

STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAR 10 2015

CERTIORARI TO YORK COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable John C. Hayes, III, Circuit Court Judge

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Appellate Case No.: 2014-001163

Robert Hooker..... Petitioner,

v.

State of South Carolina..... Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....1  
QUESTION PRESENTED.....2  
STATEMENT OF THE CASE.....3  
STANDARD OF REVIEW.....5  
ARGUMENT.....6

The PCR court properly found Counsel rendered effective assistance of counsel where Counsel articulated that she did not present additional witnesses based on her client’s own statements and where Petitioner failed to prove that he was living at Victim’s house at the time of the burglary.

CONCLUSION.....11

## **QUESTION PRESENTED**

Did the PCR court properly find Counsel rendered effective assistance of counsel where Counsel articulated that she did not present additional witnesses based on her client's own statements and where Petitioner failed to prove that he was living at Victim's house at the time of the burglary?

## STATEMENT OF THE CASE

Robert Hooker, (“Petitioner”), was indicted by the June 2011 term of the York County Grand Jury for Malicious Injury to Real Property (2011-GS-46-1837), Burglary, 1<sup>st</sup> degree (2011-GS-46-1838) and Stalking (2011-GS-46-1839). Melissa Inzerillo, Esquire, represented him. On August 10, 2011, the Applicant proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable Lee S. Alford sentenced the Applicant to confinement for fifteen (15) years for Burglary, 1<sup>st</sup> degree, five (5) years for Stalking and thirty (30) days for Malicious injury to real property.

A notice of appeal was filed on the Applicant’s behalf and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant’s conviction and sentence. State v. Hooker, Op. No. 2013-UP-100 (filed March 13, 2013). The Remittitur was issued on April 5, 2013.

Petitioner subsequently filed an application for post-conviction relief (PCR) on May 13, 2013. Respondent made its Return on August 21, 2013. Petitioner then filed a “Supplement to Application for Post-Conviction Relief” on April 10, 2014. Petitioner claimed, *inter alia*, “Trial counsel failed to investigate, effectively cross-examine the state’s witnesses, or present evidence at trial to show [Petitioner] lived at the alleged victim’s house; including witness testimony, evidence of mail that [Petitioner] lived at the alleged victim’s house, and evidence that his belongings were in the home.” (App. p. 36). On April 16, 2014, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Bobby G. Frederick, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General’s Office. On April 28, 2014, the Honorable John C. Hayes, III denied and dismissed Petitioner’s application with prejudice by written Order. Petitioner subsequently filed

a Petition for Writ of Certiorari on November 6, 2014. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR 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 found Counsel rendered effective assistance of counsel where Counsel articulated that she did not present additional witnesses based on her client's own statements and where Petitioner failed to prove that he was living at Victim's house at the time of the burglary.**

Petitioner asserts his "Conviction should be Vacated due to Counsel's Failure to Investigate or to Call Witnesses." (Pet. p. i). This argument is without merit.

In a PCR action, the Petitioner 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 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 (1984); Butler, *supra*.

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, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Petitioner 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. 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.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland at 689, 104 S. Ct. at 2065.

The reasonableness of counsel's actions may be determined or substantially **influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.** For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland at 691, 104 S. Ct. at 2066 (emphasis added).

During the trial, Victim testified she lived alone with her son, that no one else lived with her and that, most importantly, Petitioner never lived with her at her house." (Supp. App. p. 155 lines 4-20; 182 lines 7-10)). At the PCR hearing, Counsel testified that, according to her notes, "[Petitioner] indicated he knew [Victim] didn't want him to live [at Victim's house] or didn't want him there. That [Petitioner] never indicated to me that he lived there." (App. p. 69 lines 9-11). Counsel also testified as to how Petitioner entered Victim's house, further indicating Petitioner did not live with Victim. "I mean, he tore through the wall on the second story of her apartment and got in the house that way. He didn't bust through the sliding glass door. That's

how he got in the house.” (App. p. 99 lines 17-20). On cross-examination, Counsel reiterated that Petitioner knew he was not supposed to be at Victim’s house and that he did not live there. Counsel was asked if Petitioner ever told her that he lived at Victim’s house, to which Counsel responded:

No. In fact, he said that he knew [Victim] didn’t want him there. That my understanding was that he worked as a commercial fisherman. That he was gone a lot. That the night before this incident for example he stayed at his mom’s house and then went over to [Victim’s] house the next day. Not that he resided there. So no. His information to me was that he knew [Victim] did not want him there.

(App. p. 133 lines 12-19).

Petitioner presented four witnesses who tried to claim they would have testified that Petitioner lived at the house with Victim. However, none of these witnesses offered any proof, such as rental agreements, driver’s license, bills, or receipts, showing Petitioner lived with Victim. (App. p. 114 lines 17-20; 117 lines 13-16; p. 122 lines 15-25).

The PCR court held Counsel’s testimony was credible concerning that Petitioner told her that he knew he was not supposed to be at Victim’s house. (App. p. 17). See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses.)

In its Order of Dismissal, the PCR court also held:

[Petitioner] contends that even after informing trial counsel that her client knew her was not supposed to be at the house, trial counsel should have still called four witnesses during trial that would have testified that [Petitioner] did in fact live, or have a right to live, with the victim in the house. The [c]ourt disagrees with this contention as this would place trial counsel in a situation in which trial counsel would have knowledge that either her client or a witness was not being honest with the court. The undersigned cannot find fault in trial counsel for building her case strategy off of information that the [Petitioner] told her. To require trial counsel to call witnesses to the stand that would contradict what her own client told her in confidence would serve no beneficial purpose to her client’s case. The undersigned finds that trial counsel was not ineffective by failing to call witnesses

to the stand to testify under oath at a different story than what her client told her. Additionally, none of [Petitioner's] proffered witnesses could address [Petitioner's] right to be in the victim's house at the time of the alleged burglary. Also, regardless of what these witnesses would have presented as testimony, [Petitioner], at the time of the alleged burglary, was subject to a no trespassing order, and entered the victim's residence by way of knocking a hole in the wall of a second floor bedroom, and then made an attempt to conceal the hole. The witness's testimony at the PCR failed to establish in any way that there is a reasonable probability that the outcome would have been different had they testified as witnesses during the trial.

(App. p. 17-18).

The PCR court properly found Counsel rendered effective assistance of counsel in this case. Counsel based her actions upon the information supplied by Petitioner. Under Strickland, Counsel's actions may be properly based on information from Petitioner and make investigative decisions according to such information. Strickland at 691, 104 S. Ct. at 2066. Counsel testified Petitioner told her that he knew he was not supposed to be at Victim's house and did not live with Victim. This crucial information was used by Counsel in deciding that calling the other witnesses would be fruitless. This decision may not be now challenged as unreasonable under Strickland. Further, Petitioner was on a "no trespassing order" at the time of the incident, which is further proof that Petitioner did not live with Victim, nor could he even lawfully be at Victim's apartment.

Furthermore, as the PCR court correctly concluded, Petitioner and his witnesses failed to establish that Petitioner lived at Victim's house. This is the prejudice that must be shown for Petitioner to meet his burden of proof in this case. However, as stated above, none of these witnesses could show or produce any evidence, namely a rental agreement, driver's license, bills or receipts, that proved Petitioner lived at Victim's apartment. Therefore, Petitioner has failed to meet his burden of proving any resulting prejudice from Counsel's alleged ineffective assistance.

Accordingly, there is clear “evidence of probative value” to sustain the PCR judge's findings.

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

## CONCLUSION

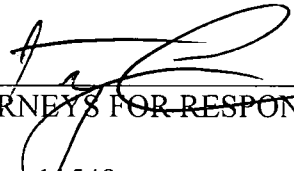
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General  
S.C. Bar # 78871

By:

  
~~ATTORNEYS FOR RESPONDENT~~

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March 10, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

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ROBERT HOOKER, 347354

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

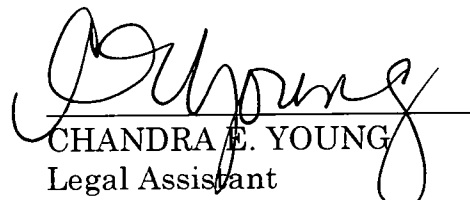
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Bobby G. Frederick  
Post Office Box 8219  
Myrtle Beach, South Carolina 29578

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

This 10<sup>th</sup> day of March 2015.

  
\_\_\_\_\_  
CHANDRA E. YOUNG  
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ALAN WILSON  
ATTORNEY GENERAL

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MAR 10 2015

March 10, 2015

**S.C. Supreme Court**

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

**RE: Robert Hooker, #347354 v. State of South Carolina  
2014-001163**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson  
Assistant Attorney General

JRJ:cey  
Enclosures

cc: Bobby G. Frederick, Esquire  
Trisha Allen, Victim Services