STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Guilty Plea Judge
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Appellate Case No. 2016-001690

Randall Nordan .....Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the PCR Court err in finding that counsel was ineffective in allowing Respondent to plead guilty after he had taken his medications, where counsel reasonably relied on his own observations in concluding Respondent was not impaired and could freely and voluntarily plead guilty?

2. Did the PCR Court err in finding counsel was ineffective in allowing Respondent's plea to go forward without a sufficient factual basis where 1) there was a sufficient factual basis to support the plea; and 2) the PCR court failed to address whether counsel's performance was objectively unreasonable under given the circumstances?

3. Did the PCR Court err in finding that counsel's investigation was ineffective where 1) counsel's investigation was reasonable under the circumstances; and 2) the PCR Court erroneously relied on speculation in its determination of prejudice?

STATEMENT OF THE CASE

Respondent was indicted for leaving the scene of the accident involving death (2011-GS-32-1859) at the July 2011 term of the Lexington County and reckless homicide (2012-GS-32-2625) at the October 2012 term of Lexington County Grand Jury. He was represented by Lawrence C. Simmons, III, Esquire. On December 9, 2013, Respondent pled guilty as indicted before the Honorable Robin B. Stilwell. Judge Stilwell accepted the pleas and sentenced Respondent to a term of twenty (20) years imprisonment suspended to ten (10) years of active service and five (5) years of probation for leaving the scene of an accident involving death, and to a term of ten (10) years of imprisonment for reckless homicide. Those sentences were set to be served concurrently.

Richard A. Harpootlian, Esquire, filed a timely post-plea motion for the reconsideration of the sentences on Respondent's behalf. In an order dated February 28, 2014, and filed March 3, 2014, Judge Stilwell denied the motion. Mr. Harpootlian filed anotice of appeal on March 21, 2014. By order filed on May 29, 2014, the South Carolina Court of Appeals dismissed Respondent's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR.

Respondent filed an application for post-conviction relief (PCR) on August 11, 2014. (2013-CP-32-2893). A hearing was held at the Lexington County Courthouse on January 11, 2016, before the Honorable J. Mark Hayes, II. Respondent was present and represented by Richard A. Harpootlian, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office represented the State. Following the hearing, the PCR Court requested proposed orders from both parties. In an order filed July 22, 2016, Judge Hayes granted post-conviction relief and ordered a new trial.

STATEMENT OF THE FACTS

On or about May 9, 2011, Respondent, while driving a motor vehicle, ran over and killed Hiram "Rez" Miller. App. p. 9-21; 330; 362. He fled the scene immediately afterwards. Id.[1] Over the course of their preliminary investigation, and as a result of several witness statements, law enforcement officers were able to identify Respondent as the primary suspect. App. p. 13, l. 5 - p. 15, l. 3. Those witnesses indicated that Respondent had been in a car accident the night before and arrived at his father's trim shop that morning smelling like alcohol. Id. Respondent and his truck were located at his mother's house. Id. The truck was heavily damaged, and law enforcement was able to match missing pieces to those found at the scene of the accident. App. p. 16, l. 10 - p. 17, l. 12. Respondent invoked his right to counsel and retained Lawrence Simmons ("counsel"). App. p. 15, l. 1-3.

Respondent was charged with leaving the scene of an accident involving death and reckless homicide. He ultimately pled guilty, the plea judge finding his plea was "entered freely and voluntarily with the advice of counsel." App. p. 21, l. 17-19.

[1] In its order denying relief, the PCR Court specifically found that "[Respondent] was driving a truck that struck [Mr. Miller] from behind and proceeded through the intersection. [Mr. Miller] died as a result of the collision and [Respondent] did not stop the truck at the scene of the collision." App. p. 330.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts review questions of law *de novo*, and will reverse the decision of the PCR Court when it is controlled by an error of law. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

ARGUMENT

I. The PCR Court's finding that counsel was ineffective in allowing Respondent to plead guilty after he had taken his medications, where counsel reasonably relied on his own observations in concluding Respondent was not impaired and could freely and voluntarily plead guilty.

Certiorari is warranted in this case because the PCR judge erred in granting relief. In order to prove his guilty plea was involuntary, Respondent bears the burden of showing at the evidentiary hearing that his plea counsel was ineffective. "In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999)). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted upon going to trial." Id. (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. Id.

The PCR Court's finding that counsel was ineffective in failing to withdraw the plea as a result of Respondent's alleged impairment is not supported by any evidence in the record, where counsel reasonably relied on his own observations. See, e.g., Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (counsel not deficient in failing to request evaluation where he reasonably relied on his own observations of client during course of representation); Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (Ct. App. 2011) ("Plea counsel could not be deficient if she had no indication of [client's] mental status"). Counsel did not know or otherwise believe Respondent was impaired. Instead, counsel testified that he did not have any question about

Respondent's ability to answer the judge's questions during the plea hearing. App. p. 95, l. 11-13. Further, although counsel admitted the fact that Respondent had taken prescription medication caused him some concern, he explained he and Respondent talked "for a good long while" the morning of the guilty plea, and "[e]very time we talked [Respondent] was on his medication to my knowledge...." App. p. 143, l. 20-23. Counsel said that Respondent "did not appear impaired" to him, and explained that he had seen Respondent impaired before. App. p. 147, l. 11-19. Counsel met with Respondent extensively, and testified that he had no reason to believe Respondent's medications were influencing him during his guilty plea. App. p. 165, l. 17 - p. 166, l. 20.

Admittedly, as highlighted extensively by the PCR Court's order granting relief, counsel testified at the evidentiary hearing that he believed he was deficient and that Respondent deserves a new trial. Reliance on these self-deprecating statements, however, was inappropriate, and using them as a basis for finding ineffective assistance was error. "Admissions of deficient performance by attorneys are not decisive," and "ineffectiveness is a question which the court must decide." Harris v. Dugger, 874 F.2d 756, 761 n. 5 (11th Cir. 1989); see also Credell v. Bodison, 2011 WL 573425 (United States District Court, D. South Carolina, Anderson, J., 2011) ("The relevant inquiry is not whether any one attorney believes he was ineffective, but whether his performance fell below an objective standard of reasonableness.") (citing Strickland, 466 U.S. at 686); United States v. Little, 14 Fed. Appx. 200 (4th Cir. 2001) (holding that the subjective beliefs behind counsels' strategic decisions are irrelevant to an ineffective assistance claim); Marrero v. Horn, 505 Fed. Appx. 174, 181 3d Cir. 2012) (ineffective assistance claim properly denied where counsel's post-conviction affidavit stating that he should have insisted on

a competency hearing had "the earmarks of one attempting to fall on his sword to assist a former client").

Further, nothing in the guilty plea transcript indicates Respondent was impaired inasmuch as it would have put counsel *or the court* on notice that a potential issue existed.[2] Respondent told the plea judge that his medications did not affect his ability to understand or appreciate questions being asked during his guilty plea. App. p. 8, l. 18-21. He further stated that the medications were not affecting his ability to discuss his charges with his attorney. App. p. 8, l. 22-24. Respondent answered the remainder of the questions to the plea judge's satisfaction and gave what appeared to be a compassionate, heartfelt, and *coherent* apology to the victim's family members:

> I just want to let everybody know that I truly am sorry, and listening to y'all today does make it that much worse. I am very sorry for what I've caused whether or not y'all can forgive me or – I want to let you know I'm truly sorry for everybody. Thank you, Your Honor.

App. p. 33, l. 16-21.

Even assuming *some* level of impairment or "haz[iness],"[3] Respondent was still able to lead an apparently normal life. Even Respondent's expert witness, James Bartling, acknowledged Respondent was "working" and "apparently doing so effectively" while on his medications. App. p. 191, l. 20 - p. 192, l. 5. Further, counsel's testimony indicates Respondent

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[2] The record reflects that Respondent's mother, Kathy Foster, also spoke during the guilty plea hearing. App. p. 34, l. 1-13. Ms. Foster did not indicate Respondent appeared "hazy" or otherwise impaired, nor did she (or anyone else, for that matter) testify to that effect at the evidentiary hearing. Id.

[3] Respondent's testimony was that his memory of the guilty plea was a "haze." App. p. 248, l. 25 - p. 249, l. 3. At the time of the evidentiary hearing, Respondent said he was unable to remember much of went on during the plea colloquy, other than that he was actually in the courtroom and was basically following along with his attorney's head nods. App. p. 228, l. 2-8; p. p. 248, l. 5 - p. 249, l. 10.

played an active role in the preparation of his defense. Before Respondent decided to plead guilty, counsel testified they discussed the problems and possibilities of the case. App. p. 162, l. 24 - p. 163, l. 2. Counsel testified he went over all the different theories he had with Respondent, but he left the ultimate decision up to him. Id. Counsel said he and Respondent "sat down and discussed what every witness said, what every law enforcement officer said and everything that happens." App. p. 163, l. 6-9.

With this in mind, and giving due deference to the fact finder, no solid basis for determining Respondent's purported impairment rendered him incapable of entering a knowing, intelligent, and voluntary guilty plea. Similarly, no basis in the record supports a finding that counsel's failure to recognize this purported impairment and withdraw the plea constituted objectively unreasonable and deficient performance. Because no evidence in the record to support the PCR Court's findings, certiorari should be granted and the ruling should be reversed.

II. The PCR Court erred in finding counsel was ineffective in allowing Respondent's plea to go forward without a sufficient factual basis where 1) there was a sufficient factual basis to support the plea; and 2) the PCR court failed to address whether counsel's performance was objectively unreasonable under given the circumstances.

The PCR Court further found counsel was ineffective in allowing Respondent to plead guilty on the claim of an insufficient factual basis for the plea. Specifically, the PCR Court found that there was no evidence in the record to support the *mens rea* component of the charged crimes. App. p. 345. Petitioner submits this was in error.

i.

First, counsel's performance was not deficient where there was clearly a factual basis for the guilty plea, including the *mens rea* requirement of offense. The purpose of requiring a factual basis for a plea is to assure the court that the conduct which the defendant admits by his plea of guilty constitutes the offense charged in the indictment. Anderson v. State, 342 S.C. 54, 58, 535 S.E.2d 649, 651 (2000) (citing U.S. v. Thompson, 680 F.2d 1145 (7th Cir. 1982)).

The PCR Court improperly analyzed this issue in a manner that closely resembles that of a trial judge ruling on a motion for directed verdict.[4] See, e.g., App. p. 351 (". . . Plea counsel failed to appreciate that the circumstantial evidence rule in Dobson would entitle [Respondent] to a directed verdict in the absence of some evidence he operated the vehicle in a reckless manner"). This was an error. A guilty plea is not a trial, and whether a factual basis is sufficient is a different question than whether directed verdict is appropriate. See e.g., U.S. v. Mitchell, 104 F.3d 649, 652 (4th Cir. 1997) ("In order to comply with [the Federal Rule of Criminal Procedure requiring a factual basis for a guilty plea], a district court need not replicate the trial

[4] Indeed, several of the cases the PCR Court cited in support of its decision involve directed verdict issues. See In Interest of Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141 (1991); State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997).

that the parties sought to avoid").[5]

The State presented an extremely thorough recitation of the facts in this case, which was legally sufficient to support the charges. App.p . 9-21. Concerning the leaving the scene of an accident offense, the State recited evidence it would have presented at trial, which indicated Respondent was aware of what was going on when he ran over Mr. Miller and subsequently fled the scene. Still, frames from a surveillance video capturing the impact showed Respondent's brake lights flashing following the collision, strongly suggesting he was aware of what was happening. App. p. 12, l. 2 – p. 13, l. 4. Immediately afterward, Respondent was on his phone calling or texting personal acquaintances rather than emergency service personnel. App. p. 17, l. 13 - p. 18, l. 6. While Petitioner submits the evidence was overwhelming, the issue during the guilty plea was not the strength of the state's case – only whether it formed a legally sufficient factual basis for the plea.

The State also recited facts sufficient to support the offense of reckless homicide. It discussed witnesses it would have presented if the case went to trial, several of whom indicated Respondent "came in smelling of alcohol" the morning after Mr. Miller was killed, having "wrecked his truck." App. p. 13, l. 10 – p. 14, l. 9. See State v. Carrigan, 284 S.C. 610, 614-15, 328 S.E.2d 119, 121 (Ct. App. 1985) ("Driving under the influence of intoxicants is evidence of driving in reckless disregard of the safety of others, which is an element of reckless homicide") (citing State v. Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967). Respondent drove well above the posted speed limit. App. p. 15, l. 4-19.[6]

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[5] As discussed above, the PCR Court's reliance on counsel's *post hoc* opinion that he was ineffective was improper.

[6] The solicitor explained that while Respondent's speed was "somewhere in the neighborhood of 36 to 43 miles an hour," it was more likely at the higher end of that range according to law

Respondent raised no objections to the sufficiency of the factual presentation given by the state, and ultimately agreed with the state's recitation to the plea judge's satisfaction. App. p. 21, l. 7-16. Thereafter, Respondent submitted his version of events in mitigation, through counsel, which *still supported a factual basis* for the underlying guilty plea.[7] Concerning the hit and run involving death, counsel acknowledged during the plea hearing that although Respondent could not say what happened "at impact," afterwards, "he noticed something was dragging," saw the front-end damage to his truck, and should have "[found] out what's going on and return[ed] to the scene." App. p. 31, l. 7-19. With regard to reckless homicide, counsel further indicated Respondent accepted responsibility because, *inter alia*, "the big thing was that he took his medications and then drove." App. p. 31, l. 20 – p. 32, l. 3.[8]

Because was a factual basis Respondent's guilty plea, the PCR Court's contrary finding is not supported by any probative evidence in the record and should be reversed.

ii.

Additionally, there is no probative evidence in the record to support the PCR Court's finding that counsel's failure to withdraw the plea was unreasonable *even if* there was an insufficient factual basis for one or both of the charges. Plea agreements are governed by contract principles. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). Each party should receive the benefit of the bargain. Id. A defendant may, as part of a plea bargain, agree

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enforcement. App. p. 15, l. 10-19. Neither Respondent nor his attorney contested this characterization.

[7] Petitioner acknowledges that exact sequence of events is not entirely clear. This can be explained, in part, by counsel's testimony that Respondent's version of events regularly changed over the course of his representation. App. p. 151, l. 17 – 153, l. 21. Unfortunately, the PCR Court did not make specific credibility findings with respect to much of the conflicting testimony.

[8] See Carrigan, supra.

to plead guilty to a crime for which he has been indicted but of which he is not guilty. Rollison v. State, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001); see also Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000) (finding an individual could plead guilty to voluntary manslaughter under an indictment for murder, even though the facts would not support such a lesser charge); North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) (holding it constitutional to allow an accused to consent to imposition of sentence, although unwilling to admit culpability, where he intelligently concluded that a guilty plea was in his best interest and the evidence strongly supported his guilt); see also James v. State, 377 S.C. 81, 84, 659 S.E.2d 148, 150 (2008) ("[I]t is well settled that a defendant need not admit guilt in order to enter a valid guilty plea. Instead, a guilty plea need only represent a voluntary and intelligent choice among alternative courses of action open to the defendant. For this reason, the implication that an admission of guilt is a necessary prerequisite to a guilty plea does not accurately characterize the law").

The PCR Court appears to have misapprehended the distinction between post-conviction relief and a direct appeal, as illustrated by its overreliance on Mastrapa,[9] a Fourth Circuit case. App. p. 346-48. Mastrapa involved a direct appeal from a guilty plea, where the key consideration was trial court error rather than whether counsel was ineffective. This distinction is critical, but was overlooked below.[10] The PCR Court's focus on whether counsel *could have* derailed the plea ignores the question of whether his failure to do so was objectively unreasonable. This was not a trial, where the failure to object to a specific piece of evidence

[9] United States v. Mastrapa, 509 F.3d 652 (7th Cir. 2007).

[10] There are additional distinctions. First, Mastrapa never said he did not know whether he was guilty; rather, his position was that he did not know about the existence of a conspiracy – one of the elements of the charge he was facing. 509 F.3d at 659. Additionally, Mastrapa involves a violation of the Federal Rules of Criminal Procedure, and must be viewed through that specific lens. Id.

could have affected the verdict. Instead, counsel's starting point – and the point from which the PCR Court should have started – was that Respondent wanted to plead guilty rather than proceed to trial. App. p. 6, l. 16 - p. 7, l. 21. The goal was not an acquittal, nor would it have been productive to contest every potential point on the table. Even assuming, for example, that the factual basis for reckless homicide was indeed insufficient, Respondent was still facing the charge of leaving the scene of an accident involving death, for which there was clearly overwhelming evidence. Both the solicitor and Respondent – through counsel – agreed at the guilty plea hearing there was a duty to stop at the point he realized there was an accident, and Respondent specifically acknowledged the accuracy of the solicitor's recitation "with respect to hitting [Mr. Miller] and killing him and then leaving the scene of the accident." App. p. 21, l. 7-16. The PCR Court's failure to take into account the overarching contractual nature of Respondent's guilty plea in determining whether counsel was ineffective was error. As a result, certiorari should be granted, and the finding should be reversed.

iii.

Alternatively, in the event this Court finds relief was granted appropriately with respect to reckless homicide, Petitioner submits this ruling is still erroneous inasmuch as it applies to hit and run involving death due to the clearly sufficient factual basis for that guilty plea. Therefore, at a minimum, reversal is warranted on that charge alone.

III. The PCR Court's finding that counsel's investigation was ineffective is unsupported by any probative evidence in the record and controlled by an error of law where 1) counsel's investigation was reasonable under the circumstances; and 2) the PCR Court erroneously relied on speculation in its determination of prejudice.

i.

The PCR Court found counsel's "investigation of [Respondent's] case fell below the standard owed to a criminal defendant to investigate the facts and to advise the client using professional judgment that is informed by the law." App. p. 349. It further concluded counsel's investigation was incomplete because it "failed to pursue defense theories that [Respondent] . . . demonstrated . . . would have undermined the State's theory of liability." App. p. 349. This finding should be reversed, where counsel's investigation was objectively reasonable under the circumstances.[11]

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Accordingly, the controlling standard for counsel's duty to investigate is *reasonableness*. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011). So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses *when it is reasonable to do so*, his performance will not be deficient. Id. at 457, 710 S.E.2d at 65 (emphasis added). Moreover, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Counsel's investigation in this case was reasonable. Counsel testified he staffed his

[11] Again, and as discussed above, the PCR Court's reliance on counsel's *post hoc* opinion that he was, indeed, ineffective was improper.

entire office on Respondent's case. App. p. 96, l. 18-21. He testified he spent between fifty and seventy-five hours working for Respondent's case, but he also conducted research after hours with his wife – another attorney.[12] App. p. 165, l. 19 - p. 166, l. 5. Counsel said he retained an expert to explore a possible blackout defense. App. p. 167, l. 9-12. He said that he also talked to a number of other healthcare professionals,[13] all of whom told him roughly the same thing: that Lisinopril could, in rare instances, cause blackouts, but they were more likely to occur when the drug was combined with alcohol. App. p. 167, l. 18-25. Counsel said he investigated multiple defenses and "looked at a lot of different things." App. p. 157. He said he looked at the lack of DNA evidence on the truck and how it affected the statements of several witnesses who gave statements. App. p. 157-58.

Counsel investigated April Hughes – another potential state witness, who told police Respondent was drinking – by confirming with Respondent and his father that Respondent's relationship with Ms. Hughes was "not very good to say the least." App. p. 157. Counsel said if the case proceeded to trial, he would have put Respondent's father on the stand to say Respondent was not drinking, and he would not have sent him off for supplies if he were drunk. App. p. 156-57. Counsel said that he discussed with Respondent any possible theories he could present at trial, as well as "what every witness said" and "what every law enforcement officer said and everything that happens." App. p. 163. Given the depth of counsel's investigation in this case, the PCR Court's finding that his performance fell below the objective constitutional floor of effective representation is unsupported by any evidence and controlled by an error of

[12] See Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (finding presence of second attorney during proceedings seriously undermines claim of ineffective assistance of counsel) (citing Lopez-Nieves v. United States, 917 F.2d 645, 647 (1st Cir. 1990)).

[13] In fact, counsel testified that in addition to speaking with a hired medical expert, he spoke with a cardiologist, a family doctor, and several nurses. App. p. 84, l. 24 - p. 85, l. 10.

law.

ii.

The PCR Court's finding that counsel's investigation was inadequate with respect to his failure to interview various witnesses is controlled by an error of law, as it relied solely on rampant speculation.

The PCR Court faulted counsel for failing to interview a witness "with known biases against [Respondent]," a witness who said she "saw [Respondent] at a bar and he was not drinking," and "the last person who spoke to [Mr. Miller] the evening before the collision." App. p. 349. To the extent the PCR Court relied on counsel's failure to speak with any of these potential witnesses in its finding, Petitioner submits it did so in error where none of them were called at the evidentiary hearing. See Moorehead, supra.[14]

iii.

The PCR Court also concluded that counsel's supposed "lapses in professional judgment" were "exacerbated by a misunderstanding of the relevant criminal law," where counsel "relied on civil negligence concepts to explain criminal recklessness to [Respondent] and analyze the risk he faced," causing him to "advise [Respondent] of a litigation risk far greater than under a proper reading of the law." App. p. 349-50.

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[14] The PCR Court also mentions, in a different section, that counsel did not retain a human factors expert, accident reconstruction expert, or an expert to determine whether Mr. Miller suffered cardiac arrest before or after the collision. App. p. 339. While not a specific basis for its ruling, Petitioner would note that Respondent did not present an expert or accident reconstruction or pathology at the evidentiary hearing. See Moorehead, supra. With regard to use of a "human factors" expert, in addition to applying solely to the charge of reckless homicide, there is nothing in the record to suggest counsel's failure to consult with a type of expert that is conspicuously absent from any South Carolina criminal case law falls beneath Strickland's constitutional floor of reasonably adequate representation *under prevailing professional norms*. 466 U.S. at 688.

This finding is, respectfully, unsupported by the record. Counsel's testimony at the evidentiary hearing was that he spent a substantial amount of time and energy investigating and researching Respondent's case. The fact that counsel was unable to recall specific cases and points on command several years later on direct examination – many of which, as discussed supra, are not specifically applicable to Respondent's charges – does not go to the reasonableness of his efforts at the time of the representation. See Strickland, 466 U.S. at 669 ("[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"). Counsel indeed testified that his recollection and understanding of the case law and statutes were probably better when the plea actually happened than during the PCR evidentiary hearing. App. p. 163, l. 23 – p. 164, l. 2.

Additionally and alternatively, as discussed above, counsel's purported "misunderstanding of the relevant criminal law" applies solely to the charge of reckless homicide. App. p. Accordingly, to the extent this Court agrees with the PCR Court that those misunderstandings constituted ineffective assistance of counsel, Petitioner submits no probative evidence in the record to extends that finding to the plea to leaving the scene of an accident involving death. Either way, certiorari should be granted, and the PCR Court's findings should be reversed.

iv.

Finally, the Court referenced counsel's failure "to pursue defense theories that [Respondent] . . . demonstrated . . . would have undermined the State's theory of liability." App. p. 349. Respondent's complaint with respect to this allegation – and the PCR Court's finding – appears focused on the fact that counsel may have left dirt unturned in his preparations and

defense. Clearly this is true, as it is true in all criminal defense cases. Petitioner does not dispute that other defense attorneys may have approached the case differently, or given different advice. Some of those approaches and some of that advice may very well have been better than was delivered by Respondent's plea counsel. Strickland, however, is an objective standard and does not concern itself with the relative difference in the quality of attorneys. 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). A criminal defendant is not entitled to exceptional representation, only constitutionally adequate representation. The record is clear that counsel's performance met that standard. The PCR Court's failure to recognize this distinction as it relates to the Sixth Amendment right to counsel was error. As a result, certiorari should be granted, and the order granting relief should be reversed.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
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v.

Randall Houston Nordan, SCDC #358103, ...Respondent.

CERTIFICATE OF SERVICE

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

Richard A. Harpootlian, Esquire
Post Office Box 1090
Columbia, South Carolina 29202

This 16th day of December, 2016

Brianna Arnone
BRIANNA ARNONE
Legal Assistant For Respondent