

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO CHEROKEE COUNTY
The Court of Common Pleas

S.C. SUPREME COURT

R. Keith Kelly, Trial Judge
J. Mark Hayes, II, Post-Conviction Judge

Post-Conviction Relief Case No. 2017-CP-11-801
Appellate Case No. 2024-000128

Thomas Anthony Styla, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

**PETITION FOR A WRIT OF CERTIORARI
OF PETITIONER/RESPONDENT**

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QUESTION PRESENTED

Did the post-conviction relief court err in finding Counsel rendered prejudicial ineffective assistance for failing to interview Robin Christian Smith prior to calling her as a defense witness at trial where there is no evidence in the record to support that finding?

STATEMENT OF THE CASE

Respondent/Petitioner, Thomas Anthony Styla (Styla), was indicted at the April, 2015 term of the grand jury for Cherokee County for one count of first-degree criminal sexual conduct (CSC) with a minor (App.p.489-490; 2015-GS-11-00239). On August 30, 2016, a jury trial was commenced at the Cherokee County Courthouse before the Honorable R. Keith Kelly. Styla was present and was represented by Andrew J. Johnston, Esquire. Petitioner/Respondent (the State) was represented by Assistant Solicitor G. Matthew Kendall of the Seventh Circuit Solicitor's Office. (App.p.1). At the conclusion of trial, the jury found Styla guilty as indicted. (App.p.479). On September 1, 2016, judge Kelly sentenced Styla to twenty-five (25) years' imprisonment. (App.p.484-p.485; p.487-p.491). A timely Notice of Appeal was filed on Styla's behalf; however, by and through appellate counsel Jack B. Swerling, Styla moved to dismiss his direct appeal. The motion was granted by the Court of Appeals by order filed June 12, 2017. The Remittitur was issued on June 28, 2017. (App.p.492-p.498).

On October 23, 2017, Styla, who was still represented by Mr. Swerling, filed an application for post-conviction relief (PCR) raising twenty-three allegations of ineffective assistance of trial counsel, including the claim that "Counsel called as a witness for the defense, Robin Christian [Smith], school guidance counselor, to ask her questions about what the complainant told her. The elicited testimony was damaging to the Petitioner and amounted to the defense bolstering and to some degree corroborating the complainant's testimony in the State's case-in-chief." (App.p.503-p.511). On January 12, 2018, the State submitted a Return requesting an evidentiary hearing to resolve Styla's numerous claims. (App.p.512-p.518). On November 1, 2018, Styla submitted an amendment to his application for PCR alleging four additional grounds. (App.p.519-p.523).

On November 6, 2018, an evidentiary hearing was held at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, II. Styla was present and was represented by Jack B. Swerling and Alissa L. Wilson. The State was represented by Assistant Attorney General Jordan A. Cox of the South Carolina Attorney General's Office. (App.p.525). During the hearing, Styla called Mr. Johnston (Counsel), to the stand and, over the State's objection, Katherine Goode, Esquire, to offer her opinion that there were no viable issues available for direct appeal. Styla also testified on his own behalf. The PCR court was provided a copy of the PCR application, the State's return, Styla's amendment, the records of the Cherokee County Clerk of Court concerning the subject conviction, the trial transcript, the direct appeal records, and Styla's records from the South Carolina Department of Corrections. Due to time constraints, the hearing was not completed that day and was continued to a future date. (App.p.525-p.717).

On September 27, 2019, the PCR court reconvened the evidentiary hearing at the Spartanburg County Courthouse. Styla was again present and represented by attorneys Swerling and Wilson. The State was represented by Assistant Attorney General Johnny Ellis James, Jr., of the South Carolina Attorney General's Office. (App.p.718). At the hearing, Styla called five additional witnesses: his partner Dottie Crowder, his friends Lee Howell, Wendy Reveles, and Chad Wright, and Wright's daughter Olivia Wright. The State then recalled Counsel to offer additional testimony. At the end of the hearing, the PCR court took the matter under advisement and requested briefs from the parties to address the matters in dispute. (App.p.718-p.809). The State submitted a brief in opposition dated December 11, 2019, and Styla submitted a brief in support dated December 18, 2019. (App.p.810-p.904). The PCR court also had before it copies of the pleadings submitted by the parties and the exhibits introduced during the evidentiary hearings.

The PCR court issued an informal decision in the matter by way of a “Form 4C” filed March 6, 2020, which denied relief and, in part, asked the State to prepare a formal proposed order consistent with the decision. (App.p.905-p.910). In an eighty-seven-page Order of Dismissal dated February 19, 2021, and filed February 25, 2021, the PCR court initially denied Styla’s application for PCR in toto. (App.p.911-p.1000).

On March 11, 2021, Styla filed a “Motion for Reconsideration and/or Relief from Judgment or Order to Amend, Alter or Modify pursuant to S.C.R.C.P. 59(e)” and on June 11, 2021, the State filed a return. (App.p.1001-p.1014). On November 10, 2022, the PCR court heard oral arguments on Styla’s motion via Webex, asking the parties to place particular focus on the allegation related to Counsel’s failure to interview Smith prior to calling her as a witness at trial. The PCR court was subsequently provided a transcript of the oral arguments. (App.p.1015-p.1075). In an Order dated May 31, 2023, and filed June 5, 2023, the PCR court granted Styla’s motion to reconsider, granted PCR on the allegation related to Smith, and thereby granted Styla a new trial. (App.p.1076-p.1088)

On June 22, 2023, the State filed a “Motion to Alter or Amend” and on September 11, 2023, Styla filed a response. (App.p.1089-p.1102). In an Order dated December 20, 2023, and filed December 27, 2023, the PCR court denied the State’s motion and reaffirmed its June 5, 2023, order “in all respects.” (App.p.1103-p.1107). On January 31, 2024, the State filed a notice of appeal with this Court and on February 5, 2024, Styla filed a notice of cross-appeal. This petition for a writ of certiorari on behalf of the State now follows.¹

¹ On June 22, 2024, Styla filed a “Petition for Writ of Certiorari of Respondent-Petitioner” asking this Court to reverse the findings of the lower court on three issues for which post-conviction relief was denied.

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (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.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) and *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; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). 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).

“A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution.” *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013) (citing U.S. Const. amend. VI). In a post-conviction relief action, an Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCF; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an Applicant 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 [proceeding] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. 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). The Applicant must overcome this presumption to receive relief.

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

“In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel’s performance was deficient, meaning that “counsel” made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Strickland* at 687); *See also Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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. *Strickland* at 696. 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. *Id.* at 696-97.

ARGUMENT

I.

The post-conviction relief court erred in finding Counsel rendered prejudicial ineffective assistance for failing to interview Robin Christian Smith prior to calling her as a defense witness at trial because there was no evidence in the record to support that finding.

The post-conviction relief court erred in granting relief based on a finding that Counsel rendered prejudicial ineffective assistance for failing to interview Robin Christian Smith prior to calling her as a defense witness at trial where there was no evidence in the record to support the PCR court's finding. Styla failed to carry his burden of proving that, had Counsel attempted to interview or interviewed Smith prior to trial, it would have produced a different result or otherwise altered Counsel's reasonable trial strategy of calling Smith as a defense witness at trial.

Under *Strickland*, to warrant a grant of relief, Styla first had to prove that Counsel's performance was deficient as measured by "reasonableness under professional norms." *Id.* at 687. Second, Styla had to prove Counsel's deficiency prejudiced him to the point that he was deprived of a fair trial and produced an unjust result. *Id.* Styla failed to carry his burden in regards to either prong of *Strickland*. Smith was not called to testify at the PCR proceeding. In the absence of any testimony from Smith, there was a total absence of evidence to support the grant of relief, which requires reversal under this Court's standard of review. This is particularly so under the prejudice prong where Counsel adjusted his strategy during trial to perform well within the range of competence required. The PCR court's grant of relief should be reversed.

Trial

At trial, after the jury was sworn, the trial judge gave preliminary jury instructions on the burden of proof and the respective roles of the judge and the jury. He explained the jury was the

sole judge of the facts including whether evidence is believable and the weight to be given to that evidence. (App.p.58-p.66). Next, the solicitor made a brief opening statement outlining the State's theory of the case. He said the case centered around the allegation that, in late December of 2009, around Christmas, Styla committed an act of criminal sexual misconduct in the first degree when he inserted his finger into the vagina of the nine-year-old Victim. The solicitor said the molestation happened at Victim's grandmother's home when Styla entered a bedroom where Victim was lying on her cousin's bed, while her cousin was on the floor playing a video game. He said Styla began giving Victim a massage of her back and legs, and then when he reached the bottom of her legs Styla reached under her clothes, inserted his finger into her vagina, and asked: "does this feel good?" The solicitor said Victim was scared, told Styla to stop, and left the room. The solicitor explained this was the single incident of actual molestation, but said there were other instances of inappropriate behavior including: (1) Styla commenting on Victim's butt sometime after she turned nine; (2) Styla reaching his hand up the legs of Victim's shorts as they were riding a four-wheeler together when she was ten; and (3) Styla inviting Victim to come lie in bed with him sometime later the same summer of the four-wheeler incident. (App.p.66-p.70).

Counsel then made an opening statement on behalf of Styla. He first noted: (1) the lack of any objective evidence in the case such as a forensic interview, medical examination, or DNA; (2) the fact Victim had never been in therapy despite her allegation; and (3) the four-year delay before she disclosed. Counsel then focused on two key angles to Styla's defense: (1) that the *sole* evidence would be the testimony of a fourteen-year-old girl with credibility issues and (2) that Styla was presumed innocent with the very high burden of proof resting solely on the State. (App.p.70-p.74).

Victim testified as the State's first witness. (App.p.75). She said that she had an okay relationship with Styla before the molestation, but that she thought of him as a "creepy old guy" because from the time she was seven until the time of the incident he would sometimes talk about or compliment her butt. (App.p.78-p.79). In regard to the incident itself, she explained that after everyone in the home opened their presents for Christmas in December 2009, she was lying on her stomach on the bed in Cousin's bedroom while Applicant watched Cousin play a video game. Applicant asked Victim "if he could rub and pop [her] back." Applicant rubbed Victim's shoulders, then her ankles, then up her tights on her legs, gradually moving ever higher. Applicant then digitally penetrated her and asked her if it felt good. Victim said it did not. Applicant stopped and looked at her. Victim told him to stop, and Applicant removed his hand. Applicant ceased touching Victim, who excused herself and went into the living room. She did not tell a soul that night. (App.p.79-p.82).

Next, Victim testified about other interactions she had with Styla that made her feel uncomfortable. She said that on one occasion when she was ten years old, Applicant had a four-wheeler, but told her she was not old enough to drive it by herself, so he rode on the back while she drove. While riding through the woods near a neighbor's house, Applicant put his hands on Victim's shorts, then under her shorts; Victim told him that she was done riding and turned to return home; Applicant stopped. (App.p.82-p.83). Victim next testified that later that summer, Styla asked her if she wanted to get in bed with him and she responded: "No." (App.p.83-p.84). Victim concluded her testimony by explaining she ultimately disclosed the abuse and incidents with Styla to her eighth-grade guidance counselor [Smith]. (App.p.85).

On cross-examination, Counsel questioned Victim about the alleged molestation incident and the other alleged interactions she had with Styla, attempting to show incongruities in her

behavior and story. (App.p.86-p.92). Counsel also questioned her extensively about her delayed disclosure to Smith, identifying specific aspects of Victim's testimony that contradicted prior statements she gave to Smith (at least according to the notes Smith prepared for the police at the time of Victim's disclosure). (App.p.92-p.111). These included: (1) whether Styla asked "does that feel good?" or "do you like it?" when he penetrated her vagina with his finger (App.p.94, line 14-p.95, line 12); (2) whether Victim simply got up and left or ran away after the incident (Tr.p.96, line 21-p.97, line 3); (3) whether Victim told Smith incidents similar to the actual molestation happened more than once (App.p.97, lines 6-16); (4) whether Styla asked Victim to wear specific shorts that were very short in length for the four-wheeler ride (App.p.101, line 5-p.102, line 16); (5) whether Styla invited Victim to bed with him or just asked her to lie down on the bed with him (App.p.102, line 17-p.106, line 8); and (6) whether, after the incident, Styla asked Victim if it was then his turn for a massage (App.p.108, line 21-p.111, line 4).

After the State rested, Counsel called Styla's partner, Dottie Crowder, to the stand, and then had Styla testify in his own defense. (App.p.267-p.341). Next, Counsel called Smith as a witness for the defense. He promptly presented Smith with the notes she prepared and provided to law enforcement, which detailed the disclosure Victim made to Smith. (App.p.342-p.343). Counsel was unable to get the notes themselves admitted as an exhibit, but nonetheless began exploring the details of Victim's disclosure and how her trial testimony contradicted Smith's notes in some respects. (App.p.343-p.347). Smith testified Victim told her Styla "would make comments about how short her shorts were" and "that he liked her short shorts" but then admitted her notes actually said Victim had claimed Styla "would ask her to wear particular shorts that were very short in length." (App.345-p.346). Smith further acknowledged her notes indicated Victim told her that when she asked Styla to stop straddling her "he told her that she

liked it.” (App.p.346-p.347). When Counsel asked Smith if Victim reported she “then told [Styla] that it was his turn for a massage,” as was set out in Smith’s notes, Smith denied Victim so disclosed, to Counsel’s surprise. (App.p.347-p.348). Smith tried to explain the inconsistency as a typographical error because she was hurriedly typing up the report for law enforcement. (App.p.348). Smith then admitted her notes indicated that when Styla got off Victim for his turn, she *ran* into the other room. (App.p.349). However, Smith continued to insist the notes were “written incorrectly.” (App.p.349-p.352). Counsel then questioned Smith about a particular note stating “the way it was told to me was that this may have happened more than once.” Smith testified that despite this note, Victim did not tell her about other specific instances of abuse, but merely “led her to believe” there were other incidents of abuse or inappropriate conduct. (App.p.352-p.354). Later, on redirect, Counsel got Smith to admit it was quite a coincidence that the points in her notes Victim claimed she did *not* say, were the same points Smith was now claiming were wrong. (App.p.366-p.368).

In closing arguments, Counsel drew the jury’s attention to Smith’s prevarication as to her own notes about Victim’s disclosure and the inconsistencies between her notes and Victim’s testimony. (App.p.410-p.412). Counsel hammered Smith for disclaiming the portions of her notes which Victim disclaimed at trial: “the two key things that [Victim] happens to now disclaim just happen to be the only typos that the guidance counselor made in her documentation. It’s an insult to your intelligence.” (App.p.412, lines 21-24). Counsel used Smith’s waffling to attack Victim’s credibility. He opined that Victim “walked back” the scope of the allegations from what she told Smith because “they didn’t sound good.” (App.p.412-p.414).

PCR Evidentiary Hearings

At the first part of the PCR evidentiary hearing, Counsel testified he obtained a copy of Smith's notes prior to trial. (App.p.586-p.587). Counsel acknowledged Smith's testimony did not pan-out exactly as planned and explained that he had not expected her to dispute her own notes. (App.p.587, lines 6-16). Counsel acknowledged he did not speak to Smith prior to trial and that the safer practice probably would have been to do so. (App.p.587-p.588). Counsel agreed Smith turned out to be an adverse witness. (App.p.588, lines 17-19). Counsel acknowledged that Smith testified as to details of Victim's disclosure to her about the molestation. (App.p.588-p.592). When challenged that the "typo" story would have been discoverable if only Counsel had called Smith before trial, Counsel astutely answered "[i]f she had told me, yes." (App.p.589, lines 19-24). Counsel noted that Smith reported Victim had disclosed abuse occurred multiple times, but Victim testified she was only ever penetrated once at trial, which was a clear contradiction. (App.p.592, lines 10-15). Counsel acknowledged Smith testified she had reported the errors in her report to the Solicitor during a phone call. (App.p.593-p.595). Counsel thereafter acknowledged his extensive closing argument excoriating Smith for her prevarication. (App.p.595-p.602).

On cross-examination, Counsel testified he "couldn't imagine [Smith] was going to go with the story that – the point I was trying to raise about prior inconsistent statements were typographical errors. I was shocked at that and remain so." (App.p.624, lines 22-25). Counsel admitted Smith's testimony did not turn out like he hoped, which was that he would elicit testimony consistent with Smith's contemporaneous notes and then use it to show prior inconsistent statements by Victim to impeach. (App.p.625, lines 1-8). Instead, Counsel "had to go with a very hastily prepared plan B, which was that [Smith] was changing her story after she

understood that [Victim] was not supporting those particular points.” (App.p.625, lines 9-12). On redirect examination, Counsel acknowledged that by closing arguments, both he and the solicitor condemned Smith as a liar. (App.p.643-p.644).

Discussion / Analysis

The State submits the post-conviction relief court erred in granting relief based on Counsel’s failure to interview Smith prior to calling her at trial. There was no evidence in the record to support a finding of ineffective assistance of counsel or prejudice. Styla failed to carry his burden of proving that, had Counsel attempted to interview or actually interviewed Smith prior to trial, it would have produced a different result or otherwise altered Counsel’s reasonable trial strategy of calling Smith as a defense witness at trial.

Under *Strickland*, to warrant a grant of relief, Styla first had to prove that Counsel's performance was deficient as measured by "reasonableness under professional norms." *Id.* at 687. Second, Styla had to prove Counsel’s deficiency prejudiced him to the point that he was deprived of a fair trial which produced an unjust result. *Id.* Styla failed to carry his burden in regards to either prong of *Strickland*. Smith was not called to testify at the PCR proceeding. Thus, the PCR court’s critical error was relatively straightforward—it based its findings on conjecture and speculation rather than on any evidence in the record. In the absence of any testimony from Smith, there was a total absence of evidence to support the grant of relief, which requires reversal under this Court’s standard of review. *Smalls* at 180, 810 S.E.2d at 839. This is particularly so under the prejudice prong where the trial court record demonstrates that even *after* the surprise of Smith deviating from her notes in some (but not all) respects, Counsel effectively adjusted his strategy by using pointed questions on direct which elicited some of the favorable testimony he sought, while using Smith’s new credibility issues to demonstrate the vague and

imprecise nature of Victim's disclosure. Counsel also made a strong closing argument discrediting Smith's transparent attempts deviate from her notes in an effort to support Victim, which showed the weakness of Victim's testimony when standing alone. The PCR court's grant of relief should be reversed.

In the May 31, 2023 order granting relief the PCR court correctly notes that: "A defense attorney may perform deficiently where he or she calls a witness without first conducting a reasonable investigation to ascertain whether the witness will be helpful to the defendant's theory of the case." (App.p.1078). It then, unfortunately, conducts a flawed review of the evidence presented at trial and at the PCR hearing before improperly concluding: "[Styla] has shown that his trial counsel . . . was deficient/ineffective and acted unreasonably by not interviewing witness Smith prior to calling her during the trial." (App.p.1086). The flaws in the analysis were shared with the PCR court by way of the State's June 22, 2023, motion to alter or amend; however, in the December 20, 2023 order denying that motion, the PCR court doubled-down on its decision and failed to correct the fatally flawed analysis or its grant of PCR. (App.p.1103-p.1107).

In the initial order granting relief, the PCR court found: ". . . **it is more likely than not**, that [Smith] would have advised [Counsel] of her altered recollection if she had been asked prior to her testimony at trial, as she had previously informed the Solicitor." (App.p.1082) (emphasis added). But "more likely than not" is not evidence. Smith was not called to testify at the PCR proceeding. Consequently, the PCR court did not know what Smith would have said about this issue. It did not know if Smith would have even agreed to talk to Counsel prior to trial, particularly considering Counsel was in the middle of preparing a defense of the man accused of sexually assaulting Victim. Even if Smith did agree to talk, the PCR court did not know if she

would have told Counsel about “her altered recollection” or would have simply stood by her written notes and presented the contradictory testimony later at trial. Her apparent decision to talk with the solicitor prior to trial is not dispositive given the adversarial positions of the parties. Ultimately, it is speculation to guess what Smith would have said to Counsel at a pretrial interview, even if it seemed “likely” to the PCR court. The burden in PCR for a grant of relief required Styla to make this showing so that the inherent uncertainty of what an interview with Smith might have revealed, could be removed. He failed to do so; therefore, PCR court should not have granted relief.

In the order denying the State’s motion to alter or amend, the PCR court stood by its error. It acknowledged the State’s argument that: “[Styla] has not proven prejudice because he has not shown that Smith would have disclosed the adjustments to her written statements to [Counsel] had he reached out to her prior to trial,” but found the argument was without merit. (App.p.1106). Specifically, the PCR court found:

The issue here is not what Smith may or may not have told defense counsel had he inquired prior to trial. The issue is that he did not ask at all – and the failure to investigate and interview a main witness in his own case in chief is the deficiency. The failure to even ask the question is the prejudice, especially when the witness is **likely** to be hostile.

(App.p.1106) (emphasis added). The State strongly disagrees and submit the precise issue **is** in fact: “what Smith may or may not have told defense counsel had he inquired prior to trial.” Indeed, that is the only issue, because if Smith either refused to talk to Counsel prior to trial or failed to tell Counsel she would contradict her notes if called as a witness at trial (both distinct possibilities), Counsel’s trial strategy and the events surrounding Smith’s testimony at that trial would have remained the same. The PCR court’s belief that Smith was “likely” to be hostile was

conjecture and was reached only under the improper “distorting effects of hindsight.” *Strickland* 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.”). At the time of trial, Counsel did not know Smith was “likely to be hostile” and Styla failed to show Counsel would have learned anything about her possible hostility even if he had attempted to interview her prior to trial. The flaw in the PCR court’s reasoning was clearly and succinctly exposed by Counsel testimony during the evidentiary hearing in the following exchange:

Q: Okay. Well, as a matter of fact, what happened was is she said that was a typographical error in the statement.

A: That’s what she said, yes.

Q: And had you talked with her about it, you would have known that, correct?

A: *If she had told me, yes.*

Q: Okay. Well, you wouldn’t have known that until you asked her.

A: No, I would not.

(App.p.589, line 19-p.590, line 2) (emphasis added). Again, without any testimony from Smith there was a total absence of evidence to support the grant of relief, which demands reversal under this Court’s standard of review.

In its analysis, the PCR court relied heavily on a federal case from the Southern District of Florida considering a claim of ineffective assistance of counsel which stated in part that:

“[While] the scope of a required investigation depends on a number of issues that may be unique to the case and their complexity, the strength of the government’s case and the overall strategy of trial counsel, at a minimum, counsel has a duty to interview potential witnesses and to make an

independent investigation of the facts and circumstances of the case.” *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d sub nom. Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987). The PCR court concluded “The *Troedel* factors support the Court’s decision in the present PCR,” and found “[Counsel] had a duty to make an independent investigation of the facts and circumstances and failed to question witness Smith prior to placing her on the witness stand.” But spanning the gap from the language in *Troedel* to a grant of PCR for Styla is simply a bridge too far. The PCR court skipped over the part of the *Strickland* analysis requiring that an applicant *prove* why an investigation would have made a difference. In *Troedel*, the Petitioner presented, by way of deposition, expert testimony to the effect that the opinion of the State’s expert was not accurate, and that such expert testimony would have been helpful in cross-examining and/or rebutting the State’s expert. *Troedel* at 1461. In other words, he introduced evidence in the PCR proceeding showing the failure to interview a potential witness was in fact prejudicial. Here, Styla made no such showing because he did not call Smith as a witness. *Cf. Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (“In the instant case, however, Newell did not articulate a strategy because he did not testify as the PCR hearing.”).

The PCR court further relies on two opinions from this Court in support of its findings. *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) and *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). Yet the facts in both cases are easily distinguishable. In *McKnight*, defense counsel had every reason to already know the witness was harmful because the expert had testified in an adverse fashion in a previous mistrial. 378 S.C. at 42-43, 661 S.E.2d at 358-59. Here, Smith had offered no prior testimony. Instead, she had a written report, prepared for law enforcement, detailing Victim’s disclosure.

In *Ingle*, the charges:

. . . . stemmed from the alleged sexual assault of the nine-year-old daughter of petitioner's live-in girlfriend, Jean Afify. In his defense at trial, petitioner denied molesting victim. Instead, he testified victim entered his bedroom shortly after he and Afify had sexual intercourse and that his semen was transferred to victim's shorts when she sat on his bed. As his first defense witness, petitioner called Afify. Counsel inquired whether she and petitioner has sex the morning her daughter was allegedly molested. Afify responded: 'No, sir, that's wrong.'

Id. at 470-71, 560 S.E.2d at 402-03. Counsel admitted he did not interview Afify before calling her as a defense witness, explaining he relied solely on petitioner, who had convinced him she was honest and would admit to having intercourse that morning. *Id.* at 471, 560 S.E.2d at 403. This Court found trial counsel was deficient because his reliance on petitioner's assertion without first ascertaining whether Afify's response to his crucial question would support his theory of defense was not a reasonable strategy.

Here, Counsel did not rely on any assertions from Styla about Smith's credibility and he did not call Smith blindly, without attempting to ascertain her responses to his questions. Instead, he had Smith's notes from her disclosure meeting with Victim and reasonably relied on those notes. Unlike in *Ingle*, Counsel *did* ascertain what Smith was expected to say in response to his questions—which he reasonably believed would be the same thing Smith wrote in her notes. Flipping the narrative, what happened to Styla here would be more akin to a circumstance where Afify gave a written pretrial statement saying she *did* have sex with Ingle the morning her daughter was allegedly molested, only to later give conflicting testimony on the stand. This would have materially altered the calculus in *Ingle* and likely the Court's narrow 3-2 decision to reverse the denial of relief. *See Ingle* at 476-77, 560 S.E.2d at 406 (Burnett, J., dissenting) ("Contrary to the majority's conclusion, there is probative evidence in the record which supports

the PCR judge's conclusion petitioner was not prejudiced. Based on this Court's limited scope of review, I would affirm.").

Additionally, in regard to prejudice, the *Ingle* Court focused on the circumstances that: "Afify was the first witness called in petitioner's defense," and her testimony "totally contradicted petitioner's defense." *Ingle* at 471-72, 560 S.E.2d at 403. Here, Styla's basic defense was that he did not commit the alleged sexual assault. Counsel testified the defense strategy was: "to attempt to discredit the allegations of the alleged victim in the case, and to present a character defense, and to point out to the jury that the lack of corroboration of any of the victim's allegations, and, finally, that the burden of proof rested upon the State to prove its allegations beyond a reasonable doubt." (App.p.773, lines 3-16). Styla's partner, Dottie Crowder, and Styla himself were the first two witnesses called – emphasizing the defense strategy that he did not commit the sexual assault, before moving on to the attempt to discredit the victim and bolster Styla's character. As the PCR court noted and Counsel admitted, Smith's inconsistent testimony was unexpected and some of it was unhelpful to Styla's defense; however, it in no way "totally contradicted" that defense. Instead, the contradictions were confronted and handled by Counsel through his questions of Smith and his closing argument, both of which showed that Smith was not credible and further called Victim's credibility into question by showing several inconsistent details in parts of her story. Even though Smith contradicted her notes in regard to what Victim said about the massage and the shorts related to the four-wheeler, she actually confirmed the part of those notes regarding whether she was told Victim was asked if she "liked it" when Styla straddled her. In other words, the egregious ineffectiveness in *Ingle* does not equally compare to, and certainly does not control, the decision in Styla's case.

Here, it was ultimately reasonable for Counsel to expect Smith to remain consistent with her own prior written notes, especially where the witness in question is a practicing professional and mandatory reporter. Furthermore, Counsel appears to have nonetheless achieved the strategic goal he had in mind in the first place, which was to elicit the portions of Smith's contemporaneous notes of Victim's prior disclosure which were inconsistent with everything else in Victim's trial testimony, and common sense. Finally, the jury is not likely to have given Smith's testimony much, if any weight given that *both* Counsel and the State condemned her as lacking credibility. For all of these reasons, Styla failed to establish either deficiency or prejudice under *Strickland*, The PCR court should be reversed and relief should be denied.

CONCLUSION

For the reasons stated above, the State submits this Court should grant Petitioner/Respondent's Petition for a Writ of Certiorari and reverse the post-conviction relief court's ruling. Should this Court grant Certiorari, the State requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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