

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
The Honorable Robin B. Stilwell, Trial Judge
J. Mark Hayes, II, Circuit Court Judge

RECEIVED
FEB 16 2017
S.C. SUPREME COURT

Appellate Case No. 2016-001690
Case No. 2014-CP-32-2893

Randall Houston Nordan.....Respondent,

v.

State of South Carolina.....Petitioner.

RETURN IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR RESPONDENT
RANDALL HOUSTON NORDAN

February 16, 2017
Columbia, South Carolina.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

REPHRASED QUESTIONS PRESENTED1

COUNTER-STATEMENT OF THE CASE2

FACTUAL AND PROCEDURAL BACKGROUND.....3

ARGUMENT12

 I. A lawyer’s failure to investigate the incapacity of an impaired client does not render the decision to plead the client guilty objectively reasonable.14

 II. The State’s inability to prove predicate elements of the offense should have caused Plea Counsel to refrain for pleading his client guilty.17

 III. Plea counsel labored under a misapprehension of applicable law and incomplete information concerning key witnesses he never contacted.22

CONCLUSION25

TABLE OF AUTHORITIES

Cases

<u>Ard v. Catoe</u> , 372 S.C. 318, 642 S.E.2d 590 (2007)	22
<u>Bannister v. State</u> , 333 S.C. 298, 509 S.E.2d 807 (1998).....	13
<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969)	14, 15
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963).....	23
<u>Hoots v. Allsbrook</u> , 785 F.2d 1214 (4th Cir. 1986).....	24
<u>In Interest of Stacy Ray A.</u> , 303 S.C. 291, 400 S.E.2d 141 (1991)	12, 18, 21, 22
<u>Jeter v. State</u> , 308 S.C. 230, 417 S.E.2d 594 (1992)	14, 16
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938)	23
<u>Jordan v. State</u> , 406 S.C. 443, 752 S.E.2d 538 (2013)	14
<u>Lee v. State</u> , 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011)	14, 16
<u>Matthews v. State</u> , 358 S.C. 456, 596 S.E.2d 49 (2004)	16
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970).....	23
<u>Moorehead v. State</u> , 329 S.C. 329, 496 S.E.2d 415 (1998).....	23, 24
<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	20
<u>Porter v. State</u> , 368 S.C. 378, 629 S.E.2d 353 (2006)	13, 15
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932).....	23
<u>Ramirez v. State</u> , 413 S.C. 351, 776 S.E.2d 101 (Ct. App. 2015).....	16
<u>Ramirez v. State</u> , Op. No. 27696, 2017 WL 56379 (S.C. Sup. Ct. filed Jan. 5, 2017) (Shearouse Adv. Sh. No. 1, at 42)	15, 16
<u>Rollison v. State</u> , 346 S.C. 506, 552 S.E.2d 290 (2001)	18
<u>Roscoe v. State</u> , 345 S.C. 16, 546 S.E.2d 417 (2001)	13, 15
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016).....	16, 18, 21, 22
<u>Simpson v. State</u> , 317 S.C. 506, 455 S.E.2d 175 (1995)	15
<u>State v. Armstrong</u> , 263 S.C. 594, 211 S.E.2d 889 (1975).....	18
<u>State v. Dobson</u> , 281 S.C. 36, 314 S.E.2d 310 (1984).....	18, 20
<u>State v. Horton</u> , 271 S.C. 413, 248 S.E.2d 263 (1978).....	17
<u>State v. Jefferies</u> , 316 S.C. 13, 446 S.E.2d 427 (1994)	21
<u>State v. Rikard</u> , 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006)	18
<u>State v. Rowell</u> , 326 S.C. 313, 487 S.E.2d 185 (1997)	17, 18, 21
<u>State v. Tucker</u> , 273 S.C. 736, 259 S.E.2d 414 (1979).....	17, 21
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	13, 14, 23, 24
<u>United States v. Cronic</u> , 466 U.S. 648 (1984)	23
<u>United States v. Mastrapa</u> , 509 F.3d 652 (4th Cir. 2007).....	19, 20
<u>United States v. Ragin</u> , 820 F.3d 609 (4th Cir. 2016)	23

Statutes

S.C. Code Ann. § 56-5-1210	3, 17
S.C. Code Ann. § 56-5-2910	3
S.C. Code Ann. § 56-5-2910(A).....	17

REPHRASED QUESTIONS PRESENTED

The Court should answer the following questions in the negative and deny the petition:

1. Whether a lawyer's decision to allow an impaired client to plead guilty is immaterial to the outcome and satisfies the objective standard of competence owed to a client?
2. Whether plea counsel acted reasonably in pleading his client guilty to a crime for which the State could not prove predicate elements of the offense?
3. Whether counsel's misapprehension of fundamental elements of the crimes charged and failure to interview key witnesses is reasonable representation without prejudicial effect to a client with recognized defenses who nonetheless pleads guilty?

COUNTER-STATEMENT OF THE CASE

Respondent Randall Houston Nordan was indicted for leaving the scene of an accident involving a death (2011-GS-32-01858) and reckless homicide (2012-GS-32-02625). See App. 357–63. On December 9, 2013, Mr. Nordan pled guilty before the Honorable Robin B. Stilwell, Circuit Court Judge. See App. 1–44. He was represented by C. Lawrence Simmons, III (Plea Counsel) at his plea. Judge Stilwell sentenced Mr. Nordan to 10 years’ imprisonment on the charge of reckless homicide and a concurrent term of 20 years, suspended upon the service of 10 years, and five years’ probation on the leaving-the-scene charge. See App. 36.

Mr. Nordan retained new counsel and, on December 12, 2013, moved the Plea Judge to vacate the plea or reconsider the sentence. See App. 45–46. That request was denied. See App. 47–48. Mr. Nordan filed a timely appeal, which was dismissed on May 29, 2014. See App. 49.

On August 11, 2014, Mr. Nordan filed an application seeking post-conviction relief (PCR) arguing he received ineffective assistance from Plea Counsel in violation of rights protected by the Sixth Amendment to the United States Constitution. See App. 51–59.

On January 11, 2016, the Honorable J. Mark Hayes, II, Circuit Court Judge, held an evidentiary hearing, during which Mr. Nordan challenged Plea Counsel’s investigation of the facts and circumstances of the case, his review of the applicable law, and his decision to allow Mr. Nordan to enter a guilty plea. See App. 70–307. By an opinion and order dated July 22, 2016 (hereinafter, the “Opinion”), the PCR court granted post-conviction relief and ordered a new trial. See App. 327–56.

The State filed a timely notice of appeal and now seeks a writ of certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

On May 9, 2011, at approximately 2:35 a.m., the Victim, Hiram Juarez Miller, was riding a moped on Highway 6 and stopped at an intersection for a red light. See App. 11, ln. 5–14. Mr. Nordan was allegedly driving a truck that struck Victim from behind and proceeded through the intersection. App. 330. The collision was captured by a surveillance camera at a nearby gas station, which indicated that after the traffic light turned green, Victim’s moped remained stationary in the road for approximately 21–22 seconds. App. 330 at n.3. It is not clear from the video whether Victim was seated on or had gotten off of the moped. Id. Victim died as a result of the collision and the truck did not stop at the scene.

In June 2011, Mr. Nordan was indicted for leaving the scene of an accident involving a death, a violation of South Carolina Code § 56-5-1210. See App. 357–60. In October 2012, he was indicted for reckless homicide, a violation of South Carolina Code § 56-5-2910. See App. 361–63. The State’s indictment cited the following predicate acts as the basis for reckless conduct:

- (a) drove a motor vehicle while his license to drive was suspended; (b) drove a motor vehicle while under the influence of alcohol or drugs, or a combination of both; (c) failed to reduce his speed when approaching and crossing an intersection; (d) failed to reduce his speed and/or drive in a reasonable and prudent manner; (e) drove without regard to actual and potential hazards then existing; (f) failed to keep and maintain a proper lookout; (g) failed to keep and maintain proper control of his vehicle; and (h) failed to drive with due care to others on the road[.]

App. 362. Mr. Nordan hired Plea Counsel to represent him.

During the PCR hearing, Plea Counsel testified it was his belief that any one of these predicate acts, if proven, was sufficient to convict Applicant of reckless homicide. App. 103, ln. 24–104, ln. 18. After reviewing the reckless homicide statute, Plea Counsel testified he advised Mr. Nordan about his *criminal* charge by applying civil negligence principles. App. 106, lns. 5–20. As to the remaining predicate acts on which the State relied in its indictment, Plea Counsel

testified that each *could* be an element of reckless homicide, depending on the particular circumstances of the case. App. 108, ln. 19–110, ln. 7; 110, ln. 25–111, ln. 8; 112, lns. 3–5. For example, when asked whether failure to keep control of the vehicle could constitute a predicate act, Plea Counsel testified, “It depends on the circumstances[.]” and conceded that the highway patrol’s investigation *in this case* indicated that, at the time of the collision, Mr. Nordan’s truck was in its lane, was not weaving, and was traveling just one mile over the speed limit. App. 110, ln. 25–111, ln. 8.

* * *

Mr. Nordan is a former Marine who injured his back and knees in a training accident, received an honorable medical discharge, and was placed on disability under the treatment of the Veterans Administration (VA) at the time of the collision. App. 78, ln. 19–19, ln. 9 & 218, ln. 19–219, ln. 16; see also App. 29, ln. 16–30, ln. 21. Mr. Nordan was prescribed medication for severe pain. App. 219, lns. 22–24. During the PCR hearing, Plea Counsel repeatedly testified that Mr. Nordan told him he blacked out and could not recall anything about the collision or the circumstances surrounding the collision. See, e.g., App. 77, lns. 12–17; 91, lns. 12–14 & 136, ln. 17–137, ln. 1. When Mr. Nordan took the stand, he testified that, while he recalls “certain parts” of the evening in question, he has never had any memory of the collision itself. App. 221, ln. 11–222, ln. 4 (“Q. What about the part where Mr. Miller gets hit and killed? A. No, sir.”). Mr. Nordan also testified that while he had suffered blackouts before, he had never suffered one to the extent as the night in question. App. 223, lns. 4–8. Plea Counsel agreed that everything his client told him about that evening was consistent with Mr. Nordan having suffered a blackout at the time of the collision. App. 91, ln. 24–92, ln. 3.

Mr. Nordan's recollection (or lack thereof) was consistent with the medical opinion of a physician retained by Plea Counsel. Plea Counsel hired a physician, Sean Fuller, M.D., to meet with Mr. Nordan and examine his VA medical records and the medications he was taking at the time of the collision. App. 78, ln. 12–79, ln. 20 & 222, ln. 20–23. Dr. Fuller concluded Mr. Nordan suffered “some type of cognitive impairment from the medication, particularly with antidepressants, muscle relaxers, insomnia medications” that caused him to blackout and collide with Victim's moped. App. 84, lns. 11–23; see also App. 79, ln. 23–83, ln. 23.

At the plea, Plea Counsel represented to the Plea Judge that Mr. Nordan had no memory of the night in question. App. 77, ln. 22–78, ln. 7 (“Q. ... you tell the judge during the guilty plea he's got no recollection of hitting anybody that night, correct? A. That's right. ... Q. And that he had no recollection of committing a reckless homicide or leaving the scene of an accident; isn't that correct? A. Correct. That's correct.”); see also App. 27, lns. 2–6 & 28, ln. 17–29, ln. 5. Plea Counsel also told the Plea Judge that Mr. Nordan had not been drinking, a fact he corroborated by interviewing Mr. Nordan's employer and father, Randy Nordan, who saw his son the morning after the collision and sent him on an errand without noticing any impairment or evidence of alcohol use. App. 28, lns. 10–16; 156, lns. 18–23; see also App. 232, lns. 1–2 (Mr. Nordan testifying to the same). Plea Counsel explained Applicant's culpable acts to the Plea Judge as follows:

Mr. Simmons: Here's what Houston did wrong: The medications that he took at approximately 11 o'clock that evening included Lisinopril, which was for blood pressure; Tramadol, which is a very mild pain killer; cyclobenzaprine, which is a muscle relaxer and an anti-inflammatory medication. That was the reason that we hired Dr. Shawn [sic] Fuller to give his report.

One of the big problems was the Lisinopril itself can cause blackouts and that's what our defense was. And we started looking at this case and said, you know what, the problem is is the defense could also convict you. Where do you go with this?

App. 28, ln. 17–29, ln. 5. Dr. Fuller’s report was presented to the Plea Judge as evidence that Mr. Nordan’s medication caused him to blackout at the time of the collision. App. 14, ln. 16–15, ln. 2 & 23, lns. 3–8.

Mr. Nordan was under the influence of these same medications at the time of his plea. This fact is evidenced by Plea Counsel’s need to interject and remind his client during the colloquy:

The Court: Are you under the influence of any drugs or alcohol today?

Defendant: No, Your Honor.

Mr. Simmons: He is under medications.

The Court: Okay. And what type of medication is that, sir?

Defendant: Tramadol, sir, psycho -- Baclofen and meloxicam, Your Honor.

App. 8, lns. 6–13. During the PCR hearing, Mr. Nordan testified he had taken 10 milligrams of Ambien the night before his plea to help him sleep, followed by 100 milligrams of tramadol, 20 milligrams of baclofen, and one meloxicam tablet at 8:00 a.m. the morning of the plea. App. 223, ln. 13–224, ln. 25. When his plea was postponed to the afternoon, he returned home and took another 100 milligrams of tramadol around noon. App. 225, lns. 1–19. Plea Counsel knew to interrupt the plea colloquy because, while he was unaware of the dose, Mr. Nordan told Plea Counsel he had taken medication prior to the plea. App. 142, ln. 11–143, ln. 13. When asked whether his client’s use of medication he described as “very powerful” (App. 147, lns. 20–22) was cause for concern, Plea Counsel answered, “Yes. Yes.” App. 143, lns. 14–16.

Plea Counsel’s testimony concerning the potency of Mr. Nordan’s medication was bolstered by the testimony of Dr. James W. Bartling, a professor at Mercer University’s College of Pharmacy with training in pharmacology. See App. 173, ln. 14–174, ln. 7. After the PCR Court

qualified him as a pharmacology expert (App. 175, lns. 14–18), Dr. Bartling explained that a drug-induced blackout means the individual is unable to recall the blackout period even though the might be able to walk, use a phone, and drive a vehicle. App. 176, ln. 18–177, ln. 13 (“Q. Could you do -- perform ordinary functions yet not have any recollection of it sometime after these occurrences? A. Yes, that’s the definition of a blackout.”). Based on his examination of medical records, Dr. Bartling agreed with Dr. Fuller’s conclusion that Mr. Nordan could have suffered a blackout the morning of the collision. App. 175, ln. 25–176, ln. 17.

Dr. Bartling also testified about the medications Mr. Nordan took the afternoon of his plea. App. 178, lns. 10–16. He explained tramadol is a strong central nervous system depressant commonly used to treat pain (App. 180, lns. 17–22), baclofen is a muscle relaxer and central nervous system depressant (App. 181, lns. 4–13), and meloxicam is an anti-inflammatory medication and central nervous system depressant. App. 181, lns. 19–24. Mr. Nordan had also taken Ambien, a sleep aid and central nervous system depressant the night before the plea. App. 180, lns. 8–16; 182, lns. 3–6. In Dr. Bartling’s opinion, after taking these medications in the doses prescribed to Mr. Nordan, he was medically unable to knowingly and freely exercise the judgment necessary to plead guilty.¹ App. 182, ln. 7–183, ln. 8; see also App. 184, lns. 9–15 (“...he apparently didn’t know he was impaired, but I believe he was.”)) In Dr. Bartling’s medical judgment, even though Mr. Nordan may not have appeared impaired, he was to a cognitive degree that should have precluded him from making an important, life-altering decision such as pleading

¹ Dr. Bartling also took issue with the Plea Judge’s statement, and Mr. Nordan’s agreement, that these drugs helped him understand and remain calm, explaining, “That’s not what they’re designed for, no, sir.” Compare 183, ln. 19–184, ln. 3, with App. 8, lns. 14–21.

guilty. App. 185, ln. 23–186, ln. 20 (“A. He was not in a position to make that kind of a decision that day.”); see also App. 194, ln. 22–195, ln. 1.

The Court also considered testimony from Stephanie Borzendowski, Ph.D., an expert in the psychology of human factors, which she explained is the science of how human beings understand and interact with technology, the environment, and other human beings. App. 196, ln. 4–198, ln. 24. Dr. Borzendowski opined that the fact that Victim’s moped was not in motion would not be appreciable to Mr. Nordan until a distance likely to result in a collision. App. 201, ln. 13–202, ln. 1. She explained a number of factors would contribute to this misperception by a driver in Mr. Nordan’s circumstances, such as, an unlit roadway, the expectation traffic would be moving in response to a green traffic light, and the expectation that the moped’s single red taillight was actually a distant vehicle with two taillights. App. 202, ln. 2–203, ln. 10 & 204, lns. 2–16. In Dr. Borzendowski’s view, it would have been difficult for “any driver” in Mr. Nordan’s position to appreciate the hazard posed by the stationary moped until it was too late and this collision presented “a perfect storm of conditions” caused by the lack of visual cues on which drivers customarily rely to make decisions. App. 203, ln. 14– 204, ln. 25; see also App. 211, ln. 22–212, ln. 16. (explaining drivers perceive a hazard and have time to react) & 215, ln. 20–216, ln. 3 (same). After the gas station surveillance video of the collision was played, Dr. Borzendowski observed that the truck “definitely does not appear to swerve[,]” and any reduction in speed was “not really detectable in the video.” App. 208, lns. 4–10. These observations formed her opinion that it did not appear Mr. Nordan ever appreciated the fact that Victim’s moped was stationary in the road. App. 216, lns. 4–7.

* * *

Plea Counsel assisted Mr. Nordan in deciding whether to plead guilty by placing Mr. Nordan and his mother in a conference room with the file and telling him he would plead him guilty or go to trial, “whichever one he wanted[.]” App. 101, ln. 14–102, ln. 23. When asked about his review of the file, Mr. Nordan told the PCR Court, he had “no idea” what he was doing. App. 233, lns. 1–5 (“Q. Have you ever seen a MAIT report before? A. I do not know what that is.”). Instead, Mr. Nordan told Plea Counsel “on numerous occasions that [he] had confidence -- 100 percent confidence in his judgment[.]” and he relied on Plea Counsel’s advice he should plead guilty. App. 233, lns. 9–17.

As for Plea Counsel’s investigation of the facts, he did not hire an accident reconstruction expert or a human factors expert. App. 116, lns. 5–19. Nor did he review the scene of the collision at the same time of day to determine what lighting conditions would have been like that morning. App. 117, ln. 25–118, ln. 8. The only weight Plea Counsel gave to the fact Victim was stationary on the moped for approximately 22 seconds after the light turned green, was a limited investigation into the possibility Victim died from other causes—a theory bolstered by the fact Victim tested positive for marijuana and a .18 blood alcohol level. See App. 118, lns. 12–22. However, Plea Counsel soon abandoned this inquiry based on the mistaken belief Victim’s death was attributable to a head injury. Compare Hr. Tr. 116, ln. 20–117, ln. 16, with 123, lns. 12–14 (“Q. So he -- the primary, what killed him was cardiac arrest? A. Right”); see also App. 122, ln. 24–123, ln. 7 (death certificate reported cardiac arrest). Plea Counsel did not retain an expert to determine whether Victim suffered cardiac arrest before or after the collision, and conceded he “ha[d] no idea[.]” whether Victim suffered cardiac arrest as a result of the collision. App. 123, lns. 8–17.

Plea Counsel testified the “one witness [he] wish[ed] [he] would have talked to[.]” was a bartender who had given a statement she received a phone call from the Victim the night of the

collision and that the State claimed saw Mr. Nordan that evening. App. 132, ln. 23–133, ln. 21. Plea Counsel “didn’t see the need to [interview her] because all she had was a phone call [with the Victim]. There was nothing in there about her seeing [Mr. Nordan] in there drinking and, in fact, when you compared that with the bartender from the Wild Hare, the bartender from the Wild Hare didn’t see him drinking.” App. 133, ln. 22–134, ln. 7. When pressed, Plea Counsel conceded this un-interviewed witness, the last person to speak to the Victim, could have had exculpatory information and should have been interviewed, if for no other reason than for possible impeachment at trial. App. 134, ln. 23–135, ln. 25 (“A. In hindsight I probably should have, yes.”). Plea Counsel also agreed his failure to speak to this witness left him unable to challenge the Solicitor’s assertion the witness would swear she saw Mr. Nordan drinking:

Mr. Harpootlian: Okay. You think that affected -- I mean, you heard what the Solicitor said at the plea.

Mr. Simmons: Yeah.

Mr. Harpootlian: You don’t think it would be important for you to be able to impeach that even at the plea?

Mr. Simmons: Yeah.

Mr. Harpootlian: Okay.

Mr. Simmons: And at that point in time I think that what I should have done was withdraw the plea and then get that straightened out with the solicitor’s office and actually contact her.

Mr. Harpootlian: Okay.

Mr. Simmons: But you’re right. I didn’t do that.

Mr. Harpootlian: And you would have -- you should have withdrawn the plea in your judgment?

Mr. Simmons: Yeah, I should have.

App. 136, lns. 1–16; see also App. 157, lns. 8–13. Nevertheless, Plea Counsel went forward.

At the PCR hearing, Plea Counsel conceded he was ineffective in pleading Mr. Nordan guilty when his client did not know whether or not he was guilty. App. 142, Ins. 5–10; see also App. 147, Ins. 2–5 & 148, In. 23–150, In. 2. When confronted with Mr. Nordan’s inability to remember and Dr. Fuller’s medical opinion concerning a likely blackout, Plea Counsel agreed Mr. Nordan’s inability to know whether he was, in fact, guilty resulted in a failure to make a knowing and intelligent waiver of his rights. App. 137, Ins. 2–8. As Mr. Nordan explained:

Mr. Harpootlian: Do you know whether you’re guilty or not?

Mr. Nordan: The whole time I’ve said I don’t like using the word “guilty” because I don’t know if I did it or not.

Mr. Harpootlian: And that’s because you have no memory of it?

Mr. Nordan: Correct.

Mr. Harpootlian: Did you tell Mr. Simmons that?

Mr. Nordan: Correct.

App. 227, In. 3–228, In. 1. When asked to explain his responses during the plea colloquy, Mr. Nordan indicated a lack of comprehension at the plea:

Mr. Nordan: Beforehand I was told to kind of -- I forget the exact words, but something along the lines of “follow my lead”, and a lot of times I looked to my left for -- I was getting a nodding of “yes” or a nodding of “no” and that was the answer that I was taking.

App. 228, Ins. 4–8. Even before Mr. Nordan took the stand, Plea Counsel had already conceded he should not have pled his former client guilty. App. 137, In. 21–138, In. 8; 149, In. 11–150, In. 2. Plea Counsel knew his client was taking very powerful drugs, specifically tramadol, during his plea, that he had taken twice the maximum dose, and conceded he should not have allowed Mr. Nordan to take the plea in that condition. App. 147, In. 23–148, In. 24 (“Q. -- and you did not interrupt the judge. Was that -- were you ineffective for not interrupting the judge? A. Probably

so.”) & 150, Ins. 3–6 (“Q. ... you should have taken further steps to make sure the drugs didn’t affect his judgment? A. Correct.”).

Plea Counsel was also confronted with legal precedent which, had he been aware of it at the time he represented Mr. Nordan, would have caused him “to hesitate and investigate further,” and could have made a difference in the outcome of the case. App. 148, ln. 25–149, ln. 10. When asked whether his advice to Mr. Nordan was founded in legal research concerning the elements of reckless homicide, Plea Counsel testified he researched the matter but did not recall any precedent concerning a defendant’s inability to remember what happened at the scene and conceded it would have been “important” if he had found such a case. App. 112, ln. 20–113, ln. 5. The undersigned presented Plea Counsel with a copy of In Interest of Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141 (1991), a case concerning a motorist charged with reckless homicide having no memory of what occurred because of injuries suffered during the collision and the only evidence being the physical evidence from the collision itself. App. 113, ln. 7–114, ln. 4. Plea Counsel conceded he never reviewed Stacy Ray A. prior to Mr. Nordan’s plea and eventually conceded the facts in Mr. Nordan’s case were *more* favorable than those cited by the Supreme Court’s decision reversing Stacy Ray A.’s conviction. App. 119, lns. 11–21.

In Plea Counsel’s view, his ineffectiveness was prejudicial to Mr. Nordan such that he believes his former client deserves a new trial. App. 171, lns. 8–14. In a detailed 28-page Opinion, the PCR Court agreed.

ARGUMENT

When Randall Houston Nordan left the Marine Corps., he did so under the care of doctors who placed him on a powerful cocktail of medications designed to treat an injury he suffered while in the service of his country. There is no dispute these medications can result in a blackout, which

is precisely what happened to Mr. Nordan on the night in question. Instead of diligently investigating the facts and researching the law, Plea Counsel pled Mr. Nordan guilty of a crime he had no recollection committing based on the misapprehension that civil negligence principles applied to the charge of criminal recklessness. Further compounding these errors, Plea Counsel allowed his ill-advised client to plead guilty while under the influence of the very same drugs that caused his blackout; drugs a medical expert explained rendered him unable to make a serious life-altering decision.

To establish a claim for ineffective assistance of counsel, a PCR applicant must prove (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) the deficient performance prejudiced the applicant's case. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). When a PCR claim attacks the voluntary and intelligent character of a plea entered on advice of counsel, the applicant must demonstrate counsel's representation (1) fell below an objective standard of reasonableness and (2) there is a "reasonable probability" claimant would have insisted on a trial instead of pleading guilty. Id. (citing Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." See Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998).

The PCR Court held Mr. Nordan was denied effective assistance because Plea Counsel (1) allowed his client to take the plea impaired, (2) failed to appreciate the State's inability to demonstrate each element of the offense, and (3) conducted no meaningful investigation of the facts or the law. See App. 344-52. The court further held that Plea Counsel's performance was prejudicial because, but for these errors, counsel (1) would have withdrawn the plea until his client was no longer impaired or sought advice from a medical expert, (2) realized he was legally unable

to allow his client to take a plea, and (3) investigated factual and legal issues that would have given rise to a defense. See App. 352–53. This conclusion—that Strickland prejudice exists—has not been challenged here. As for the Opinion’s ineffective-assistance holdings, they rely on a detailed factual record developed during the PCR hearing.

While the PCR Court’s legal conclusions are reviewed *de novo*, its factual findings are entitled to deference and must be upheld so long as there is *any* probative evidence to support those findings. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). The Opinion is well-reasoned and supported by record evidence. The State’s petition should be denied.

I. A lawyer’s failure to investigate the incapacity of an impaired client does not render the decision to plead the client guilty objectively reasonable.

When a lawyer knows his client is under the influence of medication, counsel has a duty to investigate the client’s capacity to ensure a plea is knowing and voluntary. The PCR Court held “Plea Counsel was ineffective in allowing [Mr. Nordan] to plead guilty when [he] knew his client was impaired as a result of taking the same drugs [Mr. Nordan] claimed caused him to blackout the morning of the collision.” App. 344. The State argues this is unsupported because “counsel reasonably relied on his own observations.” Pet., 6 (citing Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) and Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (Ct. App. 2011)). It suggests that because Plea Counsel “did not know or otherwise believe Respondent was impaired[,]” his decision to plead his client guilty must be reasonable. See Pet., 6–8. The State’s preferred rule turns precedent on its head and misunderstands the PCR Court’s holding.

“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Boykin v. Alabama, 395 U.S. 238, 242 (1969). Because of the gravity of such an act, a trial judge cannot accept a plea without an affirmative showing it was knowing and voluntary. Id. A knowing and

voluntary plea is one in which the defendant has a “full understanding of the consequences of his plea and the charges against him.” Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995). “An applicant may attack the voluntary and intelligent character of a guilty plea entered on the advice of counsel only by demonstrating that counsel’s representation was below an objective standard of reasonableness.” Porter, 368 S.C. at 383, 629 S.E.2d at 356 (citing Roscoe, 345 S.C. at 20, 546 S.E.2d at 419). Relying on Boykin and Simpson, the PCR Court concluded the record “supports the conclusion that [Mr. Nordan] lacked sufficient capacity to enter a knowing and voluntary plea.” App. 344. Specifically, the court cited Dr. Bartling’s testimony Mr. Nordan was “in no position to make a consequential decision” and Mr. Nordan’s testimony he had to look to Plea Counsel for assistance in answering the Plea Judge’s questions. Id.; see also App. 334–37.

The State appears to confuse the “objective reasonableness” standard with Plea Counsel’s subjective belief at the time he pled his client guilty. As this Court explained in Porter, the dispositive issue when attacking plea counsel’s assistance “is whether trial counsel rendered reasonably effective assistance under prevailing professional norms.” Porter, 368 S.C. at 385, 629 S.E.2d at 357. Here, Plea Counsel’s subjective belief whether his client was impaired is irrelevant. Cf. Pet., 6 (“Counsel did not know or otherwise believe Respondent was impaired.”). The record indicates Mr. Nordan was, in fact, impaired and Plea Counsel knew his client had taken the exact same drugs that caused a blackout the morning of the collision. Moreover, the State cannot point to any precedent sanctioning a lawyer’s decision to plead a heavily medicated client guilty without first ensuring those medications would not impair judgment.

In Ramirez v. State, Op. No. 27696, 2017 WL 56379 (S.C. Sup. Ct. filed Jan. 5, 2017) (Shearouse Adv. Sh. No. 1, at 42), the Court rejected the State’s contention here in a PCR challenging the applicant’s competency to take a plea. Both this Court and the court of appeals

held plea counsel was deficient in failing to further investigate his client's competency once he became aware of the issue through his own interactions and the report of an expert. Id. at *4–5 (citing Ramirez v. State, 413 S.C. 351, 369–70, 776 S.E.2d 101, 111 (Ct. App. 2015)). This Court affirmed the court of appeals' holding that counsel was deficient in failing to request an additional competency evaluation, and reversed on the issue of prejudice, explaining the expert's report and plea counsel's testimony "established a reasonable, if not strong, likelihood" the applicant was incompetent to take a plea. Id. at *5.

Our opinions in Jeter and Matthews [v. State], 358 S.C. 456, 596 S.E.2d 49 (2004) make it clear that when competency to enter a plea is at issue, a PCR applicant need only show there was a reasonable probability he was incompetent at the time of his plea. Once such a reasonable probability has been established, prejudice is also demonstrated.

Id. (citations omitted). Thus, while the State relies on Jeter and Lee for the proposition that Plea Counsel's subjective observations are determinative (see Pet., 6), those cases turned on an absence of facts sufficient to alert counsel of a need to further investigate. See Jeter, 308 S.C. at 233, 417 S.E.2d at 596 ("The evidence addressed at the PCR hearing was insufficient to show deficient performance on the part of trial counsel."); Lee, 396 S.C. at 322, 721 S.E.2d at 447 ("Plea counsel could not be deficient if she had no indication of Lee's mental status."). This case is distinguishable because, like Ramirez, Plea Counsel had sufficient notice to warrant inquiry.

The State's considerable reliance on the guilty plea transcript as evidence of Mr. Nordan's ability to take a plea (see Pet., 8), is misplaced. "In addressing the adequacy of a PCR applicant's guilty plea, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing." Sellner v. State, 416 S.C. 606, 611, 787 S.E.2d 525, 527 (2016)). Indeed, if the plea record alone were sufficient to assess voluntariness, there would be no reason to conduct an evidentiary hearing on PCR. Moreover, if Plea Counsel had known what was proven during the

PCR hearing, the undersigned have no doubt he would not have gone forward, as evidenced by his testimony. The error was going forward without investigating further—a lapse of professional judgment, not an act of malice. Conversely, the State’s would effectively require malice since only a lawyer that knew his client was unable to give a voluntary plea and went forward anyway would render ineffective assistance under its rule. There is no precedent for this view. The PCR Court was tasked with determining whether, based on what Plea Counsel knew at the time, it was objective reasonable to go forward with the plea and correctly determined it was not.

II. The State’s inability to prove predicate elements of the offense should have caused Plea Counsel to refrain for pleading his client guilty.

The protections guaranteed by the constitutional right to counsel include a duty whereby a lawyer must refuse to plead a client guilty who is not actually guilty. The PCR Court holds Plea Counsel’s decision to plead Mr. Nordan guilty was “flawed because there was an insufficient factual basis for the plea.” App. 344. The court reasoned that leaving the scene of an accident involving a death requires knowledge of an accident before a defendant has a legal duty to stop. App. 345 (citing S.C. Code Ann. § 56-5-1210; State v. Horton, 271 S.C. 413, 414–15, 248 S.E.2d 263, 263–64 (1978)). Reckless homicide requires driving a vehicle in reckless disregard of the safety of other. Id. (citing S.C. Code Ann. § 56-5-2910(A)). This means “a *conscious failure* to exercise due care ... or a *conscious indifference* to the rights and safety of others or a reckless disregard thereof.” Id. (emphasis original) (quoting State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997)). A culpable mental state is “a crucial ingredient” because “the gist of the charge of recklessness was that the collision could have been avoided.” App. 345–46 (quoting State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415–16 (1979)).

In light of Mr. Nordan’s inability to recall the collision, physical evidence indicating he was not operating the truck in an illegal or dangerous manner, and expert testimony explaining

why a motorist would fail to perceive the presence of a moped stopped under a green light, the PCR Court (correctly) concluded Mr. Nordan deserved a new trial. See App. 347–48. The State claims the PCR Court erred in finding no record evidence to support the *mens rea* component of the charged crimes. See Pet., 10–12. Again, the State relies exclusively on the plea transcript without addressing the PCR record. This analysis is insufficient. See § I, supra (citing Sellner). The State offers four additional criticisms that should be rejected.

First, the State complains Judge Hayes “improperly analyzed this issue in a manner that closely resembles that of a trial judge ruling on a motion for directed verdict.” Pet., 10. It is unclear and unexplained why “[t]his was an error.” See Pet., 10–11. Two ingredients are essential to a valid plea: (1) comprehension by the defendant of the charge and consequence, and (2) “that the record indicates a factual basis for the plea.” State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975); see also Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) and State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006). Relying on this foundational principle of criminal law, the PCR Court explained, “[t]his means a factual basis for each element of the charged offense.” App. 345.

While the State derides this analysis as akin to a directed verdict ruling, the Opinion draws attention to the fact that had Plea Counsel researched law and facts propounded into the PCR record, he would have understood Mr. Nordan had a substantial legal defense recognized by precedent like Rowell, Stacy Ray A., and State v. Dobson, 281 S.C. 36, 314 S.E.2d 310 (1984), which should result in a directed verdict. See App. 350–52. Nor is there anything “improper” about the PCR Court’s concern that predicate elements of a guilty plea are unmet. To the contrary, the State should not accept pleas without a good faith belief elements of the crime are met. While the State is untroubled by this here, the Solicitor was, correctly, troubled by the prospect Mr. Nordan

did not remember what occurred. This fact is memorialized in the Opinion, which quotes the Solicitor saying, “Your Honor, my only question is if there’s a *defense* of I don’t know what happened, I think we need to address that.” App. 348 (emphasis added). Plea Counsel reassured the Solicitor and Plea Judge, “[t]hat’s not where we’re going, Your Honor” (*id.*), and that reassurance was error.

Second, while the State claims the factual recitation at the plea was sufficient to support the charges, it fails to point to any evidence Mr. Nordan knew he was involved in a collision or that he acted with knowing disregard for the safety of others. See Pet., 11. The State points to claims Mr. Nordan texted personal acquaintances after the collision, but this is immaterial as Dr. Bartling explained a blackout does not mean the victim is passed out—it renders the individual unable to recall what happened while still being able to walk, drive, or use a phone. See App. 176, ln. 18–177, ln. 13. The State’s reliance on the surveillance video undermines its position because, in reviewing the video, the PCR Court concurred with the human factor’s expert that “the truck definitely does not appear to swerve, and that any reduction in speed was not really detectable in the video.” App. 338 (internal quotations omitted). The only sworn testimony concerning whether Mr. Nordan attempted to apply his brakes prior to the collision is Dr. Borzendowski’s, who testified you cannot discern whether the truck’s brake lights are lit. Compare App. 208, with App. 12 (Solicitor claiming “you also see what *appears* to be the tapping of brake lights.” (emphasis added)). These facts are all consistent with the conclusion Mr. Nordan failed to see the moped parked under the green light. See App. 216, lns. 4–7.

While these facts are significant, far more so is the absence of extrinsic evidence proving a culpable mental state *or* a defendant with a recollection able to prove the same. On this point, the PCR Court looked to United States v. Mastrapa, 509 F.3d 652 (4th Cir. 2007), where the

defendant agreed to transport bags of groceries to a hotel room when he was stopped by the police who found drugs in the bags. Id. at 654. During his conspiracy to distribute plea colloquy, and again during sentencing, the defendant admitted to driving the van and carrying bags at the request of alleged co-conspirators, but disavowed knowledge there was anything other than groceries in the bag. Id. at 655–56. The Fourth Circuit vacated the conviction because the only evidence in the record was the affidavit of the DEA agent “which likewise failed to provide evidence of *mens rea*[.]” Id. at 658. The federal appeals court also explained the sentencing judge’s reference to North Carolina v. Alford, 400 U.S. 25 (1970) did not salvage the plea because an Alford plea can be accepted “only if the defendant (1) ‘intelligently concludes that his interests require entry of a guilty plea’ and (2) ‘*the record before the judge contains strong evidence of actual guilt.*’” Mastrapa, 509 F.3d at 659 (emphasis original) (quoting Alford, 400 U.S. at 37). The PCR Court found this precedent instructive because, like Mastrapa, Mr. Nordan has never know he was “guilty.” See App. 347–48. With Mr. Nordan knowing he is guilty, any plea must be supported by extrinsic evidence on which he could rely to know he is guilty.

While the State claims it has witnesses who would testify Mr. Nordan smelled of alcohol (see Pet., 11), this is a matter in dispute. See App. 232, lns. 1–2 (“Q. Now did you have anything to drink that night? A. No, sir.”); see also App. 133, ln. 22–134, ln. 7 (bartender did *not* see him drinking) & 156, lns. 18–23 (Mr. Nordan’s father would testify he was not drunk the morning after the collision). Plea Counsel failed to interview the witnesses on which the State relies. See App. 134, ln. 23–135, ln. 25. Even assuming the State is correct (it is not), evidence of drinking, without more, does not constitute reckless homicide. See Dobson, 281 S.C. at 38, 314 S.E.2d at 311 (directed verdict required where circumstantial evidence fails to exclude other reasonable hypothesis). Thus, “[e]ven assuming Applicant had been drinking, Plea Counsel failed to

appreciate that the circumstantial evidence rule in Dodson would entitle Applicant to a directed verdict in the absence of some evidence he operated the vehicle in a reckless manner.” App. 351 (citing State v. Tucker, 273 S.C. 736, 737–38, 259 S.E.2d 414, 414–15 (1979) as an example where eyewitness testimony supported claim of recklessness).

“This is not to say that a blacked-out defendant could not plead guilty to reckless homicide when confronted with other evidence that establishes his recklessness.” App. 348. However, here, there is a dearth of evidence proving a culpable mental state. There were no witnesses to the collision; the surveillance video does not indicate swerving or an excessive rate of speed; the MAIT report indicates Mr. Nordan may have been driving no more than one mile-per-hour over the speed limit; and there are other plausible explanations for the collision short of criminal conduct. These facts should have caused Plea Counsel to refuse to plead Mr. Nordan guilty. Any other conclusion *presumes* Mr. Nordan was reckless, contrary to the criminal law’s requirement that a defendant have “an evil meaning mind [and] an evil doing hand” before liability is imposed. Rowell, 326 S.C. at 315, 487 S.E.2d at 186 (quoting State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994)); see also Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141. Absent extrinsic evidence of his guilt, Mr. Nordan’s inability to remember foreclosed the possibility of a plea and the PCR Court correctly held Plea Counsel was deficient in allowing his client’s plea to go forward.

Finally, the State argues the Opinion mistakenly focuses on “whether counsel *could have* derailed the plea” (Pet., 13), and the parties should be given “the benefit of the bargain.” See Pet., 12. This Court’s precedent holds otherwise. In Sellner v. State, a PCR applicant challenged his armed robbery plea because he did not display a weapon during the robbery. Sellner, 416 S.C. at 609, 787 S.E.2d at 526. This Court held plea counsel was deficient because “the facts presented by the State do not include the requisite corroborating evidence for armed robbery.” Id. at 612,

787 S.E.2d at 528. Since, “[t]he State also failed to introduce any evidence to address the adequacy of [applicant’s] guilty plea at the PCR hearing[.]” plea counsel rendered ineffective assistance in pleading applicant guilty. *Id.* The same holds true here.

III. Plea counsel labored under a misapprehension of applicable law and incomplete information concerning key witnesses he never contacted.

Effective assistance requires the exercise of professional judgment based on an informed investigation of the facts and the law. For many of the reasons already discussed, the PCR Court also held that Plea Counsel’s investigation of the facts and the law fell below what a lawyer owes his criminal defendant client. *See* App. 349 (citing *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007)). This conclusion turned on evidence that Plea Counsel failed to interview key witnesses and pursued the representation while laboring under a fundamental misunderstanding of the applicable law. *See* App. 349–52. The State appears to ascribe error to these conclusions based on four theories. Each should be rejected.

First, the State believes that so long as counsel does *something* on the client’s behalf, that something, no matter how ineffectual, renders counsel’s performance “effective” within the meaning of *Strickland*. For instance, the State highlights a number of the activities as evidence of an investigation it casts as “objectively reasonable under the circumstances” despite the fact that Plea Counsel failed to follow many of these leads to their logical conclusion. *See, e.g.,* Pet., 15–16 (citing Plea Counsel’s decision to consult experts concerning a blackout defense); *but see* App. App. 119, Ins. 11–21 (testifying he was unaware of *Stacy Ray A.*). This form-over-substance argument finds no support in Sixth Amendment jurisprudence.

The constitutional right to *effective* assistance of counsel recognizes that a mere right to counsel alone is insufficient to achieve the purpose for which the protection exists. Indeed, long before *Strickland*, the constitution guaranteed a right to counsel. *See, e.g., Powell v. Alabama*, 287

U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963). “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.” Strickland, 466 U.S. at 685. The constitution guarantees counsel, not because counsel in itself is sacrosanct, but because counsel plays a role “critical to the ability of the adversarial system to produce just results.” Id. When counsel is present, but not engaged on the client’s behalf, the proceeding is denigrated from a confrontation among adversaries to the sacrifice of an unarmed prisoner that engenders no confidence in the outcome. See United States v. Ragin, 820 F.3d 609, 624 (4th Cir. 2016) (sleeping lawyer denied applicant guarantee of counsel). Thus, because of counsel’s critical role, the right to counsel must guarantee the accused *effective* counsel. See Strickland, 466 U.S. at 685 (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970)).

The State’s preferred rule ignores Strickland altogether. Strickland’s ineffectiveness prong requires proof that “counsel’s performance was deficient[,]” meaning, “counsel made errors so serious” the Sixth Amendment’s guarantee of counsel was unfulfilled. Strickland, 466 U.S. at 687. Put differently, Strickland ineffectiveness requires deficient performance, not the absence of it altogether. But see United States v. Cronin, 466 U.S. 648, 659–62 (1984) (leaving open possibility of circumstances justifying presumption of ineffectiveness without particularized showing required by Strickland). Admittedly, Plea Counsel met with Mr. Nordan, spent time working on the representation, and conducted *some* legal research. But the Constitution requires something more than going through the motions. The Opinion points to specific failings by counsel, which is what Strickland requires. The State’s novel rule should be rejected.

Second, the State appears to rely on Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) for the propositions that a failure-to-investigate claim cannot rest on sheer speculation as

to the result and requires an un-interviewed witness to testify at the PCR hearing. See Pet., 15 & 17. This overstate Moorehead's rule. In Moorehead, the Court rejected a failure-to-investigate claim because “[t]here is nothing in the record to indicate that interviewing the victims would have led to any different result.” Id. at 334, 496 S.E.2d at 417. Accordingly, Moorehead merely requires some indicia in the record the outcome might be different. The PCR Court’s conclusion Plea Counsel’s factual investigation was deficient turned on its view that:

One witness, with known biases against Applicant, was never interviewed by Plea Counsel. Nor did Plea Counsel take the statement of a witness who said she saw Applicant at a bar and he was not drinking. This left Plea Counsel unequipped to challenge representations by the State that this witness had changed her story. “[D]efense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses,” such that the failure to do so could give rise to constitutional prejudice. Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986). Plea Counsel left other avenues of inquiry entirely unexplored. For example, he failed to speak to the last person who spoke to the Victim the evening before the collision. Based on the evidence presented, the Court cannot say Plea Counsel’s assistance was “reasonable considering all the circumstances.” See Strickland, 446 U.S. at 688.

App. 349. The PCR Court’s analysis of Plea Counsel’s factual investigation does precisely what Moorehead contemplates by tying uninvestigated facts to a potentially more favorable outcome.

Third, the PCR Court held Plea Counsel misunderstood the applicable law, overlooked helpful precedent, and misadvised Mr. Nordan of a litigation risk far greater than under a proper application of the law. See App. 349–50 & 353. The State claims this finding is “unsupported by the record.” Pet., 18. This is not true. Beginning on page 333 of the Appendix, under the heading “MISAPPLICATION OF LAW”, the Opinion provides a three-page discussion of Plea Counsel’s oversights while citing and quoting extensively from the hearing record. See App. 330–32. While the State might have quarreled with the Opinion’s analysis or conclusion, it is a misrepresentation to claim Judge Hayes failed to support his conclusions with record evidence, let alone where the court has done so in all caps.

Finally, the State suggests this is not a case of ineffective assistance, but simply different lawyers offering different advice. See Pet., 18–19. The PCR Court expressly recognized its role is not to second-guess strategic choices and thus reviewed this matter “with the utmost deference.” See App. 352. The State points to no finding of fact or conclusion of law to suggest otherwise.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,



Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR RESPONDENT
RANDALL HOUSTON NORDAN

February 16, 2017
Columbia, South Carolina.

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2016-001690
Case No. 2014-CP-32-2893

RECEIVED

FEB 16 2017

S.C. SUPREME COURT

Randall Houston Nordan.....Respondent,

v.

State of South Carolina.....Petitioner.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Respondent, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on February 16, 2017, served by having placed in the U.S. Mail first class postage affixed thereto, the following document to the below mentioned person:

Document: Return in Opposition to Petition for Writ of Certiorari

Served: Patrick Schmeckpeper, Staff Attorney
PCR Division
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211


Holli Miller



HARPOOTLIAN

ATTORNEYS AT LAW

RICHARD A. HARPOOTLIAN

RAH@HARPOOTLIANLAW.COM

CHRISTOPHER P. KENNEY

CPK@HARPOOTLIANLAW.COM

JAMIE L. HARPOOTLIAN*

OF COUNSEL

*ADMITTED IN LOUISIANA

OFFICE

1410 LAUREL STREET

COLUMBIA, SC

29201

MAILING ADDRESS

POST OFFICE BOX 1090

COLUMBIA, SC

29202

DIRECT CONTACT

TELEPHONE (803) 252-4848

FACSIMILE (803) 252-4810

TOLL FREE (866) 706-3997

ONLINE

HARPOOTLIANLAW.COM

February 16, 2017
VIA HAND DELIVERY

RECEIVED

FEB 16 2017

S.C. SUPREME COURT

The Hon. Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

In re: Randall Houston Nordan v. State of South Carolina
Appellate Case No. 2016-001690

Dear Mr. Shearouse:

Enclosed please find the original and eight copies of the Return in Opposition to Petition for Writ of Certiorari in the above-referenced matter. Please clock-in the original and copies and return the extra copies to my courier.

By copy of this letter, I am serving a copy of the same on opposing counsel.

Thank you for your assistance in this matter.

With warmest personal regards, I am

Sincerely,


Christopher P. Kenney

/hm

Enclosures

cc: Patrick Schmeckpeper, Assistant Attorney General