

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Calhoun County  
Court of Common Pleas  
Carmen T. Mullen, Circuit Court Judge

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Appellate Case No. 2013-000731

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WILLIE PELZER, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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APR 01 2014

**S.C. Supreme Court**

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## **ISSUES PRESENTED**

- I. Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for failing to file a direct appeal on Petitioner's behalf, where Counsel's credible testimony reveals that Petitioner never requested Counsel file an appeal and Petitioner presented no evidence that Counsel did not advise him of his appellate rights?
  
- II. Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not cross-examining Willie Reed and Jimmy Haygood about the potential sentences for murder, where neither Reed nor Haygood were ever charged with murder?

## STATEMENT OF THE CASE

Petitioner was indicted during the April 2009 term of the Calhoun County Grand Jury for Murder (2009-GS-09-0022). He was represented by Martin Banks and Mark Leiendecker, Esquires. On December 1-4, 2009, Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr., where he was convicted as indicted. Judge Williams sentenced Petitioner to life without parole. Petitioner did not appeal his guilty plea or sentences.

Petitioner filed an application for post-conviction relief on August 4, 2010, alleging that he was being held in custody unlawfully based on the allegations:

1. Ineffective assistance of counsel
  - a. Failure to file appeal
  - b. Failure to request a charge on manslaughter;
  - c. Failure to call witnesses to testify on his behalf; and
  - d. Failure to investigate witnesses

Respondent made its Return on February 4, 2011, requesting an evidentiary hearing be held. An evidentiary hearing was convened on November 1, 2012, at the Dorchester County Courthouse before the Honorable Carmen T. Mullen. Petitioner was present and represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. At the start of the evidentiary hearing, Petitioner advised the court of several additional grounds on which he intended to proceed forward. Petitioner testified on his own behalf, as well as presented testimony from Martin R. Banks, Esquire (herein "Counsel"). Respondent presented testimony from co-counsel, Mark Leiendecker, Esquire.<sup>1</sup> By Order filed March 13, 2013, Judge Mullen denied and

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<sup>1</sup> As is explicitly stated in the Order of Dismissal, Petitioner's allegations were solely against lead trial counsel, Martin R. Banks, not the second chair co-counsel, Mark Leiendecker. (App. p. 1072).

dismissed Petitioner's application for post-conviction relief.

Petitioner filed a Petition for Writ of Certiorari on November 18, 2013. This Return 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 court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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 (1984); Butler, Id.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the applicant 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.

When determining if counsel was ineffective for failing to file a direct appeal from a conviction and sentence, the United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000).

## ARGUMENT

- I. **There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for failing to file an appeal on Petitioner's behalf, where Counsel and co-counsel Leinedecker both testified that Petitioner did not request an appeal and Petitioner failed to establish that Counsel did not review his appellate rights with him.**

Petitioner asserts that the post-conviction relief court erred in determining that Counsel was not ineffective for failing to file a direct appeal on his behalf. Specifically, Petitioner asserts that "there was no knowing and intelligent waiver by Pelzer of a direct appeal and therefore, Pelzer's trial attorneys should have pursued an appeal on his behalf." PWC pp. 14-15. In support of this position, Petitioner relies on his own testimony that he asked Counsel to file an appeal on his behalf immediately after the verdict but that Counsel failed to do so. Petitioner also argues that "trial attorney Banks wrongly assumed that Pelzer's apology at sentencing was an indication that Pelzer did not want to appeal, but Banks never actually discussed this with Pelzer." PWC p. 14. However, there is no evidence or testimony in the record to support this assertion, as neither Petitioner nor trial counsels ever testified that counsels *did not discuss* an appeal with Petitioner; the only testimony before the post-conviction relief court was the credible testimony from Counsel and co-counsel Leinedecker that Petitioner *did not request* an appeal, countered by the testimony of Petitioner that he requested an appeal, which the court ruled was not credible. It is Petitioner's burden to establish the allegations set forth in his application, and Petitioner has failed to do so here.

In its Order of Dismissal, the post-conviction relief court found that Petitioner was *not credible* when testifying that he requested Counsel file an appeal on his behalf, but instead found that Counsel and co-counsel Leinedecker were credible when testifying that Petitioner did not

request an appeal. App. pp. 1073-74. In its Order of Dismissal, the post-conviction relief court found that:

“Counsel’s credible testimony reflected that he consulted with and advised [Petitioner] of his right to appeal his conviction and sentence. Counsel, as well as co-counsel Leiendecker, stated that Applicant never inquired about or asked his counsel to pursue an appeal on his behalf. This Court finds that Counsel’s performance was reasonable and effective.”

App. p. 1075. These findings are supported by ample evidence in the record. App. p. 997 ln. 5- p. 999 ln. 24; p. 1012 ln. 8- p. 1013 ln. 16; p. 1053 lns. 8-23. As the record is abundant with credible testimony that Petitioner never requested Counsel file an appeal on his behalf, the post-conviction relief court’s findings should be upheld.

**II. There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not cross-examining of Willie Reed and Jimmy Haygood about the potential sentences for murder, where neither Reed nor Haygood were ever investigated for or charged with murder.**

Petitioner contends that the post-conviction relief court erred in its determination that trial counsels were not ineffective for failing to cross-examine State witnesses Willie Reed and Jimmy Haygood regarding the sentencing ranges for murder. Petitioner elaborates that had Reed and Haygood not assisted in the State's case against him, both "clearly could have faced a murder charge." PWC p. 17. However, there is no evidence to support such an assertion, as set forth in the post-conviction relief court's Order of Dismissal. App. p. 1085. Counsel testified that there was no indication that either Reed or Haygood were ever being investigated for murder or were not charged with murder based on their assistance provided in Petitioner's prosecution. App. p. 1020 Ins. 1-9. The post-conviction relief court properly held that "it would not be proper for Counsel to be held deficient for not cross-examining the State's witnesses regarding mandatory minimum sentences for a crime which neither witness was ever indicted or charged. App. p. 1085.

In support of his position, Petitioner cites State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) and State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). However, Petitioner's case is distinguishable from Mizzell and Brown in a crucial way. In both Mizzell and Brown, the State's witnesses were both charged with the offenses that cross-examination on the potential sentences was desired. In the present case, Reed and Haygood were never charged with murder and Petitioner was the only party against whom a murder indictment was sought and obtained. As highlighted by Counsel, it is pure speculation that the State would have potentially sought murder indictments against Haygood and Reed if they had not assisted in the prosecution of

Petitioner. See p. 994 ln. 2 – p. 995 ln. 4; p. 1020 lns. 1-25. Counsel cannot be deemed deficient for failing to cross-examine witnesses on crimes for which they were never charged based on pure speculation or conjecture.

Additionally, as the post-conviction court correctly discerned, Counsel cannot be deemed deficient based on Gracely v. State, 399 S.C. 363, 731 S.E.2d 880 (2012), which was decided by this Court on August 29, 2012, nearly two-and-a-half years following Petitioner’s trial. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (“[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.” See also Thornès v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991).

Based on the foregoing, there is evidence of probative value in the record to support the finding that Counsel was not ineffective and the post-conviction relief court should be affirmed.

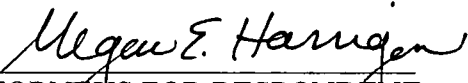
**CONCLUSION**

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

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Assistant Attorney General

By:   
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April 1, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Calhoun County  
The Honorable Carmen T. Mullen, Circuit Court Judge  
Case No. 2010-CP-09-00189  
Appellate Case No. 2013-000731

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WILLIE PELZER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**


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I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 1<sup>st</sup> day of April, 2014.

  
MEGAN E. HARRIGAN  
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ALAN WILSON  
ATTORNEY GENERAL

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APR 01 2014

April 1, 2014

**S.C. Supreme Court**

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

**Re: Willie Pelzer v. State of South Carolina**  
**Appellate Case No. 2013-000731**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan  
Assistant Attorney General  
S.C. Bar No. 100108

MEH/ko  
Enclosures

cc: Carmen V. Ganjehsani, Esquire, Appellate Defense  
Trisha Allen, Victim's Services