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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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PETITION FOR WRIT OF CERTIORARI FROM GREENVILLE COUNTY  
Court of Common Pleas

Honorable George C. James Jr., Circuit Court Judge

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Appellate Case No. 2016-002409

Michael Weatherspoon,

Petitioner,

v.

State of South Carolina,

Respondent,

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REPLY TO RESPONDENT'S RETURN

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## INTRODUCTION

Petitioner files this Reply to Respondent's Return to Petition for Writ of Certiorari.

Petitioner based his Petition for writ of Certiorari on the following five issues:

1. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to request that the plea be stood aside or discontinued prior to its acceptance by the court due to Petitioner's clear statements that he did not understand the parameters of his plea?
2. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's *sua sponte* decision to shift the plea from a straight guilty plea to a plea made pursuant to NC v. Alford without consultation with the parties?
3. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's persistent, repetitive, and inappropriate questioning of the Petitioner in a clear attempt to get the Petitioner to change his responses?
4. Did the PCR judge err in finding that Petitioner's counsel was not ineffective for failing to make a motion for mistrial followed by a motion to bar further prosecution pursuant to the US Constitutional bar against Double Jeopardy prior to advising his client to plead guilty?
5. Did the PCR judge err in finding that Petitioner was not entitled to a belated appeal based on plea counsel's failure to file a Notice of Intent to Appeal on Petitioner's behalf pursuant to *White v. State*?

In response, Respondent contended that the Certiorari is not warranted because: 1) four of the five arguments Petitioner attempts to raise in this Petition for Writ of Certiorari are not preserved for appellate review because they were neither raised nor ruled upon by the PCR court. Respondent makes the alternative argument in the issues presented after that that even if they were preserved, Petitioner failed to meet his burden under Strickland v. Washington in showing ineffective assistance and prejudice. Petitioner submits that the prejudice prong is the main thrust of these arguments by Respondent.

Petitioner asserts that Respondent is incorrect and that these issues were in fact raised and ruled upon by the PCR court. Additionally, Respondent's arguments against Certiorari because Petitioner failed to establish prejudice are incorrect because they completely ignore the ruling by the U.S. Supreme Court in Lee v. United States cited in the Standard of Review section of the Petition and thus, are not sufficient to defeat certiorari.

### **STATEMENT OF THE CASE**

Petitioner incorporates by reference the facts as stated in his Petition for Writ of Certiorari.

### **ARGUMENT**

Petitioner hereby incorporates all arguments submitted in his Petition for Certiorari. Additionally, Petitioner would like to address Respondent's arguments that Certiorari is not warranted because: 1) Four of the five arguments Petitioner attempts to raise in this Petition for Writ of Certiorari are not preserved for appellate review because they were neither raised nor ruled upon by the PCR court. Petitioner will address each of the four arguments in order.

As to Petitioner's first issue, that 'the PCR judge erred in finding that the Petitioner's plea counsel was not ineffective for failing to request that the plea be stood aside or discontinued prior to its acceptance by the court due to Petitioner's clear statements that he did not understand the parameters of the guilty plea', Petitioner submits that the issue was raised through direct and cross examination of the witnesses by Petitioner's PCR counsel, Mr. Johnson, and argued in closing to the PCR Court and that the PCR Court

specifically ruled on the issue both orally on the record at the hearing as well as in the written order. In direct examination by Mr. Johnson, Petitioner testified that he did not know what a plea pursuant to Alford was. App. p. 54, ll. 11-15. Petitioner also testified that he never discussed an Alford plea with his trial counsel and that the plea was never stopped in order to allow him to discuss these new developments with his attorney. App. p.54, l. 25, p. 55, ll. 1-6. As is cited in the Petition, Petitioner's trial counsel testified that he did not discuss what an Alford plea was because he did not know the plea was going to become an Alford plea. App. p. 83, ll. 5-25. Petitioner's PCR counsel then specifically argues the issues relating to the surprise Alford plea and the clear lack of voluntariness of the plea as a result. App p. 92, ll. 10-25, p. 93, ll. 1-3. Finally, the PCR court discusses the issue of the voluntariness of the plea with counsel for the state at the PCR hearing. App. P. 94, ll. 15-24. Further, the court expresses concern about the free and voluntary nature of Petitioner's plea. App. p. 95, ll. 15-22.

The court made a ruling on the issue of Petitioner's lack of understanding as to the nature of an Alford plea on page 6 of the written order dismissing Petitioner's PCR application. The PCR court ruled that, despite not knowing what an Alford plea was, the plea was still knowingly and intelligently entered because the court interpreted from the record that the Petitioner wanted this good sentencing deal. App. p. 109.

When the court examines each of these areas of the record, it will be clear that the issue presented in Petitioner's first question presented is more than adequately raised, argued, and ruled upon in order to be preserved to be reviewed by this court.

As to Petitioner's second issue, did the judge "err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's *sua sponte* decision to shift the plea from a straight guilty plea to a plea made pursuant to NC v. Alford without consultation with the parties", once again, as referenced as above, Petitioner's PCR counsel Mr. Johnson elicited testimony in direct as well as cross-examination that both Petitioner and his trial counsel were unaware that the trial judge was going to shift the plea to a Alford plea. The areas cited above illustrate this as well. Petitioner testified at the PCR hearing that no one stopped the plea at any time. App. p. 54-55, ll. 25-6. Petitioner's trial counsel testified that there was no discussion of an Alford plea by any party or the Court before the plea because he was unaware such was even a possibility until it happened during the plea. However, trial counsel did not testify that he objected to this despite acknowledging that his client could not know what an Alford plea was. App. p. 83-84, ll. 6-6; App. p. 85, ll. 8-17. The transcript of the plea confirms that no objection was even attempted. Petitioner's PCR counsel argues that the plea was involuntary because Petitioner did not know what an Alford plea was. App. p. 99, ll. 6-13. The ineffective assistance of trial counsel for failure to protect his client from this where he testified he was well aware and chose to do nothing is clearly implicated and inexorably intertwined with this argument and is thus preserved. This is further demonstrated by the fact that the court addresses this issue in its order by affirmatively finding that trial counsel "would have been ineffective had he tried to have the plea vacated based on his client's ignorance of Alford." App. p. 109. This issue is preserved for appellate review.

Third, as to Petitioner's third question presented, 'did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to object to the plea court's

persistent, repetitive, and inappropriate questioning of the Petitioner in a clear attempt to get the Petitioner to change his responses?’, Petitioner asserts that this issue is also preserved for appeal. During his direct testimony at the PCR hearing, Petitioner testifies that he tried to tell the Judge during his plea that he still believed a jury would not find him guilty based on the facts that were to be presented. App. p. 53, ll. 21-25, p. 54, ll. 1-4. The transcript of the plea corroborates the Petitioner’s testimony at the PCR hearing. In fact, the Petitioner specifically states in response to a question by the court as to whether he thinks the jury would agree with the State, “I would say, no, Your Honor, but that’s just my opinion”. App. p. 20, ll. 2-10. Additionally, the Plea Court’s questions of the Petitioner are so persistent that its last question misstates the proper standard for a NC v. Alford plea, saying “...but I’m asking you is there a reasonable – is it reasonable that a jury could agree with that?” to which the Petitioner finally says “I guess so.” App. p. 22, ll. 8-11. The problem is, the standard is whether the Petitioner agrees that the State has enough evidence to present that it makes his conviction at trial a substantial likelihood. Clearly the Petitioner would not agree with this standard. Finally, the PCR Court in its written order specifically rules that “there is absolutely no credible evidence that the applicant would not have pled guilty had he known exactly what an Alford plea was” and then the Court cites Kolle v. State. App. p. 109. However, it is Petitioner’s position that this ruling is clearly erroneous. The court’s ruling flies directly in the face of copious amounts of evidence in the record and the testimony of witnesses at the PCR hearing that the Petitioner wanted to go to trial and believed that he would be successful at trial. It is not enough that the plea court, the PCR court, and his attorney believed that he was getting a good deal. The only issue here was whether the Applicant believed that he wanted to go to trial. It is only after the plea court’s

repeated questions of the Petitioner to change his answers to the questions presented that the plea court barely got the plea through. As is argued in the Petition for Writ for Certiorari, the standard is not whether or not it was a good idea to continue to go to trial but only whether or not it was the Petitioner's choice to plead guilty or go to trial. Once again, Petitioner's trial counsel never denied at the PCR hearing that he never objected to, or tried to stop, the court's repeated questions regarding his opinion that the state could prevail at trial. Trial counsel did nothing to protect his client that he clearly heard state to the court that he could prevail at trial. It is clear and undenied by trial counsel that he felt it was more important for this plea to go through than to protect his client's free will. Therefore, the issue is preserved for appellate review.

Finally, as to Petitioner's fourth question presented, "[d]id the PCR judge err in finding that Petitioner's counsel was not ineffective for failing to make a motion for mistrial followed by a motion bar further prosecution pursuant to the US Constitutional bar against Double Jeopardy prior to advising his client to plead guilty?", as is argued in the Petition for Writ of Certiorari, while the Petitioner's PCR counsel did not specifically argue this issue to the PCR court, the court thought this issue had clearly been raised because the PCR court makes a point to specifically address this in its written decision. App. p. 108. As this appellate court is clearly aware, a specific finding by the lower court in a written order is always appealable whether the attorneys specifically addressed it in a hearing or not.

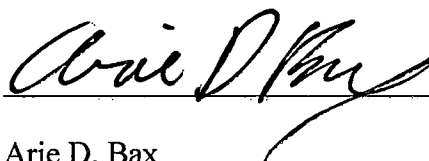
To address the Respondent's general allegation that the Petitioner has not established prejudice per Strickland v. Washington, the Petitioner would assert that the Respondent is incorrect as all the foregoing arguments demonstrate prejudice in both Lee v. United States as well as Kolle v. State indicate that prejudice is shown by proof that, but for errors of the plea

attorney, Petitioner would have gone to trial. Petitioner need not show that he would have been successful or better off continuing with his trial. Petitioner asserts that the plea transcript along with the testimony at the PCR hearing clearly demonstrates that while his trial attorney and trial judge believed this to be a good deal, he believed that he could prevail at trial. Thus, the issue clearly before the court in this case is whose decision do we continue to hold as controlling, a defendants' or the other players in the justice to system on whether to plea or go to trial.

### CONCLUSION

For all the reasons state above, Petitioner once again requests that the Court grant Petitioner's Writ for Certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Arie D. Bax", is written over a horizontal line.

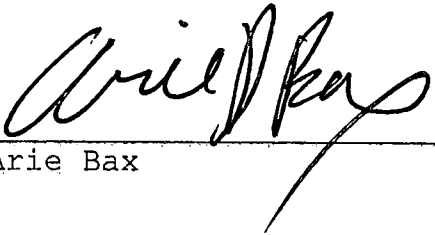
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STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )

**CERTIFICATE OF SERVICE**

I, ARIE BAX, being first duly sworn, says that I am the attorney, with the The Bax Law Firm, PA, located at 2 Merchants Lane, Suite 210, Beaufort, South Carolina; that on the 5th day of February 2018, I delivered via certified mail a copy of Reply Brief in RE: Michael Weatherspoon, 2016-002409, to the following named recipient at this address, to wit:

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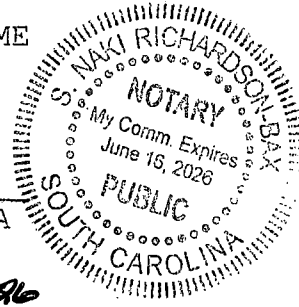
  
\_\_\_\_\_  
Arie Bax

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 1st DAY OF February, 2018

  
\_\_\_\_\_  
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 6/16/2026



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