

ORIGINAL

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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CERTIORARI TO RICHLAND COUNTY  
Court of Common Pleas

The Honorable G Thomas Cooper., Circuit Court Judge

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Case No 2007-CP-40-6691  
Appellate Case No. 2010-168749

Raymond Edmonds, . . . . . Petitioner,

v

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

**BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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MAY 17 2013

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## **ISSUE ON APPEAL**

The PCR court did not err in holding Trial Counsel was not ineffective where, Counsel met with Petitioner over a dozen times, investigated and reviewed Petitioner's case, challenged the State's case through various motions, and presented both witnesses and testimony throughout Petitioner's trial.

## STATEMENT OF THE CASE

Petitioner was indicted at the July 2003 term of the Richland County Grand Jury for Trafficking Crack Cocaine 100 to 200 grams—First Offense, Possession With Intent to Distribute Cocaine—First Offense, Possession With Intent to Distribute Marijuana, and Possession of Unlawful Weapon by a Convicted Felon. He was represented by Kana Johnson, Esquire. On August 5, 2004, after a jury trial with the Honorable Clifton Newman, Petitioner was convicted and sentenced to twenty five year's imprisonment for Trafficking in Crack Cocaine, ten years for Possession With Intent to Distribute Marijuana, and five year's for possession of a stolen pistol; with all charges to run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf, the South Carolina Court of Appeals affirmed Applicants conviction and sentence. State v. Edmonds, Op. No. 2006-UP-158 (S.C. Ct. App. Filed April 25, 2007).

Petitioner subsequently filed an application for post-conviction relief on October 8, 2007. The State made its Return on October 9, 2008. An evidentiary hearing as convened on August 14, 2009, at the Richland County Courthouse. By Order dated February 5, 2010 and filed February 5, 2010, The Honorable G. Thomas Cooper, Jr., denied and dismissed Petitioner's post-conviction relief application with prejudice.

Thereafter, Petitioner filed a Rule 59(a) motion for rehearing and Rule 59(e) motion to alter and amend the Order. Petitioner filed two documents, each titled "Petition for Reconsideration." On July 29, 2010, Judge Cooper, Jr., denied Petitioner's Motion for Rehearing and/or Motion to Alter or Amend.

Subsequently, Petitioner filed a Johnson Petition for Writ of Certiorari on November 23, 2010. The Court of Appeals granted certiorari on January 14, 2013. Petitioner filed for petition for writ of certiorari to this Court. The State's Brief of Respondent follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, 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). 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, 80 L.Ed.2d 674, 692 (1984); Butler.

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. The 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 counsel. First, the 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.

## ARGUMENT

**Probative evidence supports the PCR courts finding that Counsel was not ineffective where, Counsel met with Petitioner over a dozen times, investigated and reviewed Petitioner's case, challenged the State's case through various motions, and presented witnesses and evidence throughout Petitioner's trial.**

Petitioner argues the post-conviction relief (PCR) court erred in finding that Counsel was not ineffective in failing to provide an adversarial challenge to the State's case. However, this argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective.

This Court in Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) held the manner in which defense counsel "investigated, planned, and conducted his defense constituted a classic example of a complete breakdown in the adversarial process." Id. at 548 In Nance, defense counsel was suffering from "pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure" at the time of his appointment. Id. During the trial, defense counsel was taking various medications which greatly impaired his memory, caused lack of sleep, and sedation. Id. Co-Counsel stated at defendants PCR hearing that defendants "mother was the only family member interviewed prior to trial; that he did not recall that anyone investigated Petitioner's background; and that no one had requested [defendants] records from the department of corrections." Id. Defense counsel stated to the jury in his opening statement that he did not ask to represent the defendant. Id. Defense counsel presented only three witnesses to testify on behalf of defendant's case: "a corrections officer, an unqualified expert, and [defendant's] sister." Id. at 554. All three of the witnesses testimony included damaging statements regarding the defendant's character and propensity to commit violence. Id. This Court found defense counsel failed to act as an adversary to the prosecution. Id. at 557. In addition, the United States

Supreme Court found in Florida v. Nixon, “the Florida Supreme Court erred in applying, instead, a presumption of deficient performance, as well as a presumption of prejudice; the latter presumption, we have instructed is reserved for cases in which counsel fails meaningfully to oppose the prosecution’s case.” Florida v. Nixon, 125 S.Ct. 551, 555 (2004). (Holding defense counsel’s failure to obtain defendants express consent to a defense strategy of conceding guilt did not automatically render counsel’s performance deficient.)

In the instant case, Petitioner failed to raise any claim of per se prejudice in his post-conviction relief application, at his evidentiary hearing, or in his Rule 59(e) motion. An order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Therefore, any allegation regarding per se prejudice was not properly preserved for appellate review.

However, even if this Court determines the allegation of per se prejudice was preserved for appellate review; there is evidence of probative value to support the PCR court findings that Counsel was not ineffective. Petitioner first alleges Counsel failed to interview several witness and conduct an independent investigation of the case. However, at the PCR hearing Counsel testified she met with Petitioner at least a dozen times. (App. pp. 649 line 23- pp. 650 line 2.) Counsel further testified she reviewed discovery with Petitioner and used a private investigator throughout the case. (App pp. 650 lines 3-9 ) Furthermore, the PCR court found Counsel’s testimony to be credible and Petitioner’s testimony not credible. (App. pp. 707.)

Petitioner asserts Counsel failed to sequester the witnesses in his case, despite his request. In its Order of Dismissal, the PCR court found Petitioner “failed to satisfy his burden of proof and demonstrate that trial counsel was ineffective for not moving to sequester the State’s

witnesses.” (App. pp. 722.) Petitioner asserted law enforcement should have been sequestered prior to the Denno hearing thereby preventing them from confirming each other’s testimony. However, the PCR court found this argument failed for lack of proof. (App. pp. 723.) Specifically, the PCR court stated Petitioner “failed to demonstrate, beyond mere speculation, that the results would have been any different had law enforcement been sequestered.” (App. pp. 723).

Petitioner alleges Counsel failed to get a ruling on a motion to compel the identity of the confidential informant. At the PCR hearing, Counsel testified she did move to compel the disclosure of the confidential informant. (App. pp. 651 lines 18-20.) Counsel further stated she knew the standard regarding the State’s requirement to disclose the identity of the confidential informant and she ultimately prevailed “on that argument because Solicitor Spears ultimately *nol prossed* the indictment relevant to the CI’s participation in the transaction.” (App. pp. 652 lines 2-9.) Counsel further testified “despite that *nol pros’ing*, I still maintained that the CI’s identity was important, and so I attempted to get the State to reveal it in trial. I obviously lost that motion.” (App. pp. 652 lines 10-13.)

Petitioner further alleges Counsel never explained the standard for having disclosure for a confidential informant. However Petitioner testified at the PCR hearing that Counsel did discuss the standard necessary to get disclosure of the confidential informant. (App. pp. 612 line 24-pp. 613 line 2.) Furthermore, Solicitor Spears *nol prossed* one of the indictments against Petitioner as a result of the Counsel successfully arguing the standard for disclosing a confidential informant. (App. pp. 652 lines 2-9.)

Petitioner asserts Counsel was ineffective for failing to have him testify during the hearing to suppress the search warrant and for failing to challenge the inconsistency or the wrong

information in the search warrant. However, Counsel testified she went over the search warrant with Petitioner and she was unaware of any witness to call during the suppression hearing. (App. Pp 652 line 20- pp. 653 line 17.) Furthermore, Counsel did challenge the search warrant at trial. (App. pp. 45 line 24- pp. 46 line 12.) The PCR court noted in its Order that Counsel did challenge the warrant. (App. pp. 719.) The PCR court found Petitioner “failed to meet his burden of proof and demonstrate that had trial counsel made the arguments he alleges she failed to make, the outcome would have been any different.” (App. pp. 720.) Additionally, the PCR court determined Petitioner’s testimony was not credible. (App. pp. 707.) Therefore any testimony provided by Petitioner during the suppression hearing would not have affected the outcome of the hearing.

Petitioner asserts Counsel was ineffective for failing to object to the warrant not being specific enough when it asked to search “all persons.” (App. pp. 619 lines 22-25.) Counsel testified she recalled discussing the “all persons” language with Petitioner. (App. pp. 654 Ln. 5-17.) Counsel further testified she believed “they put down ‘all persons’...so that they can prove both a constructive possession case alongside with the actual possession case.” (App. pp. 654 lines 15-17.) The PCR court found the warrant “clearly explains the reasoning for searching all persons and the residence where suspected drug dealing is taking place.” (App. pp. 718.) The PCR court further found “the information provided to the magistrate related to seeing crack cocaine at the residence.” (App. pp. 718.) The PCR court found “no basis to support the [Petitioner’s] bare assertion that the warrant was overbroad.” (App. pp. 718.) The PCR court further noted even if for argument sake the warrant was found to be overbroad then that portion relating to “all persons” was “severable from otherwise unchallenged and valid portion(s). (App.

pp. 718.) Furthermore, Petitioner would not be able to challenge a “purported Fourth Amendment issue that may have occurred as to any of the other persons.” (App. pp. 719.)

Petitioner alleges counsel was ineffective for failing to call Petitioner or any other witness to testify at the Denno hearing regarding Petitioner’s oral statement. In support of his claim, Petitioner provided testimony from two witnesses.<sup>1</sup> The PCR court found “it is not unreasonable for trial counsel not to elicit testimony (even if credible) from this [Petitioner] and/or his sister and/or a minor child to rebut the credible testimony of the four law enforcement officers...who did testify at the Denno hearing. (App. pp. 710.) The PCR court found,

whether the [Petitioner], his sister, and/or the minor child testified would not have outweighed the credible testimony of the four law enforcement officers and the trial judge would have still ruled that the statement was voluntary by a preponderance of the evidence and admitted the statement to the jury for their consideration.

The PCR court stated “trial counsel had an opportunity to view the credible testimony of the four law enforcement officers” and Counsel electing not to present the witnesses was not deficient considering the nature of the Denno hearing. The PCR court found:

even assuming trial counsel called a minor child to testify at the Denno hearing and he did so credibly regarding his presence that at the [Petitioner’s] residence during the execution of the warrant, the exact time of arrival of the children is conflicted and testimony exists that they did not arrive until *after* the [Petitioner’s] [voluntary] statements were made.

(App. pp. 715.) The PCR court found no prejudice existed “because the preponderance of the evidence would still support the trial judge’s Denno ruling. (App. pp. 715.)

Petitioner asserts Counsel was ineffective for failing to move for a continuance when a witness, Danny Brown (“Brown”), could not be located. However at trial, Counsel stated she “would like this witness (Brown) to be provided for the court in order to assist in our defense...”

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<sup>1</sup> Petitioner provided testimony from his sister, Angela Williams, and a minor child, Rahim Taylor. The State stipulated to the testimony that Rahim Taylor was at the house the day Petitioner gave his oral statement

(App pp. 17 lines 3-4.) Counsel further stated she had an investigator attempt to locate Brown. (App. pp. 18 lines. 19-23.) At the PCR hearing, Counsel testified she contacted Brown personally and arranged for a meeting at the Solicitor's office, where Brown gave a statement taking responsibility for the drugs. (App pp. 650 lines 10-22.) The PCR court found Brown gave three conflicting statements and "it is clear that the recantation is the final version." (App. pp. 722.) Further, Brown's recantation was presented at trial. (App. pp. 722.) The PCR court concluded Petitioner "failed to satisfy his burden of proof regarding what specifically was deficient about trial counsel's handling of Danny Brown statement(s)." (App. pp. 722.)

Petitioner alleges Counsel was ineffective for failing to discuss third party guilt with him. Counsel testified she argued third party guilt because Brown previously gave a statement claiming responsibility for the drugs. (App. pp. 655 line 23- pp. 656 line 9.) Counsel felt the statement would "cast reasonable doubt" as to Petitioner's guilt. (App. pp. 656 line 5.) Counsel further testified Brown's recantation was made outside of her presence and without her knowledge. (App. pp. 656 lines 8-11.) Counsel testified she was unable to locate Mr. Brown during the trial despite using an investigator. (App. p. 650 lines 10-15; App. p. 656 lines 12-14.) However, Counsel called Investigator Poole to testify as a witness in order to bring in Brown's previous statements. (App. pp. 656 lines 15-19.) The PCR court found Danny Brown testimony was unclear because he gave "three separate and somewhat conflicting statements." (App. pp. 721.) The PCR court concluded Petitioner "failed to satisfy his burden of proof regarding what specifically was deficient about trial counsel's handling of Danny Brown statement(s)." (App. pp. 722.) The PCR court further concluded Petitioner "failed to satisfy his burden of proof and demonstrate that had trial counsel investigated Danny Brown's statements that the result would have been any different." (App. pp. 722.)

Petitioner further alleges Counsel was ineffective for failing to object to drugs, a weapon, and various paperwork being entered into evidence. Counsel testified she did not have any concerns regarding the drugs being introduced to the jury as narcotics. (App. pp. 657 lines 5-11.) Counsel further testified she did not feel the need to make an objection concerning the gun. (App. pp. 657 lines 12-22.) Counsel testified the Officer identified the paperwork as forms similar to those “he found in the dresser” and therefore she did not feel an objection was proper. (App. pp. 658 lines 9-19.) Furthermore, Counsel disputed whether the Officer actually identified the particular forms. (App. pp. 658 lines 12-14.) The PCR court found Petitioner did not specifically pursue these particular issues at the PCR hearing and therefore found the claims to be meritless. (App. pp. 724.)

There was clear evidence of probative value in the record to support the PCR court’s findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the PCR court’s Order of Dismissal should be affirmed.

**CONCLUSION**

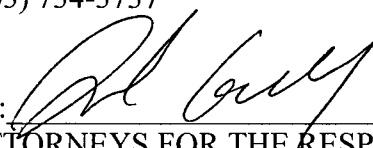
For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

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By:   
ATTORNEYS FOR THE RESPONDENT

May 17, 2013

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RAYMOND EDMONDS,

PETITIONER,

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RESPONDENT.

—————  
**PROOF OF SERVICE**  
—————

I, Lauren Meara, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

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MAY 17 2013

**SC Court of Appeals**

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

This 17<sup>th</sup> day of May, 2013.

Lauren Meara

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