

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Daniel D. Hall, Circuit Court Judge

DOUGLAS KELLY PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000955

PETITION FOR WRIT OF CERTIORARI

GARY H. JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED

Oct 02 2025

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in finding counsel employed a valid trial strategy in failing to cross-examine either of the key witnesses against petitioner when the jury’s decision turned on the unchallenged credibility of those two witnesses. 3

CONCLUSION 12

ISSUE PRESENTED

Did the PCR court err in finding counsel employed a valid trial strategy in failing to cross-examine either of the key witnesses against petitioner when the jury's decision turned on the unchallenged credibility of those two witnesses?

STATEMENT

The Pickens County Grand Jury indicted petitioner for two counts of criminal sexual conduct with a minor, second degree, and one count of criminal sexual conduct with a minor, third degree. App. 311 – 316. Petitioner’s case proceeded to a jury trial before the Honorable Thomas A. Russo on July 25, 2016. App. 1. Cheryl Aaron represented petitioner and Assistant Solicitor Christopher Jones represented the State. App. 1.

After a two-day trial, the jury found petitioner guilty. App. 289, ll. 14-24. Judge Russo sentenced petitioner to twenty years’ imprisonment. App. 307, ll. 8-25. Petitioner appealed his conviction asserting the trial court erred in admitting evidence of alleged prior sexual activity between petitioner and minor. The Court of Appeals affirmed the conviction in an unpublished opinion pursuant to Rule 220(b), SCACR. *See State v. Phillips*, No. 2016-001875 (S.C. Ct. App. Jan. 9, 2019).

Petitioner filed for post-conviction relief asserting ineffective assistance of trial counsel. App. 320. An evidentiary hearing was held on March 9, 2023, before the Honorable Daniel D. Hall. App. 339. Don Thompson appeared on behalf of petitioner and Taylor Smith represented the state. App. 339. Judge Hall denied relief by written order of dismissal dated April 4, 2025. App. 375.

This petition for certiorari follows.

ARGUMENT

The PCR court erred in finding counsel employed a valid trial strategy in failing to cross-examine either of the key witnesses against petitioner when the jury's decision turned on the unchallenged credibility of those two witnesses.

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “To establish prejudice, the defendant is required ‘to 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.’” Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (*quoting* Strickland v. Washington, 466 U.S. 668 (1984)). “In a PCR case, [our appellate courts] will uphold the PCR court’s factual findings if there is any evidence of probative value in the record to support them.” Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018). “However, this [c]ourt gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo.” Id.

A. How the issue impacted trial.

The case against petitioner centered on the trust the jury placed in the testimony of the minor and minor’s mother, Peggy Robinson. Minor testified that petitioner sexually molested her on a number of occasions but was generally vague on details regarding the timing of these alleged

assaults. Before the jury, the prosecutor lead minor through her allegations with reliance on minor's written statement to fill in the details of the alleged abuse:

Q. Okay. Now, do you remember how old you were -- I think I asked you this earlier and you said you didn't remember. Do you remember how old you were when you met Kelly Phillips?

A. No, I do not.

Q. Okay. If I showed you your statement would that help you remember?

A. Yes, sir.

App. 164, ll. 11 – 18. Minor continued to rely upon her written statement for details with the solicitor even asking minor not to examine her statement for a response to every question asked: “Tell the jury what that was. *You don't have to look at -- look at your statement for everything.* If you can just remember, you can tell the jury ---.” App. 167, ll. 17 – 19 (emphasis added).

Despite minor's heavy reliance on her written statement and her poor performance during cross-examination during an *in-camera* proffer, trial counsel elected not to ask a single question of minor in front of the jury. By contrast, during minor's *in-camera* testimony, trial counsel pushed minor on the details of the alleged encounters with petitioner, with minor claiming at one point that some of the sexual acts occurred in August of 2013 in McCormick. App. 131, ll. 15 – 21. Petitioner was already incarcerated in August of 2013 having been arrested shortly after minor made her initial disclosure in July of 2013. App. 351, ll. 16 – 25; 367, l. 20 – 368, l. 2.

Peggy Robinson was a reluctant witness for the prosecution, with the trial court granting permission for the solicitor to treat her as a hostile witness:

MR. JONES: Your Honor, at this point I'd -- she's being hostile. And I'd like to ---

A. I mean, I don't remember.

MR. JONES: --- treat her as a hostile witness.

THE COURT: Granted.

App. 173, l. 24 – 174, l. 3. The solicitor then got Robinson to testify that petitioner acknowledged to her some of the alleged sexual misconduct. App. 174, l. 24 – 175, l. 10.

Despite the importance of credibility of these two witnesses, trial counsel asked no questions of either witness. App. 170, ll. 5 – 24; 183, ll. 4 – 21.

B. How the issue was raised at PCR.

At the PCR hearing, trial counsel admitted the importance of the credibility of the minor:

The victim was all over the map. Her mother was in jail. It was just a case where the victim was going to testify. And other than the State's attempt to bolster her testimony through a therapist or forensic examiner, there wasn't going to be a lot of meat.

We felt like with the identification of the other perpetrator and the thin line that was drawn between this victim and Mr. Phillips, that was the substance of the defense.

App. 360, l. 21 – 361, l. 3.

Despite having obtained conflicting and changing stories from minor during the *in-camera* proffer, trial counsel decided not to ask a single question on cross-examination before the jury:

Q. Can you tell me why you cross-examined the minor victim in the proffer before trial but not during -- not when she testified during the State's case in chief?

A. It's my recollection that both the victim and the victim's mom were wild card witnesses. You just were never sure of what they were going to say. The State could lead them all over and make them say things, and then you could cross-examine them and they would say something different.

The victim used -- the victim used words that I would not attribute to someone her age such as vaginal penetration and inserted his

penis and those kind of things. One of our strategies in cross was to see how we could do with the coaching aspect.

She was not, in my mind, a good witness in front of the jury for Kelly because she was all over the place. And I had no idea what she would say or if in the testimony in front of the jury she would make it worse.

App. 361, l. 22 – 362, l. 13.

Trial counsel admitted that additional areas were open for cross-examination that were not brought out even during the *in-camera* proffer:

I think she mentioned someone else when talking to the police. And the revelation with regard to Kelly, the allegation, never came out until after she was confronted with another sexual relationship with a third party.

App. 362, ll. 22 – 25.

Trial counsel acknowledged that minor's mother had drafted a written statement exonerating petitioner but decided not to ask a single question on cross-examination.

She had made a statement. *She had a written statement that she had made in Mr. Warder's office recanting.* There wasn't any pinning her down on anything positive with regard to the recanting. And her testimony would be necessary in order to get it in.

There was no way she was going to back that up. I was afraid of what she would say. Not that it had any merit, but I was just afraid of what she would say.

App. 363, ll. 15 – 22. Trial counsel attempted to justify this decision by anticipating the angle that the prosecutor would have played had the prior inconsistent statement have been admitted.

Q. Can you sort of lay out for me what you thought the problems might be.

A. I mean, I think lawyers have a general bad rap anyway of trying to make people say what we want them to say. I mean, had I been on the prosecution side I would've argued, had she wanted to recant, she would've gone to the police. And I just didn't think that was valuable to discuss in front of the jury.

App. 364, ll. 8 - 15.

C. How the PCR court ruled.

While relaying the importance of the credibility of the minor (and noting it was the essential element of the petitioner's defense), the PCR court found:

Upon review of the discrepancies trial counsel identifies in her closing, the record supports trial counsel's PCR testimony that the defense strategy was to place doubt as to whether Applicant or the other unidentified charged individual abused the victim, thereby providing an explanation as to the victim's behavior being consistent with a child who has been sexually abused and reason as to why their appears to be discrepancies in the victim's description of events. Because trial counsel described that the victim's testimony was difficult to predict and coupled with the fact that she is a thirteen-year-old attempting to recall allegedly years' worth of abuse, it is reasonable for counsel to highlight the inconsistencies in closing rather than attempting to use them for impeachment purposes. Moreover, given that this was a sexual abuse case involving a young teenager with the abuse potentially occurring as early as seven years old, it may have been prudent for counsel to forgo cross examination of the victim to avoid the exposure of unnecessarily prejudicial information, as well as to avoid picking apart the victim's testimony based on discrepancies of dates, locations and ages.

App. 388-389.

As to the lack of confrontation of minor's mother over her recanted testimony, the PCR court found counsel was likewise effective by not cross-examining minor's mother. "Under the circumstances, trial counsel's decision to not question her on the recantation due to her objective unreliability was a reasonable strategy." App. 391. And while the content of the recantation was not truly disputed by trial counsel at PCR, the PCR court also noted petitioner had not submitted mother's statement nor called her as a witness at the PCR hearing. App. 392.

D. How the PCR court erred.

The Confrontation Clause provides “in all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him.” U.S. Const. amend. VI. “The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.” State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (*quoting* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). “The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers.” State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). Here, trial counsel was ineffective in *failing to conduct any*, let alone a meaningful, cross-examination of petitioner’s accuser or her mother.

Trial counsel’s error in failing to contest the state’s case through cross-examination of the two key witnesses against petitioner is mirrored in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In Smalls, the Supreme Court reviewed trial counsel’s failure to cross-examine a key witness during trial regarding a favorable plea deal. In finding trial counsel was ineffective our Supreme Court noted that the witness “faced a carjacking charge that was dismissed on the morning of trial was strong evidence of [witness’s] bias, and counsel's failure to cross-examine him on this point fell well below the ‘objective standard of reasonableness’ by which we judge the performance of counsel.” Smalls, 422 S.C. at 183, 810 S.E.2d at 841. Like counsel in Smalls, trial counsel here had an obligation to effectively cross-examine minor and minor’s mother. Much like the situation in Smalls, the lack of an effective cross-examination before the jury of the two key

witnesses against petitioner, raises a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the strength of the State's case, we find the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'

Smalls, 422 S.C. at 195, 810 S.E.2d at 847.

The PCR court relied on trial counsel's claim that minor was "not a good witness in front of the jury" and "was all over the place" so that counsel made a conscious decision not to engage in any cross-examination since trial counsel "had no idea what she would say or if in the testimony in front of the jury she would make it worse." PCR Tr. 23, l. 22 – 24, l. 13. Based upon this claim, the PCR court found trial counsel adopted a reasonable trial strategy. App. 387-88.

This finding is not supported by the Record and the PCR court's conclusion that the decision not to cross-examine witnesses was a valid strategic decision should be reviewed *de novo*. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018). To be a valid strategic decision, it must make some reasonable sense in the context of the trial. For instance, failure to call available alibi witnesses would be unsupportable as a valid trial strategy. "Thus, we can conceive of no valid trial strategy supporting trial counsel's failure to call at least one of the alibi witnesses." Weldon v. State, 436 S.C. 69, 84, 870 S.E.2d 183, 190 (Ct. App. 2021). Failing to investigate and challenge key forensic evidence would not be a valid strategic decision. "In sum, we hold counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase." Ard v. Catoe, 372 S.C. 318, 336, 642 S.E.2d 590, 599

(2007). Failing to object to prejudicial and improper argument during closing would not be a valid strategic decision. “However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

Trial counsel’s claims that there was some strategy in the decision not to cross-examine the two witnesses should not be accepted at face value. As this Court has noted, “although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this ‘strategy’ cannot be construed as a valid one given the evident impropriety of the solicitor's remarks.” Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). The alleged strategy articulated by trial counsel in Brown closely mirrors that asserted by trial counsel in this case:

Brown's trial counsel, the only witness called to testify, admitted that an objection should have been made to the solicitor's comments. However, he stated the reason “those statements were not objected to was because I didn't want to exacerbate a bad set of facts to point out to the jury something that would already aggravate what appeared to be a pretty bad case.” Trial counsel also pointed out the “gravity of the evidence” the State presented against Brown. He further noted he did not want to give the jury a reason to dislike or hate his client.

Brown v. State, 383 S.C. 506, 512–13, 680 S.E.2d 909, 913 (2009).

This case falls squarely within the scope of Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Trial counsel in the present case failed to cross-examine key witnesses and challenge the state’s case against petitioner. This case turned completely on the jury’s faith in the story told by minor and supported by minor’s mother. Trial counsel’s alleged strategic decision not to challenge the credibility of these two witnesses, combined with trial counsel’s acknowledgement that minor’s story was inconsistent and easily challenged and that mother had recanted her written

statement to police, fell below the objective standard of reasonableness required by Strickland v. Washington, 466 U.S. 668 (1984). The PCR court's decision, that a valid trial strategy existed, is a conclusion of law that this Court reviews de novo. As noted, neither the PCR court nor this Court should accept trial counsel's assertion of a trial strategy at face value. In a case that turned completely on credibility, trial counsel's decision not to cross-examine either of the two factual witnesses against petitioner fell below the standard required by Strickland.

D. Prejudice.

As this case turned solely on credibility, prejudice clearly follows. A case that depends on the credibility of the witnesses does not lend itself to a finding of harmless error. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (holding the state's reliance on circumstantial evidence and credibility of witnesses negated a finding of harmless error). As in Gracely, credibility, particularly of minor's inconsistent story and mother's recanted testimony, was central to the jury's determination of guilt. Here, there is no conclusive physical evidence, and guilt depends on the jury's judgment of the credibility of minor and their evaluation of the value of petitioner's "confession" through the testimony of minor's mother. As in Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025), the reliance on credibility precludes a finding of lack of prejudice.

CONCLUSION

Based upon the foregoing argument, petitioner respectfully requests that this Court grant the petition for certiorari to review the decision denying petitioner post-conviction relief and allow full briefing on the issue presented.



Gary H. Johnson
Appellate Defender
SC Bar #8898

ATTORNEY FOR PETITIONER

This 2nd day of October 2025.