

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No. 2013-000584

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Michael Chad Lambert, ..... Petitioner,

v.

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

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Did the PCR judge properly find trial counsel was not ineffective for not objecting to the introduction of Petitioner's statement where the PCR judge never specifically ruled upon the issue; where the circumstances surrounding the statement indicate it was voluntarily given; where trial counsel articulated a valid strategy for not wanting to exclude the statement; and where there is overwhelming evidence of Petitioner's guilt?

## STATEMENT OF THE CASE

In October 2008, the Chesterfield County Grand Jury indicted Applicant for felony DUI resulting in death. (App. pp. 587-88). In January 2010, the Grand Jury also issued indictments for reckless homicide and involuntary manslaughter. (App. pp. 590-94). James C. Cox, Jr., Esquire (“trial counsel”) represented Petitioner. (App. p. 1). On February 8-11, 2010, Petitioner proceeded to trial in Chesterfield County before the Honorable Paul M. Burch and a jury. (App. p. 1). The jury convicted Petitioner as indicted, and Judge Burch sentenced him to concurrent terms of twenty-two (22) years for felony DUI resulting in death, ten (10) years for reckless homicide, and five (5) years for involuntary manslaughter. (App. p. 495, line 24-p.497, line 10). Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief on February 4, 2011. (App. p. 500). On January 11, 2013, the Honorable Brooks P. Goldsmith (“PCR judge”) convened a hearing on the application. (App. p. 512). Andrew F. McLeod, Esquire represented Petitioner. (App. p. 512). By order dated February 13, 2013, and filed February 25, 2013, Judge Goldsmith denied and dismissed Petitioner’s application. (App. p. 579).

## ARGUMENT

### **I. The allegation trial counsel was ineffective for failing to object to the admission of Petitioner's statement is not preserved for appellate review.**

Petitioner asserts the PCR judge erred in finding trial counsel was not ineffective for failing to object to the admission of Petitioner's allegedly involuntary statement to Trooper Davis. However, the PCR judge did not rule upon the issue of whether trial counsel should have objected to the statement's admission. Therefore, this issue is not preserved for appellate review.

In his order, the PCR judge found "[Petitioner] voluntarily gave a statement to [T]rooper Leslie Davis admitting to drinking alcohol, to which counsel did not object." (App. p. 581). However, the PCR judge did not specifically address whether trial counsel should have objected to the admission of the statement. (See App. p. 581). Arguably, this issue was never presented to the PCR judge. In his summations, Petitioner merely argued he did not waive his right to a direct appeal, trial counsel did not preserve a motion for a new trial, and the conviction on the other indictments violated the Double Jeopardy Clause. (App. p. 571, line 20-p.573, line 14).

If Petitioner was seeking relief on the issue of trial counsel's failure to challenge the statement, testimony on this issue was directly presented to the PCR judge. (App. p. 529, lines 6-18). Petitioner should have filed a Rule 59(e), SCRCP, motion to preserve that issue for appellate review. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reason for those findings as required"). In this case, Petitioner did not file a Rule

59(e), SCRCP, motion to alter or amend the order to specifically address trial counsel's failure to object to the statement made to Trooper Davis. Therefore, that issue is not preserved for this Court's review. Odom v. State, 337 S.C. 256, 260 n.2, 523 S.E.2d 753, 755 n.2 (1999) ("Only final judgments or decisions may be reviewed by [an appellate court] in PCR actions."); Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) ("The circuit court did not specifically address the issue, and where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.") (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)).

**II. Probative evidence supports the PCR judge's findings trial counsel was not ineffective for failing to object to the admission of Petitioner's allegedly involuntary statement to Trooper Davis.**

Even if this Court finds the issue is preserved, the record contains probative evidence to support a finding that trial counsel was not ineffective. Therefore, the PCR judge properly denied Petitioner's application.

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. The Court presumes

counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant must prove counsel's performance was deficient. Under this prong, the Court measures an attorney's performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

This Court affords great deference to the post-conviction relief judge and will uphold its findings of fact and conclusions of law if the record contains "any evidence of probative value sufficient to support them." Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005) (citing Carpood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (emphasis added)). Accordingly, this Court will only reverse if the record lacks any probative evidence supporting the post-conviction relief judge's findings. Ellenburg v. State, 367 S.C. 66, 70, 625 S.E.2d 224, 226 (2006).

On July 23, 2008, at approximately 6:50 p.m., Petitioner's vehicle collided with Darrell Quick's vehicle, fatally injuring him. (App. pp. 118, line 21-p. 119, line 19). Petitioner testified he suffered injuries in the accident, including lacerations to the head, a fractured rib, a collapsed lung, a crushed ankle, and a fractured femur. (App. pp. 390, line 25-p. 391, line 4). Following the accident, while Petitioner was undergoing treatment for his injuries, State Trooper Leslie Davis arrived at the hospital to talk to

Petitioner about the accident. (App. p. 139, lines 8-10). Trooper Davis recorded the encounter on video, and the recording was admitted as evidence and played at trial. (App. p. 142, lines 7-8; p. 153, lines 6-7). Trooper Davis testified he “read [Petitioner] his rights,” but did not indicate Petitioner was placed under arrest at that time. (App. p. 141, line 20-p. 142, line 6). Trooper Davis testified he felt Petitioner understood what he was asking and even corrected Trooper Davis regarding his date of birth and name. (App. p. 143, lines 8-14). Trooper Davis testified Petitioner said “he thought he fell asleep at the time of the collision.” (App. p. 143, lines 17-20). Petitioner was given a ticket at the hospital for driving under the influence, but Trooper Davis took it back before leaving the hospital parking lot. (App. p. 156, line 20-p. 158 line 1). Petitioner was not formally charged with a crime until after the M.A.I.T. investigation was complete. (App. p. 156, lines 4-12).

Petitioner testified at trial he was in the hospital for a week and he did not remember speaking to Trooper Davis. (App. p. 390, line 22; p. 392, lines 9-20). He testified he was travelling from Alabama to South Carolina on the day of the accident. (App. p. 385, lines 6-11; p. 386, lines 9-10). He testified he made several stops while travelling from Georgia to South Carolina. (App. p. 386, lines 12-17). He made the first stop in Madison, Georgia at 2:00 p.m. (App. p. 398, lines 7-15). He testified he drank one beer at that time. (App. p. 398, lines 7-15). He made the second stop at the Georgia-/South Carolina state line at 3:30 p.m., where he drank two beers. (App. p. 398, lines 18-21). He made his final stop in Camden at 5:30 p.m., approximately one hour before the accident, and he testified he drank one beer at that stop as well. (App. p. 399, lines 5-11). Petitioner testified he drank four beers all together. (App. p. 408, line 3). He testified he did not have a problem driving or keeping his car under control at the time of the

accident. (App. p. 404, lines 14-18). He testified he did not think he fell asleep at the wheel, contrary to what he stated in his interview with Trooper Davis. (App. p. 404, line 21-p. 405 line 3).

Several beer cans were found outside of Petitioner's car on the ground following the accident. (App. p. 161, lines 4-12). Three of those beer cans contained DNA evidence matching Petitioner's DNA profile. (App. p. 194, lines 11-p. 195, line 4). Additionally, at trial, the forensic toxicologist testified Petitioner's blood sample, which was taken at the hospital on the night of the accident at approximately 9:00 p.m., indicated he had .163 blood alcohol content (BAC). (App p. 209, lines 24-p. 210 line 4).

**A. Petitioner failed to prove trial counsel's performance was deficient.**

Petitioner alleged trial counsel was ineffective for failing to object to or make a motion to suppress statements Petitioner made to Trooper Davis during his hospitalization. (App. p. 528, lines 5-p. 529, line 18). However, Petitioner failed to satisfy his burden of proving trial counsel's failure to object to the admission of statements constituted deficient performance because the statements were ultimately admissible and trial counsel articulated a valid strategy for wanting the statements presented to the jury.

**1. Petitioner was not in custody.**

Counsel's failure to object to the Petitioner's statements to Trooper Davis did not constitute deficient performance because Petitioner failed to allege or establish he was in custody when he made the statements. Trooper Davis testified he read Petitioner his rights, but did not indicate Petitioner was placed under arrest at that time. (App. p. 141, line 20-p. 142, line 6). "Whether a suspect is in custody is determined by an examination

of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning.” State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). Such determination requires an objective analysis, “based on whether a reasonable person would have concluded he was in police custody.” Id. This Court articulated in State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) that “the mere giving of Miranda warnings did not convert [an] otherwise noncustodial situation into ‘custodial interrogation.’”

Here, though Petitioner’s freedom to leave was restricted because of his physical condition, no other circumstances of the questioning indicate he would have reasonably believed he was in custody. There is no indication in the record the questioning was unusually lengthy or made for any purpose other than to investigate the cause of the accident. Therefore, the record supports a holding that counsel was not deficient for failing to object to Petitioner’s statements to Trooper Davis.

## **2. Petitioner’s statement was not involuntary.**

Furthermore, trial counsel’s failure to object to the statements to Trooper Davis did not constitute deficient performance because Petitioner failed to prove the statements were involuntary. Petitioner relies on Mincey v. Arizona to support his contention the statements he made to Trooper Davis were involuntary. 437 U.S. 385 (1978). However, the facts of Mincey are distinguishable from the facts of this case. In Mincey, the detective told the defendant he was under arrest for murder, gave him his Miranda warnings, and began to question him about the events from earlier that evening. 437 U.S. at 396. However, in this case, though Trooper Davis read Petitioner his Miranda rights, the record contains no testimony indicating Trooper Davis had placed Petitioner under arrest prior to questioning him. (See App. p. 528, line 3- App. p. 529, line 18; App. p.

555, lines 8-13). Rather, Petitioner was given a ticket at the hospital for driving under the influence, which Trooper Davis took back before he ever left the hospital parking lot. (App. p. 156, line 20-p. 158 line 1). Petitioner was not formally charged with a crime until after the M.A.I.T. investigation was complete. (App. p. 156, lines 4-12). Additionally, in Mincey, the defendant was in the intensive care unit at the time and could not speak because he had a tube in his mouth, so he responded by writing answers on pieces of paper. 437 U.S. at 396. Here, there is no indication Petitioner was in intensive care, or that he was unable to speak. (App. p. 390 line 4-p. 392, line 18). Further, the defendant in Mincey repeatedly asked the detective to cease the interrogation until he could obtain counsel. 437 U.S. at 396. Petitioner did not allege that he asked Trooper Davis to stop questioning him at any time, nor did he allege he requested counsel. The detective in Mincey also questioned the defendant while he was fading in and out of consciousness. 437 U.S. at 401. Here, Trooper Davis testified Petitioner was alert and appeared to understand their discussions. Accordingly, the coercive circumstances present in Mincey were not present in this case.

In determining whether a statement is voluntarily made, the Court must consider the totality of the circumstances. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). The court in State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007), pointed out that South Carolina appellate courts have recognized the following factors are suitable for consideration in totality-of-the-circumstances analysis: “background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency.” Petitioner failed to allege any of the foregoing factors were present or influential in this case. The court also held that “coercive police activity is a

necessary predicate to finding a statement is not voluntary.” Id. at 386, 652 S.E.2d at 452; see also Colorado v. Connelly, 479 U.S. 157 (1986) (“[C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment.”). Here, Petitioner failed to show Trooper Davis engaged in coercive conduct while interviewing Petitioner at the hospital.

Instead, Petitioner merely contends he was intoxicated on pain medicine at the time he gave Trooper Davis. However, intoxication at the time a statement is made does not render such a statement involuntary. State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (“The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused’s intoxication was such that he did not realize what he was saying.”). Again, Trooper Davis testified Petitioner was alert and appeared to understand their discussions. Thus, there is no evidence in the record, other than Petitioner’s self-serving statements,<sup>1</sup> indicating he did not voluntarily speak with Trooper Davis. Accordingly, ample evidence in the record supports a finding that trial counsel was not deficient for failing to object to the allegedly involuntary statements because the statements were admissible.

### **3. Counsel employed a valid trial strategy.**

Trial counsel testified the case “turned on the opinion of whether [Petitioner] was intoxicated or not,” but the jury was not convinced Petitioner was not intoxicated. (App. p. 564, lines 14-22; App. p. 554, line 21-p. 555, line 1). He further testified Petitioner

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<sup>1</sup> The PCR judge found Petitioner’s testimony not credible. (App. p. 583). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a PCR judge’s credibility findings).

“was very honest when the officers came out and talked to him. And what he told them was the truth.” (App. p. 555, lines 5-7). When asked whether he made any motion to exclude Petitioner’s statement as involuntary, trial counsel testified that “all the information [he] had on the statements, notes and summaries was what [Petitioner] said was true.” (App. p. 555, lines 11-15). Trial counsel also testified “no method was available” to exclude evidence of Petitioner’s BAC of .163 taken at the hospital. (App. p. 555, lines 2-5). Trial counsel testified his trial strategy was to stress that if Petitioner was intoxicated, he would not have been able to dial phone numbers, drive, and talk on the phone at the same time. (App. p. 565, lines 8-19). Petitioner’s statement was consistent with the position he was not intoxicated.

“[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Carpood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). Here, trial counsel testified his trial strategy depended on whether the jury would find Petitioner was intoxicated and that there was no method available to exclude evidence of his BAC. (App. p. 555, lines 2-15). He also testified he did not try to get the statements excluded because, based on the information he had from his client, the statements were true. (App. p. 555, lines 11-15). Trial counsel’s strategy was to impress upon the jury the truthful nature of Petitioner’s cooperation to try to bolster his credibility before the jury. This strategy is clearly reasonable in light of the circumstances of this case. Accordingly, the record contains sufficient evidence trial counsel articulated valid reasons for not objecting to the Petitioner’s statement.

**B. Petitioner failed to prove trial counsel's allegedly defective performance prejudiced him because there is overwhelming evidence of Petitioner's guilt.**

Even if Petitioner's statement was involuntarily made while Petitioner was in custody, Petitioner failed to allege or show there was a reasonable probability the outcome of trial would have been different had Counsel timely objected to the statement's introduction. Therefore, the PCR judge properly denied relief.

At trial, the State also introduced evidence Applicant was driving left of the center line when the deadly accident occurred. The State also introduced evidence Petitioner had a BAC of .163 at approximately more than two hours after the collision. Thus, the state presented sufficient evidence Petitioner was guilty of felony driving under the influence resulting in death.

Petitioner did not allege in his application that the results of his blood sample were inadmissible or that trial counsel should have objected to its admission. Petitioner contends trial counsel should have objected to the statements made to Trooper Davis on the night of the accident because those statements were involuntary. However, Petitioner never alleged that he would have testified differently at trial regarding his alcohol consumption had his statements to Trooper Davis been excluded. Moreover, trial counsel testified he would not have been able to exclude blood sample evidence of Petitioner's BAC at trial. (App. p. 555, lines 2-7). Consequently, the record contains ample evidence supporting Petitioner's guilt. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (no prejudice where there is overwhelming evidence of guilt). Accordingly, the PCR judge properly denied relief.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests this Court deny the  
Petition for Writ of Certiorari.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

June 9, 2014

STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas  
Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2011-CP-13-0049  
Appellate Case No.: 2013-000584

MICHAEL CHAD LAMBERT,

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

**CERTIFICATE OF SERVICE**

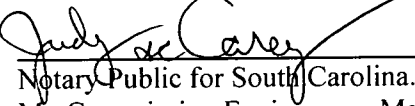
The undersigned hereby certifies that a true copy of the **Return to Petition for a Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589**

This 9<sup>th</sup> day of June, 2014

  
\_\_\_\_\_  
JOSHUA L. THOMAS  
SC Bar No. 100777  
ATTORNEY FOR RESPONDENT

SWORN to before me this 9<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: May 14, 2024



ALAN WILSON  
ATTORNEY GENERAL

June 9, 2014

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

**RECEIVED**

JUN - 9 2014

**Re: Michael Chad Lambert v. State of South Carolina**  
**Appellate Case No: 2013-000584**  
**Lower Court Case No. 2011-CP-13-0049**

**S.C. Supreme Court**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies each of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Joshua L. Thomas  
Assistant Attorney General  
S.C. Bar # 100777

JLT/jacc  
Enclosures

cc: Carmen V. Ganjehsani, Esquire  
Trisha Allen, Victim Services