IN THE SUPREME COURT OF THE UNITED STATES

THOMAS HAUGABOOK,

PETITIONER

v.

WALTER BERY, WARDEN MITCHELL STATE PRISON

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Brenda Joy Bernstein
Counsel of Record
The Bernstein Firm, P.C.
10540 Serenbe Lane
Palmetto, GA 30268
(404) 522-1200
bj@bernsteinfirm.com
Counsel For Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Did the Habeas Court err in not finding that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) when counsel failed to engage, consult or present testimony from an expert on proper forensic interview techniques of a minor child in a child molestation case.

PARTIES TO THE PROCEEDING

Thomas Haugabook, Plaintiff/Appellant/Petitioner
Darrin Myers, Warden Jimmy Autry State Prison/Appellee/Respondent

RELATED CASES

Haugabook v. Walter Berry, Warden, Superior Court of Mitchell County, Case No. 17-V-010 Docket Judgement entered April 30, 2019

Haugabook v. State, Georgia Supreme Court, Case No. S19H1279, Application for Certificate of Probable Cause filed May 29, 2019 (2020). Judgment entered April 29, 2020. Motion for Stay of Remittitur filed May 18, 2020 Stay of Remittitur denied May 18, 2020.

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The opinion of the Superior Court of Mitchell County, Appendix A is a non-reported decision of the habeas court denying habeas corpus relief. The Georgia Supreme Court did not grant certiorari to review the denial of habeas relief.

SUPREME COURT JURISDICTION

The denial of Petition for Habeas Relief of the Georgia Supreme Court, of which Petitioner seeks review, was entered on May 19, 2020. Petitioner seeks review of a judgement of the Georgia Supreme Court pursuant to 28 U.S.C. 1257. Pursuant to United States Supreme Court Order of March 19, 2020 regarding change of deadlines due to ongoing health concerns and covid the deadline for filing a Petition for Certiorari is extended 150 days. See U.S. Supreme Court Rule 1.3 and Rule 13.3. Pursuant to United States Supreme Court Rule 13.4, Mr. Haugabook's Petition for Writ of Certiorari was due in this court October 2, 2020.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment, United States Constitution, which provides:

Section 1: All person born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment, United States Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In 2010, Petitioner Thomas Haugabook was convicted of the offense Aggravated Child Molestation after a jury trial in Macon County, Georgia. The jury found him not guilty of the charges of Rape and Statutory Rape. He was sentenced to thirty years

to serve twenty years in prison. His was initially represented by attorney Althea Buafo who was appointed in 2006. Attorney Buafo died of cancer on October 20, 2009 prior to the Petitioners' trial. After her death, Franklin Hogue was appointed to represent Mr. Haugabook. The case went to trial within 30 days after the appointment of new counsel. On appeal, Petitioner was represented by the same trial counsel Franklin Hogue and his law partner Laura Hogue. The Georgia Court of Appeals affirmed his conviction on October 30, 2013.

Mr. Haugabook filed a petition for writ of habeas corpus on January 23, 2015. The Superior Court of Mitchell County denied the petition for habeas relief on April 10, 2017. The Georgia Supreme Court denied the Application for Certificate of Probable Cause on May 18, 2020 . No appellate court has yet fully reviewed the underlying issues of the habeas petition.

A. <u>Habeas Proceeding which is material to the questions presented before this Court</u>

Mr. Haugabook filed a state habeas petition in Mitchell County, Georgia raising the claim that raised federal questions and relied on precedent set in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The habeas petition alleged that trial counsel was ineffective for failing to consult a forensic psychologist to review the discovery provided by the State in this case to determine if the forensic interview of the minor female child " S.F." was deficient and improper. Habeas counsel retained an expert which revealed serious deficiencies and leading questions of the minor child making statements regarding sexual abuse.

The indictment charged Petitioner with the offenses of Rape, Statutory Rape and Aggravated Child Molestation of the minor child "S. F." The State called numerous family members of S.F. including her grandmother and her aunt to testify at the jury trial as to the details S.F.'s initial outcry. The State also presented the testimony of Sgt. Odom who was contacted by the child's aunt regarding the allegations made by the child. The child was interviewed and examined at the Crescent House a facility that interviewed children in sexual assault cases. The child was then interviewed again by a police officer and the child said she "got molested" and with follow up questions about what that meant the child indicated she did not know what that meant. At trial defense counsel did not present any evidence from an expert with regard to how the propriety of the techniques used by the two interviewers when they interviewed the child.

At the evidentiary hearing on the habeas petition, Mr. Haugabook presented the testimony of two witnesses: 1) Mr. Hogue, who served as both trial and appellate counsel and 2) an expert Dr. Christopher Tillitski who provided expert opinion proper procedures for child sexual abuse witness interviews.

Attorney Hogue testified he took over from Ms. Buafo after she became too sick to continue representation. He received State's discovery in the case on June 1, 2010. The trial of the case began on June 14, 2010. He testified being experienced with trying child sex cases and knew the protocols for interviewing alleged child victims. He also testified that the science of forensic interview is fluid and that protocols that are acceptable at one point may not be acceptable later.

Counsel acknowledged he was familiar with the use of experts to review cases involving child sexual abuse and that he had used such an expert in other child molestation trials in the past. Despite having this experience and knowledge, he did not have a forensic psychologist review the interview of S.F. nor did he have a forensic psychologist as expert review the discovery provided by the State.

At the habeas hearing trial counsel testified:

"If that forensic interview is going to play a crucial role in the State's prosecution, then it's best to have an expert review those interviews for the defense to determine whether the interview was conducted properly… so it's critical in a case to have an expert review those interview of the child to see if that has occurred or not. So generally, I would want an expert to review any forensic interview of the child in a child molestation case." (Habeas transcript at page 25.)

Counsel also acknowledged that "aside from this case, it was very rare, if ever that he did not consult with a forensic psychologist in cases like this." (*Id*. at 26)

Finally counsel testified that he did not clearly remember why he did not even consult with a forensic expert but that it could have been that the District Attorney had indicated that he " did not think highly of the case" and had indicated to defense counsel that he did not think he would be able to prosecute the case. *Id*. As of the day of trial, Mr. Hogue was under the belief that the District Attorney was going to dismiss the case. *Id* at 26-27.

At the habeas hearing trial counsel testified that he had attempted to cross-examine the forensic interviewer on relevant points but she never conceded the points that he was trying to make, including the child's use of words that she did not consider that the child had been influenced by someone else and that girls of the alleged victim's age could be influence by others, and that repeat interviews should be avoided.

Counsel for Petitioner presented at the habeas hearing the testimony of Dr. Christopher Tillitstki who has been qualified in many trials as an expert in child forensic interviews and child psychology. He testified that experts have established guidelines and protocols for forensic child interviews in sexual abuse cases in order to ensure that the interview produces valid information. In general, he testified

that 1) children should be interviewed in a neutral setting and not for example at a police station. (The interview in this case occurred at the police station); 2) the interviewer must be neutral and must not believe that they know what happened to the child and 3) open-ended questions should be used and not closed specific questions as was done in this case.

The expert further explained that memories can be tainted, and they can be influenced by outside facts. Taint can be unintentional and beliefs, emotional factors, the conditions of the outcry, the kind of questions that are asked to the child can unintentionally cause answers to these questions that to become distorted or somehow changed.

The specific troubling areas of concern testified to by Dr. Tillitski at the hearing were:

1) The child's aunt, H.F. wrote in a statement prior to trial that she asked the minor child if Mr. Haugabook had been " messing with" her and the child said no. He indicated children who are abused and questioned about it directly do not normally deny that the abuse happened.

2) The aunt also asked very specific questions about the allegations which is to be avoided because the child may acquiesce when a family member is suspicious about these types of allegations. (Id. at 45-47)

3) When pressed for details the child responded with a vague statement that he would be "messing with me" which lacked appropriate contextual details.

4) Before the forensic interview the child was asked specific and leading questions. The expert testified as an example of leading questions that the interviewer asked included a query if " stuff" had come from the accused's private part. With untrained family members asking such questions prior to the interview, it was impossible to know if she really experienced what she testified to or if she was recalling it from her aunt's suggestive and leading questions.

5) During the forensic interview the child denied seeing the defendant's penis, but she told her aunt that she had seen it. The expert testified that conflicting response could be not based on an actual memory but that the child was yielding to a specific and leading question.

6) At one point during the interview the child said that the defendant had "probably" gotten a rag to clean up which indicated to the expert that this may be conjecture rather an actual memory.

7) In the child's first outcry, she stated that Appellant was a "molester" which to the expert was a word that an adult likely introduced to her. Moreover, she stated that she did not know what molest or rape meant during the interview which to the expert indicated she had adopted the language from somewhere else.

8) The State's interview used anatomical drawings that are no longer part of the approved protocol for child sexual abuse investigations because they increased the amount of false information. The interviewer also used a protocol known as good touch, bad touch which is no longer part of the national protocol for appropriate child interview techniques . He testified that these types of questions had been found to elicit false allegations.

9) Generally, a child should not be interviewed more than once under relevant protocols and in this case the child was interviewed a second time by a police officer in a police station which violated one of the key protocols as to location for a forensic interview.

10) During the second interview it was not clear to the expert that she was paying full attention to the questions and she was likely not distinguishing between real memories and a thing she had seen or heard from others.

11) The child was unable to provide relevant contextual details such as what a condom looked like elongated. She said she cried and then she stated that she cried because she was tired and not from any pain which would be expected form the type of sexual assault she was describing. The expert testified that the lack of appropriate details was concerning.

The expert also explained that important changes in the relevant guidelines for proper child forensic interview techniques changed from when the interview was conducted and when Petitioner went to trial. Finally, he stated that given the way that the outcry came about and the way the child was interviewed about "facts and features…weigh really on that scale towards the possibility of a child saying things in the forensic interview that are not factually true." Such testimony would have been admissible at a trial had Dr. Tillitski had been consulted as an expert and testified at trial.

B. Order Denying Habeas Relief

The habeas court denied Mr. Hauguabook's petition, finding that the trial counsel had not been ineffective. Relevant here the Court indicated that it would presume that that trial counsel exercised reasonable professional judgment. The Court concluded that counsel had made a strategic decision not to call an expert forensic psychologist and to rely on cross examination instead. The Court also found that Mr. Haugabook had failed to establish prejudice:

"The mere fact that he found an expert seven years after the fact who would give favorable testimony for Petitioner is not sufficient to prove that the same expert or another expert willing to give the same testimony would have been available at the time of trial." Order of Superior Court of Mitchell County. Then the habeas judge noted that if counsel had presented an expert, "there would merely have been two competing expert opinions placed before the jury. The jury, as the trier of fact and arbiter of credibility, was not required to believe the testimony of any defense expert." Finally, the habeas court judge relied on trial counsel's cross-examination to conclude that Petitioner had not established prejudice.

ARGUMENT AND CITATION OF AUTHORITY

Petitioner's Counsel who both tried the case and handled the direct appeal was ineffective by failing to consult with an expert witness on reliable forensic interviews, which would have exposed improper interview techniques which included leading and suggestible questions and how the deficient questioning by a police officer impacted the child's responses and also precluded the jury of relevant expert testimony on patterns of abused children as witnesses which violated his rights to due process and effective assistance of counsel under the Fifth, Sixth and Fourteen Amendments of the United States Constitution

i. Habeas counsel was ineffective for failing to hire an expert on child sexual abuse interview techniques

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court has extended criminal defendants' constitutional right to effective assistance to first appeals as of right pursuant under the Due Process Clause. *Evitts v. Lucey* 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney"). *Strickland* provides the proper standard for addressing whether trial and appellate counsel was ineffective. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Under *Strickland's* two-prong test, a "defendant who claims to have been denied effective assistance must show both that counsel's performance was deficient deficiently and that counsel's deficient performance caused him prejudice." *Buck v. Davis*, 137 S.Ct. 759, 775, 197 L.Ed.2d 1 (2017) (citing *Strickland*, 466 U.S. at 687).

In the current case the deficiency of counsel was compounded by a number of issues: Trial counsel was substituted as counsel after the death of the first lawyer which meant he had less than 30 days from appointment to prepare for

trial and on direct appeal. He testified at the habeas hearing that he failed to handle Petitioner's case in the way that he handles his other defense of child molestation cases . In his other cases he has handled he consulted with an expert to review the forensic interview of the alleged victim of child molestation.

Many state and federal courts have found ineffective counsel for failure to investigate adequately or failure to secure appropriate expert assistance in preparing and presenting a defense which results in constitutionally ineffective assistance of counsel.

This court in *Hinton v. Alabama*, 571 U.S. 263 (2014) in which an attorney who did not realize that he could seek additional funds to secure an expert to assist in analyzing forensic ballistics evidence determined that the failure to secure an expert provided ineffective assistance of counsel.

In *Gersten v.Senkoeski*, 426 F. 3d 588 (2nd Cir. 2005) trial counsel was found ineffective for failing to fully investigate by searching for available expert testimony that would have contradicted the State's expert testimony on the child abuse accommodation syndrome and other psychological evidence that was offered by the prosecution in a child sexual abuse case. The attorney also failed to research or offer evidence that would have contradicted the state's expert testimony as to proof of penetration. The opinion rejected soundly this decision by counsel to not seek expert testimony stating that "defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to conduct an investigation". The Court further opined for counsel to forego even an investigation of the possibility of challenging the physical evidence in favor of an unsupported theory…. was not objectively reasonable".

Crucially, the court noted that " Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to explore a strategy that would likely have yielded exculpatory evidence…. There was nothing strategic about a decision to concede the physical evidence with no educated basis for doing so …." Id at 299.

In *United States v. Tarricone*, 996 F. 2d 1414 (2nd Cir. 1993) the court held that trial Counsel was ineffective in failing to retain a handwriting expert to show that handwriting on a document was not written by the defendant thus causing the appellate court to remand the case.

In the present case defense counsel failed to consult or call an expert on the psychology of child sexual abuse, or to educate himself sufficiently on the scientific issues, and thus was unable to mount an effective cross-examination, and missed an opportunity to rebut this attempt at bolstering and thus damage the alleged victim's

credibility. The prosecution's entire case rested on the credibility of the alleged victim's testimony.

Further in reviewing the record in this case, the trial counsel in this case did not provide a strategic reason for failing to consult with an expert. While trial counsel indicated that he did not have a specific memory of deciding not to consult with an expert, he also explicitly testified that he did not believe that the case was actually going to trial and that he thought the charges were going to be dismissed. The lack of preparation certainly prejudiced the defense and is an egregious failure of effective counsel.

The habeas court's conclusion to the contrary is unsupported by the record especially when trial counsel testified that he had never gone to trial before without expert review of a child's statement of sexual abuse. This failure thus was error which prejudiced the defendant.

CONCLUSION

Cases of sexual assault of a minor are serious and many changes have occurred over the years in the justice system and training of law enforcement to assure no undue persuasion or manipulation of a potential child victim.

Jurisdictions across the country have enacted protocols for these investigations for the very reason that children are vulnerable. Likewise, training and using experiences professionals is needed for a child interview to be a fair and impartial inquiry.

The State was slow in pursuing this case with the first attorney having the case for years and then the first lawyer dies and new appointed counsel takes over and within thirty days of the start of trial. Replacement counsel acknowledged he handled the case without doing what he did in other child molestation cases - by employing an expert to review the child interview. He acknowledged he failed to do what has become commonplace and essential in evaluating child sexual abuse allegations.

Failure to consult an expert certainly prevented the Petitioner from having effective assistance of counsel. With the high stakes beyond incarceration and sex offender registries of those convicted, insisting that a basic component for effective representation counsel of someone accused of child molestation have an expert review the circumstances of the forensic interview of a child's allegations and present to the jury should be minimum standard for this Court to establish.

Petitioner asks this Court to grant certiorari and rule in his favor.

Respectfully submitted, this 1st day of October 2020.

Brenda Joy Bernstein
Counsel of Record
The Bernstein Firm PC
10540 Serenbe Lane
Palmetto, GA 30268
(404) 522-1200
bj@bernsteinfirm.com
Counsel for Petitioner

APPENDIX A

SUPREME COURT OF GEORGIA
Case No. S19H1279

May 04, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

THOMAS HAUGABOOK v. WALTER BERRY, WARDEN.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except McMillian, J., disqualified.

Trial Court Case No. 17-V-010

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

APPENDIX B

IN THE SUPERIOR COURT OF MITCHELL COUNTY
STATE OF GEORGIA

THOMAS HAUGABOOK, GDC # 606922, Petitioner, v. WALTER BERRY, WARDEN, Respondent,	* * * * * * * * * * *	CIVIL ACTION NO. 17-V-010 HABEAS CORPUS

FINAL ORDER

Petitioner Haugabook, through counsel, filed this petition for a writ of habeas corpus to challenge the validity of his June 16, 2010, Macon County jury trial conviction for aggravated child molestation, which was affirmed on appeal. *Haugabook v. State*, A13A1375 (Ga. App. Oct. 30, 2013) (unpublished), *cert. denied*, No. S14C0364 (Ga. Apr. 22, 2014). Based upon the record as established at the June 12, 2017, evidentiary hearing in this case,[1] this Court makes the following findings of fact and conclusions of law and DENIES relief.

PROCEDURAL HISTORY

[1] Citations to the transcript of the June 12, 2017, evidentiary hearing are "HT." followed by the page number(s).

Petitioner was indicted by a Macon County grand jury on November 13, 2006, for aggravated child molestation (count 1), rape (count 2), and statutory rape (count 3). (HT. 129-32). On July 8, 2010, a jury found Petitioner guilty on count 1, and he was sentenced to thirty years, twenty to serve. (HT. 191). Petitioner was represented at trial by Frank Hogue and on appeal by Laura Hogue. (HT. 197, 215, 630).

Petitioner enumerated five errors on appeal:

1. The evidence was insufficient to support Appellant's conviction for aggravated child molestation as the State failed to prove the essential elements and material allegations alleged in the indictment for this count.
2. The trial court abused its discretion by refusing to grant a new trial based upon the child's knowing and willful false swearing at trial as to the alleged acts of child molestation committed by Appellant, which false swearing was conclusively proven at the hearing on the motion for new trial.
3. The trial court failed to give certain jury instructions necessary for the jury to determine the guilt or innocence of Appellant, which failures affected substantial rights of Appellant and constituted plain error.
4. The trial court erred by prohibiting Appellant from cross examining one of the State's child hearsay witnesses regarding matters pertinent to the defense, in violation of Appellant's Sixth Amendment right to confrontation.
5. The State's child hearsay evidence lacked sufficient indicia of reliability for admissibility under the child hearsay statute.

(HT. 630-79). The Court of Appeals found that these claims lacked merit and affirmed Petitioner's convictions and sentences on April 22, 2014. *Haugabook v. State*, A13A1375 (Ga. App. Oct. 30, 2013) (unpublished), *cert. denied*, No. S14C0364 (Ga. Apr. 22, 2014).

Petitioner, through counsel, filed this habeas corpus petition on January 12, 2017, and raised one ground. This Court held an evidentiary hearing on June 12, 2017.

GROUND 1

In the sole ground of the petition, Petitioner alleges that he received ineffective assistance of trial and appellate counsel when counsel failed to present the testimony of an expert psychologist at trial, as the State presented testimony from the child victim/witness that Petitioner molested her.

Findings of Fact

Petitioner was represented at trial by attorney Frank Hogue. (HT. 6). Mr. Hogue began practicing law in 1991, doing criminal defense, among other things, for a private firm in Macon, Georgia. (HT. 6). He began working with his wife, appellate counsel Laura Hogue, in 1997. *Id.* At the time Mr. Hogue represented Petitioner, he had handled approximately seventy felony jury trials. *Id.* He had also handled thirty or forty child sex abuse cases, with ten or twelve cases having gone to trial. (HT. 16). Because of this, Mr. Hogue was familiar with such cases and with the proper procedures for conducting forensic interviews. (HT. 17). He had used his own expert in previous child sex abuse cases, although he did not retain one in this case. (HT. 18-20). He has also considered the field of forensic interviewing to be a fluid one that has changed since he began practicing law. *Id.*

Mr. Hogue was retained to represent Petitioner after Petitioner's original counsel, Althea Buafo, got sick from cancer. (HT. 6, 152). After he was brought on the case, he received the State's discovery from Ms. Buafo. (HT. 7). Mr. Hogue considered the credibility of the child in that case to be critical to its outcome. (HT. 19). Because of this, Mr. Hogue opposed the State's request to admit child hearsay statements from four different witnesses – the victim's grandmother, the victim's aunt, the forensic interviewer, and a police officer. (HT. 20, 280-85). Despite this, all of these witnesses were allowed to give testimony at trial.

Mr. Hogue's overall strategy in this case was to persuade the jury that the victim's testimony was not believable, so he tried to get DFCS records to undermine the credibility of the victim and her family. (HT. 22-23). This defense was aided by the fact that the victim was much older at trial from the time of the allegations and that she had vacillated back and forth over her allegations, giving inconsistent statements and using a word that he considered to be age-inappropriate. (HT. 24). Even right before trial, the victim had indicated that she did not want to testify. *Id.* On cross-examination of the victim, Mr. Hogue was able to get the victim to admit that she had told her school counselor that the molestation had not happened, though the victim said she said this because she "didn't want anyone in my business." (HT. 476). He also cross-examined the

witnesses to demonstrate to the jury that repeated questioning of a child undermines the reliability of the child's account, and to show that using leading questions in child interviews was highly suggestible. (HT. 27-28). Mr. Hogue further presented four character witnesses on Petitioner's behalf. (HT. 557-98).

At the habeas hearing, Mr. Hogue did not specifically recall why he did not choose to consult an expert in this case, though he did explain that he had previously cross-examined and seen interviews of Tracey Hartley, the forensic interviewer in the case, and he thought she was a good forensic child interviewer. (HT. 21; 26). In fact, he had had other cases where experts had acknowledged that she had done a "pretty good job." *Id.*

Laura Hogue, Frank Hogue's wife and a partner in the same firm, Hogue & Hogue LLP, represented Petitioner on appeal. (HT. 90-91). Mrs. Hogue began practicing law in 1991, and her work included being the co-head of the appellate division at the Macon Judicial Circuit District Attorney's office. (HT. 91, 97). Mrs. Hogue estimated that, at the time of Petitioner's appeal, she had handled about fifty appeals and about fifty trials. (HT. 97-98). In their law firm, Mr. Hogue only handles trial work, and Mrs. Hogue handles both trials and all of the firm's appellate practice. (HT. 91). In cases where Mr. Hogue represented a defendant at trial and the client wants to stay with the firm on appeal, Mrs. Hogue will speak with the client. *Id.* Mrs. Hogue's practice when she is preparing a case

on appeal is to read everything in the docket and speak with trial counsel. (HT. 99). She also reviews any notes concerning issues that trial counsel thought were of critical importance. *Id.*

In this case, Mrs. Hogue began to work with Mr. Hogue after the trial to determine appropriate issues for the amended motion for new trial, and then she solely took the case to the appellate court. (HT. 92). Because Mrs. Hogue knew that the victim made a recantation after the trial, she focused on that issue on appeal. (HT. 99).

As part of her preparation for the motion for new trial and appeal, Mrs. Hogue would have absolutely reviewed the forensic interview videos in the case, and she did not recall seeing a need to consult with an expert. (HT. 103-04). If Mrs. Hogue had concluded that there was a potential error for failing to call an expert witness in a trial, she would have let Petitioner and his family know that and would have informed them as to their options regarding raising claims of ineffective assistance of trial counsel. (HT. 100). She would also have referred Petitioner and his family to appellate lawyers that she respected. (HT. 101).

In addition to his former attorneys, Petitioner called Dr. Christopher Tillitski, a licensed psychologist, to testify at the habeas hearing. (HT. 34-78). Dr. Tillitski was asked by Petitioner's habeas counsel to review the case. (HT. 72).

He had not previously met trial or appellate counsel, and he did not interview or even speak with the victim, nor was he present at the jury trial. (HT. 73).

At the habeas hearing, Dr. Tillitski addressed statements from several of the child hearsay witnesses, including Howanda Felton and Joyce Felton. (HT. 43; 50; 81). He explained why the types of questions asked by these witnesses were inappropriate and opined as to why the victim's responses to them were potentially false and indicative that the child was yielding to the questions. (HT. 44-48; 50-52; 71-72). At trial, Mr. Hogue cross-examined both of these witnesses to elicit information that would demonstrate that the victim had been coached to lie at the trial. (HT. 382; 392-93). He also elicited information regarding disputes between Howanda Felton and the victim's mother as well as an admission by Joyce Felton that she did not call the victim's mother after the allegation of abuse. (HT. 336).

Dr. Tillitski also opined that certain factors in the forensic interviews by both Sergeant Amber Odom and Tracey Hartley could have had an impact on the victim's responses as well and that the questioning used was "not the way to do it now." (HT. 54-55; 60). He did acknowledge, however, that protocols have changed significantly since the time the interview was conducted and that many of the techniques, including use of anatomical pictures, the term "good touch bad touch," and asking about the first outcry were standard protocol at the time of the interview. (HT. 52-55; 57; 62; 71). He also acknowledged that there could be

problems with a forensic interview but that other information, such as an accompanying medical exam that indicates penetration of the child victim, could override the result of the interview. (HT. 75). Additionally, he admitted that when abuse occurred over the course of several years versus a single incident, a victim could encode those memories in a different way and therefore give answers that may lack the specificity of a single occurrence. (HT. 76).

At the trial in this case, Mr. Hogue elicited from Sergeant Odom that multiple interviews by different people and suggestive answers were concerning due to the suggestibility of children. (HT. 417-18). He also attempted to demonstrate on cross-examination that Sergeant Odom had committed a number of errors during her interview of the victim, including wearing a police uniform, conducting an interview in the police station, and asking a number of questions that violated protocol, including those that were multiple choice, leading, and repeated. (HT. 418-21).

Mr. Hogue also cross-examined Tracey Hartley extensively about the forensic interview techniques that she had used in the victim interview. (HT. 444). As with Sergeant Odom, he questioned her extensively on the use of leading questions and the suggestibility of girls the victim's age. (HT. 446-48; 453-54). He also attempted to elicit that when a child used words like "molest" and "rape" but did not know how to define them, it was an indication that she had been

influenced by an adult. (HT. 30, 450-51). Ms. Hartley acknowledged that it was possible that the child learned the words "molest" and "rape" from an adult, though she was not sure. (HT. 452). He also questioned Ms. Hartley on the appropriateness of the secondary interview with the police officer and whether it was a bad idea to have someone in a police uniform re-interview a victim. (HT. 32, 454-55).

The victim was examined by a nurse practitioner, who testified that the victim had an absence of tissue around the hymen that was indicative of penetration. (HT. 319). This absence of tissue was consistent with chronic sexual abuse. (HT. 531).

Conclusions of Law

Strickland v. Washington, 466 U.S. 668, 687 (1984), sets forth a two-pronged test, both of which must be proven by a petitioner in order to prevail on a claim of ineffective assistance.

> First, [Petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, [Petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive [Petitioner] of a fair trial, a trial whose result is reliable. Unless [Petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreasonable.

Strickland, 466 U.S. at 687.

As to the first prong, this Court's scrutiny of an attorney's performance must be "highly deferential." *Strickland*, 466 U.S. at 689.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

A [petitioner] must identify the acts or omissions of counsel which he contends are unreasonable, while this Court determines "whether, in light of all the circumstances," the challenged action was outside the range of professional competent counsel. *Id.* at 690. Counsel is "strongly presumed" to have rendered effective assistance and made "all significant decisions in the exercise of reasonable professional judgment." *Id.* A [petitioner] has the burden of proof to overcome the "strong presumption" that counsel's conduct falls within the range of reasonable professional conduct and affirmatively show that the purported deficiencies in counsel's performance were indicative of ineffectiveness and not examples of a conscious, deliberate trial strategy. *Morgan v. State*, 275 Ga. 222, 227, 564 S.E.2d 192 (2002).

As to the attorney performance prong in the context of appellate counsel, the "controlling principle" is whether appellate counsel's decision was a reasonable, tactical decision that any competent attorney in the same situation would have made. *Shorter v. Waters*, 275 Ga. 581, 585, 571 S.E.2d 373 (2002). A petitioner

can raise a *Strickland* claim based on an appellate attorney's failure to raise a particular claim "but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). A defendant does not have a right to compel counsel to press non-frivolous points if counsel decides, as a matter of professional judgment, that those issues should not be raised. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

As to the prejudice prong:

> The [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. *See also Miller v. State*, 285 Ga. 285, 287, 676 S.E.2d 173 (2009).

Petitioner alleges he received ineffective assistance of trial counsel when counsel did not call an expert to rebut the forensic interviews. However,

> As a general rule, matters of reasonable trial strategy and tactics do not amount to ineffective assistance of counsel. The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego cross-examination and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis of a successful ineffective assistance of counsel claim.

Thomas v. State, 284 Ga. 647, 650, 670 S.E.2d 421 (2008) (citation omitted). "It is well established that the decision as to which defense witnesses to call is a

matter of trial strategy and tactics." *Humphrey v. Nance*, 293 Ga. 189, 220, 744 S.E.2d 706, 729 (2013) (citations omitted). "[W]here the record is incomplete or unclear about [trial counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Id.* (citing *Williams v. Head*, 185 F3d 1223, 1228 (11th Cir. 1999)).

Based on the evidence in the record and the deference owed to trial counsel's strategic decisions, Mr. Hogue's usage of extensive cross-examination of the forensic interviewers concerning the child victim's forensic interviews and his decision not to call an expert witness were the result of reasonable strategic decisions made based on an investigation into the interviews and his experience with child sex abuse cases. (HT. 21-22). In furtherance of the defense that the witnesses were not reliable, Mr. Hogue cross-examined the victim, her aunt, and her grandmother to demonstrate inconsistencies with their testimony as well as bias. (HT. 24). Mr. Hogue also thoroughly cross-examined the two forensic interviewers, questioning their methods and asking them about common interview practices. Petitioner has not shown that this tactic was outside the range of professional competent counsel. *Strickland.* 466 at 690. Further, because trial counsel did not provide ineffective assistance, appellate counsel was not ineffective for choosing to forego this issue on appeal in favor of more meritorious

claims. *See Hayes v. State*, 262 881, 884-85, 426 S.E.2d 886 (1993) ("Failure to make a meritless objection cannot be evidence of ineffective assistance.").

Petitioner has also failed to show that he was prejudiced by counsel's decisions. The mere fact that he found an expert seven years after the fact who would give favorable testimony for Petitioner is not sufficient to prove that the same expert or another expert willing to give the same testimony would have been available at the time of trial. Further, even if Mr. Hogue had chosen an expert who would have presented different analysis of the forensic interviews, there would merely have been two competing expert opinions placed before the jury. The jury, as the trier of fact and arbiter of credibility, was not required to believe the testimony of any defense expert. This is particularly true since Dr. Tillitski's testimony did not elicit any issues that were not raised during cross-examination, including issues such as Sergeant Odom's second interview, Sergeant Odom driving the victim, Tracey Hartley's interview technique, and the victim's usage of words like "molest" and "rape." In light of the other evidence presented at trial, including the nurse practitioner's examination of the victim in conjunction with her trial testimony, Petitioner has not shown that, but for his counsels' decisions, there is a reasonable probability that the outcome in his trial or appeal would have been different. *Strickland*, 466 U.S. at 694; *Nelson v. Hall*, 275 Ga. 792, 573 S.E.2d 42 (2002).

Accordingly, Petitioner's claims of ineffective assistance of counsel lack merit and do not provide a basis for relief.

CONCLUSION

Wherefore, the petition for a writ of habeas corpus is DENIED.

If Petitioner desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this order and also file a notice of appeal with the Clerk of the Superior Court of Mitchell County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby DIRECTED to mail a copy of this order to Counsel for Petitioner, Respondent, and the office of the Attorney General.

SO ORDERED, this 22 day of April, 2019.

J. KEVIN CHASON, Judge
South Georgia Judicial Circuit

17-V-010

Prepared by:

Matthew M. Youn
Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3399