defense counsel raised the issue of improper influence or 'coaching' by asking Victim whether she 'practiced' before testifying and whether anyone had told her what to say." Id. at 397, 565 S.E.2d at 324. Defense counsel further "inquired whether Victim had talked to Mother about what she was going to say in court and whether the solicitor told Victim 'what things to say in the courtroom.'" Id. The Court of Appeals found "[t]hese questions impliedly charged improper influences by Mother and the prosecution." Id. The Court of Appeals further explained why the admission of the mother's and therapist's testimony Victim reported to them Jeffcoat had touched her with his "weenie" was proper to rebut the charge of improper influence, writing

[T]he trial court properly admitted the statement made by Victim to Mother that Jeffcoat "put his weenie on her toodie." Since this statement constituted Victim's initial disclosure of Jeffcoat's abuse, it obviously was made prior to any contact with the judicial system and thus could not have been the result of either Mother or

³ This Court can affirm the post-conviction relief court on any basis appearing in the record. On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Respondent reserves the right to brief all available grounds should this Court grant the petition.

the solicitor's alleged coaching of her court testimony. Similarly, Victim's prior consistent statements related in Taylor's testimony predate the family's exposure to the judicial branch; Mother testified the family only became involved with the solicitor's office and subsequent prosecution after Victim stopped seeing Taylor for therapy. Accordingly, the trial court properly found Victim's statements to Taylor admissible to rebut the charges of improper influence.

Id. at 398, 565 S.E.2d at 324–25.

In Petitioner's case, defense counsel argued in his opening statement:

Number one, why would a child make something like this up? Number two, how could a father sign a statement admitting to doing it?

Now, let's talk about the first question. **Why would a child make this up?** You're going to hear about a family situation that isn't exactly stable. Custody fights, child support fights, stepmothers fighting with mothers, mothers fighting with stepfathers, sisters fighting with stepfathers, new fathers coming into the equation when he was eight, nine years old. How does that affect a child? Are they caught in the cross-fire? **Are different people influencing him in different things?** **You're going to hear about repeated interviews of this child,** asking him time and time again about this situation, about his father, John Barnes, by trained professionals. You're going to hear about how he was interviewed by untrained professionals even as lately as last week. **How does that affect a child?** Because he is a child.

App. pp. 83-84 (emphasis added).⁴

⁴ This theme continued throughout trial. During Victim's testimony, defense counsel asked how Victim felt about "having all these people influence [him] in [his] life;" whether Victim felt his legal father had lied to him; how many times he was interviewed by various people about the allegations; and details about his pre-trial interview and preparation with the solicitors. App. pp. 254, 256-59. Additionally, on cross-examination of the forensic interviewer, defense counsel asked whether "repetitive questions" and "asking the same question over and over and over again" could influence a child's answers during an interview. App. pp. 334-35. Defense counsel also repeatedly asked the forensic interviewer about bias being injected into interviews and whether it was proper for the solicitors to give Victim his interview tapes to watch prior to trial. App. pp. 342-43, 345-46, 348-49. In closing, defense counsel argued Petitioner had answered the question of why a child would make up an allegation like this. App. p. 510. Defense counsel argued Victim changed his story and disclosed abuse during the second forensic interview in August 2010 because Victim "spent all summer with the people that hate John Barnes. . . . There is no way... a child would be with these parents for four months and them not talk about this. He comes back. His parents are waiting outside. He tells them what they want to hear." App. p. 516. He also argued Victim was influenced by "repeated interviews" by "authority figures" asking the child over and over to "tell us how this happened." App. p. 526.

Immediately thereafter, the State called Murray as its first witness. Murray testified Victim told her “inappropriate things” had been happening between him and Petitioner. App. p. 90. She also testified she passed along what Victim said to her stepmom, which eventually led to a police report in Richland County. App. p. 98. Murray did not testify about the details of the disclosure and her testimony did not mention the specific points of masturbation or the bubble bath. In fact, her testimony was only that she had seen Petitioner and Victim sleeping in the same bed. App. p. 89. However, because the disclosure to Murray happened in April 2010, before the family had any involvement with the legal or judicial system regarding this allegation, and because she was the first person to whom Victim disclosed the abuse, her testimony was proper to rebut the defense’s implication of improper motive or undue influence. App. pp. 90, 98, 254, 256-59, 334-35, 342-43, 345-46, 348-49, 510, 516.

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999) (citing Evitts v. Lucey, 469 U.S. 387 (1985)). This Court has repeatedly held that although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)) (emphasis in original). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would dissuade the very goal of vigorous and effective advocacy. . . .” Jones, 463 U.S. at 754. In fact, Jones notes that in order to render effective assistance to the client, appellate counsel must necessarily “winnow[] out weaker arguments on appeal and focus[] on one central issue if possible. . . .” because “a brief that raises every colorable issue runs the risk of burying good arguments. . . .” Id. at 751-753. When a claim of ineffective

assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” Gray, 800 F.2d at 646. Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

In Petitioner’s case, Appellate Counsel briefed two issues on their merits. As to the issue of whether the trial court erred in qualifying the forensic interviewer as an expert witness when such qualification was unnecessary for the admission of his testimony, the Court of Appeals found the qualification was “likely error,” although they determined it was ultimately harmless due in part to Petitioner’s own voluntary admission to the crime. State v. Barnes, 2013-UP-314 (Ct. App. Filed July 10, 2013). Appellate Counsel correctly identified a trial error and raised it to the appellate court. Thus, Petitioner’s claim this argument was “clearly weaker” than the time-and-place objection is not supported by the record. The PCR court therefore correctly found Appellate Counsel was not deficient for raising other issues on appeal.

Furthermore, to prove prejudice in this instance, Petitioner must show that, but for appellate counsel’s errors, there is a reasonable probability he would have prevailed on direct appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). In this case, Petitioner, unprompted by law enforcement, asked for an interview and gave a voluntary confession to masturbating Victim in the bath tub *after Victim had denied any abuse in a forensic interview*. App. pp. 205-06, 442-45, 451, 454, 512. Petitioner characterizes the confession as “disputed” because he testified at trial he gave it during a time he was “looking for a way to die and [he] failed,” and because he wanted to protect Victim from having to give further forensic interviews or testify at trial. App. pp. 444, 452-53. This testimony is so plainly self-serving and nonsensical

– Petitioner’s confession did nothing to stop the subsequent forensic interview in which Victim disclosed the abuse, which in turn resulted in a trial in which Victim had to testify – that even if the Appellate Counsel should have raised the issue, there is no reasonable probability the appellate court would have found the admission of the testimony anything other than harmless error.

The PCR court thus correctly found Appellate Counsel was not deficient in deciding not to raise the time-and-place limitation issue, nor was Petitioner prejudiced by this decision. This Court should thus deny certiorari.

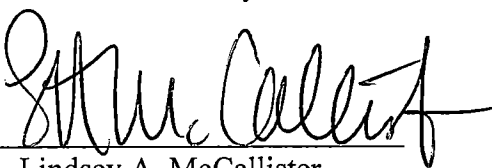
CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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November 20, 2019

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
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CERTIORARI TO RICHLAND COUNTY
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JOHN BARNES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

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

This 20th day of November, 2019.



Lindsey A. McCallister, AAG
For Respondent



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NOV 22 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 20, 2019

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

RE: John Barnes v. State of South Carolina
Appellate Case No.: 2018-001696

Dear Mr. Shearouse:

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

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar # 79054

LAM/em
Enclosures

cc: Joanna K. Delany, Esquire
Victim Advocacy Division