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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

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On Petition for Writ of Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Plea Judge  
The Honorable G. Thomas Cooper, Jr., PCR Judge

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Appellate Case No. 2020-000781

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GENUINE TRUTH BANNER.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

CHELSEY F. MARTO  
Assistant Attorney General  
S.C. Bar # 104191

Post Office Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **STATEMENTS OF ISSUE ON CERTIORARI**

### **Petitioner's Statement of Issue on Certiorari**

Did the PCR court err in ruling petitioner's *Alford* plea was knowingly, intelligently, and voluntarily entered where trial counsel was ineffective for failing to advise petitioner of the appellate consequences of his *Alford* plea and petitioner was from a state that allowed conditional guilty pleas and therefore it was reasonable for petitioner to believe that he could appeal the trial court's denial of his motion to suppress?

### **Respondent's Counterstatement of Issue on Certiorari**

Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failure to inform Petitioner of the appellate consequences involved in entering an *Alford* plea because Counsel credibly testified he informed Petitioner of appellate consequences and the rights waived when entering a plea, Petitioner failed to contact Counsel in a timely fashion about a decision to appeal, and Petitioner did not reasonably believe he could appeal from the denial of his suppression motion simply because he hails from a state with different procedural law on this particular issue, especially when no indication that Petitioner knew and understood the law in that state was shown?

## STATEMENT OF THE CASE

Genuine Truth Banner (hereafter “Petitioner”) is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its October 2016 term, the Spartanburg County Grand Jury indicted Petitioner for armed robbery (count one) and bank robbery (count two) (2016-GS-42-05451), armed robbery (count one) and possession of a weapon during commission of a violent crime (count two) (2016-GS-42-5452), and five counts of kidnapping (2016-GS-42-5453, -5454). William J. Nowicki, Esquire, represented Petitioner. Seventh Circuit Solicitor Barry Barnette prosecuted the case. On January 22, 2018, Petitioner proceeded forward on a pre-trial motion to suppress hearing concerning evidence obtained in the automobile, pursuant to the executed search warrant. After the motion was denied, Petitioner pled guilty as indicted to all charges before the Honorable J. Mark Hayes, II. The State’s only recommendation was that the armed robbery and bank robbery sentences run concurrent. On January 23, 2018, Judge Hayes sentenced Petitioner to twenty years’ imprisonment for kidnapping, armed robbery, and bank robbery, and five years’ imprisonment for possession of a weapon, sentences running concurrently.

Petitioner moved to reconsider the sentence on January 25, 2018, which was later withdrawn. Petitioner filed a *pro se* notice of appeal on March 27, 2018, which was dismissed for untimeliness and failure to serve within ten days of imposition of the sentence, pursuant to Rule 221(b), SCACR. The remittitur was issued May 14, 2018.

Petitioner timely filed a PCR application on April 10, 2018, alleging:

1. “Ineffective Assistance of Counsel.”
  - a. “My motion of discovery was never viewed in its entirety by myself because I was not afforded the opportunity by my counselor.”
  - b. “During the motion to suppress evidence, Mr. Nowicki never subpoenaed my witnesses to court so that the judge could evaluate their input into my argument that the arresting officer committed an illegal search prior to obtaining a search warrant.”

2. “Illegal search and seizure.”
  - a. “This was an illegal search as verified by court transcripts, even the judge admitted there was a violation but called it minimal.”
3. “Miranda rights violation by arresting officer.”

Respondent made its return on July 30, 2018. Petitioner, through Counsel, filed an amended application on September 11, 2018. In the amended application, Petitioner alleged the following (excerpts verbatim):

1. Ineffective assistance of trial counsel for:
  - a. “Failure to investigate and prepare for trial.”
  - b. “Advising him to plea under *Alford* without a proper inducement or benefit.”
  - c. “Failing to request a continuance to wait for ruling on *Collins v. Virginia*, which had oral argument on January 9, 2018; 584 U.S. \_\_\_\_ (May 29, 2018).”
  - d. “Failing to challenge jurisdiction as Applicant was enlisted in the U.S. Navy at the time of plea.”
  - e. “Failure to advise Applicant that his right to appeal the ruling on his pretrial motion to suppress would be waived he pled guilty.”
  - f. “Failure to appeal plea and sentence on behalf of the Applicant.”
2. Involuntary Plea:
  - a. “Due Process violations because the plea was not knowingly and voluntarily made because the Applicant was not advised that the guilty plea would waive his right to appellate review of the court’s ruling on his pretrial motion to suppress.”

The evidentiary hearing occurred on October 11, 2019, before the Honorable G. Thomas Cooper, Jr. Susannah Ross, Esquire was Petitioner’s attorney. Jacob Isenberg, Esquire of the South Carolina Attorney General’s Office represented Respondent.

The court issued an order of dismissal, denying Petitioner’s PCR application and request for relief and remanding him to the custody of South Carolina Department of Corrections on May 4, 2020. Petitioner appeals from the denial of relief, alleging that trial counsel was ineffective for allegedly failing to advise petitioner of the appellate consequences of his *Alford* plea, specifically regarding the ability to appeal the trial court’s denial of his motion to suppress.

## STATEMENT OF FACTS

On October 29, 2016, Petitioner, armed with a shotgun, robbed Spartan Federal Credit Union. (App. 91). Petitioner held bank customers, including a minor, hostage while the bank tellers collected money out of registers. (App. 91-92). Petitioner took one of the tellers by the arm and led her around the room, forcing her to open the drawers. (App. 92). Thereafter, he ordered her to go faster and, emphasizing his point, fired a shotgun into the roof. (App. 92). The other teller came around to help empty the drawers. (App. 92). Seed money was dropped on the floor by one of the tellers, which had serial numbers specifically marked for armed robbery cases totaled over \$15,000. (App. 92-93). Petitioner took part of the seed money, went around the room, and fired another round in the floor of the breakroom. (App. 93). He then put the money in his backpack, loaded it on his back, and left through the back door. (App. 93). Petitioner stole a victim's truck to flee the crime scene in. (App. 93).

An officer arrived when Petitioner was driving away. (App. 93-94). When another detective arrived on scene, he ran the license plate number on the BMW parked in the parking lot, thinking it was connected to drug activity. (App. 93-94). After collecting the plate number, the detective received a call about the armed robbery. (App. 95).

Officers discovered the victim's truck was taken to the same location the BMW was located. (App. 96). An officer went to the location, approached the BMW parked within the curtilage of the home, to make sure the VIN number was the same. (App. 96). Officers then secured the area, called investigators, and obtained a search warrant. (App. 96).

In the vehicle, officers found ammunition shells that matched the gun used during the robbery, and clothing that matched what the robber wore during the armed robbery. (App. 97-98). A shotgun was found under the deck of Petitioner's house. (App. 97). Additionally, when

the officers entered the house they found a bag containing the money, including the seed money that was traced back to the money stolen from the bank. (App. 98). This money was taken into evidence. (App. 98). In the bottom of the bag was Petitioner's photo identification card, containing his name and social security number. (App. 98-99).

## STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the petitioner shouldering the burden of proof. Rule 71.1(e), SCRCF; *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). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failure to inform Petitioner of the appellate consequences involved in entering an *Alford* plea because Counsel credibly testified he informed Petitioner of appellate consequences and the rights waived when entering a plea, Petitioner failed to contact Counsel in a timely fashion about a decision to appeal, and Petitioner did not reasonably believe he could appeal from the denial of his suppression motion simply because he hails from a state with different procedural law on this particular issue, especially when no indication that Petitioner knew and understood the law in that state was shown.**

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was allegedly ineffective for failing to inform Petitioner about the appellate consequences of entering an *Alford* plea, specifically as it relates to his ability to appeal the denial of the motion to suppress. However, the PCR court properly rejected this argument, finding that Counsel credibly testified he told Petitioner about appellate consequences and Petitioner was informed of his rights waived and appellate consequences involved in entering a plea. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on

the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Regarding guilty pleas specifically, the petitioner must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The petitioner's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness inherently included in the plea's judicial procession. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the petitioner is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a guilty plea to be valid, the record must establish the defendant had a full understanding of the consequences of her plea and the charges against her. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Further, a petitioner can attack the voluntary, knowing and intelligent character of a guilty plea entered on advice of counsel by showing counsel's advice in taking the plea fell below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353

(2006). “That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.” *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 771.

Here, Petitioner claims that the plea is invalid because Counsel failed to warn Petitioner of the appellate consequences of pleading. (App. 165-66). However, Counsel testified at the PCR hearing that he informed Petitioner of his right to appeal and that he could move to reconsider. (App. 194-95). Additionally, Counsel moved to reconsider the sentencing length and this was withdrawn because the Solicitor stated he would ask for more time and bring the witnesses back. (App. 195). Furthermore, Counsel testified he told Petitioner he had ten days to appeal and Petitioner did not contact Counsel during those ten days. (App. 195-97). Further, Counsel stated he told Petitioner about the rights he was waiving when entering the plea. (App. 198). Thus, there is probative evidence in the record to support the fact that Petitioner was made aware of the appellate consequences of entering a plea.

Additionally, Petitioner’s argument that he reasonably believed he could appeal from the motion to suppress hearing because Michigan law allows for such an appeal is unpersuasive. Beyond stating that he previously lived in Michigan, Petitioner offers no support concerning if or how he knew Michigan’s criminal procedure rules and case law precedent sufficiently enough to have the requisite foundational knowledge for such an assumption to take hold. Though Petitioner graduated high school, there is no indication Petitioner received a legal education or an informal equivalent that would have rendered him aware of Michigan law on this particular

issue. (App. 113). Further, Respondent contends that, given Petitioner's lack of a prior record, chances of Petitioner understanding Michigan law are presumably even smaller than chances of understanding South Carolina law; the State where he went through the process himself with the assistance of counsel. Even if Petitioner had such a thorough understanding of Michigan law, he presumably would have understood State-specific law is not binding in other jurisdictions and, consequently, the law on specific issues such as appeals from suppression hearings varies depending on the jurisdiction. Thus, reliance on extra-jurisdictional law when determining specific procedural issues in an entirely different state is not a reasonable basis for believing an appeal from the suppression hearing was possible after entering an *Alford* plea. Consequently, this Court should find Petitioner was informed of his right to appeal, did not pursue an appeal in a timely fashion, and did not have a reasonable belief concerning the ability to appeal the denial of the motion to suppress.

**CONCLUSION**

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

CHELSEY F. MARTO  
Assistant Attorney General

BY: /s Chelsey F. Marto  
Chelsey F. Marto

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-0386

ATTORNEYS FOR RESPONDENT

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