

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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SC SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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Appellate Case No. 2015-001608

Robert S. Horton, ..... Petitioner,

v.

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

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON  
Attorney General

ALICIA A. OLIVE  
Assistant Attorney General  
SC Bar #102089

P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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### **QUESTION PRESENTED**

Is there probative evidence supporting the post-conviction relief judge's finding that counsel was not ineffective for not objecting when Victim came to the stand with a security pillow?

## 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 July 2009 term of the Spartanburg County Grand Jury for two counts of criminal sexual conduct with a minor, second degree, but the indictment was later amended and was re-indicted at the November 2011 term (2009-GS-42-3878, and -3879). Petitioner was represented by Michael D. Brown, Esquire. Petitioner proceeded to trial July 9-12, 2013, after which he was found guilty of criminal sexual conduct with a minor, second degree.<sup>1</sup> The Honorable J. Derham Cole sentenced him to imprisonment for a term of eighteen years.

Petitioner filed a pro se Notice of Appeal. However, the South Carolina Court of Appeals dismissed Petitioner's appeal as untimely served on May 6, 2013. State v. Horton, No. 2013-UP-904 (Ct. App. May 16, 2013). The Remittitur was issued on May 24, 2013.

On July 17, 2013, Petitioner filed an Application for post-conviction relief ("PCR"). Respondent made its Return on or about July 2, 2014. An evidentiary hearing into the matter was convened on March 26, 2015, at the Spartanburg County Courthouse. Petitioner was present and represented by Leah Moody, Esquire. Suzanne White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner and his trial counsel, Michael Brown ("Counsel") testified at the hearing. On July 7, 2015, the PCR judge denied and dismissed Petitioner's PCR application but granted Petitioner a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

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<sup>1</sup> On one count of criminal sexual conduct with a minor, second degree (2009-GS-42-3878), the jury could not reach a verdict and the trial judge declared a mistrial as to that charge. (App. p. 549-50).

## 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). 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)). 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)).

## ARGUMENT

### **I. There is probative evidence to support the PCR court's finding that counsel was not ineffective for not objecting when Victim came to the stand with a security pillow.**

Petitioner asserts the PCR court erred by finding counsel was not ineffective for failing to object when Victim came to the stand with a security pillow. However, the record indicates that probative evidence exists to support the PCR court's findings. Therefore, the State submits the PCR court properly denied Petitioner's application.

In a post-conviction relief 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 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." 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 that 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 that 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.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

The victim ("Victim") was Petitioner's stepdaughter. (App. p. 27, line 20). Victim testified at trial. (App. pp. 68-123). In addition to Victim's testimony about the abuse she experienced, Petitioner's DNA, which was collected from Victim's bedroom closet, was introduced as evidence at trial. (App. pp. 190, 220, 228). This evidence was consistent with the victim's testimony. (App. p. 85, lines 8-12). Victim's mother, Stephanie Horton ("Ms. Horton") testified that Victim had learning disabilities that significantly affected her education. (App. p. 128, lines 20-25). Ms. Horton testified that Victim, though seventeen, was functioning at an eighth grade level. (App. p. 129, lines 1-3). Ms. Horton also testified that Victim required some level of special education. (App. p. 166).

In his PCR action, Petitioner alleged that Counsel was ineffective for not objecting when Victim, who was seventeen years old at the time of trial, came up to testify on the stand carrying a blue "security" pillow. (App. p. 635, lines 21-25). Petitioner stated that Victim's maturity lagged behind, but not to that degree. (App. p. 636, lines 14-15). Petitioner felt that Counsel should have objected to her coming to the stand with the pillow. (App. p. 636, lines 16-18). He stated that they discussed this as "best [they] could cause it was—she just walked in with it." (App. p. 636, lines 20-21). Counsel testified that he and Petitioner had not "really paid attention

to [Victim's] presence outside the standing [sic] in the courtroom. So when she walked up, it wasn't something that initially shocked the conscience." (App. p. 656, lines 8-11). Counsel also confirmed that the video the jury viewed of Victim had been taken when she was thirteen or fourteen. (App. p. 656, lines 16-18).

The PCR judge found that Petitioner failed to demonstrate deficient performance, and that there was no evidence that an objection to Victim's security pillow would have affected the outcome of the trial. (App. p. 674).

Here, there was testimony that Victim had an intellectual disability and Petitioner himself testified that her maturity lagged behind. Further, DNA evidence collected from Victim's bedroom in this case corroborated Victim's allegation of an instance of abuse that occurred in her bedroom. Counsel testified that he did not know about the pillow until Victim came to the stand. Petitioner also testified that they discussed it as best they could but that it happened quickly. Counsel also testified that the Victim coming to the stand with the pillow did not shock the conscience. Petitioner submits the PCR judge correctly determined that there is no reasonable probability that Victim's act of bringing a pillow with her to the stand inflamed the passions of the jury.

Because the record contains significant probative evidence that trial counsel acted reasonably and within professional norms and that no prejudice resulted from trial counsel's actions, the PCR court did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

**CONCLUSION**


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

Respectfully submitted,

ALAN WILSON  
Attorney General

ALICIA A. OLIVE  
Assistant Attorney General  
S.C. Bar # 102089

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

By:   
ATTORNEYS FOR RESPONDENT

May 23, 2016

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to the Court of Appeals  
Appeal from Spartanburg  
The Honorable Roger L. Couch, Circuit Court Judge

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Appellate Case No. 2015-001608

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ROBERT S. HORTON,

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:

**Susan B. Hackett, Esquire**  
**SC Commission of Indigent Defense**  
**Appellate Defense**  
**Post Office Box 11589**  
**Columbia, SC 29211**

This 23<sup>rd</sup> day of May, 2016

  
\_\_\_\_\_  
ASHLEY HAWORTH  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

May 23, 2016

RECEIVED

MAY 23 2016

SC SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**RE: Robert S. Horton v. State of South Carolina**  
**Appellate Case No.: 2015-001608**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Alicia A. Olive  
Assistant Attorney General  
SC Bar No. 102089

AAO/ah  
Enclosures

cc: Susan B. Hackett, Esquire