

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS  
EDGAR W. DICKSON, Circuit Court Judge

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Case No. 2013-001737

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Oscar Gramling, #341691,  
Petitioner,

vs.

State of South Carolina,  
Respondent,

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**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## INTRODUCTION

Petitioner files this Reply to Respondent's Return to Petition for Writ of Certiorari. Petitioner based his Petition for writ of Certiorari on four issues: 1) did the PCR judge err in finding that although Petitioner's plea counsel's representation may have fallen below the reasonable professional standard that Petitioner failed to meet his burden that he was prejudiced as a result?; 2) did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to adequately investigate Petitioner's case?; 3) did the PCR judge err in finding that Petitioner's plea counsel was ineffective by misrepresenting the terms and conditions of the plea offer by misinforming Petitioner regarding the potential maximum term of incarceration under this plea and misrepresenting what could be expected in terms of sentencing?; and 4) did the PCR judge err in finding that Petitioner's plea counsel was ineffective for failing to prepare for trial, failing to prepare an adequate defense and demonstrating such directly to the Petitioner?

In response, Respondent contended that the Certiorari is not warranted: 1) where the PCR judge correctly found Petitioner's allegation that counsel was ineffective in his preparation for and representation during the victim's trial testimony was fatally reliant on speculation and 2) where ample probative evidence supports the PCR Judge's correct finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to adequately advise him of the terms and sentencing range of his plea.

Petitioner asserts that Respondent misstated the pertinent facts of the case and relied on facts not presented in evidence. Additionally, Respondent's arguments against Certiorari do not directly address the issues argued by Petitioner and as thus, are not sufficient to defeat certiorari.

## **STATEMENT OF THE CASE**

Petitioner incorporates by reference the facts as stated in his Petition for Writ of Certiorari. Petitioner asserts that Respondent's Statement of Trial facts present facts not evidence that should not be considered by the court in review of Petitioner's Writ for Certiorari.

Specifically, Petitioner takes exception to the numerous references to "grooming" of the victim as referred to in Respondent's Statement of Trial facts. At no time during the initial trial of this matter, was there any testimony that Petitioner engaged in "grooming" of the victim. Respondent's continuous use of this term that is usually associated with pedophiles and other sexual predators is without any foundation from the record. On the contrary, mitigation evidence was submitted to the court during Petitioner's sentencing point out that there was low risk of Petitioner ever to reoffend. App. p. 249. Moreover, the evidence admitted during the brief trial alluded to the fact that the victim initiated contact with Petitioner. App. pp. 171-172. The victim in this matter invited Petitioner to sneak into her bedroom at her parents' home. App. p. 174. The victim also ran away from home on her own volition. App. p. 187. Therefore, Petitioner asserts that Respondent's Statement of Trial Facts be stricken from the record or in the alternative not considered as they refer to facts not in evidence and contain assertions not supported by the record.

## **ARGUMENT**

Petitioner hereby incorporates all arguments submitted in his Petition for Certiorari. Additionally, Petitioner would like to address Respondent's arguments that Certiorari is not warranted: 1) where the PCR judge correctly found Petitioner's allegation that counsel was ineffective in his preparation for and representation during the victim's trial testimony was

fatally reliant on speculation and; 2) where ample probative evidence supports the PCR Judge's correct finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to adequately advise him of the terms and sentencing range of his plea.

Petitioner submits that Respondent misstates the findings by the PCR judge in this matter. Respondent argues that the PCR judge correctly found that Petitioner's contention that plea counsel's representation was ineffective was fatally reliant on speculation. Nowhere in the PCR judge's Order of Dismissal is there any mention that Petitioner's claim being "fatally reliant on speculation." Instead the PCR judge correctly found that plea counsel's conduct was insufficient. Specifically, the PCR judge found that "plea counsel's representation may have fallen below the reasonable professional standard" and that "plea counsel could have been better prepared for the victim's testimony and avoided the reaction her testimony prompted." App. p. 7. Instead, the court found that Petitioner failed to satisfy his burden in proving he suffered any resulting prejudice.

Respondent argues that any failure to prepare by plea counsel should be placed squarely on the shoulders of Petitioner. Though Respondent acknowledges that both plea counsel and Petitioner testified that they met several times over the course of representation, Respondent argues that it is Petitioner, not plea counsel, who is responsible for the preparation of a defense at trial. App. p. 303. Petitioner submits that this entire argument is without merit.

Plea counsel admitted in his testimony that the Victim in this case contacted him several times during the pendency of this case, giving him ample opportunity to discuss with her the circumstances surrounding the allegations. App. p. 323. Plea counsel failed to properly investigate by failing to even question the testimony of the Victim in this matter, even though he had already had several conversations with Petitioner in which, plea counsel stated that the only

viable trial strategy was to attack the Victim's credibility. App. p. 316. As referred to by the Respondent, Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2055 (1984) states that "[t]he reasonableness of counsel's actions may be determine or substantial influenced by the defendant's own statements or actions... in particular what investigation decisions are reasonable depends crucially on this information... In short inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions."

Plea counsel's lack of investigation cannot be deemed reasonable when it was plea counsel who admitted that if the Victim testified in a manner contrary to what Defendant believed, that the only avenue of defense was to attack her credibility. App. pp. 316-317. During pre-trial motions he made it very clear to the court that the crux of the defense case was to challenge the Victim's credibility. App. pp. 84- 85. Even with this understanding, plea counsel did no independent research or investigation regarding the prior allegations that the Victim had made against several other individuals, none of which had been substantiated by any other independent means. Additionally, the state's position was that none of these other allegations had actually occurred. App. pp. 85- 87.

At a minimum, plea counsel had a duty to undertake a "reasonable investigation" which includes interviewing potential witnesses and "making an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, plea counsel had the foresight to discuss with Petitioner obtaining the services of a private investigator but he offered no explanation why he did not do so. He admitted that he did not even pursue the possibility of obtaining an investigator but he couldn't remember why. App. pp. 362.

Respondent points out that the Victim made several phone calls to plea counsel's office but never disclosed the facts of the substantive offense to plea counsel's staff. Petitioner would assert that plea counsel testified that he himself had conversations with the victim but he never questioned her on the facts of the underlying charges. App. pp. 363-364. At the very least Plea counsel had an obligation "to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting Wiggins, 539 U.S. at 524-25, 123 S.Ct. 2527). Plea counsel failed to do so.

Plea counsel's duty to investigate notwithstanding, Respondent's contention that any challenge to the victim's testimony by plea counsel would tantamount to suborning perjury is disingenuous and without merit. A defense attorney has a duty to challenge statements given by any witness. Impeaching a witness by their prior inconsistent statement is Trial Advocacy 101. There is nothing untoward or unethical about using a witness' own statement against them. The trial transcript is clear that Victim initially did begin to testify in this manner until the prosecutor prodded her to change her story. App. pp. 174-176. Even with this available for him to use in Petitioner's defense, plea counsel passed on the opportunity to probe the Victim further. Plea counsel did not even attempt to counter the victim's testimony and passed on the opportunity to cross-exam the victim for any period of time. Instead, he went to the solicitor seeking a plea. App. p. 333. At no time during the hearing on this matter, did plea counsel articulate any "reasonable" strategic theory of why approaching the solicitor for a plea before he cross-examined the witness was to his client's advantage when the prevailing theory of defense was to

attack the victim's credibility. Petitioner asserts that is the prime illustration of how he was prejudiced by plea counsel's ineffective conduct.

Respondent further argues that ample probative evidence supports the PCR Judge's correct finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to adequately advise him of the terms and sentencing range of his plea. Respondent's argument seems to confuse the actual events of the trial and resulting plea. PCR counsel testified at one point he had discussed with the state the possibility of a lesser-included offense of Assault and Battery of a High and Aggravated nature (ABHAN) before the trial had begun. However, he also testified that he had never actually gotten such an offer, just that the possibility had been discussed with a solicitor from another jurisdiction, making any reference to that plea offer irrelevant. App. p. 317. This is evidenced by that fact that the plea was not to ABHAN, but in fact to Criminal Sexual Conduct with a Minor. Moreover, plea counsel testified that even though the plea judge would allow him time to call in his mitigation witness, Dr. McKee, so that he could come and testify in person that Petitioner was unlikely to reoffend, the decision was made to forgo that option as Petitioner did not want to spend a night in jail. The trial transcript does not indicate that there was any time in which plea counsel conferred with his client. Instead, plea counsel stated, "We will go ahead and do it. It'll be fine." App p. 230. Instead, plea counsel did not confer with his client until after the court had accepted his plea of guilty. App. pp. 245, 330-331. This contradicts the testimony that Petitioner was fully aware that he was not going to be able to go home at the end of his plea. Accordingly, Petitioner made it clear that his plea counsel led him to believe that without the state commenting on sentencing that he would be able to get a probationary sentence. Due to this, Petitioner wholly believed plea counsel's assertion that he

would be able to get such a sentence. Accordingly, plea counsel was ineffective in not ensuring that Petitioner truly understood the ramifications of his plea.

### CONCLUSION

For all the reasons state above, Petitioner once again requests that the Court grant Petitioner's Writ for Certiorari.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

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**S.C. SUPREME COURT**

APPEAL FROM LEXINGTON COUNTY  
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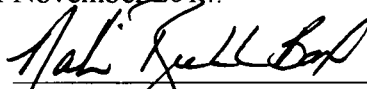
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Petitioner,

vs.

State of South Carolina,  
Respondent,

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply to the Return to Petition for Certiorari in the above referenced case has been deposited in the United States Mail, postage prepaid, addressed to J. Walt Whitmire, SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211, this 13th day of November 2014.



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# THE BAX LAW FIRM, PA

November 13, 2014

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

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**S.C. SUPREME COURT**

RE: Oscar Gramling v. State of South Carolina  
Appellate Case No: 2013-001737

Dear Mr. Shearouse:

Enclosed for filing is the original and (6) copies of Petitioner's Reply to Return for Writ for Certiorari filed on behalf of Oscar Gramling in the above captioned case.  
Please let me know if you have any questions.

Sincerely yours,

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