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January 3, 2014

**RECEIVED**

JAN - 3 2014

**S.C. Supreme Court**

*Via Hand Delivery*

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

**RE: Michael Odom v. State of South Carolina  
Circuit Court Case No: 2011-CP-42-4163  
Appellate Case No.: 2013-000242**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White  
Assistant Deputy Attorney General

SHW/aam  
Enclosures

cc: Wanda H. Carter, Esquire (w/enclosure)

STATE OF SOUTH CAROLINA  
In The Supreme Court

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JAN - 3 2014

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2013-000242

Michael Odom. .... Petitioner,

v.

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

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

ALAN WILSON  
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ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

QUESTION PRESENTED .....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW .....4

ARGUMENT

    The PCR Court properly held that Counsel was not ineffective in his representation of Petitioner, when Petitioner pled guilty and failed to establish that but for Counsel’s alleged error in failing to object to the Solicitor’s recitation of Petitioner’s record, he would have proceeded to trial rather than plead guilty and failed to establish any prejudice .....4

CONCLUSION.....8

## **QUESTION PRESENTED**

Did the PCR Court properly hold that Counsel was not ineffective in his representation of Petitioner, when Petitioner pled guilty and failed to establish that but for Counsel's alleged error in failing to object to the Solicitor's recitation of Petitioner's record, he would have proceeded to trial rather than plead guilty and failed to establish any prejudice?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the July and October 2009 terms of the Spartanburg County Grand Jury for breaking into motor vehicle (09-GS-42-3767), petit larceny (09-GS-42-3768), and two counts of shoplifting - \$1,000 or less (09-GS-42-5591, -5592). He was represented by Robert T. Usry, Esquire, and S. Frank Adams, Esquire. On April 14, 2011, the Petitioner pled guilty to all charges. He was sentenced by The Honorable J. Mark Hayes II to concurrent terms of ten years on each charge of shoplifting and petit larceny, five years for breaking into a motor vehicle, and restitution. The Petitioner did not appeal his convictions or sentences.

The Petitioner subsequently filed a PCR application on October 28, 2011. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on September 6, 2012, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Richard W. Allen, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable J. Derham Cole denied the PCR application by written Order dated December 7, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

- I. The PCR Court properly held that Counsel was not ineffective in his representation of Petitioner, when Petitioner pled guilty and failed to establish that but for Counsel’s alleged error in failing to object to the Solicitor’s recitation of Petitioner’s record, he would have proceeded to trial rather than plead guilty and failed to establish any prejudice.**

Petitioner was charged with charges of breaking into a motor vehicle, petty larceny, 3<sup>rd</sup> or subsequent and two charges of shoplifting, 3<sup>rd</sup> or subsequent. Counsel Adams represented Petitioner on the charges of breaking into a motor vehicle and petty larceny, while Counsel Usry represented Petitioner on the two shoplifting charges. Petitioner pled guilty to each of the charges as indicted and was sentenced to concurrent terms of ten years for each of the 3<sup>rd</sup> or subsequent property crimes and five years for breaking into a motor vehicle. (App. p. 17-8). During the plea, the Assistant Solicitor read Petitioner’s record into the record. (App. p. 12-3). However, Petitioner alleged that Counsel was ineffective for failing to ensure that his record was properly presented to the plea court for consideration prior to sentencing. (App. p. 33).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that “there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Id. Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

Petitioner testified that he “felt” his record was incorrectly presented to the court and that the incorrect record affected the amount of time Petitioner received. (App. p. 36). Petitioner asserted that he was never convicted of armed robbery in 1990 or of attempted armed robbery and that the two convictions of common law robbery from 1994 were repeated on the document as additional charges in 1996. (App. p. 38). Petitioner testified that at the time the armed robbery and attempted armed robberies were mentioned in court, the judge began writing and appeared upset, so Petitioner believed that influenced the judge’s sentence. (App. p. 41). However, Petitioner acknowledged that the judge never indicated that those charges affected the sentence Petitioner received. (App. p. 42). Petitioner testified that he told Counsel Usry that the record was incorrect and that Petitioner had never been convicted of armed robbery, but Counsel Usry told Petitioner that it was not wise to argue with the Solicitor in front of the judge. (App. p. 41). However, Petitioner acknowledged that he also failed to inform the court about the inaccurate record when he was specifically asked if there was anything additional Petitioner wanted the court to know. (App. p. 44).

Counsel testified that he did not recall if Petitioner pointed out the inaccurate record to him during the plea. (App. p. 48). Counsel testified that even after reviewing the possible inaccuracies, he does not believe that he would have objected if he had been aware because of the difficulty in getting a recommendation from the State for concurrent sentences based upon Petitioner’s number of previous property offenses. (App. p. 48-9). Counsel testified that Petitioner had pled guilty in 2008 to two prior counts of 3<sup>rd</sup> or subsequent property offenses. (App. p. 50). Counsel testified that he had shared with Petitioner the fact that he faced up to ten years on each of the 3<sup>rd</sup> or subsequent charges. (App. p. 51).

Respondent submits that the PCR court was correct in finding that the Petitioner failed to present any evidence or testimony to support the claim that he would not have pled guilty, but would have proceeded to trial except for Counsel's alleged ineffectiveness. Id. (App. p. 58). The court also found Counsel's testimony credible and found that Counsel's conduct did not fall below the objective standard of reasonableness. (App. p. 58). As Petitioner's application states, he was simply seeking a resentencing on these charges, in the hopes that he would receive a sentence less than the ten years received previously. (App. p. 25). There is no evidence to support a claim that Petitioner received a higher sentence based upon the alleged inaccurate information regarding his prior record.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

SUZANNE H. WHITE  
Assistant Attorney General  
SC Bar #78225

By:   
ATTORNEYS FOR THE RESPONDENT

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1-3-~~4~~, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

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Circuit Case No.: 2011-CP-42-4163  
Appellate Case No.: 2013-00242

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MICHAEL ODOM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

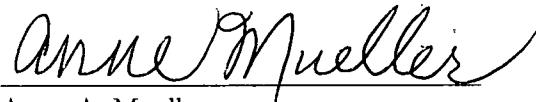
Respondent.

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**CERTIFICATE OF SERVICE**

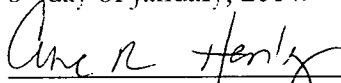
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The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Wanda H. Carter, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 3<sup>rd</sup> day of January, 2014.



Anne A. Mueller  
Legal Assistant for Respondent

SWORN to before me this  
3<sup>rd</sup> day of January, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 7/18/2017