STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO LANCASTER COUNTY

Daniel D. Hall, Plea Judge
Paul M. Burch, PCR Judge

DAVID A. KUCINSKI,

PETITIONER,

v.

STATE OF SOUTH CAROLINA

RESPONDENT.

App. Case No. 2019-000891

RETURN TO PETITIONER FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

> Trial counsel erred in failing to move for the withdrawal of petitioner's guilty pleas based on his actual innocence claim, which was the remedy upheld on a similar claim in *Rolen v. State*,[1] because petitioner pled guilty despite his innocence after having been being coerced to do so in response to various threats made against him and his family.

Respondent's Counter-Statement of Issue Presented

I. Whether Counsel was ineffective for failing to move to withdraw Petitioner's *Alford* plea where Petitioner claimed his innocence and was threatened into pleading is preserved for appellate review where this issue was never raised to the PCR court?

II. If this issue is preserved, whether Counsel was constitutionally ineffective where Petitioner never timely asked Counsel to move to withdraw the plea, and the PCR court found not credible Petitioner's testimony that the only reason he entered the *Alford* plea was because he had received threats when Petitioner, under oath, informed the plea court he was not threatened into pleading guilty, and where Petitioner informed the plea court he was pleading guilty to avoid a life sentence?

[1] 384 S.C. 409, 683 S.E.1d 471 (2009).

STATEMENT OF THE CASE

Petitioner was indicted in July 2016 for murder, armed robbery, and two counts of possession of a weapon during the commission of a violent crime. (App. 92–95). Petitioner was represented by Deputy Public Defender Marion H. "Mark" Grier, Jr. (Counsel). Chief Deputy Solicitor Lisa G. Collins prosecuted the case. (App. 1).

On August 22, 2017, Petitioner entered an *Alford*[2] plea before Judge Daniel D. Hall to murder, armed robbery, and one count of possession of a weapon during the comission of a violent crime. (App. 1–32). The plea was entered without formal sentencing recommendations or negotiations—straight-up; however, the State agreed to remain silent during sentencing. (App. 3). The plea court accepted Petitioner's *Alford* plea and sentenced him to concurrent terms of thirty years for murder, twenty-five years for armed robbery, and five years for the weapons charge (App. 18; 31–32). Petitioner appealed.

Counsel timely filed a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, and *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991), on August 30, 2017. Petitioner filed a *pro se* guilty plea explination with the Court of Appeals on September 12, 2017. In his explanation, Petitioner asserted he was pressured into entering his *Alford* plea without having time to think about it, and that he was convicted of a crime he did not commit and would like to go to trial. Petitioner also asserted Counsel and his family pressured him into pleading because his codefendants were going to be State's witnesses at trial, and one of his codefendants produced "fake text messages that scared me." The court of appeals dismissed the appeal on December 28, 2017, and remittited the case on January 29, 2018.

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

Petitioner timely commenced the underlying PCR action on May 4, 2018. (App. 34–41). In his original PCR application, Petitioner alleged:

1. Ineffective assistance of counsel for failing to move to withdraw his guilty plea.

(App. 36; 38–41). The State submitted its return on November 29, 2018, requesting an evidentiary hearing be held on the issue of ineffective assistance of counsel for failing to move to withdraw Petitioner's *Alford* plea. (App. 43–52). An evidentiary hearing into the matter convened on January 23, 2019, before Judge Paul M. Burch. Petitioner was present and represented by Donae A. Minor, Esquire. Assistant Attorney General Samuel L. Key represented the State. (App. 53–80). Petitioner and Counsel testified at the PCR hearing. (App. 56–67; 67–78). The PCR court denied relief and dismissed the action with prejudice on May 16, 2019. (App. 82–91). Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner was arrested for the armed robbery and murder of Randy Tran. On April 5, 2016, Tran had planned to sell six pounds of high-quality marijuana to Nachon Hayden, Chris Glass, and Tony Maynard. Hayden, Glass, and Maynard arrived in one car. Petitioner and Tran arrived in Tran's car, an orange Scion. (App. 13). During the drug deal, Petitioner shot Tran in the back of the head. Tran died. (App. 14).

After Petitioner shot Tran in the back of the head, Hayden, Glass, and Maynard fled in the vehicle they arrived in. (App. 14). However, as they were leaving, Vicki Gordon, C.J. Loftis, and Loftis's girlfriend drove by. Gordon and Loftis, her son, both knew Petitioner because he had previously lived with Melissa Gordon, a family member. (App. 14–15). Gordon and Loftis observed Petitioner trying to stuff a bloody body into the trunk of an orange car. Gordon and Loftis also observed Hayden fleeing the scene. Gordon and Loftis passed by and then called 911. (App. 15).

Law enforcement arrived on scene, but the orange car was gone and no one was present. However, there was a large blood stain in the area. Eventually, Tran's body was found in a nearby ditch covered by trash and debris. Petitioner was seen fifteen-to-twenty minutes after the incident by Trent Sucie and Sucie's sister at Sucie's home. (App. 15).

Petitioner left the scene, driving the Scion, and went to a Sucie's house. Petitioner brought six pounds of high-quality marijuana with him to the Sucies' house. Sucie inquired about the Scion, and Petitioner claimed to have "bought it from my homeboy." (App. 15-16). Sucie's sister was also present, and claimed Petitioner bagged about having a .45 and stated "he's not afraid to use it." (App. 16). Petitioner gave Sucie two pounds of the marijuana and left. Sucie claimed to have flushed the marijuana. (App. 15–16).

Petitioner learned he was wanted in connection to the murder, and eventually called law enforcement and gave up his location. He was arrested in Charlotte, North Carolina. He waived his right to remain silent and gave law enforcement two statements. In his first statement, Petitioner claimed he did not know what happened and that he was not present when Tran was killed. However, when the interviewing officers stated they would look into his alibi, he changed his story. (App. 16). In his second statement, Petitioner claimed Glass shot Tran in the back of the head, and then Glass threatened Petitioner. (App. 17).

Phone records taken from Petitioner's and Hayden's cellphones contradicted Petitioner's version of events. Sometime before the incident, Petitioner sent two text-messages to Hayden (1) asking Hayden for a gun, and (2) stating Petitioner wanted to get a gun because he was going to do a "lick." (App. 12–13). Petitioner also sent text messages to other individuals immediately following the incident.

First, Kucinski sent text-messages to friends bragging about his new car, saying he had "so much weed," and he wanted to party. (App. 17). However, when the recipients informed Petitioner that he was suspected of murder, he claimed to have been either in Columbia or Charlotte all day. (App. 17). At one point, Petitioner sent a text message stating, "I'm just going to sell the weed and run, see you in five years." (App. 17). However, as mentioned above, he eventually turned himself in. Petitioner and his co-defendants were all charged under the "hand of one, hand of all" theory of accomplice liability. (App. 14).

Guilty Plea

Petitioner's case was called for trial on August 22, 2017. A jury was empaneled and ready to be selected, but Petitioner informed the State that he wished to enter an *Alford* plea to murder, armed robbery, and one of the weapons charges. The plea was entered without recommendations or negotiations; however, there was an agreement for the prosecution to remain silent during the sentencing phase of the hearing. (App. 3).

The plea court asked Petitioner whether he wished to plead pursuant to *Alford*. Petitioner responded affirmatively. (App. 5). The plea court advised Petitioner of the charges against him and the maximum and any mandatory minimum sentences for each charge. Petitioner affirmed he understood the charges against him and the sentencing exposure he faced. (App. 5–7). The plea court then advised Petitioner of the meaning and consequences of entering an *Alford* plea. (App. 7–8). Petitioner affirmed he understood the nature and consequences of his plea. (App. 8–9). The plea court asked:

> Q: And so how do you plead to all three of these charges?
>
> A: From what I've talked with [] [plea counsel] and what we're facing here with the State's evidence versus the truth that I've spoken, it seems in my best interest to plead guilty for the following three crimes, not saying that, one, I shot Randy Tran or had anything

> to do with the robbery. But based off of the State's evidence that could compel a jury to say yes, [I] [am] guilty and prosecute me in ***the possibility of it being the life sentence that pushes me to come before the [plea court] and beg for mercy*** on a plea in regards to saying that I'm guilty.
>
> Q: All right. And so is it your desire to enter this plea under a[n] [*Alford*] plea?
>
> A: Yes, Your Honor.

(App. 8–9) (emphasis added).

The plea court asked Petitioner whether he was entering the plea freely, voluntarily and knowingly. (App. 9; 11). Petitioner affirmed. (App. 9; 11). The plea court found Petitioner's decision to enter the plea to be "freely, voluntarily, and intelligently made . . . ." (App. 11–12). The plea court then advised Petitioner:

> [Y]ou have ten days from today's date in which to appeal, if I make an[] error, if you disagree with the sentence you have a right to an appeal, however, you have to file that appeal within ten days. You normally start that process by notifying your attorney of your desire to appeal, do you understand that right?

Petitioner affirmed he understood. (App. 12). The factual basis for the charges were then placed on the record. (App. 12–17).

After hearing the State's version of the facts, Petitioner reaffirmed that he wished to plead pursuant to *Alford*. (App. 18). The plea court sentenced Petitioner to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for the weapons charge. (App. 31–32).

PCR Testimony

At the PCR hearing, Petitioner testified he filed his PCR action because he wished to withdraw his *Alford* plea because he, his family, and Counsel, he believed, were threatened by his codefendant. (App. 57). Petitioner testified he was actually a victim in the case because he and

Tran were robbed by Hayden, Glass, and Maynard. (App. 57–58). Petitioner testified his codefendants threatened his sister, his niece's father, his mother, and Counsel "seemed like they had come to him and threatened him." (App. 58).

On the issue regarding Counsel's failure to move to withdraw his guilty plea, Petitioner testified, "[A]s I was listening to [the plea court] [it] did say that you have 10 days to withdraw this plea bargain if I make a mistake or error." (App. 58). Petitioner conceeded the transcript reflected the plea court informed him "you have 10 days from today's date in which to appeal." (App. 58). Petitioner explained, "Where it says 'appeal,' through my hearing, vision, my senses, it said 'withdraw.'" (App. 58). Petitioner testified he thought that meant, "If the plea was not spoken on until after that 10 days, [he had] to go through the regular appeal process." However, Petitioner again conceeded the plea transcript was correct and "[he] could have heard [the plea court] wrong with withdrawing the plea bargain." (App. 62). Petitioner also stated he could have heard the plea court wrong because he was in "severe mental distress" and "almost committed suicide about seven times."

Petitioner testified he wrote to Counsel on August 23, 2017, and did not write concerning an appeal. Rather, Petitioner stated he wrote to Counsel that he "want[ed] to withraw, because [he was] an innocent man." (App. 59). Petitioner also stated he informed Counsel his family had been threatened to stay silent, and his wife was in danger. (App. 59).

Counsel testified Petitioner understood he did not have to plead under *Alford*. (App. 70). Counsel testified Petitioner's sister wanted to talk to Petitioner before trial and Petitioner's sister played a part in convincing Petitioner that it was in his best interest to plead. (App. 70–71). Counsel testified he never received a letter from Petitioner during the ten day period after the plea. (App. 71). Counsel stated he eventually received a copy of a letter stating Petitioner wished to withdraw

the plea after Petitioner filed a grevience against Counsel with the Bar. (App. 71). Counsel stated the first time he saw the letter was during the grievance, and when he did receive the letter, Counsel knew the plea court did not say what Petitioner asserted in the letter because "that wasn't an option." (App. 71). Counsel testified he did not file the motion to withdraw the plea because "I didn't know [Petitioner] asked to do it, if he did ask to do it. Frankly, it appeared to me that that was kind of reconstructed after the fact." (App. 72).

Counsel testified that he had Petitioner evaluated, and Petitioner's competency was restored by the time he pleaded. (App. 72–73). Counsel stated Petitioner did tell him threats were made to Petitioner, but there was never nothing to investifate to that end. (App. 73). Further, Counsel refuted that he was ever threatened and threats did not "factor into the representation, as far as I was concerned." (App. 73).

Counsel testified that Petitioner asked him to enter plea negotiations fairly early on, and to negotiate for a twelve-year deal, but the State refused that offer. (App. 75). Counsel testified Petitioner was reluctant to plead guilty. (App. 75). Counsel stated he informed Petitioner, in his professional opinion, the evidence against Petitioner was compelling and Petitioner was unlikely to prevail at trial. (App. 76). Further, Counsel testified that he "did't think that [Petitioner] would see the outside again if [they] lost at trial. I felt the evidence was compelling." (App. 76). Finally, Counsel testified there was no discussion of the threats at the time of the plea. Counsel felt it was Petitioner's decision to plead based on discussing the case and discussing whether to plead with his sister. (App. 77).

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). Appellate courts give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). 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).

ARGUMENT

Petitioner argues that Counsel was ineffective for failing to move to withdraw his guilty plea because Petitioner was threatened into pleading guilty, and he maintained his innocence. Petitioner likens his case to *Rolen v. State*, 384 S.C. 409, 683 S.E.1d 471 (2009), and argues Counsel was ineffective for failing to withdraw his plea because he wrote to Counsel asking Counsel to move to withdraw his *Alford* plea. First, this specific issue was never raised to the PCR court; therefore, it is not preserved for appellate review. Second, Counsel was not constitutionally ineffective because Petitioner never timely asked Counsel to move to withdraw the plea, and Petitioner failed to prove prejudice because he told the plea court he was not pleading because he was threatened, but rather, was pleading to avoid the possibility of a life sentence.

I. Whether Counsel was ineffective for failing to move to withdraw Petitioner's *Alford* plea where Petitioner claimed his innocence and was threatened into pleading was never specifically raised to the PCR court; therefore, it is not preserved

Below, Petitioner's allegation of Counsel's failure to withdraw his guilty plea revolved around his misunderstanding of the plea colloquy. Petitioner never argued below that Counsel was ineffective for failing to move to withdraw his guilty plea because he was actually innocent of the

crime and was threatened into pleading. Petitioner conceded below that the trial court never told him he had ten days to withdraw his plea, which is entirely what Petitioner's failure to withdraw allegation was based on. Based on this concession, the PCR court found Petitioner waived and abandoned his allegation that Counsel was ineffective for failing to move to withdraw his guilty plea.

Petitioner separately claimed his guilty plea was involuntary because he was threatened into pleading guilty. Petitioner has attempted to merge two separate and distinct allegations—failure to move to withdraw the plea because the plea court told Petitioner he had ten days to withdraw his plea, and his plea was involuntary because he was threatened—into an entirely new allegation the PCR court was never presented. Certiorari should be denied because whether Counsel was ineffective for failing to move to withdraw the plea because Petitioner was innocent and threatened into pleading is not preserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Recently, this Court has overlooked preservation arguments in PCR appeals and remanded cases back to the PCR court to decide issues where the issue was properly raised to the PCR court, but omitted from the PCR court's order and no Rule 59(e), SCRCP, motion to alter or amend was filed. *See Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (stating a remand was necessary even without a Rule 59(e), SCRCP, motion "because the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases . . ."); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (vacating and remanding the PCR court's order of dismissal and order denying the applicant's Rule 59(e), SCRCP, motion where the

order of dismissal omitted a properly raised allegation and failed to address the omission in the order denying the motion to alter or amend).

This case is drastically different from *Fishburne* and *Reese* because the issue was simply never raised to the PCR court. As discussed in *Fishburne*, here, the order was prepared by the prevailing party and reviewed by opposing PCR counsel. The order was then submitted to the PCR court. The PCR court adopted the order denying Petitioner's allegations. *See* 427 S.C. at 516, 832 S.E.2d at 589–90 (describing the best practices for the parties and the PCR court to follow in issuing PCR orders). A rule 59(e), SCRCP, was not filed; presumably, because the order did not omit any issues raised to the court because the process described in *Fishburne* was not ignored on the front end.

The Court should deny certiorari because the issue presented ***was never raised*** to the PCR court. Allowing this issue to proceed on the merits would nullify the purpose of PCR evidentiary hearings as this Court would be ruling on the issue in its original jurisdiction. Likewise, vacating the order and/or remanding the case is unnecessary because the order properly addressed the issues raised. Therefore, certiorari should be denied because whether Counsel was ineffective for failing to move to withdraw Petitioner's plea because he was innocent and threatened into pleading guilty was never raised to the PCR court.

II. Even if this issue is preserved, Counsel was not constitutionally ineffective where Petitioner never timely asked Counsel to move to withdraw the plea, and the PCR court found not credible Petitioner's testimony that the only reason he entered the *Alford* plea was because he had received threats when Petitioner, under oath, informed the plea court he was not threatened into pleading guilty, and where Petitioner informed the plea court he was pleading guilty to avoid a life sentence

Certiorari should also be denied because Petitioner's argument that Counsel was ineffective for failing to move to withdraw the plea because Petitioner asserted his innocence and was threatened into pleading fails on the merits.

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 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). "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 establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694). In the context of a guilty plea, 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).

Counsel was not deficient because Petitioner failed to prove that he ever timely asked Counsel to move to withdraw the plea. Unlike a direct appeal, which Counsel filed in this case, Counsel is under no specific duty to move to withdraw a plea where Petitioner indicated he wished to do so because Petitioner was not entitled to withdraw his plea. Counsel credibly testified he "never saw a letter from [Petitioner] during that time period where [Petitioner] says he wrote me." (App. 71). Counsel testified the first time he saw a copy of the letter was when Petitioner filed a grievance against him. (App. 71). Counsel testified he did not file a motion to withdraw the guilty plea because he "didn't know [Petitioner] asked [him] to do it." Counsel further testified, "Frankly, it appeared to me that that was kind of reconstructed after the fact." (App. 72).

Counsel cannot be deficient for failing to file a motion to withdraw the plea when he was not timely asked to do so. *See e.g. Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (stating Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing). However, unlike an appeal, which all defendants have a right to, there is no duty to consult with and file a motion to withdraw a guilty plea. Petitioner failed to prove Counsel actually received the letter within the time frame for Counsel to act on the request. The only evidence in the record as to when Counsel actually received the letter was Counsel's credible testimony that he first saw the letter during the appeals process or when Petitioner filed a grievance against him. Counsel cannot be deficient for failing to file a motion Petitioner failed to timely request and never indicated he wanted the motion filed until after the time frame lapsed.

Petitioner's case is easily distinguishable from *Rolen v. State*, 384 S.C. 409, 683 S.E.1d 471 (2009). Rolen decided to plead guilty to murder. *Id.* at 411, 683 S.E.2d at 473. Rolen informed the plea court he voluntarily confessed to law enforcement and admitted to committing the murder. *Id.* The guilty plea was formally accepted; however, during sentencing, Rolen burst out:

> All right, this has went on far enough, I didn't kill this man. This has went too far, I ain't doing this. I didn't kill your brother . . . I didn't kill this man, I can't do this . . . I don't know who did, I wish I did . . . I swear to God I didn't do it . . . Should have never pled guilty, I didn't do this.

Id. This Court ultimately found Rolen's plea counsel was ineffective for failing to move to withdraw the guilty plea. *Id.* at 413, 683 S.E.2d at 474. The Court found it was clear that Rolen wanted to withdraw his guilty plea because Rolen repeatedly asserted his innocence before the plea court sentenced him. *Id.* The Court found Rolen was prejudiced because the plea court was unable to exercise its discretion. *Id.* at 414, 683 S.E.2d at 474.

The first reason this case is distinguishable from *Rolen* is because here, Petitioner chose to enter an *Alford* plea. Unlike the guilty plea in *Rolen*, Petitioner never stated he was guilty and always maintained his innocence. However, Petitioner informed the plea court he wished to enter an *Alford* plea because the jury would likely convict him based on the State's compelling evidence. Petitioner chose to enter his plea to avoid a much harsher sentence at trial. *See Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012) (finding there was evidence to support the PCR court's conclusion Goins was not prejudiced when he accepted the plea offer to avoid a harsher sentence).

Importantly, Petitioner never indicated on the record he wanted to do anything other than go forward with his *Alford* plea. Petitioner was asked several times during the plea colloquy if he wanted to continue with his plea, and every time Petitioner informed the plea court he wished to

do so. This is nothing like the outburst in *Rolen*. Therefore, Counsel was not deficient for failing to move to withdraw the plea.

As for prejudice, the PCR court found not credible Petitioner's testimony that the only entered his *Alford* plea because he was threatened into doing so. Counsel did testify that Petitioner told him about threats made against Petitioner; however, Counsel did not think the alleged threats were why Petitioner ultimately entered an *Alford* plea. Counsel stated he believed Petitioner entered the *Alford* plea to avoid a life sentence. Indeed, Petitioner himself informed the plea court that he was pleading pursuant to *Alford* to avoid a life sentence. (App. 8–9). Specifically, Petitioner informed the plea court:

> From what I've talked with [Counsel] and what we're facing here with the State's evidence versus the truth that I've spoken, it seems in my best interest to plead guilty for the following three crimes, not saying that, one, I shot Randy Tran or had anything to do with the robbery. But based off of the State's evidence that could compel a jury to say yes, [I] [am] guilty and prosecute me in ***the possibility of it being the life sentence that pushes me to come before the [plea court] and beg for mercy*** on a plea in regards to saying that I'm guilty.

(App. 8–9). Based on this testimony, the PCR court correctly concluded Petitioner failed to prove prejudice. Therefore, certiorari should be denied.

CONCLUSION

Based on the foregoing, certiorari should be denied. Petitioner's argument that Counsel should have moved to withdraw the plea because Petitioner claimed innocence and was threatened into pleading is not preserved for appellate review. Even so, Petitioner failed to prove Counsel was constitutionally ineffective. Counsel was not deficient because Petitioner did not timely indicate he wanted Counsel to move to withdraw his guilty plea. Further, Petitioner's testimony he pleaded because he was threatened into doing so what not credible where Petitioner told the plea court no one threatened him into pleading and told the plea court he was pleading under *Alford* to avoid a life sentence. Therefore, certiorari should be denied.

Respectfully submitted,

s/ Samuel L. Key

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June 12, 2020

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