THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jun 27 2025
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
2015-CP-32-1888
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2024-000979

Thomas Stafford, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question I

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?

Question II

Was trial counsel ineffective for not moving to withdraw the guilty plea when the State changed the plea negotiations on the eve of the guilty plea, Thomas Stafford was confused during the guilty plea, and the State did not honor its agreement to remain silent on the recommended sentence?

Question III

Was trial counsel ineffective for not conducting a complete mental health evaluation of Thomas Stafford when that evaluation would have revealed a defense to leaving the scene of an accident and would have provided valuable mitigation evidence that would have resulted in a more favorable sentence?

STATEMENT OF THE CASE

This matter comes before this Court by an Application for Post-Conviction Relief filed May 22, 2015, filed by Thomas Stafford, through his retained counsel E. Charles Grose, Esq. App.p. 57-64. The Respondent made a Return on December 1, 2016. App.p. 64-68. On June 22, 2023, an evidentiary hearing was convened before the Honorable Edward W. Miller. App.p. 69-200. The Applicant was present and represented by his counsel. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Appliocant, Dr. Donna Schwartz Maddox, Lisa Kornmeyer, Jim Kornmeyer, Lillian Williford, Tina Orlowski, Anna Browder, and Rick Collins. Subsequent to the hearing, The Applicant made a Post-Hearing Brief dated July 3, 2023. App.p 302-321. On January 31, 2024, Judge Miller entered his Order of

Dismissal. App.p. 321-345. The Applicant then made a Motion to Alter or Amend on March 7, 2024. App.p. 347-354. The Respondent made a Response to the motion to alter on May 3, 2024. App.p. 382-397. Judge Miller entered an Order Denying Thomas Stafford's Motion Rule 59 (e) Motion on May 28, 2024. App.p. 398-411.

This appeal follows:

PRIOR PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. In February 2013, the Lexington County Grand Jury indicted Applicant for leaving the scene of an accident with death (2013-GS-32-0392) and felony driving under the influence (DUI) resulting in death (2013-GS-32-0393). He was represented by Anna Good (Browder), Esquire. On October 3, 2013, Applicant pleaded guilty as indicted on the charge of felony DUI resulting in death and entered an Alford[1] plea to leaving the scene of an accident with death. App.p. 9-56. The Honorable Robert E. Hood sentenced Applicant to a term of imprisonment for seventeen (17) years for each charge. App.p. 55. These sentences were to be served concurrently.

A timely notice of appeal was filed. Current counsel Charles Grose, Esq. represented Applicant on appeal. In an Order filed September 11, 2014, the Appeal was dismissed, noting Applicant voluntarily withdrew and dismissed his appeal. The Remittitur was issued on September 30, 2014.

FACTUAL BASIS OF THE PLEAS

The factual basis of the plea was set out by then Assistant Solicitor Rick Collins on the charge of felony DUI resulting in death and leaving the scene of an accident with death:

[1] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

On December 3, 2012, at 1:33 p.m., the defendant was operating a 2003 Nissan Pathfinder westbound on 1-20 near the 62 mile marker in Lexington County. At that same time the Department of Transportation had deployed a cleaning crew on the overpass, one of the employees of which was Mr. Nicholas Johnson. . . parked in the emergency lane up against the barrier of the overpass were three Department of Transportation vehicles. . .. You could see that picture would depict a Department of Transportation vehicle in the far right-hand lane. You would see that attached to the dump truck is a trailer. On the back of the trailer is black and yellow reflective paint. Also you see trailer lights and reflectors. The sole purpose of that trailer is to act as a crash barrier. Attached to the truck are its lights and its reflectors, and on the top of the vehicle were orange lights, which were working and illuminated at the time. There were two other vehicles in front of that Department of Transportation vehicle.

Mr. Stafford passed that particular vehicle with all the warning signals and the other two vehicles, swerved over to the right-hand side of the road and near simultaneously struck the barrier and Mr. Johnson, who was then shoveling debris off the side of the roadway. Your Honor, that collision resulted in the nearly instantaneous death of Mr. Nicholas Johnson, who then was only 21 years old. . .

[He is in lane three] The far right lane. And he passes that vehicle, two other vehicles in the emergency lane, and then approximately another 300 feet where he veers into the emergency lane striking the barrier and Mr. Johnson. . . .

Your Honor, at that time in lane number two, the middle lane, were two witnesses, Mr. Charlie Bishop and Mr. Brett Blanks, who are in the courtroom here today. They would likely testify that Mr. Blanks saw the collision and Mr. Bishop saw the effects immediately after the collision. . . They're also continuing toward 378 exit, see the incident, and see that Mr. Stafford is continuing behind them. Your Honor, they would likely testify that they made an effort in an attempt to stop Mr. Stafford. They would further testify that Mr. Stafford changed lanes in an effort to get around them and then they in turn changed lanes as well, ultimately bringing him to a stop approximately one half mile up the road right before the Highway 378 exit. There they exited the vehicle, and confronted Mr. Stafford. They would testify as to his condition of being lethargic, slow, slurred speech, at one point making an attempt to get back into the vehicle, at which point they took the keys from the car, would not give him the keys back, contacted law enforcement. Approximately 20 minutes later the law enforcement officers did show up. . .

Your Honor, their conversation with Mr. Stafford at that point would reveal that they had inquired of Mr. Stafford if he realized what happened. His responses to them would have been no, that he did not know what happened. He couldn't understand why they were stopping him at that point. As the conversation progressed, that he began, well, I realized I hit something, I didn't know what it was.

Your Honor, in layman's terms as we believe that they would describe it, they would describe him as being on something at that point.

Your Honor, as I stated before the Highway Patrol and other emergency services were contacted. Trooper Blaylock of the Highway Patrol did respond to the scene approximately 20 minutes later. Once he arrived, emergency services were already on scene, and according to their report, again, resuscitative efforts were deemed futile at that point, given the nature of the collision.

Your Honor, Trooper Blaylock began to interview Mr. Stafford. There he noticed that his pupils were constricted, that he seemed to sway, that he seemed disoriented. Based on that, asked him a series of questions and performed a series of standardized field sobriety tests to which, according to Trooper Blaylock, he performed poorly on. He was subsequently arrested. He was transported to the Lexington ER where a blood draw was performed. The blood was analyzed by SLED, and that analysis revealed methadone and generic Xanax.

Your Honor, in statements taken from the defendant by the Highway Patrol MAIT team, Mr. Stafford would admit at that current time he was undergoing treatment from a methadone clinic. That on a daily effort at approximately 4:30 to 5 o'clock in the morning, he would attend the clinic, receive a dose of about 120 milligrams of methadone, continue on about the day.

Your Honor, the levels according to the forensic toxicologist from SLED, the levels of methadone that were revealed in the analysis would tend to suggest that they were of therapeutic levels.

Your Honor, however, the Xanax that was indicated, we believe the toxicologist would testify that those levels were approximately three to four times what could conceivably be a therapeutic level of the Xanax. Moreover, it would be beyond comprehension in the toxicologist’s opinion that the two would ever be prescribed together due to the additive or the synergistic effect of both the medications being combined at once and never would it be recommended that anyone drive after consuming both of those medications. . .

Your Honor, as you may very well already know, methadone is commonly used to, I think, wean people off of an opioid based pain killer or heroin...

And at the time I think Mr. Stafford would admit that there was such an addiction.

Your Honor, it's again our contention that Mr. Johnson's death was proximately caused by the driving due to the ingestion of those substances, and the basic facts of the case at issue. I believe what is more concerning in this case is that approximately 15 days before that, Mr. Stafford had been arrested for a DUI 2nd offense under circumstances which are strikingly similar to the facts in this case. It was about the same time in the afternoon, 1:30, 1:40 p.m., based on conversation with Officer Parker of the Pine Ridge Police Department, the conversation with Mr.

> Stafford would seem similar, that on that same day he had received a dose of methadone. On the DUI 2nd, he refused to submit a sample. However, in his vehicle that day was a prescription for 60 generic Xanax, Your Honor, only nine of those pills remained of a 60-day prescription of having — getting it filled seven days earlier.
>
> Your Honor, that charge was pending obviously two weeks prior to this incident. This charge is being consumed in this plea. In exchange for his plea to these charges, this DUI 2nd is being dismissed. . . .

Plea Tr.p. 10-19. App.p. 18-27.

SUMMARY OF PCR TESTIMONY

Respondents incorporate herein by reference the summary of the PCR testimony set for the in the Order of Dismissal, Appendix pages 324-331**.**

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State,* 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). "[W]e [also] afford great deference to a PCR court's credibility findings." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

"To establish a claim of ineffective assistance of counsel, the [PCR applicant] has the burden of proving '(1) counsel failed to render reasonably effective assistance under prevailing

professional norms[ ] and (2) counsel's deficient performance prejudiced the applicant's case.' " *Frierson*, 423 S.C. at 262, 815 S.E.2d at 436 (quoting *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008)).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland v. Washington*, 466 U.S. 668, 700 (1984). Thus, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

ARGUMENTS

I. Remand is not necessary whenever the PCR Court requests a prevailing party to prepare a proposed order for the PCR Court to review. The Petitioner's request to vacate its order was properly denied in the Rule 59 Motion.

In his initial argument before this Court the Applicant claims he was denied the right to have the matter adjudicated by a judicial officer. He claims that the responsibility was delegated to the Attorney General's Office and that such delegation violated the separation of powers required by S.C. Const. Art. I, §8. His basis is that the PCR Court signed the proposed order presented by the Attorney General's Office, making only minor formatting changes. He references *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335, 341(2004) and *Fishburne v State*, 427 S.C. 505, 832 S.E.2d 584 (2019) in support of his position.

This issue was raised below in his Rule 59 motion. App.p. 347 -348. The PCR Court denied the motion its order denying the motion. App.p. 3987-403. Respondent submit the Petitioner has failed to show error.

It is essentially the Applicant's position that no judge should request proposed orders prepared by the parties in any case and that it is state constitutional error for this Court to sign

and adopt the order as a violation of their duty to adjudicate decisions. Petition The Applicant misreads both the intent and effect of Hall and Fishburne.

In Hall, the Court was faced with the preparation of orders in capital PCR matters. The Court there noted that "[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." Importantly, the Hall court noted the following important factors as it relates to the Applicant's case:

> The commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e) provides that "[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." Further, in *Pruitt v. State*, this Court directed that:
>
> > [c]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP....
>
> 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

Hall v. Catoe, 360 S.C. 353, 364–65, 601 S.E.2d 335, 341 (2004).

In addition the Hall court concluded :

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. Further, Hall waived his right to make this challenge when he failed to file a motion to alter or amend the order. Id.

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (emphasis added).

In *Fishburne*, the Court faced with an Order that the Court deemed insufficient in its fact-finding and conclusions of law on issues that were actually raised and presented. The Fishburne court endorsed the procedure taken in the present case, contrary to the implication of Applicant:

> We do not place the blame on a single party below for an insufficient PCR order. The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. See Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues. When these steps are ignored on the front end, we find ourselves having to remand a case, as we do today.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992)

Like in *Hall*, adequate steps were taken in the matter. On July 25, 2023, after reviewing the Applicant's post-hearing brief, the Court emailed both counsel indicating a decision to deny relief and requested a proposed order reflecting the court's ruling. As noted in the Court's Rule 59 Order, on December 29, 2023, the Respondents emailed a copy of Respondent's proposed order to the PCR Court and counsel with the following email:

> Judge Miller, et al.

> Attached is Respondent's Proposed Order in the above-captioned case heard by Judge Miller on June 22, 2023. I am providing a copy simultaneously to Applicant's retained counsel Charles Grose for his initial review as well.
>
> If further information or transcripts are required, please advise me. My apologies to the Court, Mr. Grose, and his client for my delay in getting this matter and request completed.
>
> December 29, 2023 Email.

There was no opposition to the preparation of a proposed order by the State nor to the Court's request from July 25, 2023 through December 29, 2023 when the proposed order was submitted to this Court nor from December 29 through January 19, 2024 when the Order was signed by this Court. This is contrary to the demands upon Applicant's counsel with procedures set out in *Fishburne*.

Respondent submits the PCR Court did not abdicate its role in judicial adjudication as Applicant suggests. After reviewing the Applicant's brief, this Court requested the State to submit a proposed order finding that Applicant's counsel did not fall below the objective standard of reasonableness and that he was not prejudiced by the conduct. *July 25, 2023 email*. Next, after receipt of the proposed order on December 29, 2023 until this Court signed an Order of Dismissal, the Applicant was silent about his current contention that the State was not authorized to prepare a proposed order nor that the Court acted in violation of Article I. Section 8 or §17-27-80 in the mere request for a proposed order from a prevailing party. In addition, like the setting in *Hall,*

in the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

The request to have the Court withdraw its order its January 19, 2024 should be is denied. The process of submitting proposed orders is built into our rules, (see Rule 5(b)(3),

SCRCP), and custom, *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. Further, a long line of precedent, state and federal, allows the acceptance of proposed order language where the court independently reviews and adopts the language as its own. *See, e.g., Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City,* 470 U.S. 564, 572 (1985)) ; *State v. Holmes*, 832 S.E.2d 777, 781 (Ga. 2019) ("It is well established that a trial court may request and then adopt a proposed order from one party. Doing so does not itself demonstrate an absence of cautious discretion.") (internal citations omitted); *McGahee v. State*, 885 So.2d 191, 229–30 (Ala.Crim.App.2003) ("even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous."). *See also Bryant v. Stirling*, No. 9:16-cv-1423-DCN-MHC, 2022 WL 10686835 *12 n. 6 (D.S.C. April 19, 2022) ("As this court and others have recognized on many occasions, it is disfavored for courts to wholesale adopt proposed findings and conclusion by one party; "[n]onetheless, the disposition of a petitioner's constitutional claims in such a manner is unquestionably and 'adjudication' by the state court.").

Respondent submits that certiorari should be denied on this issue.

II. Certiorari is not warranted where there is sufficient evidence to support the findings of fact and legal conclusion that thee Petitioner failed to show that counsel was ineffective in failing to move to withdraw the guilty plea where testimony found credible was that at the time of the plea there was no unkept plea bargain. The actual plea offer that was accepted at the entry of the plea was that the Applicant would plead guilty to felony DUI resulting in death and plead guilty under *North Carolina v. Alford* to leaving the scene of an accident resulting in death without a negotiated sentence, without a sentence recommendation by the prosecution and the defense was free to argue whatever sentence it deemed appropriate. This is supported by evidence found credible at the hearing.

This Court must find that the Applicant failed in his burden of proof on his first allegation. In his assertion in the Petition, the Applicant contends that counsel should have moved to withdraw the guilty plea because the plea was inconsistent with counsel's understanding of the charges Stafford was going to face because it was the understanding of the family members that the hit and run (leaving the scene) charge would be dismissed as a result of the plea bargain. Petition, p. 10-11. The Applicant contends that the State did not honor the plea agreement, relying upon email correspondence that predated the day of the plea and the testimony of family members present at the plea who asserted Applicant was confused at the time of the plea. The PCR Court rejected that argument and determined there was no unkept plea bargain agreed between the parties and no basis for counsel to either object or move to withdraw the guilty pleas. App.p. 332-339, 404-406.

Trial counsel must provide reasonably effective assistance under "prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Reviewing courts presume counsel was effective. Id. at 690, 104 S.Ct. 2052. Therefore, to receive relief, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms and was deficient; and (2) the deficient performance prejudiced the applicant's case. Id. at 687, 104 S.Ct. 2052.

There is credible evidence in the record to support that the PCR Court correctly concluded that the plea bargain entered at the time of the entry of the guilty plea was satisfied by the actions of the Applicant, defense counsel and the prosecutor. App.p. 334-335. On the day the plea was entered and the time it was entered the relevant parties were aware of and accepted the terms of the plea offer. The PCR Court findings that the actual plea offer that was accepted at the entry of the plea was that the Applicant would plead guilty to felony DUI resulting in death and plead guilty under *North Carolina v. Alford* to leaving the scene of an accident resulting in death without a

negotiated sentence, without a sentence recommendation by the prosecution and the defense was free to argue whatever sentence it deemed appropriate is supported by evidence found credible at the hearing.. App.p. 334-335. In return the prosecutor agreed to dismiss the pending DUI second offense. This Court further finds that the 17 year concurrent sentences the Applicant received were consistent with the agreed negotiation.

The Applicant relies upon two prior South Carolina cases that are distinguishable in the present setting. He relies upon Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000), to support our conclusion. In Thompson, plea counsel failed to object after the solicitor recommended the maximum sentence in violation of the earlier plea agreement. 340 S.C. at 115, 531 S.E.2d at 296. Thompson was indicted for murder and pleaded guilty to voluntary manslaughter. Id. at 113, 531 S.E.2d at 295. Thompson testified at the PCR hearing that he chose to plead guilty because he was under the assumption the solicitor was not going to make a sentencing request or recommendation. Id. at 114, 531 S.E.2d at 295. In addition, Thompson's attorney testified she told him prior to the plea the solicitor was not going to make a sentencing recommendation. Id. Thompson's attorney also confirmed to the plea court that the solicitor had correctly and completely stated the plea agreement and there was nothing further that needed to be added regarding the plea negotiations. Id. at 116, 531 S.E.2d at 296. Our supreme court found there was a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance because he entered his guilty plea in reliance on the sentencing range and the solicitor's agreement not to make any sentencing recommendations. Id. at 117, 531 S.E.2d at 297.

The Applicant also relies upon Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant agreed to plead guilty because he believed the solicitor would neither oppose

nor recommend probation. Id. at 54, 374 S.E.2d at 685. When the solicitor in Jordan reneged on the plea agreement and recommended against probation, Jordan's attorney failed to draw the plea judge's attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea. Id. Therein, the Supreme Court held that "the conduct of Jordan's counsel in not protecting Jordan's right to enforce the plea agreement with the Solicitor's office fell below prevailing professional norms." Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Like the attorney in Jordan, Thompson's attorney's failure to object fell below prevailing professional norms. See also Smith v. South Carolina, 775 S.E.2d 696 (S.C. 2015) (the supreme court found deficient performance when trial counsel failed to object to the solicitor's recommendation that the defendant receive maximum punishment after the solicitor promised to remain silent during sentencing).

As found by the PCR Court, this case is distinguishable from both cases. Unlike Thompson and Jordan, at the time the actual plea was entered the defense counsel, the Applicant and the prosecution were aware that the agreed negotiations now additionally included the entry of the Alford plea to leaving the scene of the accident. This is supported by the credible testimony of defense counsel and prosecutor. App.p. 161-164 (defense counsel); App.p. 115-184-186, 191-195 (prosecutor). In his PCR testimony, the Applicant acknowledged that he indicated to the judge that he had spoken with his counsel and was aware that leaving the scene was part of the negotiation, although he initially claimed App.p. 144-145. See, Guilty Plea Tr.p. 12, l. 6-11. In particular, his plea colloquy is revealing:

> THE COURT: They further tell me that you want to plead guilty to hit and run involving a death and what we sometimes call leaving the scene of an accident where a death was involved. That also carries a mandatory one year up to 25 years in prison. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

App.p. 12, l. 6-11, Plea Tr.p. 4.

> THE COURT: As to the charge of leaving the scene of an accident where a death was involved, do you believe that the State could produce sufficient evidence to prove your guilt on tie charges beyond a reasonable doubt, and that if you went to trial, a jury would most probably find you guilty?
>
> MS. GOOD: Your Honor, the reason we're pleading under Alford, he believes that possibly they couldn't, but he knows based on the evidence that they could.
>
> THE COURT: All right. Do you believe that if you went to a jury -- I'm not saying that you are admitting to leaving the scene of an accident. What I'm saying is, do you believe that if you went to trial, to a jury trial on the leaving the scene of an accident where a death was involved, that a jury would more likely than not convict you of that charge?
>
> THE DEFENDANT: Yes, sir.

App.p. 16, l. 12- 17, l. 3. See also, App.p. 128, l. 5-8.

The fact that the Applicant's family may have been surprised at the time of the plea by the inclusion of the second charge of leaving the scene of the accident did not bind the PCR Court or the prosecution. Counsel confirmed at the PCR hearing that she had conversations with the Applicant about the evolved and revised plea negotiations to include leaving the scene on the day of the plea. She did not recall having additional discussions with the Applicant's family after the plea negotiations and agreement changed prior to the actual entry of the plea, until after the plea and sentencing had occurred. App.p. 167, l. 10-23. Counsel confirmed that she was advised by the prosecutor the night before the plea that the victims had indicated their disagreement with negotiations and the State was changing the offer to include the hit and run charge. App.p. 161-162. 162. 197, l. 1-5.

The Court properly found that the Applicant was aware prior to and at the time of the entry of the plea of its inclusion during the plea with the understanding that he was pleading under

Alford. App.p. 14; Tr.p. 6, l. 12-p. 9, l 2.[2] In addition to this testimony, the PCR Court found the defense counsel was credible in her assertion that she was aware that the removal of the pending leaving the scene charge would only occur if there was agreement by the victim's family which did not occur on the eve of the plea. Applicant's Exhibit 14 is contemporaneous and consistent with this understanding. App.p. 242-244. Further, the prosecutor credibly stated that the removal of the leaving the scene charge throughout the negotiation was contingent upon the victim's approval.

Unlike, Thompson, Jordan, and Smith, the understanding of the negotiations as Applicant entered the plea was consistent with what occurred. The prior hopes and expectations of the defense counsel and his family that the hit and run charge would be dropped did not occur and was not part of the actual plea bargain when he entered his plea. Unlike Thompson and Jordan, the prosecutor also complied with his agreement that he would not seek a particular sentence or consecutive sentences. As counsel stated clearly in Applicant's Exhibit 14, "the deal with the prosecution was that they were not going to put a number on the record and would not take a position on sentencing. We always knew the victims were going to ask for something very high due to their emotions."[3] Further, the prosecutor had indicated to the judge in chambers that he had

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[2] The colloquy by the Applicant, his counsel, and the Court about his understanding about the entry of the plea pursuant to Alford carries a presumption of verity. The Applicant has failed to present a cogent reason as to why he should not be held to the truth of his statements. See *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (holding that solemn declarations in open court "carry a strong presumption of verity"). see also *State v. Thrift*, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994) ("[A]ll plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement.").

[3] The PCR Court noted that consistent with the expectations and negotiation during the plea the victim's mother made a victim impact statement on behalf of the family and asked for the maximum allowed sentence. App.p. 34; Tr.p. 26. Similarly, on behalf of the State Highway Patrol First Sgt. Chris Shelton and supervisor of at the scene also speaking on behalf of the victim's family asked for the maximum sentence. App.p. 35; Tr.p. 27. The PCR Court also found these presentations were also consistent with the expectations of defense counsel and did not

no position on sentencing. App.p. 168. The prosecutor indicated that he was not going to oppose anything that counsel Browder asked for. App.p. 185, l. 22-25. The record reflects that prosecutor Collins stood silent at the plea with regards to any sentencing recommendation. The Applicant's and his family's reliance upon earlier emails between counsel with the mother and father, which predated that day of the plea and admittedly before the firm and final offer was made by the State is not persuasive after the credible explanation by defense counsel.

The Applicant questions whether the alleged potential for a trial was imminent as pushing the entry of the plea. Counsel Browder testified that testified that it would be up for trial either that week or the next week, but that she could not remember. App.p. 197. He points out trial counsel's testimony that if a plea was not entered, the case would have proceeded to trial either that week or the next week. Applicant questions these statements because the date of the guilty plea was on a Thursday and there was no General Sessions term the next week.

The PCR Court, noted that although the Applicant appears to be correct that there was no scheduled term the next week, he has not shown that if the plea was not entered that a trial would not have been held during the next available General Sessions term. In August 13, 2013 and August 20, 2013 emails indicated that the State may proceed on other available charges such as there was a risk the prosecutor would seek other charges such as reckless homicide and others if he did not enter a plea to felony DUI (Applicant's Exhibits 12, 13). App.p. 234-240. The Applicant is correct that the State had not yet indicted on other charges at the time the plea was entered. However, the prosecutor confirmed that in their discussions, he had spoken with counsel about

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suggest that reasonable counsel should have either objected or moved to withdraw the plea at that time as a violation of the plea agreement. App.p. 337, n. 3. See App. 184-185 (prosecutor did not consider recommendation by victim and highway patrol to be breach of plea agreement). App.p. 196, l. 12-22 (defense counsel did not consider recommendation by victim and highway patrol to be breach of plea agreement).

possible outcomes and possibilities, including trying that case that week if the Applicant had not accepted the plea. App.p. 189, l. 17-21. As noted by defense counsel, she felt if the plea fell through, it may have been tried that week or later, "but it was up immediately." App.p. 197, l. 10-14.

Although additional charges by a new indictment could not be made that week, there remained a possibility of a direct indictment by the grand jury at the next term, if that remained the course the prosecutor chose to pursue on the other potential charges. As revealed in the factual basis of the plea, there was a factual basis to do so. Respondent recognizes that this remained speculation because he ended up pleading, but it remained in the mind of the parties. App.p. 239-240. (Applicant's Exhibits 11 and 12), Throughout, there was a risk the prosecutor would seek such as reckless homicide, ABHAN and others and push for a trial over a plea. (Applicant's Exhibit 12) (August 14, 2013). App.p. 239.

The Applicant also asserts the comment by the prosecutor that the State had a strong case regarding leaving the scene of the accident should not be considered because it is not the relevant test in assessing the prejudice prong from a guilty plea after deficient performance is shown. The strength of the case was reflected in the factual basis set forth in the plea as set out earlier. The representation was made by defense counsel that the basis for the *Alford* plea on that charge was set out and asserted that he was not trying to leave the scene although he stopped a half a mile from the actual scene. Tr.p. 34-35. Here, the comment at the PCR hearing by the prosecutor was based to support the entry of the Alford plea and counsel's reasonable advice and assessment that that there was a basis to enter the Alford plea and was not deficient in the recommendation. The Applicant is correct that mere strength of the State's case does not alone satisfy the prejudice prong

which is related to what the Applicant would do if there was deficient performance proven. See Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Since the representations at the time of the plea were consistent with the negotiations actually agreed upon by all parties, there was no basis that reasonable counsel would have moved to withdraw the plea or object to anything the prosecutor stated. Counsel did not misinform the Applicant concerning the agreed plea negotiation. Counsel cannot be deemed to be deficient under the circumstances. Certiorari is not warranted.

III Certiorari is not warranted where plea counsel reasonably investigated the mental health issue related to the Applicant and prejudice was not shown by a claim it would have resulted in a more favorable sentence. which did not provide for sentencing. The PCR Court's rejection is supported by probative evidence.

The Applicant contends that counsel failed to adequately investigate the case, in particular in failing to follow Dr. Maddox's recommendations for neurological testing and did not develop an adequate rapport with the Applicant prior to the testing. Applicant claims that had this been followed up, the Applicant would have had an opinion from Dr. Maddox about the Applicant suffering from Post-Traumatic Stress Disorder and Opiate Use Disorder, in a Controlled Environment.

"[C]riminal defense attorneys have a duty to conduct a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226,235, 723 S.E.2d 610,615 (Ct. App. 2012), overruled on other grounds, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334,

496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003).

The PCR Court found that counsel performed a reasonable investigation related to the Applicant's mental status by retaining Dr. Maddox, Dr. Brawley, and Dr. Morton to assess the Applicant's mental state and the impact of his drugs injection on his performance. App.p. 339-344. The critical problem the Applicant ignores in hindsight was that the Applicant was determined to be malingering by Dr. Brawley, the neuropsychologist, during her neuropsychological testing of the Applicant. App.p. 156. This critical finding at that time precluded further assessment by Dr. Brawley and Dr. Maddox at that time. App.p. 156. It is uncontested that counsel attempted to get Dr. Maddox to continue to complete an examination of the Applicant after the malingering assessment, but she refused to do so due to the Applicant's malingering. This is not a situation where there was no investigation into the Applicant's mental health, but an investigation was attempted but impacted by the Applicant's malingering of his mental symptoms.

An assessment of counsel's performance must be viewed from the perspective at the time of counsel's conduct when the Applicant was malingering and preventing a further assessment. As stated earlier, judicial scrutiny of counsel's performance must be highly deferential, and 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. Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052, 2055, 80 L. Ed. 2d 674 (1984).

In the plea in mitigation, counsel expressed the Applicant's remorse for the accident. App.p. 36 Tr.p. 28. As stated above, she presented a packet of materials to the sentencing judge which included evidence of Applicant's methadone treatments, the prescriptions for Klonopin for anxiety and Vybrid for depression.[4] She described to the sentencing court his 2011 accident that caused a compressed disc in his back that led to his addiction to pain medication. App.p. 39; Tr.p. 31. She presented as a result he began methadone treatments which he had been faithful to since October 2011 for a year prior to this incident. She further noted the impact of having lost a child a couple months before led to a tailspin prior to the accident and a period of depression and extreme anxiety with the added medications. App.p. 39; Tr.p. 32. [5]

She also addressed in the mitigation presentation the basis as to why he pled to leaving the scene under Alford. First, she indicated that there was no doubt he was under the influence and overmedicating himself in excess of what it should have been and the accident occurred as a result of the overmedication. App.p. 35; Tr.p. 32. However, she asserted that there was a factual issue with how the accident happened, but he was still under the influence and could have been avoided if he had not been. She sought to mitigate the prior DUI charge and the pending DUI 2nd that was dismissed because there was no evidence about his medications on that day and claimed he was unaware that his driver's license was suspended on the day of the incident. As to the leaving the scene Alford basis, she asserted that Applicant had contended to her since her representation that he had no intent to flee at he time of the incident and stopped a half a mile down the road. She

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[4] During the State's presentation at the plea, information was provided that the levels of methadone were at therapeutic levels, but the Xanax was at three to four times of a therapeutic level. It was further reported that no one should be recommended to drive with the synergistic effect of the combination of those prescribed drugs. App.p. 25; Tr.p. 17, ll. 3-16.

[5] Counsel did not bring negative details she learned from Dr. Morton's assessment of the SLED toxicology report that benzodiazepines were also in his system at the time of the incident.

claimed that his position would have been he could have managed to avoid Mr. Blanks and Mr. Bishop to get away from them if he was really trying to leave the scene. She suggested that if he was actually fleeing he would have been three miles or more down the road, but he was only stopped one half mile. App.p. 43; Tr.p. 35. Counsel further claimed he was not taking drugs for recreational purposes, but that this was prescribed medication that just got out of control while he was trying to help his family. App.p. 50; Tr.p. 42. The Applicant stated his remorse for the accident. [6]

The Applicant suggests that the failure to further investigate would have provided a defense to the leaving the scene of the accident. However, in Dr. Maddox's testimony, she opined that there was no evidence to support either a defense of insanity or guilty but mentally ill. App.p. 87, l. 4-8. Applicant suggests that it was defense to leaving the scene because some of his memory deficits would have caused him to take a longer amount of time to process that he committed the accident.[7] The law requires an immediate stop or as close as possible, not a stop one-half mile

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[6] In the materials provided to the sentencing court in counsel's plea packet, it included references from Lisa Kornmeyer that the Applicant was sexually abused at age 5 and age 7 by two different men, at age 11 or 12 by a mother of a friend, and subsequently she reported on a neighbor who had molested the Applicant time and his friend. State Exhibit 2, page 4-5. App.p. 259-300. Although the information did not include a diagnosis of Post-Traumatic Stress Disorder, the genesis of such a diagnosis was presented to Judge Hood, the sentencing authority, who acknowledged he had read the material. App.p. 37; Tr.p. 29, ll. 6-9. ("I have reviewed it in full. I've read every page."). However, as Dr. Maddox acknowledged the diagnosis she recently rendered does not support a plea of guilty but mentally ill (lacked sufficient capacity, due to mental illness to conform his conduct to the requirements of law, S.C. Code Ann. § 17-24-20(A)). App.p. 87. .

[7] S.C. Code Ann. § 56-5-1210 (A) involving the "Duties of drivers involved in accident resulting in death or personal injury; moving or removing vehicles" states as follows:

> (A) The driver of a vehicle involved in an accident resulting in injury to or the death of a person immediately shall stop the vehicle at the scene of the accident or as close to it as possible. He then shall return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-

down the road. The PCR Court conclusively found, supported by the record, that it was the Applicant's malingering, not counsel's deficiency that prevented this additional information from Dr. Maddox from being presented in mitigation at the plea. App.p. 343.

Under these discrete circumstances, the record supports the PCR Court's conclusion that counsel was not deficient in her investigation in the matter. She acted as reasonable counsel in seeking mental health expert assistance in her representation. It was not performance, but the Applicant's own actions that thwarted the additional investigation. He failed in his burden of proof.

Respondent submits that the PCR Court's conclusion that Sixth Amendment prejudice has not been shown, assuming *arguendo* that deficient performance was found. The prejudice prong issue is initially whether *to a reasonable probability* the Applicant would have gone to trial on all charges with this information rather than plead guilty or reject the plea agreement to plead under Alford. This claim by the Applicant does not address issues with Felony DUI charge but is focused on the presentation of the leaving the scene of the accident charge. Although the Applicant asserted in the PCR proceeding he would have gone to trial on the hit and run charge, the PCR Court viewing all the circumstances found that this was not credible as related to the prior Alford plea entry and the plea agreement. App.p. 343 – 344. This additional information did not undermine confidence in the earlier acceptance of the negotiated plea and did not provide a legal defense to the leaving the scene which the Applicant was allowed to plead under Alford. The PCR Court's conclusion that Petitioner failed in his burden of proof is supported. The PCR Court also rejected that prejudice was shown related to the mitigation or sentencing of the Applicant. The sentencing

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1230. However, he may temporarily leave the scene to report the accident to the proper authorities. The stop must be made without obstructing traffic more than is necessary.

court was presented with significant information about the impact of the drugs on the Applicant's action as and his history of being a victim of child abuse, the basis for the later diagnosis of Post-Traumatic Stress Disorder by Dr. Maddox by defense counsel in mitigation by the family member and the materials counsel provided in sentencing, including State Exhibit 2, App.p. 259-300. The sentencing court also learned that it was the Applicant's position under Alford, that being stopped one-half mile from the scene of the accident under his condition was a short distance and not supportive of an intent to leave the scene. App.p. 42. The additional information from Dr. Maddox that he suffered under some memory deficits which may have led to some processing issues may have explained a delay, but does not undermine confidence in the plea court's sentencing to two concurrent 17 year sentences when the victims were asking for a maximum sentence on the charges. He had failed in his proof to show a reasonable probability that the sentence would have been different.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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