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**Apr 20 2026**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Vernon F Dunbar, Circuit Court Judge

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ROBERT DAVIS SMITH, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002223

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did the post-conviction relief court err finding trial counsel was not ineffective for failing to call the nurse that treated the alleged victim as a witness where there was a reasonable probability her testimony regarding the alleged victim's demeanor would have changed the outcome of petitioner's trial?

## STATEMENT

On April 22, 2014, a Greenville County grand jury indicted petitioner for criminal sexual conduct (CSC), first degree, three counts of kidnapping, burglary, first degree, assault and battery first degree, and possession of a weapon during the commission of a violent crime. App. 406-409. Petitioner's case was called to trial on March 2-4, 2016, before the Honorable Brian M. Gibbons, and a jury. App. 1-313. Randy Chambers represented petitioner. App. 1. Kimberly Howard and Kathryn McCall prosecuted for the state. App. 1. The state opted to proceed only as to three charges: CSC first degree, burglary in the first degree, and possession of a weapon. App. 4, ll. 4-9.

At the conclusion of trial, the jury found petitioner was guilty of CSC, first degree but was not guilty of burglary, first degree, and possession of a weapon. App. 305, ll. 10-21. Judge Gibbons sentenced petitioner to twenty-three years' imprisonment. App. 312, ll. 8-10.

Appellate counsel filed a brief on direct appeal raising the following issue: "Did the trial judge err in admitting Appellant's statements to police and a photographic lineup identification where law enforcement violated Appellant's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution by arresting Appellant without probable cause?" The South Carolina Court of Appeals affirmed petitioner's conviction and sentence in an unpublished opinion. *State v. Smith*, 2018-UP-466 (S.C. Ct. App. filed Dec. 19, 2018). On January 17, 2019, the Court denied his request for rehearing. On June 28, 2019, the South Carolina Supreme Court denied certiorari.

Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 314-322; 334. On February 26, 2025, an evidentiary hearing was held before the Honorable Vernon F. Dunbar. App. 336-386. Isaac Johnson represented petitioner. App. 336. Kaylee Kemp and J.

Anthony Mabry appeared on behalf of the state. App. 336.

On September 30, 2025, Judge Dunbar signed an order denying PCR. App. 387-405. In the order the court found petitioner “failed to carry his burden of proof and was not entitled to any relief.” App. 387. The court found trial counsel was not deficient even though counsel could not recall why he did not call the nurse as a witness. App. 403. The PCR court presumed trial counsel rendered adequate assistance and made all decisions in the exercise of reasonable professional judgement. App. 403. The PCR court found there was no prejudice pursuant to *Bannister v. State*,<sup>1</sup> because neither the supplemental report nor the nurse’s testimony were offered into evidence at the hearing. App. 402.

This petition for writ of certiorari follows.

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<sup>1</sup> 333 S.C. 298, 303, 509 S.E.2d 807, 810 (1998) (holding the applicant must present the testimony of the witness he argues is favorable or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial).

## ARGUMENT

The post-conviction relief court erred finding trial counsel was not ineffective for failing to call the nurse that treated the alleged victim as a witness where there was a reasonable probability her testimony regarding the alleged victim's demeanor would have changed the outcome of petitioner's trial.

### **Relevant facts**

#### *Trial*

On July 17, 2013, the alleged victim, her boyfriend, Walter Pope, and their two children lived in a motel room at the Regal Inn in Greenville South Carolina. App. 67, l. 8 –68, l. 21. That morning, she was “[s]tripping the beds, putting stuff outside, getting ready for the maid to come pick up the stuff and then waiting on her to come back.” App. 68, l. 17 – 69, l. 6. A man stopped by her room and asked for someone named Mike Mike or Mookie. App. 69, ll. 10-14; 87, l. 17 – 88, l. 20. When she told the man she did not know who that was, he walked away. App. 69, ll. 14-15.

Soon after, the man re-appeared, this time in her room. App. 70, ll. 1-5. She claimed the man had a box cutter in his left hand. App. 70, ll. 6-7; 90, ll. 14-17. According to the alleged victim, the man said “to be quiet,” closed the door, put the box cutter closer to her, and told her “to get on the bed.” App. 70, ll. 8-11. She was “pushed onto the bed” and began fighting the man “from about the middle of the bed” until the pair fell onto the floor. App. 70, ll. 17-21. She claimed she continued to fight until she was choked to the point of barely able to breathe. App. 70, ll. 22-23. During the struggle, she was “kicking” waving her arms, and “probably” yelling. App. 92, ll. 7-22.

Somehow, the man managed to pull his pants down, and move “her panties and stuff” to

the side. App. 93, l. 21 – 94, l. 2. She alleged the man penetrated her with his penis in her “vaginal area.” App. 71, ll. 9-24; 82, ll. 1-3. The man did not ejaculate and did not wear a condom. App. 71, ll. 17-20. Apparently, the man did not get an erection, but somehow managed to penetrate her. App. 94, ll. 13-21. The alleged victim claimed she later realized the man took money, which was on top of the television. App. 73, l. 23 – 74, l. 7. She then called 911. App. 74, ll. 23-24.

Dr. Alissa Manfredi testified regarding her treatment of the alleged victim. App. 104-115. Dr. Manfredi testified that typically when a patient comes in reporting a sexual assault they are first seen by a nurse that specifically deals with these types of patients. App. 106, ll. 1-13. Manfredi referred to her report as she did not have an independent recollection of this patient. App. 113, ll. 7-15. In her report she noted that according to the physical exam she noted “right-sided neck tender, slight swelling and red marks and bruising.” App. 110, ll. 13-19. Additionally, she noted there were lacerations to the genital area and bloody vaginal discharge. App. 111, ll. 3-6.

#### *Evidentiary hearing*

At the beginning of the hearing PCR counsel, Mr. Isaac Johnson, declared he hired an investigator and found the nurse, Serena Brown, that treated the alleged victim at the hospital. App. 341, ll. 15-17; 353, ll. 9-10. He stated that “for brevity’s sake” he “pare[d] this thing down to what [he thought were] the essential matters and one seminal issue regarding ineffective assistance of counsel.” App. 341, ll. 17-21. PCR counsel further stated that in an effort to, “save the court the expense of calling the nurse because we’ve agreed that we don’t need her here,” he would only call petitioner to testify. App. 341, l. 22—342, l. 7.

Regarding the nurse, petitioner testified there was a supplemental report with the nurse’s

name on it proving there was no penetration. App. 353, ll. 6-15. The assistant attorney general objected as to hearsay. App. 353, ll. 16-17. PCR counsel responded that the contents of the report were not being offered for the truth of the matter but to show he discussed with trial counsel the fact there was a nurse referenced in the supplemental report. App. 353, l. 20-354, l. 3. The PCR court ruled the evidence would be allowed for that purpose only. “With regard to penetration, that would be hearsay. It would be in the medical records, unless the medical records have been entered into evidence. And I don’t think they have been.” App. 354, ll. 4-8.

Petitioner contended he requested trial counsel subpoena the nurse for trial so that she could testify as to her findings of the sexual assault kit. App. 354, ll. 15-22; 361, ll. 14-23. He testified trial counsel told him he would not need the nurse as a witness. App. 355, ll. 2-4. On redirect petitioner proffered testimony—over the state’s sustained hearsay objection—as to what was in the supplemental report. App. 364, ll. 2—365, l. 4. Petitioner testified that the nurse stated “the victim [], was in a hurry to get the examination completed and stated that, [victim] didn’t shed a tear. Nurse Brown stated that there didn’t appear to be any penetration.” App. 367, ll. 13-18.

Trial counsel did not recall “a lot of detail” about the nurse and her potential testimony. He stated he recalled the doctor testified there was some indication of force that would not be consistent with consensual sex. App. 373, ll. 3-19. Counsel testified that if he had thought she would have been of help he would have called her. App. 373, ll. 16-19. He later said that maybe he made a mistake in not calling the nurse. App. 374, ll. 11-15.

## **Discussion**

Trial counsel was ineffective for failing to call a witnesses that would support petitioner’s claim that he and the alleged victim had consensual sex. Petitioner was prejudiced where the

only evidence presented of his version of the incident was through the recording his interview with police. The jury was shown no corroborating evidence or testimony and had only the state's witnesses' accounts of the incident to consider during its deliberation.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Walker v. State*, our Supreme Court held trial counsel was required to interview defendant's former girlfriend as a potential alibi witness; and counsel's failure to interview her prejudiced defendant. 407 S.C. 400, 756 S.E.2d 144 (2014). In that case the Court reversed the Court of Appeals' reversal of the PCR court's grant of PCR. In reversing, the Court found the Court of Appeals "read *Glover*<sup>2</sup> to broadly and failed to adhere" to the standard of review. *Id.* at 406, 756 S.E.2d at 146-147.

In *Glover*, the Court held defendant was not denied effective assistance of counsel where trial counsel failed to contact alibi witnesses. *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). In that case the Court found there was no prejudice where neither witnesses PCR testimony established an alibi defense. *Id.* at 498, 458 S.E.2d at 540. Additionally, the Court found defendant did not establish prejudice where the other witnesses he claimed could provide an alibi were not called at his PCR hearing. *Id.*

Trial counsel's failure to call a defense witness that could support the defense theory was

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<sup>2</sup> *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995).

was deficient. It was not reasonable to rely solely the recording of petitioner's statement to police to support his claim of consensual sex where there was a witness who would testify that based on the demeanor of the alleged victim they did not believe she was being completely truthful because she did not show any emotion.

Trial counsel's deficiency prejudiced petitioner where the jury did not have any evidence to consider that supported his claim of consensual sex. Petitioner admitted to engaging in sex with the alleged victim. Counsel called no witnesses to support petitioner's version of events. Had trial counsel called the nurse that treated the alleged victim there is a reasonable probability the result of trial would have been different.

**CONCLUSION**

Based on the foregoing argument, petitioner respectfully requests this Court grant the petition for writ certiorari and order further briefing.

  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2026.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Robert Davis Smith states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Vernon F Dunbar, which was held on February 26, 2025, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Robert Davis Smith.

Respectfully Submitted,



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2026.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 20th day of April, 2026.