

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO KERSHAW COUNTY  
D. Craig Brown, PCR Judge

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Appellate Case No. 2019-000316

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CLIFTON COOKE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## **PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI**

- I. Whether the PCR court erred in denying relief, where plea counsel was ineffective for failing to move to withdraw Petitioner's plea after the assistant solicitor divulged in chambers, minutes before Petitioner's guilty plea, that a co-defendant who implicated Petitioner and cooperated with law enforcement was not going to testify against him, where counsel instead filed a motion to reconsider the sentence, and where Petitioner would have gone to trial if the co-defendant was not going to testify against him?
- II. Whether the PCR court erred in denying relief, where plea counsel failed to request a continuance after learning in chambers that Petitioner's co-defendant was not going to testify against him, mere moments before Petitioner's plea began, where Petitioner could have been successful at trial had the co-defendant not testified against him, where good cause existed to grant a continuance, and where Petitioner was denied time to make a life-changing decision?

## **RESPONDENT'S STATEMENT OF ISSUES ON CERTIORARI**

- I. The PCR court correctly concluded Counsel was not ineffective for failing to move to withdraw the *Alford* plea where during post-plea discussions, Petitioner informed Counsel he wanted the fifteen-year sentence requested during sentencing so Counsel moved for reconsideration, and Petitioner never indicated he wished to withdraw his plea.
- II. The PCR court correctly concluded Counsel was not ineffective for failing to request a continuance because Petitioner still wanted to plead after he found out Dixon was no longer cooperating with the State, and Petitioner wanted to plead in front of the presiding plea court because he hoped he would receive a favorable sentence.

## STATEMENT OF THE CASE

In April 2006, the Kershaw County Grand Jury indicted Petitioner for murder. App. 113–14. Joshua Kendrick and Theresa N. Johns, Esquires, represented Petitioner at trial. On February 13–14, 2007, Petitioner proceeded to a jury trial before the Honorable James R. Barber, III. The jury convicted Petitioner as indicted. Judge Barber sentenced Petitioner to serve forty years' imprisonment. Petitioner appealed.

Chief Appellate Defender Joseph L. Savitz, III, perfected the appeal. The Court of Appeals affirmed on November 19, 2009. *State v. Cooke*, 2009-UP-556 (S.C. Ct. App. filed November 19, 2009). The State petitioned for a writ of certiorari to the Supreme Court, but subsequently moved to withdraw its notice of appeal in the matter. The motion was granted by the Supreme Court on December 5, 2012. The case was remitted to the lower court on December 27, 2012.

### *First PCR action*

Petitioner filed his first PCR application on April 26, 2010 (2010-CP-28-0452). The State made its Return on May 10, 2010. An evidentiary hearing was convened on the matter on January 9, 2012, before the Honorable J. Ernest Kinard, Jr. Petitioner was present and represented by Jeremy A. Thompson, Esquire. The State was represented by Assistant Attorney General Brian T. Petrano. On February 29, 2012, Judge Kinard granted relief on the grounds of ineffective assistance of counsel, vacated Petitioner's conviction and sentence for murder, and remanded the case for a new trial.

### *Underlying guilty plea*

On March 6, 2014, Petitioner pleaded pursuant to *North Carolina v. Alford*,<sup>1</sup> to the lesser included offense of voluntary manslaughter before the Honorable R. Ferrell Cothran, Jr. Petitioner

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<sup>1</sup> 400 U.S. 25 (1970).

was represented by Assistant Public Defender Jason Kirincich (Counsel). Assistant Solicitor Curtis R. Hutchinson prosecuted the case.

Before Petitioner's guilty plea, Counsel, the State, and the plea court held an off the record discussion, in chambers, regarding Petitioner's case. During the discussion, the State revealed that Talmadge Dixon—who previously cooperated with the State and testified against Petitioner at trial—was no longer cooperating with the State. App. 66. Counsel informed Petitioner that Dixon was no longer cooperating with the State and would not testify against him if he went to trial. App. 66–67. However, knowing this new information, Petitioner told Counsel he still wished to proceed with his guilty plea. App. 67. Thereafter, Petitioner pleaded pursuant to *Alford*, and Judge Cothran accepted his guilty plea. App. 3–24.

Judge Cothran sentenced Applicant to twenty years' imprisonment. App. 24. On March 14, 2014, Petitioner, through Counsel, moved for reconsideration of the sentence asserting the State allegedly untimely disclosed that a prior State witness, Talmadge Dixon, was no longer cooperating with the State. App. 26. Judge Cothran denied the motion on May 20, 2014. App. 27. Petitioner appealed.

#### *Appeal from the guilty plea*

Appellate Defender Tiffany L. Butler perfected the appeal. However, Petitioner subsequently withdrew his appeal; thus, pursuant to Petitioner's withdrawal, the Court of Appeals dismissed the appeal on August 3, 2015. *State v. Cooke*, Appellate Case No. 2014-001175 (S.C. Ct. App. filed August 3, 2015). The case was remitted to the circuit court on August 19, 2015.

#### *Instant PCR action*

Petitioner commenced this PCR action on August 24, 2015. The State made its return on November 9, 2015. Thereafter, Petitioner amended his PCR application on June 17, 2016. On

July 14, 2016, an evidentiary hearing convened before the Honorable D. Craig Brown. Petitioner was present and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Jessica E. Kinard represented the State. Petitioner and Counsel testified at the PCR hearing. Judge Brown denied relief and dismissed the action with prejudice on February 21, 2019. Petitioner appealed.

## STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

## ARGUMENT

### **I. Alleged failure to move to withdraw guilty plea**

Petitioner alleges the PCR court erred in finding Counsel was not constitutionally ineffective for failure to move to withdraw Petitioner's guilty plea. This allegation is without merit and certiorari should be denied on this issue.

The PCR court found, "Counsel credibly testified that he advised [Petitioner] that Dixon was not cooperating with the State prior to the entry of the plea and that he decided to go forward." App. 105–06. Petitioner appears to concede he was aware Dixon was not going to testify for the State before he entered his plea. In his petition, he states "*they* were told, mere moments before Petitioner's plea, that Dixon would not testify against him." Pet. 11 (emphasis added).

Even without such concession, the PCR court's finding was supported by the record and based on Counsel's credible testimony. See *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (stating appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them); *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("[Appellate courts] give great deference to a judge's findings where matters of credibility are involved since [appellate courts] lack the opportunity to directly observe the witnesses.").

The PCR court's finding is supported by Petitioner's testimony he became aware Dixon was not going to testify against him "[m]inutes before the plea," and Counsel's testimony he told Petitioner that Dixon would not, or Dixon had indicated he would not, testify for the State against Petitioner moments before the plea. App. 55; 66–67. Therefore, the PCR court's finding Petitioner was aware Dixon would not testify against him at trial was correct. However, with this knowledge, Petitioner nonetheless decided to plead pursuant to *Alford*.

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."

*Alford*, 400 U.S. at 31. “[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

Petitioner argues he did not knowingly and voluntarily plead guilty because the information regarding Dixon did not arise until moments before he decided to plead guilty. Petitioner asserts because of the alleged late disclosure, Counsel should have moved to withdraw Petitioner’s guilty plea rather than move for reconsideration. In making this assertion, Petitioner relies on *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009). Petitioner’s reliance on *Rolen* is misplaced.

In *Rolen*, this Court was asked if plea counsel was ineffective for failing to move to withdraw Rolan’s guilty plea. 384 S.C. at 413, 683 S.E.2d at 473. During the plea hearing, Rolan pleaded guilty, and the plea court accepted Rolan’s guilty plea. *Id.* at 411, 683 S.E.2d at 473. However, during sentencing—after members of the victim’s family addressed the plea court—Rolan suddenly exclaimed, “I didn’t kill this man. This has went too far, I ain’t doing this. . . . Should have never pled guilty, I didn’t do this.” *Id.* The Court found plea counsel deficient because “it was *clear* that [Rolan] wanted to withdraw his guilty plea.” *Id.* at 413, 683 S.E.2d at 474 (emphasis added). The Court further found Rolan was prejudiced “because due to counsel’s failure to [move to withdraw the guilty plea], the plea [court] was not able to exercise [its] discretion.” *Id.* at 414, 683 S.E.2d at 474.

*Rolen* is distinguished from the instant case for two reasons: (1) Petitioner decided to enter an *Alford* plea knowing Dixon was not going to testify at trial; and (2) from the credible testimony presented at the PCR hearing, it was unclear whether Petitioner wanted Counsel to move to withdraw his guilty plea.

First, Petitioner decided to enter an *Alford* plea knowing Dixon was not going to testify at trial. Unlike the defendant in *Rolen*, who initially pleaded guilty, Petitioner pleaded pursuant to *Alford* maintaining his innocence. App. 10. This is important because nothing in the record reflects Petitioner had a sudden change of heart similar to the defendant in *Rolen*. Conversely, at all times during the plea hearing, Petitioner indicated he wanted to proceed. App. 3; 10; 11–14; 21–22. Specifically, in mitigation, Petitioner stated,

I want to tell the family I'm sorry, but I did not shoot [the victim].  
***The only reason why I'm pleading guilty to this is because I fear for my life. . . .*** So that's why I'm going to go ahead and plead guilty. But Talmadge Dixon shot [the victim].

(App. 21) (emphasis added). Therefore, the record is clear that during the plea hearing, Petitioner wanted to continue with his plea unlike the facts in *Rolen*.

Second, it is clear Counsel and Petitioner discussed how to proceed following Petitioner's plea; however, it is unclear whether Petitioner asked Counsel to move to withdraw his plea. Petitioner testified he asked Counsel to move to withdraw his plea after the hearing. App. 56. Counsel testified he could not remember Petitioner asking him to file a motion to withdraw the plea. However, Counsel recalled, "[W]e discussed motions that could be filed just to get a straight appeal. I may have made the decision to go with the motion to reconsider based upon the information that we were given just directly before the plea regarding Mr. Dixon not wanting to cooperate." App. 68. On cross-examination, Counsel testified, "I don't know if he wanted to appeal it right away. We discussed some options about some motions that could be filed. ***We still, from what I recall, wanted the [fifteen] years,*** so I filed a motion to reconsider. I don't recall him asking me to withdraw his plea." App. 78 (emphasis added). The PCR court found Petitioner failed to show Counsel was deficient in failing to move to withdraw the plea. App. 107.

The PCR court's finding Petitioner failed to show Counsel was deficient in failing to move to withdraw the plea is supported by the record. While Petitioner testified he requested Counsel to move to withdraw the plea, Counsel could not recall Petitioner ever making such request. However, Counsel did recall, in their discussions after the plea hearing, Petitioner still wanting the fifteen years asked for during sentencing. In finding Petitioner failed to prove Counsel was deficient, the PCR court clearly believed Counsel and did not believe Petitioner. This shows that Petitioner at that time did not want to withdraw the plea but wanted a lesser sentence than he received. Therefore, Counsel's decision to move for reconsideration rather than withdrawal of the plea entirely was reasonable. See *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) ([W]here counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."); *Strickland*, 466 U.S. at 689 (In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). Certiorari should be denied on this issue because Counsel's conduct was reasonable based on Petitioner's assertions he wanted the previously requested fifteen-year sentence.

## **II. Alleged failure to move for a continuance**

Petitioner asserts Counsel should have requested a continuance, after learning Dixon was not going to testify against him, to allow Petitioner additional time to decide between pleading under *Alford* and going to trial. This argument is without merit.

Counsel was not deficient for failing to request a continuance. Based on Counsel's credible testimony, the PCR court found: Petitioner was advised he did not need to go forward with the

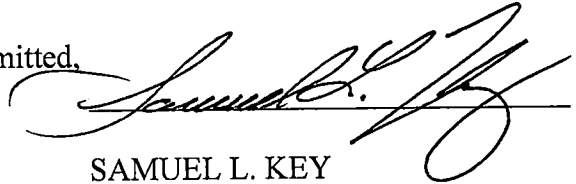
guilty plea after he was advised that Dixon was not cooperating; and Petitioner indicated to Counsel that he still wanted to proceed with the plea before Judge Cothran. App. 106. Counsel stated he did not see any basis for a continuance at that time because of Petitioner's assertions. App. 71. The PCR court's credibility determination and factual findings are supported by the record; therefore, the PCR court did not err in finding Counsel was not deficient for failing to request a continuance. See *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (stating appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them); *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (“[Appellate courts] give great deference to a judge’s findings where matters of credibility are involved since [appellate courts] lack the opportunity to directly observe the witnesses.”). Because the PCR court’s findings that Petitioner wanted to proceed and wanted to plead in front of the presiding plea court are supported by the record, certiorari should be denied as to this issue.

Further, Petitioner presented no evidence at the PCR hearing the State was willing to leave its offer open for Petitioner to plead under *Alford* to the lesser included offense had the case been continued. Therefore, whether the State was willing to extend the offer’s time beyond the scheduled plea date is speculation at best. As such, Petitioner failed to show any prejudice resulted from Counsel’s alleged deficiency of failing to request a continuance because the State, within its right, could have immediately revoked the offer. See *Reed v. Becka*, 333 S.C. 676, 690, 511 S.E.2d 396, 404 (Ct. App. 1999) (“[T]he State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.”).

CONCLUSION

Based on the foregoing argument, Counsel was not constitutionally ineffective. Counsel reasonably moved for reconsideration because Petitioner wanted the requested fifteen year sentence instead of the received twenty years, and Petitioner never indicated he wished to withdraw his plea. Further, Counsel was not ineffective for failing to move for a continuance because after learning Dixon was no longer cooperating with the State, Petitioner still wished to proceed with the *Alford* plea, and Petitioner indicated he wanted to plead in front of the presiding plea court. Accordingly, certiorari should be denied on these issues.

Respectfully submitted,



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January 2, 2020

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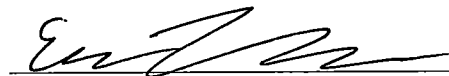
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

**Mr. Taylor Davis Gilliam**  
**S.C. Commission on Indigent Defense**  
**P.O Box 11589**  
**Columbia, SC 29201**

This 2<sup>nd</sup> day of January, 2020.



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Erik Marcusson  
Legal Assistant for Respondent