

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**RECEIVED**

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

SEP 11 2013

Appellate Case No. 2012-213702

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**S.C. Supreme Court**

Randall Smith, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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Attorney General

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ATTORNEYS FOR RESPONDENT

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## QUESTION PRESENTED

1. Whether trial counsel was ineffective for failing to cross-examine the complaining witness about his motive to lie, in that Petitioner's wife was blackmailing the minor because he was a homosexual?

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 2004 term of General Sessions for second-degree criminal sexual conduct with a minor (2004-GS-23-6874). Thomas M. Creech, Jr., Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On November 8, 2005, the Honorable D. Garrison Hill sentenced Petitioner to twenty years imprisonment. (App.pp.398-99).

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App.pp.401-13). The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Smith, Op. No. 2008-UP-673 (S.C. Ct. App. filed December 9, 2009). (App.pp.432-34). Counsel filed a petition for writ of certiorari at the South Carolina Supreme Court. (App.pp.435-46). By order dated October 7, 2009, the Supreme Court denied the petition. (App.pp.462-63).

Petitioner filed an application for post-conviction relief (PCR) on September 27, 2010 (2010-CP-23-8027) and a subsequent amendment on January 17, 2012. (App.pp.464-86; pp.487-90). A hearing was convened at the Greenville County Courthouse on October 31, 2012. (App.pp.496-525). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Markley Dennis, Jr. denied relief in an order filed December 5, 2012. (App.pp.538-46).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have cross-examined the victim about his motivation for testifying.**

Petitioner argues trial counsel should have cross-examined the victim about his motive to lie in this case. Petitioner argues the victim testified against him because Petitioner’s wife blackmailed the victim “because he was a homosexual.” (Pet. Cert., p.4). This argument is without merit.

Before trial, the State informed the trial judge that it planned to introduce into evidence letters Petitioner wrote his wife while he was in jail. The State noted it planned to redact a portion of one of these letters in which Petitioner stated the victim “[s]aid he’s worried about being gay months ago.” Trial counsel objected to the redaction and the trial judge took the matter under advisement. (App.pp.10-14). When the matter was revisited, trial counsel eventually consented to the redaction. (App.pp.134-42).

At trial, the minor victim testified Petitioner (his uncle) anally raped him twenty-five or twenty-six times. The victim testified Petitioner also performed oral sex upon him and digitally penetrated his rectum. (App.pp.67-75; pp.90-91).

At the PCR hearing, Petitioner stated “I believe my wife was blackmailing [the victim] to make these allegations against me. . . . I think there was some motive for him to lie. It had to be something to coerce him.” (App.pp.504-05). Petitioner stated he mentioned to his wife in a letter that the victim confided to him that he was gay approximately a week before Petitioner was arrested. (App.p.505). Petitioner stated trial counsel consented to redacting the letter to remove references to the victim’s sexuality, which limited his ability to prove the victim had a motive to lie. (App.pp.505-06).

At the PCR hearing, trial counsel testified Petitioner never said that he thought his wife was blackmailing the victim. (App.p.518). When asked whether Petitioner ever indicated whether the victim had a motive to lie, trial counsel testified:

The only thing that he said to me was that he thought the victim’s dad, who is [Petitioner]’s brother-in-law, did not like [Petitioner] and that also the dad was very mean, mad, or always angry at the son or something and the dad had set all this up or that the dad had something about getting the child to lie.

(App.pp.518-19). Trial counsel testified he recalled one of Petitioner’s letters to his wife mentioned the victim’s homosexuality but that he “did not believe it was a defense strategy to try and attack the child as being homosexually [sic] potentially and there was no evidence that the child was.” (App.p.519).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner failed to “produce any credible evidence or testimony” to support his contention that Petitioner’s wife and the minor victim were motivated to give false testimony. The PCR judge concluded “[w]ithout evidence to support such an argument, it was not incumbent for trial counsel to have attempted to attack these witnesses’

credibility on the stated grounds.” (App.pp.543-44).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to the relief of a new trial. Petitioner failed to prove trial counsel’s representation was deficient. Trial counsel testified Petitioner never told him he believed either the victim or his wife was motivated to lie or testify falsely. Trial counsel testified Petitioner never told him he believed his wife was blackmailing the victim – much less his belief that his wife was blackmailing the victim because he was homosexual. (App.p.518). The PCR judge found trial counsel’s testimony was credible and Petitioner’s testimony was not. (App.p.542). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge’s findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners’ Ass’n,

Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.”). Regardless, trial counsel testified it was not a proper defense strategy to attack the minor victim about his sexuality. (App.p.519). This was a valid trial strategy – especially as Petitioner was accused of having repeatedly raped the minor child. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). “Counsel’s strategy will be reviewed under ‘an objective standard of reasonableness.’” Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). As Petitioner did not share his opinion with trial counsel that the victim was being blackmailed by his wife and trial counsel testified that, regardless, such an argument was not in line with the defense strategy, Petitioner failed to meet his burden of proving trial counsel should have cross-examined the minor victim about whether he was being blackmailed to testify falsely.

Regardless, Petitioner also failed to meet his burden of proving he suffered prejudice because trial counsel did not cross-examine the victim to determine whether he was being blackmailed about his sexuality. Petitioner failed to present any proof of this alleged blackmail. Petitioner’s only “evidence” of his contention is his own testimony at the PCR hearing. This testimony, however, was vague and speculative. Petitioner stated “I believe my wife was blackmailing [the victim]” and “I think there was some motive for

him to lie.” (App.pp.504-05). This speculative testimony is not credible and does not rise to the level of actionable information that either (1) trial counsel could have cross-examined the victim about or (2) would have affected the outcome of the trial. Petitioner failed to present any additional evidence or testimony to corroborate his suspicions. As such any contention that trial counsel’s cross-examination of the victim would have differed enough to change the outcome of the trial is purely speculative. Cf. Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel’s failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the PCR hearing that the victims and witnesses had criminal records). As such, Petitioner cannot demonstrate either there was a reasonable probability that – had trial counsel cross-examined the victim about whether Petitioner’s wife was blackmailing him to testify against Petitioner – the outcome of the trial would have been different. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625; Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**CONCLUSION**


For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

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By:   
ATTORNEYS FOR RESPONDENT

September 11, 2013

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2012-213702

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Randall Smith,.....Petitioner,

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State of South Carolina, .....Respondent.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 11th day of September, 2013.

  
KAREN C. RATIGAN  
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Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

September 11, 2013

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

**RECEIVED**

SEP 11 2013

**S.C. Supreme Court**

**Re: Randall L. Smith v. State of South Carolina**  
**Appellate Case No: 2012-213702**  
**Lower Court Case No: 2010-CP-23-8027**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Robert M. Dudek, Esquire  
Trisha Allen, Victim Services Counselor