STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2013-001269

DAYDRIAN ROUSE, #342518,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
SC Bar #101443

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

ATTORNEYS FOR RESPONDENT

INDEX

QUESTIONS PRESENTED

I. Did Defense Counsel fail to adequately investigate possible defenses to the Petitioner's charge and was he ineffective for neglecting to advise the Petitioner of available defenses and available evidence which might be presented in support thereof.

II. Did the lower court err in finding that trial counsel was not ineffective in his representation of the Petitioner on the question of restitution?

III. Did the lower court err in failing to find that Defense Counsel provided Petitioner ineffective assistance of counsel where Counsel neglected to fully advise Petitioner of the methods and evidence that could be used to impeach the State's witnesses if he proceeded with his trial by jury?

IV. Did the lower court err in failing to grant Petitioner relief based upon Defense Counsel's failure to respond appropriately to Petitioner's statements made during the plea proceeding?

V. Was Defense Counsel ineffective for neglecting to adequately advise Petitioner concerning sentencing exposure?

VI. Did Defense Counsel fail to provide Petitioner reasonable professional assistance of counsel when he failed to adequately advise Petitioner concerning what challenges could be made at a jury trial concerning the State's introduction of evidence concerning Petitioner's communications with his brother?

VII. Did Defense Counsel fail to provide Petitioner effective assistance of counsel during sentencing?

VIII. Did Defense Counsel provide Petitioner ineffective assistance of counsel during plea negotiation process?

STATEMENT OF THE CASE

Petitioner was indicted at the July 2009 term of the Richland County Grand Jury for Hit and Run – Great Bodily Injury (2009-GS-40-03721) and two (2) counts of Assault and Battery with Intent to Kill ("ABWIK") (2009-GS-40-03722; -03723). Petitioner was represented by George Johnson, Esquire and Yvonne Murray-Boyles, Esquire.

On August 30, 2010, Petitioner proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. After jury selection but before the jury was sworn by the court, Petitioner waived the jury trial and entered pleas of guilty to Hit and Run – Great Bodily Injury and to the lesser included offense of Assault and Battery of a High and Aggravated Nature ("ABHAN"). Petitioner also entered an Alford[1] plea to the remaining ABWIK charge. Judge Cooper sentenced Petitioner to concurrent sentences of ten (10) years imprisonment for ABHAN, ten (10) years for Hit and Run, and fifteen (15) years imprisonment suspended upon the service of ten (10) years in prison and five (5) years probation on the ABWIK charge. The ABWIK sentence was to be converted to a ten (10) year sentence with no probationary period upon Petitioner's payment of twenty-thousand dollars ($20,000) in restitution to the victim.

A hearing was convened on Petitioner's Motion for Reconsideration on November 8, 2010. Petitioner was represented by Michael Coleman, Esquire, at the hearing. Judge Cooper denied Petitioner's request to reconsider the sentence.

A Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Desa Ballard, Esquire, and Tara Dawn Shurling, Esquire, represented Petitioner on appeal. Petitioner withdrew his appeal via an Affidavit of Support of Motion to Withdraw Direct Appeal. The appeal was dismissed by the Court of Appeals on May 11, 2010.

---

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

Petitioner filed an application for post-conviction relief on March 22, 2011. Respondent made its Return on September 19, 2011. An evidentiary hearing on the matter was convened on September 10, 2012, before the Honorable J. Ernest Kinard, Jr. Petitioner was represented by Tara Dawn Shurling, Esquire. Respondent was represented by Robert D. Corney, Esquire, of the South Carolina Attorney General's Office.

Judge Kinard accepted proposed orders from both parties and denied and dismissed the Petitioner's post-conviction relief application by Order filed on April 10, 2013. On April 25, 2013, Petitioner filed a Motion to Alter and Amend pursuant to Rule 59(e), SCRCP. On May 21, 2013, the Court filed an Order denying Petitioner's Motion to Alter and Amend. Petitioner filed a Notice of Appeal on June 6, 2013 and a Petitioner for Writ of Certiorari on March 25, 2014. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is "any probative evidence" to sustain the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

I. There is probative evidence to support the PCR court's ruling that counsel were not ineffective for failing to adequately investigate possible defenses to Petitioner's charges, and available evidence where counsel's trial strategy was to present an accident theory of the case by introducing evidence that would negate elements of the charges and where counsel fully advised Petitioner of this strategy.

Petitioner asserts the PCR court erred by finding Petitioner failed to carry his burden of proving counsel were ineffective for failing to adequately investigate possible defenses, and for failing to advise Petitioner of available defenses and of available evidence. Respondent submits there is probative evidence to support the PCR court's finding as the record conclusively shows that counsel proficiently investigated the viability of various defenses. Counsel Johnson testified numerous times at the PCR hearing that the strategy, if the case were to go to trial, would be to present an accident theory of the case. (App. p. 125, lines 5-9, p. 168, lines 4-15, p. 185, lines 2-5). Counsel Johnson also testified that he would have attempted to show that Petitioner lacked the requisite intent to commit ABWIK. (App. p. 128, lines 16-25 – p. 129, lines 1-20).

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, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

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, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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. With respect to a guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Respondent submits Petitioner did not satisfy either requirement of the Strickland test.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Respondent submits it is clear counsel investigated possible defenses and properly advised Petitioner of those defenses and of the evidence to support those defenses. Petitioner openly admitted to driving the car which hit the victim, so that was never at issue. (App. p. 29, lines 11-15, p. 29, lines 23-25 – p. 30, lines 1-4). Therefore, there were no defenses available to the hit and run charge. Petitioner was fully aware of counsel's strategy to employ an accident theory of the case in an attempt to negate the general intent element of the ABWIK charges. This was counsel's primary trial strategy. Counsel Johnson testified he would

have argued, if the case had proceeded to trial, that there was a black SUV blocking his view of the victims crossing the road. (App. 174, lines 13-15). Counsel Johnson also would have argued that it was dark, that the victim who was seriously hurt was wearing dark clothes, and that there was no physical evidence that Petitioner revved the engine towards the victims as the solicitor stated at the plea proceedings. Each of these arguments would have been consistent with counsel's primary strategy of portraying the incident as a tragic accident where Petitioner did not have the requisite intent to be convicted of ABWIK.

This Court should affirm the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to investigate possible defenses, and for failing to advise Petitioner of the available defenses and evidence to support those defenses.

II. There is probative evidence to support the PCR court's ruling that counsel were not ineffective in their representation of Petitioner on the issue of restitution where counsel adequately advised Petitioner of the benefits and detriments of pleading guilty in this fashion and where counsel articulated a reasonable and valid strategic decision in not objecting to restitution being ordered.

Petitioner asserts the PCR court erred by finding counsel was not ineffective on the issue of restitution being awarded to the victim at sentencing. Respondent submits counsel's decision not to object to the restitutionary aspect of Petitioner's sentence was reasonable and served a benefit to Petitioner. Counsel Johnson testified that restitution was not a term of the guilty plea agreement and that the court imposed the payment of restitution on its on volition because the car Petitioner was driving during the accident was uninsured. (App. p. 140, lines 1-19). Counsel Johnson also testified that the victim was left with over one-million dollars ($1,000,000) in medical bills and no recourse against Petitioner. Id. The court researched the legality of issuing a

"probation terminated upon payment" (PTUP)[2] sentence and even went so far as to contact the South Carolina Department of Corrections to ensure the sentence was legal and structured appropriately. (App. p. 175, lines 18-25 – p. 76, lines 1-11). Counsel Johnson further testified that he believed Petitioner's family had the means to pay the restitution. (App. 161, lines 5-6).

Petitioner has failed to show that the PCR court erred in finding counsel was not ineffective for not objecting to the imposition of restitution. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." Id. It was to Petitioner's benefit to have a chance to pay twenty-thousand dollars ($20,000) to the victim and then have his sentence reduced from a ten (10) year term of incarceration with five (5) years probation to a ten (10) year term with no probationary period. Petitioner agreed to the imposition of restitution as it was certainly a benefit to Petitioner to have an opportunity to reduce his sentence. Counsel understood that Petitioner's family had the means to pay the amount, so this was a favorable aspect of the plea deal in counsel's opinion. Counsel Johnson also adequately apprised Petitioner of the benefits and detriments of pleading guilty in this fashion and Petitioner offered no objection.

Petitioner's claim that counsel was ineffective for failing to request a restitution hearing is facially suspicious and illogical. If a restitution hearing were held, the victim would be able to present to the court that the actual medical costs incurred were over one-million dollars ($1,000,000). Counsel articulated a valid and strategic reason in not requesting a hearing, as Petitioner would have been exposed to an amount over fifty (50) times of what was actually

[2] See S.C. Code § 24-21-550.

ordered as restitution. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) ("Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance.").

This Court should affirm the PCR court's finding that counsel was not ineffective in this regard as there is ample evidence to support the court's finding.

III. There is probative evidence to support the PCR court's ruling that counsel were not ineffective for failing to adequately advise Petitioner of the methods and evidence that could be used to impeach State witnesses at trial where counsel reviewed all evidence and disclosures made by the State with Petitioner which included witness statements, where counsel attempted to interview all witnesses, and where counsel fully advised Petitioner that he would have the opportunity to cross-examine all witnesses called by the State.

Petitioner asserts the PCR court erred in finding that counsel were not ineffective for failing to fully advise Petitioner of the methods and evidence that could be used to impeach State witnesses. Respondent submits that counsel reviewed the entire discovery file with Petitioner and that Petitioner was fully aware of Tory Shaw's statements to authorities and that counsel would have the opportunity to cross examine each witness to call their credibility and version of facts into question if the case were to go to trial. Counsel testified that he attempted to contact Tory Shaw through his appointed counsel, but was unsuccessful in scheduling an interview because Mr. Shaw's counsel refused to make his client available. (App. p. 131, lines 9-25 – p. 32, line 1). Counsel Johnson also testified that he reviewed the disclosures made by the State with Petitioner and his family and counsel also provided a copy of those discovery materials to Petitioner. (App. p. 53, lines 2-17). Petitioner testified that counsel did review all disclosures made by the State with him which included the statements from various witnesses. (App p. 214, lines 24-25 – p. 215, lines 1-7). Counsel Johnson also testified that he and Petitioner discussed the fact that most

eyewitnesses were in the same fraternity and were friends. (App. p. 43, lines 9-25 – p. 44, lines 1-17). Petitioner's father also had concerns which were raised to counsel and discussed. Id.

Respondent submits that counsel diligently reviewed the discovery file with not only Petitioner, but also with his family members. Counsel Johnson focused on statements made by Mr. Shaw and noted that the statements had minor inconsistencies but were not all that damaging to Petitioner's case as they could corroborate Petitioner's version of the facts that the incident was an accident. (App. p. 137, lines 6-17). Counsel Johnson advised Petitioner that he would cross-examine every witness called by the State. Petitioner was fully aware of his right to challenge the testimony of all State witnesses, including Mr. Shaw's. (App. p.157, lines 14-21). Counsel also made attempts to interview all potential witnesses, including Mr. Shaw who was represented by counsel. (App. p. 131, lines 3-22). Counsel advised Petitioner of his efforts and the strategic reasons for doing so. Further, the PCR court found Petitioner's statement that he would have gone to trial but-for counsel's failure to advise him of the ability to impeach Mr. Shaw's statement to be not credible. (App. p. 282). See Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (overruled on other grounds) (Great appellate deference is to be given to the PCR judge's credibility findings which required the court to uphold judge's determination even where testimony at PCR hearing flatly contradicted by trial record).

This Court should affirm the lower court's ruling that the Petitioner failed to carry his burden to prove counsel was not ineffective for failing to properly advise Petitioner of the methods and evidence that could be used to impeach State witnesses at trial.

IV. There is probative evidence to support the PCR court's ruling that counsel were not ineffective for failing to consult with Petitioner during the plea hearing where counsel made a strategic decision to focus on mitigation, and where alternatively any instance of ineffective assistance of counsel was cured during the plea colloquy.

Petitioner asserts the lower court erred in finding that Petitioner failed to carry his burden of proving that counsel were ineffective for failing to challenge the State's recitation of the facts during the plea proceeding. Petitioner testified he did not have the required intent to kill the victim as the crash was an accident in which he did not see the victim crossing the road prior to hitting him. (App. p. 206, lines 11-25 – p. 207, lines 1-4).

Respondent submits that Petitioner pleaded guilty to ABWIK pursuant to Alford while maintaining that he did not have the requisite intent to be convicted of the charge. Counsel testified that he did not believe the plea hearing was the appropriate forum to contest the element of intent. (App. 148, lines 15-22).

> [I]n South Carolina there is no significant distinction between a standard guilty plea and an Alford plea. The Alford plea may nevertheless offer advantages to both the state and the defendant by facilitating a more efficient trial, providing the defendant a choice that benefits her interests, or obviating a humiliating public admission of guilt.

State v. Herndon, 403 S.C. 84, 93, 742 S.E.2d 375, 380 (2013). "The foregoing authority and this Court's precedent demonstrate the general consensus that an Alford plea is merely a guilty plea with the gloss of judicial grace allowing a defendant to enter a plea in her best interests." Id., at 95, 742 S.E.2d at 381. Counsel's advice to plead guilty pursuant to Alford was absolutely reasonable in light of the fact that Petitioner contested intent, but admitted to driving the car that hit the victims and leaving the scene. See United States v. Morrow, 914 F.2d 608, 611 (4th Cir.1990) (The primary thrust of the Alford decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime.).

Counsel Johnson went on to testify that the mitigation strategy during the guilty plea proceedings was to emphasize what a good person Petitioner was in hopes for a more lenient

sentence. (App. 149, lines 16-25). During the guilty plea proceedings, counsel made an appropriate decision to not challenge the State's recitation of the facts and put the victim on trial in hopes that Petitioner's acceptance of responsibility would prove beneficial to the sentence imposed. "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008).

During the mitigation phase, Counsel Johnson *did* present the court with Petitioner's version of the facts. (App. pp. 41-44). Counsel Johnson explained that Petitioner was not the one making aggressive statements towards other young men at the party and then offered evidence that he would have presented at trial. Counsel Johnson stated he would have presented testimony that there was a black SUV blocking Petitioner's view of the pedestrians crossing the street. (App. p. 174). He also would have presented testimony explaining that Petitioner and Mr. Shaw went directly to McDonald's after the incident because Mr. Shaw needed to take pain medication and did not want to do so on an empty stomach. Id. The trial judge was made aware of Petitioner's version of the facts and of his objections to certain details in the State's recitation of the facts.

Importantly, the plea colloquy between Petitioner and the Court shows Petitioner intended to plead guilty by his statements, admissions, and conduct during the plea. (App. pp. 4-14). Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive

unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). There is ample probative evidence that supports the PCR court's finding that Petitioner should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

Petitioner fully understood the charges and had a full understanding of the possible penalties as the court went through each charge and asked if he understood that he could be sentenced to the maximum sentence proscribed by law. Since Petitioner pleaded guilty to the ABWIK charge pursuant to Alford, the court noted that Petitioner did not have to admit that he had the requisite intent while also ensuring that Petitioner understood that it would make no difference to the court in terms of sentencing. (App. p. 5, lines 17-23).[3] Petitioner also stated that he believed the State had enough evidence to convict him of the charge. (App. p. 5, lines 24-25 – p. 6, lines 1-11).

This Court should affirm the lower court's ruling that counsel was not ineffective for failing to challenge the State's recitation of the facts or the evidence of intent at the plea hearing.

V. There is probative evidence to support the PCR court's ruling that Petitioner failed to carry his burden of proving trial counsel were ineffective for failing to adequately advise Petitioner concerning sentencing exposure where counsel did in fact undertake a reasonable and appropriate review of the potential sentencing ranges Petitioner was facing with Petitioner in advance of the plea hearing.

Petitioner asserts trial counsel was ineffective for failing to advise Petitioner prior to the entry of his plea of the sentencing range associated with the pending charges. Respondent submits counsel *did* in fact properly and reasonably advise Petitioner of the potential sentencing

[3] See State v. Herndon, 403 S.C. 84, 93, 742 S.E.2d 375, 380 (2013) (There is no significant difference between a standard guilty plea and an Alford plea.).

ranges involved with the charges of hit-and-run, ABHAN, and ABWIK. The PCR court found counsel presented very credible testimony. The PCR court also found that counsel reviewed all potential penalties for each charge with Petitioner during their meetings. (App. p. 277). This review of potential penalties included the thirty (30) day mandatory minimum sentence carried by the hit-and-run charge. Id. Counsel Johnson testified that he did specifically discuss the mandatory minimum sentence of thirty (30) days with Petitioner and his family. (App. p. 45, lines 18-22).

This claim is without merit as the record is clear that counsel did reasonably and properly advise Petitioner of the applicable sentencing ranges for each charge. In the alternative, any defect in that advice is cured by the plea colloquy between Petitioner and the trial court. In determining guilty plea issues, this Court should consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984); Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). The plea judge ensured that Petitioner was aware of and fully understood the maximum penalties for each charge. (App. pp. 4-5). Petitioner was fully aware of the sentencing ranges he was facing on all charges due to counsel's proper advice and the trial court's thorough plea colloquy.

This Court should affirm the lower court's ruling that Petitioner failed to carry his burden of proving counsel was not ineffective for failing to properly advise Petitioner regarding the applicable sentencing ranges.

VI. There is probative evidence to support the lower court's ruling that Petitioner failed to carry his burden of proving counsel were not ineffective for failing to adequately advise Petitioner of the merits of a suppression defense concerning Petitioner's communications with his brother where counsel repeatedly advised Petitioner of his right to cross-examine all State witnesses and where Petitioner made no allegation that the admissibility of such evidence had any bearing on his decision to plead guilty.

Petitioner contends that counsel were ineffective for neglecting to advise him that certain communications taking place with his brother may have been excluded based upon Fifth and Fourteenth Amendment grounds or otherwise be characterized as prior consistent statements supporting his defense. Counsel Johnson testified that Petitioner "knew that we were going to cross-examine all the witnesses against him." (App. p. 155, lines 3-5). Counsel could have challenged the evidence by way of an objection to its admissibility, by way of cross-examination and by other means if the case had gone to trial. Counsel was also not ineffective for failing to make a motion *in limine*, as Petitioner suggests. See Jones v. Stotts, 59 F.3d 143, 146 (10th Cir. 1995) (Failure to bring a motion *in limine* was not ineffective because a motion *in limine* is an inherent part of trial strategy.).

The PCR court's ruling that Petitioner did not allege that the admissibility of such evidence had any bearing upon his decision to plead guilty is clearly supported by the record. A Jackson v. Denno[4] hearing was held for a statement given to law enforcement by Petitioner where the trial court found the statement to be admissible. (App. p. 138, lines 1-17). Counsel Johnson testified that he had not filed a similar motion to suppress the text messages between Petitioner and his brother, as they "hadn't gotten that far." (App. p. 138, lines 18-22). Counsel would have had a full opportunity to object to the admissibility of communications between Petitioner and his brother after the incident if the case had gone to trial. At that point, an appropriate determination could be made by the trial court. In addition, Petitioner failed to present competent evidence that the trial judge erred in admitting his own statement to authorities after the Denno hearing. This claim is based on pure speculation. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent

[4] Jackson v. Denno, 378 U.S. 368 (1964).

investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Further, Petitioner also waived all defenses and admitted his guilt to the trial court at his sentencing hearing and stands convicted on his admissions in court that he committed the crimes charged against him.

This Court should affirm the PCR court's finding the Petitioner failed to carry his burden of proving counsel provided ineffective assistance of counsel in this regard.

VII. There is probative evidence to support the PCR court's ruling that Petitioner failed to carry his burden of proving trial counsel were ineffective during the sentencing proceeding for failing to inform the trial judge that Petitioner turned himself in for questioning the day after the incident, for failing to offer the statements of co-defendant Shaw attempting to explain the stop at McDonald's, and for failing to object to the State's recitation of facts.

Petitioner asserts that counsel were ineffective for failing to bring to the attention of the trial court that Petitioner had turned himself in for questioning the day after the incident at the plea proceeding. Petitioner goes on to argue that counsel was also ineffective for not offering statements from Tory Shaw explaining the stop at McDonald's, and for failing to object to the solicitor's recitation of facts at the plea proceeding.

Respondent submits these issues are fully encompassed by Issues III and IV and will rely on its responses above. This Court should affirm the lower court's ruling that Petitioner failed to carry his burden of proving counsel was ineffective during the plea proceeding.

VIII. There is probative evidence to support the PCR court's ruling that Petitioner failed to carry his burden of proving counsel were ineffective in negotiating a plea offer with the State where counsel made numerous reasonable attempts to work out a plea deal with the State.

Petitioner asserts counsel were ineffective during the plea negotiation process. This issue is meritless as Strickland does not extend to the duty to compel the State to make plea offers absent detrimental reliance. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App.

1999). South Carolina courts have expressly recognized the hornbook contract principle of "detrimental reliance" in criminal guilty plea cases. See Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007):

> [A] defendant does not have a constitutional right to plea bargain, a trial judge is not required to accept a plea bargain, and that ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court-approved plea of guilty . . . This exception is stated as: Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining.

Counsel Johnson testified that no plea offers were made until the day of the trial (in chambers) where the State offered Petitioner an opportunity to plead "straight up." (App. 125:10-19). Counsel Jonson testified that he made reasonable efforts throughout the process to enter into negotiations with the State and even tried to meet with the Solicitor in hopes of initiating plea negotiations. (App. p. 128, lines 2-10). It is clear that counsel made reasonable efforts to enter into plea negotiations with the State, but the State did not entertain these attempts.

This Court should affirm the PCR court's ruling that counsel was not ineffective during the plea negotiation process.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted this Court should affirm the PCR court's finding that the Petitioner failed to carry his burden of proving counsel provided ineffective assistance of counsel and deny this petition for a writ of certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

(signatures on following page)

Respectfully submitted,

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

BY: _____
J. Clayton Mitchell
SC Bar #: 101443
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

August 25, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2013-001269

Daydrian Rouse,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Tara D. Shurling, Esquire
3614 Landmark Drive; Suite A
Columbia SC 29204

This 25th day of August, 2014.

J. CLAYTON MITCHELL, SC Bar #101443
ATTORNEY FOR RESPONDENT

SWORN to before me this 25th day of August, 2014.

Notary Public for South Carolina.
My Commission Expires: May 14, 2024

ALAN WILSON
ATTORNEY GENERAL

August 25, 2014

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

Re: Daydrian Rouse v. The State of South Carolina
Appellate Case No. 2013-001269

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/sbm
Enclosures

cc: Tara Dawn Shurling, Esquire
Trisha Allen, Victim's Services