

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO Horry COUNTY  
Court of Common Pleas  
Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2017-000840

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James Junior Little,

v.

State of South Carolina

**RECEIVED**  
MAY 08 2018  
Petitioner, S.C. SUPREME COURT

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **RESPONDENT'S ISSUES PRESENTED**

**Is there evidence of probative value to support the post-conviction relief court's finding Petitioner's guilty plea was knowingly and voluntarily entered into upon the competent advice of counsel where plea counsel properly informed Petitioner of his sentence exposure and where the plea was in no way conditioned on any information regarding the preferences of the victim's family?**

## STATEMENT OF THE CASE

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the February 2014 term of the Horry County Grand Jury for leaving the scene of an accident resulting in death (2014-GS-26-00436). William Edward Chrisco, Esq. represented Applicant, and Monica Wooten, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On November 12, 2014, Applicant pled as indicted pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The Honorable Larry B. Hyman sentenced Applicant to imprisonment for a term of 10 years.

Applicant filed a timely notice of appeal. By order issued December 22, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal for failure to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. State v. Little, S.C. Ct. App. Order filed Dec. 22, 2014. Applicant thereafter filed a letter explaining the basis for his appeal. Liberally construing the letter as a petition for rehearing, the Court of Appeals denied the petition by order filed February 19, 2015. State v. Little, S.C. Ct. App. Order filed Feb. 19, 2015. The Remittitur was issued on March 31, 2015.

Applicant filed his application for post-conviction relief on October 20, 2015 (2015-CP-26-7570). He alleged the following grounds for relief in his application:

1. "No Autopsy"
  - a. "questionable cause of death"
2. "Involuntary Guilty Plea"
  - a. "Counsel did not explain elements of crime to defendant"
3. "Ineffective Assistance of Counsel"
  - a. "No investigation, Counsel allowed defendant to plea to a crime he did not commit"

Respondent made its return on February 22, 2016, and an evidentiary hearing into the matter was convened on February 7, 2017, before the Honorable Michael G. Nettles. Applicant was present

at the hearing and represented by James K. Falk, Esq. Shelby Winters, student-practitioner of the Charleston School of Law, and J. Rutledge Johnson, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and William Edward Chrisco, Esq., also testified. By written order dated March 1, 2017, and filed March 6, 2017, Judge Nettles denied and dismissed the application.

This appeal follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see also Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (great deference to a judge's findings where matters of credibility are involved). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, \_\_\_ S.C. \_\_\_, 810 S.E.2d 836, 389 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. 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, 59 (1985).

## ARGUMENT

### **THE PCR COURT PROPERLY DENIED RELIEF BECAUSE CREDIBLE EVIDENCE EXISTS ON THE RECORD TO SHOW PETITIONER HAD A FULL UNDERSTANDING OF THE CONSEQUENCES OF HIS PLEA AND THE CHARGES AGAINST HIM, AND WAS COMPETENTLY ADVISED PRIOR TO HIS ARRAIGNMENT AND PLEA**

The PCR court's Order of Dismissal meets the "any evidence" standard because the record provides credible testimony from Counsel refuting each of Petitioner's allegations. Petitioner argues the court erred because (1) Counsel allegedly gave him the impression he would receive a time-served sentence, and (2) Counsel "allowed him" to plead guilty without discovering the intent of the victim's family. Petitioner's argument is without merit and the petition for writ of certiorari should be denied.

On July 10, 2013, the victim bicyclist swerved to avoid Petitioner's red Chevrolet Cavalier as it failed to yield right-of-way, fell from his vehicle, and suffered blunt force brain trauma; the victim died within 48 hours. (Appx. 7-8). Numerous witnesses saw the accident, Petitioner's manager provided a statement to law enforcement that Petitioner was nervous and upset that day. (Appx. 7-8). Petitioner's girlfriend gave a statement that Petitioner admitted that he hit someone, "but didn't stop due to not having a valid driver's license at that time." (Appx. 8, ll. 18-22).

At the plea proceeding, the plea court informed Petitioner that his charges carried up to 25 years, and Petitioner affirmed that Counsel explained the offense and potential sentence. (Appx. 3, ll. 7-14). Petitioner denied he was promised anything to induce him to enter his plea. (Appx. 10-11). Though Petitioner pled pursuant to Alford, he told the plea court in mitigation that had he "known or even thought that the gentleman had gotten hurt, I would have stopped." (Appx. 18, ll. 24-25). The Court said nothing of the victim's family's remarks, but referred to

Petitioner's prior record as "horrible" immediately before sentencing. (Appx. 19, ll. 12-19).

At the evidentiary hearing, the only evidence offered in support of Petitioner's "time-served" allegation was Petitioner's own testimony. Petitioner claimed that Counsel told him the victim's family was satisfied by his lengthy pre-trial incarceration, and that they did not have any interest in him serving any further jail time. (Appx. 49-50). Notably, Petitioner also conceded he understood the offense of leaving the scene of an accident and its elements. Counsel refuted the allegations point by point. Counsel testified he only told Petitioner the plea was straight-up and he could get up to 25 years. (Appx. 67, ll. 4-6). Counsel denied there was any discussion about what the victim's family wanted in the case. (Appx. 67, ll. 11-20). Counsel specifically denied ever mentioning the possibility of time-served and recalled Petitioner indicated he did not wish to go to trial as a matter of course:

I never mentioned time served. I say, you can get up to 25 years, it's a straight up plea. And he says that he wasn't guilty. I said, so you want a trial. And then he said, well, no, I don't really want a trial. And I said, well, I said, there's no purgatory here, that you got to go one way or the other.

(Appx. 69, ll. 3-8). The PCR court, with the opportunity to observe both Petitioner and Counsel, found Counsel's testimony credible, and Petitioner's testimony not credible. (Appx. 82). The appellate court is bound by its standard of review to respect that finding, especially in the utter absence of any evidence to contradict the PCR court's finding. Thompson v. State, Op. No. 27785 (S.C. Sup. Ct. filed March 21, 2018) (Shearouse Adv. Sh. No. 12 at 23) (deference to credibility findings regarding witnesses who appear before the PCR court).

Petitioner argues he could not have knowingly and voluntarily entered his plea without knowing the victim's position on sentencing. First, Petitioner cites to no authority to support that specific requirement, nor is Respondent aware of any. To the contrary, all that is required for a plea to be knowingly and voluntarily entered is that the defendant have a full understanding of

the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). That involves an inquiry into the charges, the facts of the case, the maximum potential sentence, the constitutional rights waived, and certain specific questions to foreclose the possibility of coercion or incompetency. Id., 339 S.C. at 34, 528 S.E.2d at 421. The cases cited by Petitioner do not support his assertion, but rather reflect grants of relief for affirmative misadvice as to parole,<sup>1</sup> affirmative misadvice as to the maximum possible sentence,<sup>2</sup> and a breach of a plea agreement.<sup>3</sup> In any event, any such requirement would be utterly unworkable, and would only serve to require as a matter of law that defense attorneys take the stand on PCR to articulate the obvious strategic consideration that contacting the victims or the surviving family is a risky proposition that may only stoke a likely adverse party, to the considerable detriment of the defendant.

Second, Petitioner's argument is not preserved for appeal. "A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); State v. Carlson, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) At the PCR hearing, Petitioner alleged and testified that he was misadvised as to the sentence he should expect and as to what the victims wanted. (Appx. 41, ll. 14-20; pp. 49-50). Now, on appeal, Petitioner seizes upon Counsel's testimony refuting that claim to raise the subtly different allegation that Counsel was deficient by failing to be aware of the victim's wishes at all. This Court should recognize the pivot and dispense with it pursuant to its prior holdings. Altogether, Petitioner offered little in support of his application but his own, self-serving testimony held to be not credible by the PCR. The total record more than meets the "any evidence" standard, and the PCR court's denial of relief should therefore be affirmed.

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<sup>1</sup> Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

<sup>2</sup> Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991).

<sup>3</sup> Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988).

**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
S.C. Bar No. 101260  
Assistant Attorney General

By:   
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*8 May*, 2018

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In the Supreme Court

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CERTIORARI TO HORRY COUNTY  
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Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2017-000840

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**PROOF OF SERVICE**

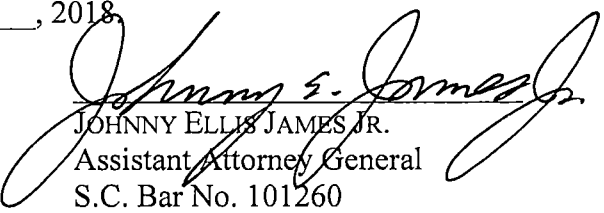
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I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esq.  
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 8<sup>th</sup> day of May, 2018.

  
JOHNNY ELLIS JAMES JR.

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**RECEIVED**

MAY 08 2018

May 8, 2018

S.C. SUPREME COURT

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

**RE: James Junior Little v. State of South Carolina**  
**Appellate Case No. 2017-000840**  
**Lower Court Case No. 2015-CP-26-7570**

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,

Johnny E. James Jr.  
Assistant Attorney General  
S.C. Bar No. 101260

JEJ/mm  
Enclosures

cc: David Alexander, Esquire