

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lee County  
Court of Common Pleas  
R. Ferrell Cothran, Jr., Circuit Court Judge

**RECEIVED**

APR 21 2014

**S.C. Supreme Court**

\_\_\_\_\_  
Appellate Case No. 2013-000591

EFRAIN THOMAS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
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ALAN WILSON  
Attorney General

MEGAN E. HARRIGAN  
SC Bar No. 100108  
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

**INDEX**

ISSUE PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW .....6

ARGUMENT .....8

CONCLUSION.....10

### **ISSUE PRESENTED**

Did the post-conviction relief court err in determining that Counsel was not ineffective for failing to object to comments during the State's closing argument regarding Petitioner's lack of remorse at the time of the offense, where Petitioner failed to establish any resulting prejudice?

## STATEMENT OF THE CASE

Petitioner was indicted during the November 22, 2005 term of the Lee County Grand Jury for murder and possession of a firearm during the commission of a violent crime (2005-GS-31-0102). Petitioner was represented by William W. Wheeler, III, Esquire (hereinafter "Counsel"). On April 4-6, 2006, Petitioner proceeded to a jury trial before the Honorable Clifton Newman alongside co-defendants Eunice McCall and Chad Moore.<sup>1</sup> Petitioner was convicted as indicted on both counts. Judge Newman sentenced him to thirty years imprisonment for murder and five years imprisonment for possession of a weapon during a crime of violence, with both sentences to be served concurrently.

A notice of appeal was filed and an appeal was perfected on Petitioner's behalf. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Efrain Thomas, 2009-UP-059 (Ct. App. filed January 22, 2009). The Remittitur was sent on February 11, 2009.

Petitioner filed an application for post-conviction relief on September 11, 2009, alleging that he was being held in custody unlawfully based on various allegations of ineffective assistance of counsel. Respondent made its Return on January 11, 2010, requesting an evidentiary hearing be held. An evidentiary hearing was convened on December 12, 2012, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by Kenneth R. Young, Jr., Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and the State presented testimony from Counsel. By Order

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<sup>1</sup> Eunice McCall was also indicted for murder and possession of a weapon during the commission of a violent crime and was convicted of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Chad Moore was indicted for accessory after the fact to murder and was acquitted.

dated February 14, 2013, Judge Cothran denied and dismissed Petitioner's application for post-conviction relief.

Petitioner filed a Petition for Writ of Certiorari on December 20, 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.

## ARGUMENT

**The post-conviction relief court did not err in determining that Counsel was not ineffective for failing to object to comments during the State's closing argument regarding Petitioner's lack of remorse, where Petitioner failed to establish any resulting prejudice.**

Petitioner asserts that the post-conviction relief court erred in finding Counsel provided effective assistance of counsel because "any reasonable attorney would have objected [to the State's closing argument comments about a lack of remorse] and requested, at the minimum, a curative instruction" and that Petitioner was prejudiced by Counsel's failure. PWC p. 13. Petitioner argues that the State's comments "invited the jury to draw an adverse inference that Petitioner acted with malice when he shot the decedent instead of the defense of others" and that since malice is the key distinction between murder and voluntary manslaughter, prejudice is clearly presumed. PWC p. 13. However, the post-conviction relief court did not err in finding Counsel effective, as Petitioner failed to meet his requisite burden of proof.

In its Order of Dismissal, the post-conviction relief court found that Counsel was not ineffective, as the comments made by the solicitor were directly related to the record presented to the jury and were not intended to appeal to the personal biases of the jury or calculated to arouse the jury's passions or prejudices. App. p. 844-845. This is supported by the testimony of Counsel at the evidentiary hearing. App. p. 801 ln. 20 – p. 802 ln. 15.

In support of his position, Petitioner relies on State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). However, Petitioner's case is distinguishable from Johnson for several key reasons. In Johnson, the solicitor's comments regarded the defendant's lack of apology for shooting the victim after the defendant testified that he could not recall shooting the victim but was sorry if he had shot him. 293 S.C. at 324, 360 S.E.2d at 319. In the present case, the solicitor's comments

were not regarding Petitioner's lack of an apology on the stand, but were related to Petitioner and his co-defendant's failure to call for any assistance after claiming that they shot the decedent in defense of self and of others. App. p. 668 lns. 11-25. Petitioner readily admitted that he *intentionally* shot decedent multiple times and did not call for any assistance, despite claiming that he was acting in defense of his co-defendant. App. p. 526 – 528; p. 786 ln. 20 – p. 787 ln. 23. The solicitor's comments were directly related to this testimony and did not reference Petitioner's lack of apology for an act he claimed did not occur.

Additionally, Petitioner's case is distinguishable from Fossick v. State, 317, S.C. 375, 453 S.E.2d 899 (1995), also relied upon by Petitioner, as Petitioner readily admitted that he intentionally shot the decedent, albeit in defense of others. Petitioner failed to show that Counsel's failure to object to this comment prejudiced Petitioner to the extent that there exists a reasonable probability that the outcome of the trial was affected. Id. (citing Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992)).


**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

MEGAN E. HARRIGAN  
SC Bar No. 100108  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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April 21, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lee County  
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge  
Case No. 2009-CP-31-0184  
Appellate Case No. 2013-000591

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EFRAIN THOMAS,

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:

Lara M. Caudy, 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 21<sup>st</sup> day of April, 2014.

  
MEGAN E. HARRIGAN  
Assistant Attorney General  
S.C. Bar No. 100108

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Columbia, SC 29211  
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ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

APR 21 2014

S.C. Supreme Court

April 21, 2014

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

Re: Efrain Thomas v. The State of South Carolina  
Appellate Case No. 2013-000591

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: Lara M. Caudy, Appellate Defender  
Trisha Allen, Victim's Services