STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Apr 12 2021
SC Court of Appeals

On Petition for A Writ of Certiorari to Greenwood County
Court of Common Pleas

The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
The Honorable Donald B. Hocker, Plea Judge

Appellate Case No. 2018-000892

TIMOTHY BEHELER, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ...Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

The PCR court erred in finding plea counsel was not ineffective for failing to prepare for trial.

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The post-conviction relief court correctly found Petitioner failed to establish any constitutional ineffectiveness of plea counsel for failing to prepare for trial, where Petitioner knowingly, voluntarily, and intelligently pled guilty to two counts of second-degree criminal sexual conduct with a minor and contributing to the delinquency of a minor stemming from his admitted sexual relations with the thirteen-year-old child based upon the advice of competent counsel who diligently investigated and prepared Petitioner's case for final resolution

STATEMENT OF THE CASE

During the summer of 2013, Petitioner Timothy Earl Beheler, who was in his late forties, began an on-going sexual relationship with a thirteen-year-old child—the minor daughter of his girlfriend—in exchange for providing the child with marijuana or money. The sexual assault of the minor child lasted for approximately one year until it was reported to law enforcement. During the investigation into the allegations, Petitioner admitted to engaging in sexual intercourse with the child. (App. 7).

As a result of the investigation and Petitioner's admissions, the Laurens County Grand Jury indicted Petitioner for two counts of criminal sexual conduct with a minor second degree (2013-GS-30-1463, -1567), and contributing to the delinquency of a minor (2013-GS-30-1568) in September 2013 He was originally represented by then-Assistant Public Defender[1] Chelsea B. McNeill of the Eighth Circuit Public Defender's Office, who was already representing him on pending drug offenses. However, Ms. McNeill eventually moved to be relieved due to a deteriorating relationship with Petitioner, stemming from his insistence she raise defenses that she believed were unethical based on his own admissions to the indicted conduct and a breakdown in communication.

At Petitioner's evidentiary hearing, Ms. McNeill testified she had a hearing for a motion to be relieved on November 10, 2015, where Ms. McNeill informed Judge Addy of an irreparable breakdown in communication with Petitioner. App. p. 149, l. 19-23. Ms. McNeill testified she told Judge Addy that she and Petitioner had fundamental differences in his defense strategy and she would be unable to move forward due to ethical dilemmas and obligations to the court. App. p. 150, l. 7-11. Afterward, Ms. McNeill scheduled a meeting between Petitioner, his

[1] Ms. McNeill is now the Eighth Circuit Public Defender.

wife, and his two kids, however Petitioner became so angry he walked out of the meeting. App. p. 150, l. 14-22. Ms. McNeill testified she, and Mr. Chip Howe, met with Petitioner on January 8, 2016, to ask if Petitioner would accept the recommendation from the State regarding a plea. Petitioner stated he was ready to go to court and speak with the judge. App. p. 151, l. 1-10.

Ms. McNeill, and Mr. Howe then spoke with Petitioner regarding a grievance he filed against Ms. McNeill, however Petitioner denied filing a grievance against Ms. McNeill, instead Petitioner stated he wrote to the Disciplinary Counsel to get some questions answered but never got an answer. Ms. McNeill testified she told Petitioner the committee took his letter as a grievance and informed Petitioner the committee would not provide him with legal advice. Ms. McNeill further testified "Petitioner then got furious, stood up and said, 'You haven't ever given me any legal advice. I've been here two and a half years.'" Ms. McNeill testified Petitioner got angry and stormed out of the room stating "I ain't got time for y'all and I'm not talking to y'all anymore." App. p. 152, l. 18- p. 152, l. 19.

Ms. McNeill testified Petitioner was brought to the courthouse on February 2, 2016, with the intention of having Petitioner plead guilty on this day. However, when Ms. McNeill spoke with Petitioner he indicated he needed to get a different attorney. Petitioner proceeded to tell Judge Addy he had not met with Ms. McNeill for two years, and only spoke with her regarding his case for the last four months. Ms. McNeill proceeded to warn Petitioner to not discuss any of the facts of his case at this hearing, however Petitioner put his hand in Ms. McNeill's face and told her to shut up. App. p. 153, l. 19- p. 154, l. 18. Following multiple hearings, Ms. McNeill was relieved as counsel and Michael Gambrell, Esquire, was appointed to represent Petitioner.

On May 31, 2016, Petitioner pled guilty as indicted before the Honorable Donald B. Hocker, circuit court judge. Petitioner entered these pleas without any negotiations or

recommendations, having previously rejected plea offers from the State. During the plea, Petitioner acknowledged he did have sexual intercourse with the child, had no defense to the charges, and wished to freely, intelligently, and voluntarily enter guilty pleas to all of three indictments. Judge Hocker found Petitioner's pleas were knowingly, intelligently, and voluntarily entered with the advice of competent counsel with whom Petitioner was satisfied and accepted the guilty pleas. Judge Hocker sentenced Petitioner to imprisonment for fifteen years for both counts of second-degree criminal sexual conduct with a minor and 1,056 days' time served for contributing to the delinquency of a minor, with the sentences to be served concurrently. (App. 1-18).

Petitioner filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Petitioner's appeal on November 8, 2016, for failure to provide a sufficient guilty plea explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. The remittitur was sent on November 29, 2016.

On April 26, 2017, Petitioner filed an application for post-conviction relief, asserting various claims of ineffective assistance of counsel. In response to the application, Respondent made its return and requested an evidentiary hearing. On February 28, 2018, an evidentiary hearing was convened before the Honorable J. Mark Hayes, II, circuit court judge. Petitioner was present and represented by appointed counsel Carson Henderson. Petitioner, Ms. McNeill, and plea counsel Gambrell testified.

By order filed on May 2, 2018, Judge Hayes denied and dismissed the application. Specifically, Judge Hayes found Petitioner failed to establish counsel was ineffective for failing to prepare for trial, failed to establish his plea was involuntary, failed to establish counsel failed to perfect a direct appeal on his behalf, and failed to move for a speedy trial.

Petitioner timely filed a notice of appeal. Appellate Defender David Alexander submitted a filed a Johnson[2] Petition for Writ of Certiorari and Appendix on Petitioner's behalf and petitioned to be relieved as counsel. Thereafter, the Supreme Court transferred the case to this Court pursuant to Rule 243(l), SCACR. The South Carolina Court of Appeals denied Appellate Defender Alexander's petition to be relieved as counsel and ordered both parties to address whether the PCR court erred in finding plea counsel was not ineffective for failing to prepare for trial. On December 10, 2020, Petitioner filed a Petition for Writ of Certiorari.

[2] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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. Smalls, 422 S.C. 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).

ARGUMENT

The post-conviction relief court correctly found Petitioner failed to establish any constitutional ineffectiveness of plea counsel for failing to prepare for trial, where Petitioner knowingly, voluntarily, and intelligently pled guilty to two counts of second-degree criminal sexual conduct with a minor and contributing to the delinquency of a minor based on his admitted sexual relations with the thirteen-year-old child based upon the advice of competent counsel who diligently investigated and prepared Petitioner's case for final resolution.

On appeal, Petitioner asserts the post-conviction relief court erred by finding counsel was not constitutionally ineffective for failing to prepare for trial. Specifically, Petitioner argues counsel failed to obtain a copy of a DSS file for the victim, counsel failed to interview potential witnesses, counsel failed to visit the crime scene, and counsel failed to challenge the admission of Petitioner's confession. Petitioner argues he would not have pled guilty but for plea counsel's complete failure to prepare for trial. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective. These findings are supported by ample probative evidence and not premised on any errors of law, and accordingly, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine

whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

When reviewing a guilty plea, the analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he

would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685,

511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty or no contest, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty or no contest, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on

those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970). The standard 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." Id. at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993. To ensure the defendant understands the consequences of his or her guilty or no contest plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty or no contest plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

An applicant who enters a plea on the advice of counsel may "only attack voluntary,

knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [Applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Petitioner has failed to meet his burden of proof of establishing his counsel was ineffective or his plea was not knowingly, voluntarily, or intelligently entered. The record from the general sessions proceedings and the post-conviction relief proceeding all establish Petitioner entered a knowing, voluntary, and intelligent with the advice of competent counsel, who was thoroughly prepared for trial.

The record clearly establishes counsel was properly prepared for trial. Chelsea McNeill, Petitioner's first attorney, reviewed all discovery with Petitioner and provided him with a paper copy while Petitioner was at the detention center. App. p. 145, l. 1-19. Ms. McNeill met with Petitioner multiple times, at the detention center, and at the court house, including a meeting for which Ms. McNeill arranged for Petitioner to be transported to the court house so he could have a private meeting with his family members. App. p. 145, l. 23- p. 146, l. 13. Ms. McNeill testified that during her meetings with Petitioner, he admitted to having sex with the thirteen-year old minor victim in exchange for marijuana, cigarettes, or money, however he denied having sex in certain places in the house. App. p. 146, l. 20- p. 147, l. 8. Both Ms. McNeill, and Michael Gambrell spoke with Detective Hunnicutt in an attempt to locate the list of witnesses Petitioner had provided to him, however both of Petitioner's attorneys indicted Detective Hunnicutt lost the list of names and could not provide Counsel with any of the names. App. p. 147, l. 25- p. 148, l. 9; App. p. 96, l. 15-20. Both Ms. McNeill, and Mr. Gambrell testified they spoke with Petitioner to obtain the names of witnesses he previously provided to Detective Hunnicutt, however Petitioner was unable to

provide either attorney a single name from this list of witnesses. App. p. 148, l. 10-21; Mr. Gambrell further testified he followed every lead that Petitioner gave him regarding contacting witnesses. App. p. 97, l. 12-23. Mr. Gambrell testified he drafted an order, which was signed by Judge Griffith, requiring the Department of Social Services to produce any records they had with regard to the victim in this case. App. p. 53, l. 4-21. Mr. Gambrell further testified he served the order on DSS himself, to which DSS indicated they did not have any information regarding the victim. App. p. 53, l. 22- p. 54, l. 12. Mr. Gambrell testified Petitioner never provided him with a list of potential witnesses to subpoena or to investigate regarding his case. App. p. 100, l. 18- p. 101, l. 11. Mr. Gambrell testified he spoke with Ms. Blackwell at the courthouse. Mr. Gambrell testified he spoke with Ms. Blackwell while in court in March, and Ms. Blackwell was limited in what she wanted to talk to him about. App. p. 62, l. 4-15; p. 63, l. 23-24. Mr. Gambrell testified he prepared this case for trial. App. p. 106, l. 25- p. 107, l. 5. Mr. Gambrell further testified he felt he would have been ready for trial in this case if Petitioner did not plead guilty. App. p. 108, l. 21-23.

When Petitioner decided he wanted to forgo a trial, and plead guilty, Mr. Gambrell testified he discussed what the plea hearing would entail with Petitioner. App. p. 107, l. 9-13. Mr. Gambrell testified he spoke with Petitioner about his constitutional rights, including Petitioner's right to a speedy trial. Further, Petitioner was informed of the charges he was facing, the maximum sentence he could face if he went to trial, and his constitutional rights during the plea colloquy with Judge Hocker. App. p. 5, l. 2- p. 10, l. 23. Petitioner testified at his plea hearing that he was satisfied with his counsel's performance, and his counsel did everything Petitioner asked, and he had no complaints against Counsel. App. p. 10, l. 5- p. 11, l. 2. Judge Hocker found a substantial, factual basis for Petitioner's plea, and found Petitioner made his plea freely, voluntarily, and intelligently. App. p. 11, l. 19-25.

Although Petitioner alleges counsel failed to perform certain tasks Petitioner requested, none of the requests made by Petitioner would constitute a valid defense to the charges Petitioner faced. The record clearly established Petitioner admitted to unlawful sexual intercourse with a thirteen-year old child. Ms. McNeill testified Petitioner consistently admitted to having sexual intercourse with the thirteen-year old victim, therefore Ms. McNeill did not feel there was any reason to pursue an alibi witness. App. p. 149, l. 1-10. Ms. McNeill testified that despite Petitioner alleging the sex was consensual, she informed Petitioner that the thirteen-year old victim was too young to consent. App. p. 149, l. 10-14. Additionally, Petitioner signed a written confession in front of police, where he admitted to having sexual intercourse with the thirteen-year old victim. App. p. 108, l. 14-20; App. p. 119, l. 23- p. 120, l. 14. The investigation Petitioner requested, at best, would only serve to establish additional sexual activity of the thirteen-year old victim. Ms. McNeill testified Petitioner told her the thirteen-year old victim was "quote unquote, a gangbanger, and that she was in a gang and that was trying to up her ranks in the gang by sleeping with a bunch of gang members. He called her a whore and said that he was mad..." App. p. 147, l. 12-17. Ms. McNeill testified Petitioner was mad that he was the only one going down for this offense and he wanted to tell a jury the thirteen-year old victim was a gangbanger and that she had sex with other people and he was the only one going down for that. App. p. 147, l. 21-25.

Moreover, Petitioner failed to present any credible evidence that he wanted to proceed to trial rather than entering a guilty plea. At his PCR hearing, Petitioner asserted, if counsel had fully investigated his possible witnesses, and prepared for trial he would have gone to trial. App. p. 133, l. 16-24. However, Petitioner's assertions do not align with overwhelming evidence presented establishing that he knowingly, voluntarily, and intelligently plead guilty to secure a favorable resolution of his case after consulting with proficient counsel who thoroughly investigated and

developed his case in order to reach the best resolution possible for Petitioner. The post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this certiorari and affirm the decision of the PCR court. Should this Court grant certiorari, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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TIMOTHY BEHELER,

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STATE OF SOUTH CAROLINA,

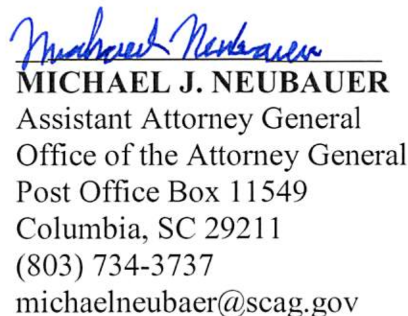
RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Second Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

David Alexander, Esquire
dalexander@sccid.sc.gov

This 12th day of April, 2021.



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SC Court of Appeals

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April 12, 2021

The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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(By Electronic Filing Only)

Re: Timothy Beheler v. State of South Carolina
Appellate Case No. 2018-000892

Dear Ms. Kitchings:

Enclosed please find a copy of the Return to Petition for Writ of Certiorari for filing in the above-referenced post-conviction relief appeal. By copy of this letter, I am serving opposing counsel with this Return.

Sincerely,

Michael J. Neubauer
Assistant Attorney General
SC Bar No. 104450

MJN/ks
Enclosures

cc: David Alexander, Esquire *(By Email Only)*