STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2017-000225

DANIEL BRIAN MONTY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S ISSUE PRESENTED

I. Whether the PCR judge erred by denied post-conviction relief where Counsel adequately advised Petitioner prior to his guilty plea after thorough investigation including the hiring of multiple expert witnesses, where the witnesses would not have been able to contradict the State's ample evidence against Petitioner, and where there is no evidence of prior false allegations made by the victim for Counsel to have introduced?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. The September 2008 term of the Dorchester County Grand Jury indicted Petitioner for criminal sexual conduct with a minor, second degree (2008-GS-18-1105). Petitioner was represented by Henry R. Schlein, Esquire ("Counsel"). Meghan Hall, Esquire, prosecuted the case. On May 31, 2013, Petitioner pled guilty as indicted before the Honorable Edgar W. Dickson pursuant to North Carolina v. Alford, 400 U.S. 25 (1975). Pursuant to the State's recommended cap of six years, Judge Dickson sentenced Petitioner to imprisonment for six years. Applicant did not appeal his guilty plea or sentence.

On September 23, 2013, Petitioner filed an application for post-conviction relief. The State made its return on January 3, 2014. An evidentiary hearing into the matter was convened on October 25, 2016, before the Honorable Diane Schafer Goodstein. Petitioner was present at the hearing and represented by Rodney Davis, Esquire ("PCR Counsel"). Assistant Attorney General Ruston Neely represented the State. Judge Goodstein denied and dismissed the application with prejudice by order of dismissal signed January 9, 2017, and filed January 11, 2017. Petitioner filed a notice of appeal on January 24, 2017. Petitioner subsequently filed a petition for writ of certiorari on September 18, 2017. This return follows.

STATEMENT OF THE FACTS

At the guilty plea hearing, the State recounted a June 5, 2008, incident in which Petitioner forced anal sex upon a twelve year-old victim. (App. p. 10, ll. 12-15). Petitioner, who was fifty-one years old at the time of his plea, had taken the victim to a pet store and a bar before returning

to his house with the victim. (App. p. 9, ll. 18-25 – p. 10, ll. 1-3). Petitioner then proceeded to teach the victim to play "strip poker," after which they both ended the game completely unclothed. (App. p. 10, ll. 6-11). It was at this point Petitioner forced anal sex upon the victim until she was able to stop the assault by suggesting she needed to use the restroom, where she was able to call her mother and have Petitioner take her home. (App. p. 10, ll. 12-15).

The next morning, the victim reported the incident to her mother, who reported to MUSC, where a rape kit was performed. (App. p. 10, ll. 16-18). While there was no DNA profile developed that would match Petitioner, evidence of anal tearing was found. (App. p. 10, ll. 18-20).

The victim, eighteen years old at the time of the hearing, addressed the court and explained the mental and emotional toll of Petitioner's assault. (App. p. 13, ll. 21-25 – p. 14, l. 1-18).

RELEVANT PCR HEARING TESTIMONY

At the October 25, 2016, PCR hearing, Petitioner testified he pled guilty on a Friday, and the trial was scheduled for the following Monday. (App. p. 54, ll. 21-25). Petitioner testified he met with Counsel roughly twenty times before the guilty plea. (App. p. 55, ll. 2-6). Petitioner testified he was originally offered a plea deal of five years, which he declined, was then offered ten years, and eventually took a six year offer on the eve of trial. (App. p. 55, ll. 12-24). Petitioner later testified he was offered a five year plea deal twice. (App. p. 65, ll. 16-17). Petitioner explained he felt twenty years or twenty years would be the same, given his age. (App. p. 56, ll. 2-8). Although the transcript from the guilty plea hearing reveals otherwise, Petitioner testified at the PCR hearing he was not informed this was a violent offense. (App. p. 5, ll. 2-4; p. 56, ll. 18-20). Petitioner did guess that the "85% offense" issue was mentioned. (App. p. 56, ll.

24-25 – p. 57, ll. 1-3). Petitioner testified he was "under duress" at the time, the source of which he later testified being a possible twenty year sentence had he proceeded to trial. (App. p. 57, l. 5; p. 58, ll. 1-3).

When questioned why he pled guilty pursuant to Alford, Petitioner testified he wanted to go to trial but did not feel he had a chance of winning. (App. p. 57, ll. 24-25). Petitioner testified it was explained to him if he went to trial and lost, he would more than likely get twenty years, which frightened him into accepting the plea offer. (App. p. 58, ll. 1-3). Despite having testified earlier at the PCR hearing he felt he had no chance of winning, Petitioner also testified he remembered telling the plea judge he felt he had a "50/50" chance at trial. (App. p. 58, ll. 18-20).

Petitioner testified Counsel left the decision to go to trial or plead guilty up to Petitioner, and it was Petitioner's decision. (App. p. 59, ll. 14-15). However, Petitioner testified, "twenty years kept ringing in my ear." (App. p. 59, ll. 15-17). When questioned whether Counsel told him he would likely be convicted, Petitioner testified he was told there was a good chance he would be convicted. (App. p. 59, ll. 20-22).

Petitioner testified Counsel went over the discovery and evidence with him "somewhat," and they went over it at Counsel's office. (App. p. 60, l. 25 – p. 61, ll. 1-2). Petitioner testified he thinks Counsel gave him a copy of all the evidence and discovery and they went over it at Counsel's office. (App. p. 61, ll. 11-15). According to Petitioner, there were no expert witnesses who could go on his behalf. (App. p. 61, ll. 7-8). Petitioner testified Counsel informed him any witnesses for the defense would be character witnesses and he did not want to go that route, but Counsel informed him the State had medical witnesses. (App. p. 61, ll. 21-25 – p. 62, ll. 1-3). When questioned whether he had discussions with Counsel about how he would handle those witnesses, Petitioner testified it went over his head if Counsel did. (App. p. 62, ll. 8-12).

Petitioner then proceeded to testify about how Counsel told him he would handle the witnesses. (App. p. 62, ll. 20-22). Petitioner testified Counsel had told him there was not much he could question the victim on because she was protected under "the minor acts." (App. p. 62, ll. 17-19). Petitioner testified he and Counsel did not discuss or review the medical records pertaining to the victim. (App. p. 63, ll. 1-8).

Petitioner testified he told Counsel about the alleged knowledge he had of prior accusations of sexual misconduct made by the victim, but Counsel advised him it was hearsay that he could not bring up in court. (App. p. 63, ll. 9-17). Petitioner testified he was not aware of any further investigation into the matter. (App. p. 63, ll. 18-21).

Petitioner testified he really did not feel that he had a defense, as he did not have helpful witnesses. (App. p. 63, ll. 24-25 – p. 64, l.1). As to the DNA evidence, Petitioner testified it was fair to indicate the DNA test was not conclusive, but did not remember going over it with Counsel. (App. p. 64, ll. 9-16). However, Petitioner testified he does not remember other discussions about the DNA report with Counsel because it was a long time ago. (App. p. 65, ll. 1-3).

Recalling the conversations from the day of the plea hearing, Petitioner recounted Counsel explaining he was ready to go to trial, but Petitioner could be sentenced to imprisonment for twenty years if they lose. (App. p. 66, ll. 10-24). Petitioner then testified Counsel told him the judge was about to leave for the day so Petitioner needed to make the decision then or go to trial Monday, and Petitioner signed under stress. (App. p. 66, ll. 18-21).

Petitioner testified he would have probably proceeded to trial if Counsel had more fully discussed how he would handle witnesses, the DNA report, the State's burden of proof, the

victim's medical records, and if he would have felt Counsel was more prepared. (App. p. 68, ll. 3-25 – p. 69, l. 1-9).

On cross-examination, Petitioner testified he pled guilty under duress but after the six year offer. (App. p. 70, ll. 8-16). Petitioner recalled telling the plea judge he did indeed want to plead and was doing so freely, voluntarily, and intelligently. (App. p. 71, ll. 10-15). When Petitioner was confronted with the fact the plea judge advised the offense was a violent offense, Petitioner testified he did not hear or understand because he "was under so much duress at the time," but did not challenge the judge said it. (App. p. 71, ll. 20-25 – p. 72, l. 1). When asked whether the only duress was the fact he was scared of getting more time at trial than he was getting in the plea deal, Petitioner testified he was scared of going to prison. (App. p. 72, ll. 3-25). Petitioner explained his fear was he would possibly get a greater sentence at trial. (App. p. 73, ll. 2-5).

Petitioner testified he discussed the lack of defenses with Counsel, but, in a way, did not feel he had a defense and was not going to be properly defended. (App. p. 73, ll. 18-25 – p. 74, ll. 1-3). Petitioner testified again there were no witnesses to speak for him. (App. p. 74, ll. 4-7). Also, Counsel informed Petitioner of his right to testify at trial, but recommended that he did not. (App. p. 74, ll. 8-10).

Counsel testified in stark contradiction to Petitioner. First, Counsel testified Petitioner's claims that Counsel lacked the money to defend him properly were incorrect. (App. p. 77, ll. 1-3). Counsel testified he received funds for a private investigator, an expert for DNA purposes, and a medical expert. (App. p. 77, ll. 5-10). Counsel explained the private investigator did everything needed to help track down some fact witnesses. The medical expert who reviewed the

records would not have been able to contradict anything, and a biologist provided him with questions so his testimony would not have been necessary. (App. p. 77, ll. 15-22).

While Petitioner had testified he had twice rejected five year plea offers, Counsel testified he recalled Petitioner wanted five years but did not recall receiving a five year offer. (App. p. 78, ll. 1-6). Counsel testified he had four offers in writing for ten years and did not recall any offers less than ten until the final six year offer. (App. p. 78, ll. 6-9). Counsel testified he explained the meaning and consequences of an Alford plea to Petitioner. (App. p. 78, ll. 18-25 – p. 79, ll. 1-7). Counsel explained to Petitioner he was facing a maximum of twenty years at trial and he expected he would receive the maximum. (App. p. 79, ll. 10-15).

Regarding Petitioner's chances at a trial, Counsel testified he advised Petitioner there was "a good chance" he would be convicted with the evidence being what it was and what it was not. (App. p. 79, l. 25 – p. 80, ll. 1-2). Counsel explain the evidence against him would be the victim and her testimony, the consistent medical evidence that corroborated her claims, the fact he brought the twelve year-old girl home with him alone, and Petitioner would basically be his only witness. (App. p. 80, ll. 1-12).

Counsel recalled having discussions with Petitioner about whether Petitioner should testify at trial. (App. p. 80, ll. 20-22). Counsel testified he advised Petitioner if he did not testify then the victim's testimony would be unrebutted and that would be the only evidence they would hear. (App. p. 80, l. 25 – p. 81, ll. 1-2). That being said, Petitioner testified the downside was Petitioner could not deny they were alone together in his home and had a prior record for, among other things, contributing to the delinquency of a minor. (App. p. 81, ll. 2-9).

Counsel's testimony also contradicted Petitioner's testimony that they did not go over the medical records. As Counsel testified, his recollection was they reviewed the entire file, Counsel

showed Petitioner everything, and they had probably twenty or more meetings. (App. p. 81, ll. 10-20). Counsel testified Petitioner seemed to understand all of their conversations and participated intelligently in those conversations. (App. p. 83, ll. 6-11). Moreover, when they went over the guilty plea, Petitioner seemed to understand the explanations of the plea as well as the rights he was waiving. (App. p. 83, ll. 12-18). Counsel testified he was prepared to go to trial and had already done all the preparation necessary, but it was Petitioner's decision to plead guilty. (App. p. 83, ll. 17-24).

Counsel testified he never told Petitioner that it was not his choice to testify. (App. p. 86, ll. 1-10). Counsel testified he did advise Petitioner his testimony would be needed to rebut the testimony of the victim for the jury to hear his denial, but also explained there was danger in testifying with his prior record. (App. p. 86, ll. 8-18). Counsel explained he cannot tell someone they cannot testify or they must testify. (App. p. 86, ll. 18-20).

Counsel reminded Petitioner's PCR Counsel that lawyers take an oath to defend people who cannot afford to pay for a lawyer, and your responsibility is to represent them just like you would a paying client, and therefore, money was never an issue with him. (App. p. 90, ll. 18-25).

Regarding the allegation that Counsel did not investigate prior allegations by the victim, Counsel testified they had no access to any information about prior false allegations made by the victim; there was no information that there were false allegations to look into. (App. p. 91, ll. 18-20). Petitioner proceeded to testify he informed Counsel that he had heard from a female friend at a restaurant there were prior allegations of somebody molesting and no charges being brought against the man, "whoever this man was." (App. p. 93, ll. 1-6). Despite the fact Petitioner referred to the alleged man as "whoever this man was," Petitioner then testified he gave Counsel the man's name, but did not testify to providing any further contact information to Counsel.

(App. p. 93, ll. 9-12). Finally, Petitioner testified Counsel recommended at the time it would not be good for him to testify and advised Petitioner he would be attacked with his prior conviction for contributing to the delinquency of a minor. (App. p. 94, ll. 13-21).

STANDARD OF REVIEW

This Court must affirm the PCR court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey, 363 S.C. at 368). This Court also gives great deference to the PCR court's credibility findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; 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 applicant 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within

the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should

be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

ARGUMENT

I. The PCR judge properly denied post-conviction relief where Counsel adequately advised Petitioner prior to his guilty plea after thorough investigation including the hiring of multiple expert witnesses, where the witnesses would not have been able to contradict the State's ample evidence against Petitioner, and where there is no evidence of prior false allegations made by the victim for Counsel to have introduced.

The PCR judge correctly found Petitioner failed to present any evidence or valid reasons why he should be allowed to depart from the truth of his statements made at his guilty plea and has failed to satisfy his burden of proving ineffective assistance of counsel on all allegations. (App. pp. 100-104). This matter involves many significant contradictions between the testimony of Petitioner and Counsel, including the review of evidence, the plea offers extended, the extent of investigations, and the procurement of witnesses. Therefore, the credibility of the parties is of great importance. Accordingly, it must first be recognized the PCR judge found Counsel's testimony to be credible regarding all allegations addressed. (App. pp. 100-104). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993). Therefore, not only has Petitioner failed to present evidence to support the allegations of ineffective assistance of counsel, but the PCR judge also found credible the testimony by Counsel which refuted Petitioner's allegations.

Petitioner argues Counsel erred in advising Petitioner to either testify at trial or plead guilty to sexual misconduct when there was no proof of guilt beyond a reasonable doubt because no DNA evidence linked him to the crime and a valid credibility claim against the victim existed due to prior false accusations of sexual misconduct. This argument is without merit and relies on several incorrect assumptions. As the PCR judge correctly observed, no evidence of false

allegations or useful fact witnesses were found. (App. p. 103). This was after a thorough investigation by Counsel which included the hiring of a private investigator, a DNA expert, and a medical expert. (App. p. 77, ll. 1-9). The PCR judge found Petitioner's testimony to lack credibility regarding Counsel's investigation, while Counsel's testimony was judged to be credible. (App. p. 103). Counsel testified there was no information that there were any prior false accusations made by the victim to look into. (App. p. 91, ll. 15-20). Petitioner testified his basis for alleging prior false allegations by the victim resulted from a conversation in which a friend at a restaurant told him about allegations of sexual misconduct being made against a man who was not charged. (App. p. 93, ll. 1-6). Petitioner referred to the man as "whoever this man was," yet testified he gave Counsel only the man's name when asked if he provided Counsel with names and contact information. (App. p. 93, ll. 1-10). Counsel credibly testified he hired a private investigator who attempted to track down all potential fact witnesses and allegations. (App. p. 103). Counsel cannot be ineffective for failing to present impeachment evidence he has no information actually exists after a thorough investigation which the PCR judge found to be adequate. (App. p. 103).

While the DNA evidence was inconclusive, the State also had consistent medical evidence corroborating the victim's allegations. (App. p. 80, ll. 4-7; p. 85, ll. 6-7). There was also the circumstantial evidence of Petitioner, who was over forty years old at the time, having taken a twelve year-old girl to a pet store, then a bar, and then back to his house with him alone, from where the victim called her mother after the assault. (App. p. 10, ll. 1-15; p. 80, ll. 4-12). While Petitioner testified Counsel did not go over the medical evidence with him, Counsel testified he went over all the evidence with Petitioner throughout the course of their numerous meetings. (App. p. 81, ll. 10-17). Again, the PCR judge found Counsel's testimony on this matter

to be credible and found Petitioner's testimony to lack credibility. (App. p. 104). Counsel also testified the defense's hired medical expert would not have been able to contradict the medical evidence. (App. p. 77, ll. 15-22). The allegations raised by the victim, circumstantial evidence, as well as the State's corroborating medical evidence supported the plea judge's finding there was substantial factual basis for Petitioner's guilty plea. (App. p. 13, ll. 5-7).

Petitioner's argument Counsel erred in advising Petitioner that he had to testify to rebut the state's case is without merit. Petitioner's reliance on State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977), is misguided as the case is not analogous to this case. In State v. Posey, this Court addressed whether a *solicitor* was permitted to comment on the failure of the defendant to call an eyewitness in a closing argument, and noted a defendant is not required to present a defense and can rely entirely on the weakness of the State's case. Posey, 269 S.C. at 502.

In this case, Counsel never required Petitioner to present a defense or plead guilty. Petitioner conceded at the PCR hearing that Counsel left the decision to plead guilty up to Petitioner. He reaffirmed, "It was my decision." (App. p. 59, ll. 11-17). Petitioner testified Counsel merely recommended the plea offer of six years and advised him there would be a "good chance" he would be convicted, which is supported by the above-mentioned evidence. (App. p. 59, ll. 20-22). Counsel also testified he informed Petitioner there was a "good chance" of a conviction and explained the likelihood that Petitioner would receive a twenty year sentence, the maximum for the charge. (App. p. 79, ll. 24-25 – p. 80, ll. 1-19). Petitioner testified his fear was he was not being properly defended and would receive twenty years if he did not take the plea offer. (App. p. 72, ll. 22-23). Petitioner testified it was his decision, "but twenty years kept ringing in my ear." (App. p. 59, 14-17). However, Petitioner told the plea judge he was satisfied with his representation. (App. p. 8, ll. 22-23). Moreover, pleading guilty to avoid a possibly

greater sentence, without more, does not render a guilty plea involuntary. Brady v. United States, 397 U.S. 742 (1970); Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992). Therefore, the PCR judge properly found Petitioner failed to satisfy his burden of proving the alleged on the part of Counsel induced his guilty plea. (App. pp. 103-104).

Not only was the decision to plead guilty freely made by Petitioner, but Counsel also left the decision to testify solely in the discretion of Petitioner. Counsel testified he discussed the possibility of Petitioner testifying at trial with Petitioner and explained to Petitioner the prior record including contributing to the delinquency of a minor would be problematic. (App. p. 80, ll. 20-25 – p. 81, ll. 1-9). However, Counsel did not only advise on the possible pitfalls of testifying at trial. The record shows Counsel also advised Petitioner that the absence of his testimony would effectively leave the victim's testimony unrebutted. (App. p. 80, ll. 24-25 – p. 81, ll. 1-2). This was sound, prudent advice given to Petitioner by Counsel. As mentioned above, a thorough investigation revealed no helpful witnesses for Petitioner on the facts of this case. Indeed, Counsel did not advise Petitioner he was *required* to present a defense, only that he would have to testify if he wanted to rebut the victim's testimony. As Counsel testified, he never told Petitioner it was not his choice to testify. Counsel reaffirmed he cannot tell someone they must or cannot testify. (App. p. 86, ll. 16-20). Rather, failure to advise Petitioner of the implications Counsel advised him of would have been unreasonable. Moreover, Counsel's advice to Petitioner regarding the pitfalls of testifying as opposed to not testifying would have been a matter of trial strategy if this case had gone to trial. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

Petitioner has failed to present any evidence that, but for Counsel's alleged deficiencies, he would have chosen to proceed to trial. Petitioner's allegations that he had turned down two previous plea offers of five years was rebutted by Counsel's testimony that he only recalled written ten year offers, and five years was the offer Petitioner had been asking for. (App. p. 78, ll. 3-9). After only receiving ten year plea offers, Counsel was completely prepared for trial until the six year offer was extended and Petitioner decided himself to plead guilty. (App. p. 83, ll. 17-24). As the PCR judge correctly held, Petitioner presented no evidence why he should be able to depart from the truth of his statements at the plea that he was pleading intelligently and voluntarily.

For these reasons, ample probative evidence supports the PCR judge's finding that Petitioner has not met his burden of proving ineffective assistance of counsel because Counsel effectively represented Petitioner, rendered sound and reasonable advice, and any alleged deficiency had no effect on Petitioner's decision to plead guilty.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2017-000225

DANIEL BRYAN MONTY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Deputy Appellate Defender Wanda H. Carter
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 2 day of February, 2018.

CHRISTIAN SAVILLE
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CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: Christian Saville
ATTORNEYS FOR RESPONDENT

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February 2, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No.: 2017-000225

DANIEL MONTY, #355627,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

CERTIFICATE OF SERVICE

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

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 2nd day of February, 2018

TAMIEKA RUSSELL-BROWN
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 02 2018
S.C. SUPREME COURT

February 2, 2018

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

RE: **Daniel Monty, #355627 v. State of South Carolina**
Appellate Case No. 2017-000225
Lower Court Case No: 2013-CP-18-1687

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/trb
Enclosures

cc: Wanda H.Carter, Esquire