

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO DORCHESTER COUNTY  
Court of Common Pleas  
Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2017-002021

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RANDAL WILLIAM BENTON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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OCT 17 2018

S.C. SUPREME COURT

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**The PCR court properly found Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to properly advise Petitioner of the evidence against him prior to his abandoned Alford plea where Petitioner has not alleged with any specificity what evidence Counsel did not go over with him, where Petitioner conceded he had been over the evidence with Counsel but just “wouldn’t say every bit of it,” and where the only testimony of evidence not seen by Petitioner pertained to post-mortem photographs of his wife taken after he murdered her which Petitioner himself chose not to view .....10**

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## RESPONDENT'S ISSUE PRESENTED

**Did the PCR court properly find Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to properly advise Petitioner of the evidence against him prior to his abandoned Alford plea where Petitioner has not alleged with any specificity what evidence Counsel did not go over with him, where Petitioner conceded he had been over the evidence with Counsel but just “wouldn’t say every bit of it,” where the only testimony of evidence not seen by Petitioner pertained to post-mortem photographs of his wife taken after he murdered her which Petitioner himself chose not to view, and where Counsel was in no way responsible for the plea judge’s refusal to accept the plea?**

## STATEMENT OF THE CASE

### Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. During its January 2011 term, the Dorchester County Grand Jury indicted Petitioner for murder (2010-GS-18-1675). John M. Loy, Esquire (“Counsel”), represented Petitioner. Russell D. Hilton, Esquire, and Barney Giese, Esquire, prosecuted the case. Petitioner originally appeared on January 6, 2012, before the Honorable Diane Schafer Goodstein to enter a guilty plea pursuant to Alford v. North Carolina, 400 U.S. 25 (1970). There was to be a negotiated sentence of imprisonment for forty years. Judge Goodstein refused to accept Petitioner’s plea when Petitioner, despite earlier claiming to have reviewed the evidence against him with Counsel, responded “I wouldn’t say every bit of it,” when asked whether he had been over “every bit” of the evidence. App. p. 27, ll. 2-7. This statement followed the Solicitor’s recitation of the facts.

Petitioner later proceeded to a jury trial before the Honorable Stephanie P. McDonald. Counsel, as well as Michelle R. Suggs, Esquire, represented Petitioner at trial. The jury found Petitioner guilty as indicted. On February 9, 2012, Judge McDonald sentenced Petitioner life imprisonment without parole.

Petitioner filed a timely notice of appeal. Breen R. Stevens, Esquire (“Appellate Counsel”), of the Office of Appellate Defense, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). In his Anders brief, Appellate Counsel argued the trial court erred in admitting a hearsay statement of the decedent. On October 30, 2013, the South Carolina Court of Appeals dismissed Petitioner’s appeal and granted Appellate Counsel’s motion to be

relieved. State v. Benton, Op. No. 2013-UP-400 (Ct. App. 2013). The remittitur was issued on November 18, 2013.

On May 23, 2014, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on May 18, 2016, before the Honorable Benjamin H. Culbertson. Petitioner was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General J. Clayton Mitchell, III, represented the State. Judge Culbertson denied and dismissed the application with prejudice by an order of dismissal filed September 20, 2017.

Petitioner filed a timely notice of appeal on September 28, 2017. Petitioner then filed a petition for writ of certiorari on June 1, 2018. This return follows.

#### **STATEMENT OF THE FACTS**

Petitioner was convicted of murder after shooting his unarmed wife (“Victim”) eight times in a restaurant parking lot. App. p. 129, ll. 5-16; p. 147, ll. 3-9; p. 267, ll. 3-6. Petitioner continued shooting Victim after his first shot brought her to the ground, paused to threaten the multiple eyewitnesses and order them back inside the restaurant, then proceeded to resume shooting Victim in the back. App. p. 130, ll. 15-19; p. 147, l. 4 – p. 148, l. 5; p. 161, ll. 2-14; p. 164, ll. 9-14; p. 274, ll. 9-18; p. 275, ll. 12-15; p. 277, ll. 20-24.

Petitioner and Victim were married but had been separated for approximately six months when the murder occurred on October 30, 2010. App. p. 330, ll. 1-11. Earlier that day, Petitioner and other family members had helped Victim move belongings into a storage unit as she prepared to move. App. p. 222, ll. 1-20. Later that day, Petitioner returned to a residence of Victim’s at which they had previously lived together that day to find she was not there. Victim’s neighbor was standing outside and mentioned Petitioner had “just missed them.” App. p. 218, ll.

5-14. Victim's neighbor testified at trial Petitioner remarked, "She is probably with her damn boyfriend," and sped off in his two-tone blue and silver Chevrolet truck. App. p. 218, ll. 12-23. Petitioner, smelling of alcohol, later appeared at the back porch of Victim's condominium where her son was residing and asked if Victim could drive him home. App. p. 224, ll. 6-23. While Petitioner testified he asked Victim for a ride home because he was intoxicated and feeling strange after a recent altercation at a bowling alley, Victim's son testified Petitioner asked for a ride home claiming his truck had broken down. App. p. 225, ll. 15-19; p. 351, ll. 1-10. Victim agreed to come and drive Petitioner home but instructed her son to call her cell phone if she did not return in twenty minutes, and to call the police if there was no answer. App. p. 228, ll. 8-25.

An argument ensued during the drive as Petitioner began to angrily question Victim about whether she had been spending time with a male friend with whom Petitioner suspected she was romantically involved. App. p. 357, l. 13 – p. 359, l. 13. Victim eventually pulled over in the restaurant parking lot, where the two were seen arguing in the truck by numerous bystanders including restaurant employees. App. p. 125, ll. 18-21; p. 144, l. 22 – p. 145, l. 6; p. 164, ll. 4-8.

They exited the vehicle and continued arguing while Victim pleaded with Petitioner to leave her alone. App. p. 127, ll. 5-11; p. 146, ll. 12-25. Trial testimony indicated there was no physical struggle, only Petitioner aggressively "coming toward" Victim and Victim acting defensively, at which point Petitioner's baseball cap was knocked off. App. p. 127, l. 23 – p. 128, l. 2; p. 154, ll. 1-20. The argument persisted, and eventually employees walked outside to ask them to take the argument elsewhere. App. p. 126, l. 24 – p. 127, l. 4; p. 146, ll. 5-9.

As Victim asked Petitioner to leave her alone, he drew his gun and shot her dead. App. p. 129, ll. 2-17; p. 147, ll. 4-9; p. 164, ll. 9-14. Victim fell to the ground when she was first shot. App. p. 129, ll. 10-17; p. 161, ll. 10-14. Petitioner then threatened the employees who had

walked outside and instructed them to go back inside. App. p. 130, ll. 15-19; p. 147, ll. 4-14; p. 164, ll. 9-14. Two eyewitnesses testified Petitioner had fired three or four shots before pausing to threaten the girls and then returned to fire more shots into Victim. App. p. 147, l. 15 – p. 148, l. 5; p. 161, ll. 3-14; p. 164, ll. 11-14. All total, Victim was shot eight times including one shot through her eye and multiple shots in her back. App. p. 269, ll. 22-25; p. 274, l. 9 – p. 277, l. 24.

Police officers eventually made contact with Victim's son who feared for his mother's safety and was walking down the road with a baseball bat. App. p. 229, l. 18 – p. 230, l. 5. Victim's son gave law enforcement a description of Petitioner including what he was wearing, which matched the eyewitness descriptions, at which time officers drove him to the restaurant parking lot where his mother was killed. App. p. 230, l. 10 – p. 231, l. 1.

Petitioner was eventually apprehended at a convenience store in Alabama the next day when he called his mother from the clerk's cell phone and his mother informed the clerk he was wanted for murder in South Carolina. The clerk then pressed the panic button and law enforcement arrived to arrest Petitioner. App. p. 567, ll. 9-23. Petitioner's truck, which matched the descriptions given by witnesses and had a tag listed in NCIC as being driven by a homicide suspect, was seized, where law enforcement found Petitioner's Smith & Wesson Sigma Series 9mm pistol. App. p. 238, ll. 10-12; 246, ll. 6-10. SLED was able to verify that all four bullets recovered at the crime scene were fired from this gun. App. p. 308, ll. 9-18. SLED also found enough matching characteristics to conclude all eight of the cartridge cases recovered at the scene were fired by this gun. App. p. 308, l. 25 – p. 309, l. 3. Law enforcement also obtained a buccal swab from Petitioner, which matched the DNA on the baseball cap that fell off Petitioner's head at the crime scene. App. p. 294, ll. 20-25.

### *Rejected Guilty Plea*

Petitioner originally appeared on January 6, 2012, before the Honorable Diane Schafer Goodstein to enter a guilty plea pursuant to Alford v. North Carolina, 400 U.S. 25 (1970), with a negotiated sentence of imprisonment for forty years. App. p. 3, l. 1. At the guilty plea hearing, Counsel told Judge Goodstein he “certainly” believed the State could produce sufficient evidence to convict and establish Petitioner’s guilty beyond a reasonable doubt, and he concurred with Petitioner’s decision to plead guilty. App. p. 4, l. 20 – p. 5, l. 1.

Judge Goodstein instructed Petitioner to not answer any questions that he does not understand and to let her know if he does not understand something. App. p. 5, ll. 15-21. Moreover, Judge Goodstein explained there are many ways to “explain any one thing” and she would be happy to try to explain things in a different way if Petitioner did not understand the question. App. p. 5, ll. 19-24. Petitioner was also told to feel free to take a break and talk with Counsel at any point in the proceedings. App. p. 5, l. 25 – p. 6, l. 6.

Judge Goodstein thoroughly explained the concept of an Alford plea to Petitioner, and Petitioner affirmed he still wanted to plead guilty under Alford. App. p. 14, l. 3 – p. 15, l. 11. Petitioner asserted he wished to waive his constitutional rights in order to plead guilty. App. p. 18, ll. 11-23.

The Solicitor recited the facts of the case and described the DNA evidence, ballistics evidence, and the testimony which the State later presented at trial. App. p. 20, l. 9 – p. 26, l. 6. In fact, Petitioner testified at trial and claimed to have “blacked out” immediately before the shooting, but did not challenge anything recited by the Solicitor’s facts other than a minor point about Petitioner having smashed a picture of himself and Victim the night before the murder and

the conversation he had with Victim's neighbor. App. p. 21, ll. 7-11; p. 392, ll. 16-24. Petitioner later testified at trial the picture had been broken for days before the incident. App. p. 392, l. 23.

Nevertheless, when Judge Goodstein asked Petitioner whether those were the facts he believes the State could produce sufficient evidence to convict him and establish his guilty beyond a reasonable doubt, Petitioner replied, "I don't know, Your Honor." App. p. 26, ll. 13-17. Judge Goodstein asked again, "And are those the facts for which you believe you would be found guilty?" Petitioner then asserted, "Yes, ma'am." App. p. 26, ll. 18-20. The exchange prompted Judge Goodstein to ask why Petitioner does not know if those are the facts which he believed the State had evidence to support, and inquired whether he had been over the evidence the State had available. App. p. 26, ll. 21-25. Petitioner answered he had been over the State's evidence with his lawyer. App. p. 27, ll. 1-4. However, when asked whether he had been over "every bit" of that evidence, Petitioner answered, "No ma'am, I wouldn't say every bit of it." App. p. 27, ll. 5-7. At that point, Judge Goodstein announced:

I'm not going to take the plea. If he doesn't know the evidence and he can't tell me if he believes that that's the evidence that the State has and he's been over it and he thinks there's evidence he hadn't been over I can't take the plea. App. p. 27, ll. 11-15.

Petitioner eventually proceeded to a jury trial the next month in February 2012 before the Honorable Stephanie P. McDonald.

#### **RELEVANT PCR HEARING TESTIMONY**

At the PCR hearing convened on May 18, 2016, the court heard testimony from Petitioner and Counsel. After observing the witnesses, the PCR court found Counsel's testimony to be credible and persuasive. App. p. 592. By contrast, the PCR court found Petitioner's testimony and assertions to be not credible. App. p. 592.

*Petitioner*

Petitioner testified he met with Counsel “two or three times” prior to his abandoned guilty plea and had not reviewed all the discovery prior to his guilty plea. App. p. 522, l. 21 – p. 523, l. 5; p. 525, ll. 13-16. According to Petitioner, Counsel did not attempt to get Petitioner back in court to plead again. App. p. 523, l. 24 – p. 524, l. 15.

Petitioner voiced his disagreement with what he perceived to be the State’s characterization at trial of the broken picture of Petitioner and Victim found in Petitioner’s bedroom. As Petitioner explained, “Best I can gather ... they were trying to establish that I had destroyed a picture of my wife earlier that evening...” App. p. 535, ll. 4-18.

On cross-examination, Petitioner conceded he understood the general evidence against him including the restaurant employees who were going to testify against him as well as the gun found in his truck which matched the bullets fired at Victim. App. p. 551, ll. 1-8. Petitioner then conceded it was fair to say he had a general understanding, “maybe just not every little detail.” App. p. 551, ll. 9-11. When asked which portion of the evidence he had not reviewed before his abandoned guilty plea, Petitioner testified he was unable to “give a definite amount” or “answer to how much he did or did not study.” App. p. 550, ll. 15-25. At no time did Petitioner articulate or specify any evidence he was not apprised of prior to his abandoned guilty plea.

*Counsel*

Counsel testified he would have advised Petitioner to accept the plea deal for a negotiated sentence of forty years. App. p. 553, ll. 18-22. Counsel testified they would have discussed the plea deal in chambers and he “probably pushed pretty hard with both her and the State to get it through.” App. p. 554, ll. 1-8. Counsel recalled having a difficult time getting the plea deal into place and explained the solicitors essentially wanted to try the case and the judge did not want to

take the plea either. App. p. 555, ll. 14-20. Counsel noted there was no attempt to resurrect the plea deal contained in the transcript, but explained his best recollection of what happened was the plea judge did not want to take the plea and was not pleased with it being put forward at all, being an Alford plea to murder and a negotiated forty years. App. p. 554, ll. 1-5. Nevertheless, Counsel suspected he tried to rehabilitate the plea deal in chambers, but “[The plea judge] essentially banged the gavel and said I’m not taking this plea. We’re done.” App. p. 554, ll. 9-17. While Counsel could not specifically remember if the State held the plea open, Counsel doubted the fact, as the State wanted to try the case. App. p. 565, ll. 16-21.

Regarding Petitioner’s claim that he had not seen all the evidence, Counsel testified he suspects Petitioner was referring to the pictures from Victim’s autopsy. App. p. 554, ll. 18-22. Counsel explained he would have told Petitioner at that point in time they were not something Petitioner would want to see because, although Petitioner killed his wife, Counsel believed Petitioner still very much loved her at that point. App. p. 554, l. 22 – p. 555, l. 1. Counsel did not feel this was enough reason to pull the plea but it was enough for the judge to say that she would not accept it. App. p. 555, ll. 1-4. Counsel suggested that if he is correct, then the judge could have asked Petitioner what he had not seen and Counsel could have showed him the pictures. App. p. 555, ll. 7-9. Counsel noted that Petitioner agreed he did not want to see the photos of his deceased wife. App. p. 554, l. 23.

Counsel described the substantial evidence against Petitioner to the PCR court and remarked that any credibility Petitioner had would have been shot if he claimed he did not shoot Victim, as the State was going to be able to prove Petitioner shot Victim. App. p. 574, l. 11 –p. 576, l. 3. As Counsel explained, the plea fell through because the judge did not want to take the

plea, the State wanted to try the case, “and when Judge McDonald came to town it was first up for trial.” App. p. 555, ll. 16-20.

### STANDARD OF REVIEW

This Court gives great deference to the PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that “any evidence” of probative value to support the PCR court’s findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRPC; 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.

### ARGUMENT

**The PCR court properly found Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to properly advise Petitioner of the evidence against him prior to his abandoned *Alford* plea where Petitioner has not alleged with any specificity what evidence Counsel did not go over with him, where Petitioner conceded he had been over the evidence with Counsel but just “wouldn’t say every bit of it,” where the only testimony of evidence not seen by Petitioner pertained to post-mortem photographs of his wife taken after he murdered her which Petitioner himself chose not to view, and where Counsel was in no way responsible for the plea judge’s refusal to accept the plea.**

Petitioner argues Counsel was ineffective for failing to properly advise him prior to his *Alford* plea of the evidence the State was prepared to present against him. However, Petitioner has presented no probative evidence to support this allegation. In fact, Petitioner himself has been unable to specify just what, if any, evidence Counsel did not review with him. Petitioner’s behavior regarding his guilty plea was indicative of an individual wavering in his decision to take responsibility for his charge rather than an unadvised defendant, as evidenced by Petitioner’s initial concessions that Counsel *did* review the evidence with him and he believed the State could produce sufficient evidence to convict him of the facts alleged. App. p. 26, l. 13 – p. 27, l. 4. If anything, Counsel suspected the evidence Petitioner may have been referring to was Victim’s autopsy photographs which Petitioner chose not to see. App. p. 554, ll. 18-23.

Therefore, the PCR court correctly found Petitioner failed to carry his burden of proving Counsel was deficient or that he was prejudiced by any alleged deficiency, and certiorari should be denied.

Credibility is a pivotal factor in this PCR action because Petitioner has presented no evidence or even a description of the evidence to corroborate his testimony at the PCR hearing that he had not seen all the discovery materials at the time of his plea. App. p. 522, l. 21 – p. 523, l. 2. First, it must be recognized the PCR court found the testimony of Counsel to be both credible and persuasive. App. p. 592. By contrast, the PCR court found Petitioner’s testimony and assertions not credible. App. p. 592. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

**i. Petitioner has presented no evidence to support or corroborate his allegation and has failed to specify what evidence Counsel allegedly failed to review with him.**

The PCR court properly found Petitioner failed to satisfy his burden of proving Counsel was deficient regarding his attempted guilty plea or that he was prejudiced by Counsel’s performance. The burden of proof is on the applicant to prove his allegations in PCR proceedings. Rule 71.1(e), SCRCPP; Butler, 286 S.C. at 442. This rule is reflected in PCR case law addressing other common allegations from failing to call alibi witnesses to failing to properly investigate which requires the applicant to actually produce the evidence or testimony he alleges was not presented by his trial counsel. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (holding the Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from a witness failure to testify at

trial); See also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (holding in order to support a claim trial counsel was ineffective for failing to call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the testimony); See also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (holding an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more prepared to establish counsel was inadequately prepared). In this case, Petitioner has fallen well short of this carrying his burden as his only support for this allegation is his uncorroborated assertion at the PCR hearing that he had not seen all the evidence at the time of his plea proceeding. App. p. 522, l. 21 p. 523, l. 2.

Petitioner's testimony, again, was found to be not credible by the PCR court. App. p. 592. Furthermore, when questioned as to which portion of the State's evidence he had not reviewed at that point, Petitioner answered, "I can't, I can't really give you a definite amount or answer to how much I did or did not study." App. p. 550, ll. 22-25. Petitioner then conceded he understood the general evidence against him including the restaurant employees who were going to testify against him as well as the gun found in his truck matching the bullets that were fired into Victim. App. p. 551, ll. 1-10. Clearly, Petitioner was somehow able to recall the evidence he had been apprised of at the time, yet could not provide a single description or hint as to what evidence was allegedly withheld from him.

Furthermore, despite Petitioner's testimony at the PCR hearing that he had not viewed all the evidence before the plea, Petitioner initially told the plea judge that Counsel did review the evidence with him and he believed the State could produce sufficient evidence to convict him of the facts alleged. App. p. 26, l. 13 – p. 27, l. 4. It was only when further pressed by the plea judge as to whether he had been over "every bit" of the evidence that Petitioner answered, "I wouldn't

say every bit of it.” App. p. 26, l. 21 – p. 27, l. 7. Earlier during the plea proceeding, Petitioner had been asked how he was pleading and responded, “I guess guilty, Your Honor.” App. p. 13, l. 23. The vagueness of Petitioner’s allegation he had not seen all the evidence, in conjunction with his wavering representations to the plea judge and the hesitance with which he announced he wished to plead guilty all evidence a criminal defendant who was simply struggling with accepting the responsibility or consequences of his charges rather than a defendant whose Counsel has failed to review evidence with him.

The PCR court found Counsel’s testimony to be credible and persuasive on this issue. App. p. 593. Counsel at no point indicated he was certain what evidence Petitioner was referring to. However, Counsel did testify he suspected Petitioner was referring to the post-mortem pictures of Victim. App. p. 554, ll. 18-22. Counsel explained that while Petitioner may have killed his wife, Counsel certainly believed Petitioner still loved her at that point. App. p. 554, ll. 23-25. Therefore, Counsel recalled, he warned Petitioner about the pictures and Petitioner agreed he did not want to see them. App. p. 554, l. 18 – p. 555, l. 4. Other than this testimony about the possibility Petitioner was referring to pictures of his wife, there was no further testimony regarding the unspecified evidence which Petitioner alleges he had not seen.

Petitioner has repeatedly failed to present any evidence or corroborating testimony in furtherance of carrying his burden of proof. Counsel was clearly not deficient for failing to review evidence with Petitioner when there is no evidence Counsel ever failed to do so. Therefore, ample probative evidence from the record supports the PCR court’s finding that Petitioner has failed to satisfy his burden of proof, and certiorari should be denied.

**ii. Counsel was at no fault in the plea judge’s refusal to accept Petitioner’s plea.**

Notwithstanding the fact Counsel adequately reviewed the evidence with Petitioner,

Petitioner has also failed to establish prejudice in this case from Counsel's alleged failure to "save" the plea as Counsel recalled attempting to rehabilitate the plea offer but was unsuccessful due to both the plea judge's unwillingness at that juncture and the State's desire to try the case.

As the PCR court observed, Counsel testified credibly and persuasively that while there was no attempt to resurrect the plea deal reflected in the transcript itself, he suspects he tried to "rehabilitate" the plea deal in chambers. App. p. 553, l. 23 – p. 554, l. 10. In fact, Counsel testified he "probably pushed pretty hard with both her and the State to get the [original] offer through." App. p. 554, ll. 6-8. Nevertheless, it is Counsel's belief the plea judge never really wanted to take the plea, being an Alford murder plea for a negotiated forty years, and was not pleased about it being put forward at all. App. p. 554, ll. 1-6. As Counsel explained, "[The plea judge] essentially banged the gavel and said I'm not taking this plea ... We're done," after Petitioner stated he had not seen every bit of the evidence. App. p. 554, ll. 14-17 Not only did the plea judge not want to accept the plea, but the solicitors were apparently eager to try the case. Counsel could not specifically recall whether the State held the offer open after the failed plea attempt, but explained it was doubtful they did as "they kind of wanted to try the case." App. p. 565, ll. 16-19. As Counsel summarized, he had a difficult time getting the plea into place, and when it fell through, the solicitors wanted to try the case and the judge did not want to take the plea. App. p. 555, ll. 16-20.

Respectfully, Petitioner's reliance on Lafler v. Cooper, 566 U.S. 156 (2012), Missouri v. Frye, 566 U.S. 133 (2012), Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), and Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014) in the Petition for Writ of Certiorari is misplaced. Frye, Davie, and Bell examined cases in which plea counsels failed to communicate plea offers to defendants. There has been no evidence presented nor any allegations made that

Counsel failed to communicate any plea offers to Petitioner. Rather, there has been credible testimony from Counsel that he fought hard to obtain Petitioner's plea offer and even attempted to rehabilitate the offer after Petitioner's hesitation resulted in the plea falling through. App. p. 553, l. 23 – p. 554, l. 10. Furthermore, in Lafler, the Court was examining whether an applicant received ineffective assistance of counsel when the defendant rejected a plea offer based on counsel's erroneous advice the State would not be able to prove malice because he had shot the victim below the waist. 566 U.S. at 160. Lafler is in no way analogous to Petitioner's case as there has been no evidence or testimony to indicate Counsel misadvised Petitioner on the law or any other pertinent information. Moreover, as Counsel recalled, he encouraged Petitioner to take the plea deal Counsel worked diligently to obtain. App. p. 553, ll. 18-22.

Petitioner would ask this Court to grant certiorari on the basis of an unsupported claim that not only did Counsel fail to review evidence with him which Petitioner has yet to identify over six years after his trial, but also that it was Counsel's fault that the plea judge refused to accept an Alford plea when Petitioner himself made the unfounded representations that resulted in the plea judge rejecting his plea while the State was eager to bring the case to trial. There is ample probative evidence to support the PCR court's finding that Petitioner has not met his burden of proving ineffective assistance of counsel, and therefore certiorari should be denied.

## 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,

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10/17, 2018

In the Supreme Court

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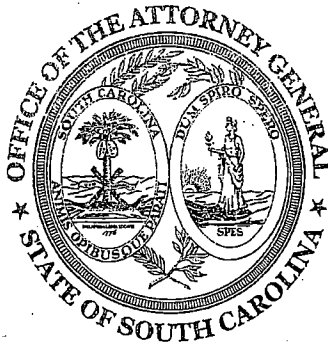
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**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

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

**Susan B. Hackett, Esquire**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211**

This 17<sup>th</sup> day of October, 2018

  
\_\_\_\_\_  
CAROLINE COLLINS  
Administrative Coordinator



ALAN WILSON  
ATTORNEY GENERAL

October 17, 2018

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OCT 17 2018  
S.C. SUPREME COURT

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

**Re: Randal William Benton v. State of South Carolina**  
**Appellate Case No. 2017-002021**  
**Lower Court Case No. 2014-CP-18-01001**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville  
Assistant Attorney General  
SC Bar No. 103272

CS/cc  
Enclosures

cc: Susan B. Hackett, Esquire (2 copies)