STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-000105

Tarus Tramaine Henry, Sr.,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

Did the post-conviction relief court correctly find counsel was not constitutionally ineffective in advising Petitioner regarding a plea offer from the State where Petitioner failed to establish he would have accepted the plea offer but for counsel's erroneous advice?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Petitioner was indicted at the December 2008 term of the Florence County Grand Jury for two counts of unlawful conduct towards a child, one count of assault and battery with intent to kill (ABWIK), and one count of arson – second degree. Petitioner was represented by Karen E. Parrott, Esquire (Counsel). On July 27-31, 2009, Petitioner proceeded to trial before the Honorable Ralph King Anderson, Jr., and a jury and was convicted as indicted. Judge Anderson sentenced Petitioner to twenty years for ABWIK and twenty years for arson, each to be served consecutively. Judge Anderson also sentenced Petitioner to ten years for each count of unlawful conduct towards a child, to be served concurrently, for an aggregate sentence of forty years.

Petitioner filed a timely appeal, and this appeal was perfected by LaNelle Cantey Durant, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division. On appeal, Petitioner raised three issues: (1) whether the trial erred in determining his statement was voluntary and should be admitted; (2) whether the trial court erred in refusing to charge assault and battery of a high and aggravated nature as a lesser-included offense of ABWIK; (3) whether the trial court erred in refusing to charge intent to burn as a lesser-included offense of arson. After briefing, the Court of Appeals affirmed Petitioner's convictions and sentences by order filed December 13, 2011. State v. Henry, Op. No. 2011-UP-562 (S.C. Ct. App. filed December 13, 2011). Petitioner filed a Petition for Rehearing, which was denied by order dated January 13, 2012. Petitioner then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Court denied the petition by order dated August 23, 2013. The remittitur was returned on August 28, 2013.

On July 17, 2014, Petitioner filed an application for post-conviction relief (PCR). The State filed a return on September 14, 2016. An evidentiary hearing on the matter was convened on January 31, 2018, at the Florence County Courthouse. Jonathan D. Waller, Esquire, represented Petitioner at the PCR evidentiary hearing. Assistant Attorney General Lindsey A. McCallister, Esquire, represented the State. In an order of dismissal filed April 16, 2018, Judge Nettles denied relief. On May 4, 2018, Petitioner filed and served his notice of appeal. Through counsel, Petitioner filed a Petition for a Writ of Certiorari on December 12, 2018. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

Scott McAleese lived in the same apartment complex as Petitioner and Victim. App. p. 107. McAleese woke up about 11 a.m. on June 23, 2008, and went outside to walk his cat. App. pp. 106, 109, 113. McAleese testified he observed Petitioner walk to his car, pull up to the dumpster, and throw something in. App. p. 109. Petitioner then parked the car and went back towards his apartment. App. p. 109. McAleese next saw Petitioner and Victim coming down the stairs from their apartment, and Victim was covered in blood. App. pp. 109-10. When McAleese asked what happened, Victim answered they got in a fight, while Petitioner said someone had tried to break in their apartment. App. p. 110. McAleese went back to his own apartment to retrieve his cell phone, and when he came back outside, he saw smoke billowing from Petitioner's apartment. App. p. 111.

Matthew Huggins, a security guard at McLeod Hospital, testified Petitioner brought Victim to the hospital, saying she had been stabbed. App. pp. 151-52, 154. Petitioner helped Victim from the car, covered with a blanket. App. p. 152. Huggins asked what happened, and neither Petitioner nor Victim would say. App. p. 152. Petitioner then left in the car when Huggins took Victim inside to the emergency room. App. p. 152.

Petitioner drove all the way to the Kershaw County Medical Center to be treated for lacerations on his hands, two of which required sutures. App. pp. 161, 164. He was treated by Nurse Amy Corbett, but he did not give a clear explanation as to why he had driven all the way to Kershaw for treatment. App. pp. 163, 167. He told Nurse Corbett he got in a fight with his wife, and one of his wife's friends attacked him with a machete. App. p. 167. Nurse Corbett was suspicious of the story and alerted law enforcement. App. pp. 164, 167.

Meanwhile, the Windy Hill Fire Department had arrived at Petitioner's apartment at 11:52 a.m. and had the fire under control by 12:07 p.m. App. pp. 117-18. Firefighter Steve McCormick opened the door to Petitioner's apartment and discovered massive amounts of blood on the floor. App. pp. 125-26. Deputy Darren Yarborough of the Florence County Sheriff's Department also went into the apartment and saw the blood on the living room floor. App. pp. 143-44. Investigator Bert Turner, an arson investigator, arrived on the scene and determined the fire had originated in the master bedroom, where the bedding materials had been set alight. App. p. 232, 239, 243. He found no evidence to suggest the fire was set accidentally. App. p. 241. Turner opined the cause of fire was arson. App. p. 245.

Officer Adam Moore collected evidence at the crime scene and took photographs. App. p. 182. He testified there were three pools of blood on the living room floor, covered by towels, and blood spread throughout the entire. App. pp. 195, 200. There was also considerable blood splatter in the living room, including some on a small dresser near the front door and a toy John Deere tractor next to it. App. p. 195. A machete was recovered underneath a pile of clothes. App. pp. 192, 201, 374. DNA from swabs of the blood pools in the living room and on the file cabinet matched Victim. App. p. 199, 281, 285. Petitioner's blood was found on various items recovered from the apartment and on cuttings from his clothes. App. pp. 280. Additionally, a can of charcoal lighter fluid was recovered from Petitioner's car, and there was blood in the car. App. pp. 319-20.

Petitioner was arrested in Kershaw County and brought back to Florence by Investigator Calvin Timmons of the Florence County Sheriff's Office. App. pp. 332, 383. Investigator Timmons read Petitioner his Miranda rights, and Petitioner gave a statement. App. pp. 385, 387-88. In addition to Timmons, Investigators Bert Turner, and Kathleen Streett were also present during Petitioner's interview and statement. App. pp. 322, 332. By the time of trial, Investigator

Timmons was no longer available, having taken a job in Afghanistan. App. pp. 159, 322. Following a Jackson v. Denno hearing, during which Counsel strenuously objected to Timmons's absence, the trial court found Petitioner's statement was freely and voluntarily given and allowed it to be introduced into evidence. App. pp. 49-84.

Petitioner was booked at 7:26 p.m. and was interviewed from 8:05 p.m. until 9:02 p.m. App. pp. 347-48, 350. He never asked the officers to stop the interview or requested counsel. App. p. 354. Investigator Turner testified Petitioner did not appear to be under the influence or in any distress at the time of his statement. App. pp. 325-26. Further, Turner testified he would have allowed Petitioner to use the restroom, have food or water, or medical treatment, if Petitioner had asked. App. pp. 327-28, 354. Turner further testified he put no pressure on Petitioner to give or continue giving a statement, and Petitioner never asked to stop the interview. App. pp. 327, 354, 358. Turner also testified that "[i]f [Petitioner] had shown any symptoms of any medical condition, physical or mental, the interview would have ceased, and we would have attended to him." App. p. 362.

Investigator Kathleen Street was the third investigator involved in the interview. App. p. 388. She testified Timmons told her he read Petitioner his Miranda rights during the car ride back to Florence, but Timmons did not go into detail about what he and Petitioner discussed, if anything. App. p. 385. Streett testified Petitioner signed the Miranda waiver form before the interview was taped. App. p. 387. He was then read his Miranda rights again on tape, making the third he was Mirandized before giving his statement. App. p. 388. She testified her usual practice was to tell someone she is interviewing that they can go to the restroom if they need to and that she usually offers a drink at the beginning of the interview. App. pp. 391-92. She testified that Henry was not

threatened, coerced, or abused, and she had no concerns about his ability to understand his rights or his mental state during the interview. App. pp. 390-91.

Victim was hospitalized for eighteen days. App. p. 418. Dr. Reynolds, a trauma surgeon, who treated Victim, testified Victim was close to death when she arrived at McLeod. App. pp. 406, 413. Dr. Reynolds identified twenty-eight wounds or injuries on Victim's body. App. p. 413. The worst injury was a lash to the base of the skull which caused Victim to have a stroke, likely due to the vertebral artery being transected from that lash. App. pp. 414, 416-17. Victim was immediately taken to surgery to repair and close her wounds. App. p. 416, 419. She had extensive tendon injuries and fractures to her right hand, which required surgical repair by an orthopedic specialist. App. pp. 416, 419. She also needed chest tubes in both lungs, large wall IVs for aggressive resuscitation, and a ventilator. App. p. 419. Later, Victim required rehabilitation services to help her recover from the effects of the stroke. App. p. 420. Dr. Reynolds testified her injuries were life threatening, and she continues to suffer residual effects of her injuries. App. pp. 420, 425.

Victim testified she and Petitioner had an argument the morning of the stabbing about the well-being of their children and Victim's job search. App. pp. 434-36. She testified she wanted her mother to watch the children, and Petitioner objected. App. pp. 435. Victim testified she went into the master bedroom to call her mother and discovered the phone line was cut. App. p. 437. Petitioner then blocked the front door to keep Victim from leaving with their daughter. App. p. 438. Victim testified the room seemed to get dark, and she felt something around her neck and looked down and realized she was bleeding. App. pp. 438-39. She testified she fell to the floor and continued to feel Petitioner hitting and cutting her back. App. pp. 439-40. As Petitioner administered the blows, he said, "Are you going to tell on me? Are you going to tell on me? Need to be here and be a family, be here with the family." App. p. 440.

Victim testified Petitioner's son, Taurus, Jr., entered the living room and said, "Daddy, what are you doing." App. p. 442. Petitioner told him to go back to his room. App. p. 442. Victim's seven-month old daughter, who was sitting in her car seat on the living room floor, began crying, so Petitioner took both children and left, locking Victim inside the apartment. App. pp. 440-41, 443. Victim got up, walked down the hall, looked out Taurus, Jr.'s window, came back to the living room, and sat down on the floor. App. p. 444. Victim testified Petitioner then came back into the apartment, walked past her down the hallway, then passed her again on the way out. App. p. 444. Victim was lying on the floor when she smelled smoke, so she got up again, wrapped herself in a blanket, and opened the apartment door. App. p. 445. She testified she was at the top of the stairs when Petitioner came back and helped her down. App. p. 445.

Petitioner testified in his own defense at trial. App. pp. 500-57. Petitioner testified he has a history of mental illness including psychosis, schizophrenia, and bipolar disorder. App. p. 502. Petitioner also testified he underwent a right temporal lobectomy when he was seventeen years old to treat a seizure disorder. App. p. 504.

Petitioner testified he was having an argument with Victim when she attacked him with the machete. App. pp. 512-14. He said he caught the machete with his hand, which began bleeding rapidly so he grabbed a rag to keep from bleeding everywhere. App. pp. 516-17. Then, with a rag around his hand, Petitioner said he reached for the machete, and he blacked out as soon as he got ahold of it. App. pp. 517-18. Petitioner testified the next thing he recalled was his son calling out to him. App. p. 518. Petitioner testified he noticed blood on the machete, and he realized Victim was laying on the floor, injured, and he panicked. App. p. 518.

In his statement to law enforcement, Petitioner admitted setting the fire. App. p. 523. At trial, however, he only admitted seeing smoke or fire from the apartment, and testified he did not

know anything about how the fire started. App. pp. 523-24. Petitioner claimed he only confessed to starting the fire during his interview due to "extreme pressure" from Investigators Turner and Timmons. App. pp. 523-24. When asked by his counsel why he told the officers about an intruder, Petitioner replied "the person [he] was seeing could have been [himself.]" App. pp. 535, 538. Petitioner claimed he was tortured during the interrogation. App. p. 539.

Petitioner testified he changed his clothes because he didn't want to upset the children when he brought them to the car, not to try to hide anything that had happened. App. pp. 522-23. Petitioner also testified that he told the neighbor, McAleese, in explanation of Victim's condition, "maybe somebody broke in," because he did not want a confrontation with McAleese and wanted to "keep him out the business." App. p. 522. Petitioner testified he ended up in Kershaw County because, after taking Victim to the hospital, he went to take the children to his mother and drop his car off at his brother's house so it wouldn't be vandalized, and by that time, Kershaw County Medical Center was the closest hospital. App. pp. 526-29.

On cross-examination, Petitioner said it was possibly true that he got the machete from his desk as he told law enforcement in his statement, contradicting his direct testimony that he had retrieved the machete from his wife. App. p. 553-54. Petitioner also admitted lying to McAleese, and in a roundabout way, admitted lying to Nurse Corbett. App. pp. 530, 555. Finally, Petitioner admitted he "knew [he] was in trouble" after he saw what had happened to Victim. App. p. 532.

The defense called Dr. Richard Frierson who had evaluated Petitioner for both competency to stand trial and his ability to distinguish right and wrong at the time of the crime. App. pp. 465-66. He testified Petitioner was competent to stand trial, knew right from wrong at the time of the offense, and was capable of conforming his conduct to the requirements of the law. App. pp. 466-67. However, Dr. Frierson confirmed Petitioner's testimony regarding his previous mental health

issues, his seizure disorder, and the temporal lobectomy operation. App. pp. 467-68, 470-72. Dr. Frierson testified one of the effects of the temporal lobectomy is an impaired ability to recognize fear in others, which could impair Petitioner's ability to control his behavior. App. pp. 468-70. Dr. Frierson testified Petitioner's mental illnesses, if any, would not cause a black out like the one described by Petitioner, though it could be caused by stress due to a loss of control. App. pp. 475-76. Dr. Frierson also noted Petitioner did not report any symptoms of mental illness at the time of the offense. App. p. 480. Further, Dr. Frierson testified he could not determine the presence of any symptoms that would impair Petitioner's knowledge of wrongfulness, nor could he opine that Petitioner lacked the ability to control his conduct. App. pp. 470, 479, 490.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); 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 "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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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." Id., 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The PCR court correctly found counsel was not constitutionally ineffective in advising Petitioner regarding a plea offer from the State where Petitioner failed to establish he would have accepted the plea offer but for counsel's erroneous advice.

Petitioner argues Counsel was constitutionally ineffective because when Counsel conveyed to Petitioner an offer to enter a plea of guilty but mentally ill (GBMI) plea with a fifteen year sentence, she told Petitioner his sentence would actually be indeterminate, based on how long he would need mental health services. App. pp. 671, 680. However, even if Counsel was deficient, certiorari should be denied because Petitioner failed to establish prejudice.

Petitioner testified he only received this offer on the day of trial, with approximately ten minutes to discuss it with his attorney. App. p. 671. According to Petitioner, he asked Counsel "how much time or what's the advantage or disadvantage of this plea offer," but all Counsel told him was, "[i]t's like a tunnel," so he did not accept the offer because he did not have enough time to completely understand the terms and he did not want to plead guilty without a cap on his sentence. App. pp. 670-71. Counsel, on the other hand, testified the plea offer had been extended well before trial, and she discussed it with Petitioner on several occasions. App. pp. 680-81. Petitioner argues, however, Counsel testified she told him a plea of GBMI could result in a life sentence because he could be kept in mental health treatment indefinitely, and this erroneous advice induced him to reject the final offer. App. pp. 682-83.

While Respondent concedes the testimony counsel presented at the evidentiary hearing supports Petitioner's assertion she provided him erroneous advice when she improperly advised him a plea of GBMI could result in an indeterminate sentence, other evidence in the record establishes Counsel did indeed properly advise Petitioner regarding the plea offer from the State. Counsel's notes from her various meetings with Petitioner, which were introduced as exhibits at

the evidentiary hearing, establish she corrected the erroneous advice at her final meeting with Petitioner before trial. At the evidentiary hearing, Counsel produced several pages of notes recording her conversations with Petitioner about the GBMI plea offer. Those notes reflect Counsel and Petitioner met on July 15, 2009, at which time Counsel told Petitioner the GBMI plea was likely to result in a life sentence. However, the notes also reflect Counsel and Petitioner again spoke about the GBMI offer on July 27, 2009, which was the first day of trial, at which time Counsel laid out all of Petitioner's options: (1) he could be found not guilty at trial; (2) he could plead guilty or be found guilty and receive up to sixty-five years; (3) he could plead GBMI or be found GBMI and receive up to sixty-five years (or twenty-five years if concurrent) and he would be "in [mental health] treatment until [his condition was deemed] under control;" or (4) he could be found insane and "possibly institutionalized for life." App. p. 705.

Counsel noted Petitioner told her he was "taking the chance," indicating that Petitioner was unwilling to accept *any* plea offer and instead wanted to proceed to trial in the hope he would be acquitted. App. p. 705. As this final note reflects, Counsel's gave correct advice on the morning of trial. Counsel could not tell Petitioner how long he might spend in treatment, or if he would receive any at all, just that he would receive mental health treatment until his condition was under control before he would be sent to prison. See State v. Wilson, 306 S.C. 498, 502, 413 S.E.2d 19, 21 (1992) (When the verdict rendered is guilty but mentally ill, "the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff... the defendant may be safely moved to the general population of the Department of Corrections. . . ."). Therefore, although Counsel at one time gave incorrect advice about the GBMI plea, she corrected it on the morning of trial, and therefore was not deficient.

In any event, even if Counsel provided Petitioner with erroneous advice regarding the State's plea offer, Petitioner failed to establish he would have accepted *any* plea, much less the GBMI offer, and thus his claim for relief must fail on the prejudice prong. A criminal defendant is entitled to effective assistance of counsel during plea negotiations, and "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 134, 145 (2012)). In a situation in which a plea offer is conveyed but rejected due to alleged ineffective assistance of counsel, the two-prong Strickland test for deficiency and prejudice still applies. Lafler, 566 U.S. 162-63. To show deficiency, a defendant must prove counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. However, in order to prove prejudice

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., *that the defendant would have accepted the plea* and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 164 (emphasis added).[1] For example, Collins v. State, this Court found Collins failed to meet his burden of proving he was prejudiced by counsel's failure to ask the State to revive an expired plea offer where the record was devoid of any testimony "that Collins expressed a desire to accept the expired plea offer." 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018). "At the PCR hearing, Collins testified only that after he became aware of the expired plea offer, he told trial counsel he

[1] "The correct remedy in these circumstances... is to order the State to reoffer the plea agreement. Presuming [Petitioner] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." Lafler, 566 U.S. at 174.

wanted more information about the offer." Id. Consequently, this Court found the record was devoid "of any testimony that Collins expressed a desire to accept the expired offer." Id.

Here, in his testimony at the evidentiary hearing, Petitioner claimed he was offered "eighteen years without a cap" and a week later "fifteen [years] without a cap," which he rejected because he did not want to accept an offer without a capped sentence. App. pp. 670-71. However, this testimony is nonsensical; an offer of a sentence of a specific number of years "without a cap" *is* an offer for a determinate term of years – eighteen and fifteen, respectively, in this case – and Petitioner rejected that option twice.[2] App. pp. 670-71, 681-82. Petitioner's insistence he only received this offer on the morning of trial with approximately ten minutes for discussion further discredits his testimony on this issue, as Counsel's notes and testimony conclusively demonstrated Petitioner was aware of the offer several weeks prior to trial. App. pp. 703-05. Thus, his alleged reasoning for rejecting the GBMI offer – that Counsel could not tell him an end date and he did not have enough time to consider it – is not credible.

Most crucially, as in Collins, Petitioner never testified he would have accepted the GBMI offer absent Counsel's allegedly erroneous advice. App. pp. 670-72. He had already been offered a determinate term of fifteen-years, which he rejected. Petitioner has not presented any evidence he would have accepted a determinate term of fifteen-years the second time it was offered, simply because it came with the possibility of mental health treatment. Additionally, Counsel's notes reflect Petitioner was concerned with maintaining his innocence throughout his case. On one occasion, he requested a lie detector test, and Counsel testified he had to be repeatedly told why his preferred defense – that the victim was the aggressor – was not viable. App. pp. 680-81, 704.

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[2] Petitioner testified he rejected those offers because, without a cap, "you can do the whole thing at 65," which is seemingly a reference to how much of his sentence he would have to serve before becoming parole eligible, not to an indeterminate sentencing range. App. p. 670.

On another occasion, he inquired of the investigator about being exonerated and pardoned. App. pp. 681, 704. Counsel testified, before the GBMI offer was ever made, Petitioner requested a meeting with her boss because he was angry Counsel kept notifying him of plea offers for his consideration, and she had Petitioner reject those offers in writing because she felt Petitioner was making a mistake by not accepting those offers. App. pp. 681-82. Finally, Petitioner testified in his own defense at trial, indicating he wished to maintain his innocence rather than pleading guilty. App. pp. 500-57.

Accordingly, even if Counsel was deficient in her advice regarding the implications of accepting an offer to plead GBMI, Petitioner has not met his burden of proving prejudice because he would not have accepted the offer in any event. Therefore, this Court should deny the petition for a writ of certiorari.

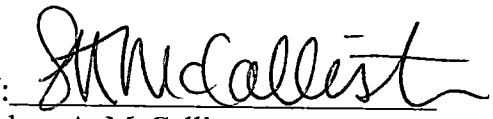
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not ineffective. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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CERTIORARI TO FLORENCE COUNTY
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Appellate Case No. 2018-000847

TARUS TREMAINE HENRY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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 the United States mail, postage prepaid:

Kathrine Haggard Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 29th day of April, 2019

LINDSEY A. MCCALLISTER
Attorney for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 01 2019
S.C. SUPREME COURT

April 29, 2019

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

Re: **Tarus Tremaine Henry v. State of South Carolina**
Appellate Case No. 2018-000847
Lower Court Case No. 2014-CP-21-1976

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,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/can
Enclosures

cc: Katherine H. Hudgins, Esquire (2 copies)