

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

The Honorable Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No. 2015-001037

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Randall Price, ..... Petitioner,

v.

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

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

Does the record contain evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving counsel was ineffective where Counsel gave a valid strategic reason for not seeking to introduce a SLED report showing the existence of DNA from an unidentified third person on the knife?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2007 term of the Spartanburg County Grand Jury for two counts of assault and battery with intent to kill (2007-GS-42-2836, -2837). Petitioner was represented by Richard Welchel, Esquire. On June 10, 2011, Petitioner proceeded to trial, where he was convicted of the charges by a jury. The Honorable J. Derham Cole sentenced Petitioner to twenty years, suspended upon service of twelve years to three years of probation (2007-2836) and a consecutive sentence of twelve years suspended to three years of probation (2007-2837).

A timely notice of appeal and Anders brief were filed on the Petitioner's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Price, Op. No. 2013-UP-141 (filed April 10, 2013). The Remittitur was returned on June 4, 2013.

Petitioner filed an application for post-conviction relief ("PCR") on May 9, 2013. An evidentiary hearing into the matter was convened on January 13, 2015, at the Spartanburg County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Petitioner testified on his own behalf. Pastor Kevin Smith, Timothy Powell, and Juanita Price also testified on his behalf. Richard H. Welchel, Esquire, ("Counsel") also testified. Judge Jefferson denied and dismissed Petitioner's PCR with prejudice by Order signed April 30, 2015, and filed May 7, 2015.

## STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

## ARGUMENT

- I. **The record contains evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving counsel was ineffective where Counsel gave a valid strategic reason for not seeking to introduce a SLED report showing the existence of DNA from an unidentified third person on the knife.**

In a PCR action, the 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, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Id. at 117-18, 386 S.E.2d at 625.

**A. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show Counsel's performance was deficient.**

This Court should deny review because there is ample evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to show Counsel's performance fell below an objective standard of reasonableness. The PCR judge found that "Counsel was not ineffective for failing to introduce DNA evidence and exercised his discretion by making tactical, strategic decisions for [Petitioner's] defense." (App. p. 393).

Counsel testified that "there was never any question, from the beginning, that [Petitioner's case] was going to be a self-defense case." (App. p. 335, lines 5-6). Counsel testified that Petitioner had a cut on his wrist, that the cut was some evidence of self-defense, that Petitioner had testified he was cut, and that Officer Talanges also testified about the cut and there were photographs taken of the cut as well. (App. p. 337, p. 10-12). Counsel also testified that the cut was not substantial. (App. p. 337, lines 13-15). Counsel testified he did not recall specifically questioning the other witnesses about the cut but that he "didn't want to give them a chance to deny." (App. p. 341, lines 9-24).

Counsel further testified that to his knowledge, there was no testing done of the other individuals that Petitioner testified were there, but that they also could not find those individuals. (App. p. 343, lines 10-14). Counsel testified that in order to elicit testimony regarding the DNA evidence, he would have to call "the SLED chemist [who] does the blood analysis." (App. p. 343, lines 20-23). Counsel further stated, "[b]ut my problem is when you bring in what I consider to be professional normal State's witnesses, they tend to tailor their testimony towards the State

and not the defense." (App. p. 344, lines 1-4). Counsel added that "[t]hey could testify that they have no way of knowing when or where that blood was on the knife, whether it was on there, . . . from before, had not related to the incident at all." (App. p. 344, lines 6-9).

Petitioner testified at trial. (App. pp. 161-203). Petitioner testified that the testimony he gave at the PCR hearing "was the same testimony [he] provided at the trial." (App. p. 315, lines 19-21). Petitioner testified that that it was his contention that the DNA report "would definitely show that I was injured with that particular knife and that my blood was on the knife[,] and that the jury would not have "couldn't say that [he] was not injured." (App. p. 310, lines 7-20). However, Petitioner testified at trial that he was attacked by four attackers and cut on his hand. (App. p. 194, lines 14-15; 199, lines 19-22). Additionally, a photograph of the laceration to his hand was introduced at trial. (App. p. 153, lines 3-9).

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317, S.C. 292, 294, 454 S.E.2d 312, 313 (1996). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)). In making a fair assessment of attorney performance, a court must make every effort 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." Strickland v. Washington, 466 U.S. 668, 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

Here, Counsel testified that he did not introduce the DNA report because he would have had to call a SLED analyst to testify and he reasoned that the analyst's testimony would be slanted toward the State and that he would not be able to testify as to how or when the DNA came to be on the knife. Furthermore, though Petitioner argues the DNA report would have supported his testimony that four people attacked him, it is equally likely, based on the record and the testimony at the PCR hearing, that the evidence would have undermined his testimony. (See App. p. 310, lines 11-20).

Accordingly, the record contains ample evidence of probative value to support the PCR judge's finding that Counsel gave valid strategic reasons for not introducing the DNA report, and that, therefore, Petitioner failed to satisfy his burden of proving Counsel's performance fell below an objective standard of reasonableness.

**B. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show prejudice.**

The record supports the PCR judge's finding that Petitioner failed to satisfy his burden of proving that any alleged deficiency in Counsel's performance prejudiced him.

To satisfy the second prong of Strickland, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In other words, Petitioner would have to show not only

that the challenge to the indictment would have been successful, but that he would not have been convicted.

Petitioner failed to introduce evidence at the PCR hearing to show who the DNA belonged to or when the DNA came to be on the knife. (App. p. 344, lines 6-9). Furthermore, no evidence was presented to show whether the DNA belonged to a male or female. Accordingly, the PCR judge could only speculate as to whether the evidence would have affected the outcome. Furthermore, Petitioner testified the DNA report would have showed that his blood was on the knife. However, this would have only been cumulative evidence because Petitioner and an offer testified at trial that Petitioner had been cut and a photograph of the cut was admitted into evidence. Therefore, the fact Petitioner's DNA was on the knife with another unknown individual had no bearing on the outcome of Petitioner's trial.

Accordingly, the record supports the PCR judge's finding that there is no reasonable probability that, but for the alleged errors of Counsel, the outcome of the proceeding would have been different.

Accordingly, the record fully supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient or that he was prejudiced by any alleged deficient conduct. Therefore, this Court should deny review.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

March 30, 2016.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge  
Appellate Case No. 2015-001037

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RANDALL PRICE, #346410,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Benjamin J. Tripp, Esquire**  
**SC Commission of Indigent Defense**  
**Appellate Defense**  
**Post Office Box 11589**  
**Columbia, SC 29211**

This 30<sup>th</sup> day of March, 2016

  
ASHLEY HAWORTH  
LEGAL ASSISTANT