STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Fairfield County

John C. Hayes, III, Plea Judge
Robert E. Hood, Jr., Post-Conviction Relief Judge

Appellate Case No. 2020–001171

MICHAEL CLAYTON, JR,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
S.C. Bar No. 104114

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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II. Did the PCR Court err in finding Petitioner knowingly and voluntarily pled guilty when Plea Counsel failed to adequately prepare for trial based on an unreasonable trial strategy, provided coercive advice to plead guilty on the morning of trial, and failed to fully advise Petitioner of the sentencing consequences?

III. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?

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I. Did the post-conviction relief court properly determine Petitioner failed to establish any constitutional ineffectiveness of counsel for failing to conduct a reasonable investigation finding Counsel's investigation reasonable where Counsel reviewed all the discovery in the case, discussed the discovery with Petitioner, viewed the police interviews, and looked into the Newberry County charges?

II. Did The post-conviction relief court properly determine Petitioner failed to establish any constitutional ineffectiveness of counsel as to Petitioner's assertion his plea was involuntary where Petitioner knowingly and voluntarily chose to plead guilty pursuant to *Alford* to avoid a harsher sentence if convicted at trial after Counsel adequately prepared for trial and fully advised Petitioner of the sentencing exposure and consequences he faced by entering the plea?

III. Did the post-conviction relief court's procedures comport with statutory and constitutional requirements in regards to adopting the State's proposed order of dismissal where the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the court?

STATEMENT OF THE CASE

Petitioner is currently on probation. On August 21, 2018, and October 16, 2018, the Fairfield County Grand Jury issued indictments against Petitioner for two counts of Criminal Sexual Conduct (CSC) with a Minor, Second Degree (2018-GS-20-00181; -00265). The Sixth Circuit Solicitor's Office subsequently presented an amended indictment to the Grand Jury for Indictment No. 2018-GS-20-00181 on June 19, 2018. (App. 329–334). Petitioner was represented by George Speedy (Counsel) of Speedy, Tanner & Atkinson, LLC. Assistant Solicitor Julie Hall prosecuted the case.

On August 27, 2018, Petitioner pleaded pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to two counts of second-degree CSC with a minor before Judge John C. Hayes, III. Petitioner waived presentment of the additional second-degree CSC with a minor charge at the plea hearing. (App. 4–5). Judge Hayes accepted Petitioner's *Alford* plea and sentenced him to serve concurrent terms of imprisonment for five years on each charge, suspended upon the service of five years' probation. Petitioner did not appeal.

Petitioner timely commenced his post-conviction relief action on March 19, 2019, alleging ineffective assistance of counsel rendering his *Alford* plea unknowing and involuntary. Petitioner asserted Counsel was deficient in several aspects, and contended he would not have pleaded guilty but for Counsel's alleged deficiencies. (App. 20–28). Petitioner amended and supplemented his allegations on January 13 and January 17, 2020. (App. 3544; App. 45–54). Petitioner's allegations of ineffective assistance of counsel and involuntary guilty plea were as follows:

1. Involuntary guilty plea due to Counsel's:
    a. Failure to investigate;
    b. Failure to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial;

i. Specifically, Tova Clayton, Meredith Suber, Cindy Long, and Roger Long regarding the allegations of the victims' disclosure of sexual abuse;

c. Failure to interview potential character witnesses;
d. Failure to review pictures Petitioner possessed that would have contradicted portions of the victims' statements to the police;
e. Failure to interview the Newberry County law enforcement officers who received the report filed in Newberry County by the victims' biological father and for failing to further investigate the complaint when Newberry County law enforcement did not pursue charges against Petitioner;
    i. Specifically, Lt. Garrett Lominack and Inv. Robert Dennis;
f. Failure to adequately prepare for trial;
g. Decision to change the trial strategy immediately before trial;
h. Erroneous and coercive advice that Petitioner plead guilty the morning of trial;
i. Failure to advise Petitioner of all sentencing consequences; specifically, Petitioner would be required to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment demanding he accept responsibility for the offenses with polygraph testing;
j. (same as allegation (e)).

The State made its return on July 8, 2019, requesting an evidentiary hearing on Petitioner's allegations of involuntary guilty plea and ineffective assistance of counsel. (App. 29–34). A hearing into the matter convened on January 30, 2020, at the Lancaster County Courthouse before the Honorable Robert E. Hood. Petitioner was present and represented by Dayne C. Phillips, Esquire.

At the hearing, the post-conviction relief court admitted the following exhibits submitted by Petitioner into evidence: (1) Affidavit of Tova Clayton from the divorce proceeding; (2) Text messages between Tova and Petitioner; (3) Investigator Robert Dennis's report; (4) Victim 1's mental health records under seal; (5) Video recorded interviews of Tova, Victim 1, and Victim 2 under seal; (6) Investigator Castles's initial report; (7) Investigator Castles's notes; and (8) DPPP's

standard conditions of sex-offender registry. (App. 228–261). Post-conviction relief Counsel provided the post-conviction relief court with a separate copy of the videos for viewing in preparation of the Court's decision. The following witnesses testified at the hearing: Petitioner, George Speedy (Counsel), Tova Clayton, Robert Dennis, Karen Castles, Tiffany Drew, Barry Glymph, Kevin Chalk, Gwen Ray, Marsha Valasco, Michael Clayton, Sr., and Dave Anatra. Also before the post-conviction relief court were the Fairfield County Clerk of Court records of the underlying convictions, the plea transcript, and the post-conviction relief application.

At the close of evidence, the post-conviction relief court took the matter under advisement and allowed the parties to submit briefs instead of presenting closing arguments. The State submitted its Memorandum in Opposition to post-conviction relief via email on May 8, 2020, and Petitioner filed its Memorandum in Support of Granting post-conviction relief on May 12, 2020. (App. 262–280). On August 3, 2020, the post-conviction relief court filed an Order of Dismissal, finding Petitioner failed to prove that Counsel provided ineffective assistance of counsel and that Petitioner knowingly and voluntarily pled guilty. (App. 281–314). The post-conviction relief court denied each of Petitioner's allegations raised during the hearing and argued in the memorandum in support of granting post-conviction relief.

On August 10, 2020, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. (App. 315–322). The post-conviction relief court then filed an Order Denying the Motion to Alter or Amend via a Form 4 Order on August 17, 2020. (App. 323–324). Petitioner timely filed a Notice of Appeal. (App. 325–326).

STATEMENT OF THE FACTS

Petitioner's charges stem from his relationship with Tova Clayton (Mother) and her two daughters, the victims. Mother and her children moved into Petitioner's home in 2003. The

Victim's had separate bedrooms across the hall from one another. In 2004, Petitioner began visiting each victim's room. Petitioner would enter one victim's bedroom, stay in the room for about ten minutes, and then transition to the other victim's bedroom. Vitim 1 and Victim 2 both reported Petitioner digitally penetrated their vaginas, groped them, and made them touch his penis on several occasions during his visits to their bedrooms over the course of several years. (App. 10–11). These incidents occurred from age ten to fourteen on Victim 1, and Victim 2 from age eleven to eighteen. (App. 11–12).

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 any 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)). Appellate courts give great deference to a post-conviction relief 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, 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

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief as to his claims of ineffective assistance of counsel for failure to conduct a reasonable investigation, involuntary guilty plea, and that the post-conviction relief court violated the separation of powers doctrine by adopting the State's proposed order of dismissal. However, the post-conviction relief court properly rejected all claims, finding Petitioner failed to meet his requisite burden of proof of establishing constitutional ineffectiveness or any constitutional deprivations as to Petitioner's ineffective assistance of counsel and involuntary guilty plea claims. These findings are not controlled by an error of law and are supported by ample probative evidence in the record. Additionally, the procedures employed by the post-conviction relief court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the post-conviction relief court and comports with statutory and constitutional requirements. 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). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, *300 S.C.* at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997).

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 that 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.

The analysis of counsel's performance under the first prong of Strickland remains

unchanged—the applicant must show that counsel's representation fell below an 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 guilty 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." *Id.* 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 post-conviction relief hearing. *Harres*, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

"[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, 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 that 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, 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); *see also Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty 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 post-conviction relief that a guilty 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 post-conviction relief was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate's right to contest the validity of such a plea is usually,

but not invariably, foreclosed." *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also Jamison v. State*, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." *Id.* at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge*, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

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 failed to meet his burden of proof and the post-conviction relief court properly denied relief. This Court should deny certiorari.

I. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel for failing to conduct a reasonable investigation where Counsel reviewed all the discovery in the case, discussed the discovery with Petitioner, viewed the police interviews, and looked into the Newberry County charges.

Petitioner argues Counsel was constitutionally ineffective for his alleged failure to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not attempting to interview or subpoena material or character

witnesses. However, the post-conviction relief court properly denied relief, as the record firmly establishes Counsel's investigation was reasonable. The post-conviction relief relied on Counsel's credible testimony and properly denied relief. This Court should deny certiorari.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). However, no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S.at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id*. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id*. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Further, "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). 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." *Strickland*, 466 U.S. at 689.

First, addressing Petitioner's general claim of ineffective assistance of counsel for failure to conduct a reasonable investigation, at the evidentiary hearing, Counsel testified he reviewed all

the discovery in the case, discussed the discovery with Petitioner, viewed the recorded police interviews, and looked into the Newberry County charges. (App. 196–98). Petitioner provided Counsel with the information and court documentation from Petitioner and Mother's divorce. Counsel testified he then used the discovery and the divorce documents to create a timeline to formulate and prepare his trial strategy. Petitioner also testified Counsel asked him to create a similar timeline for the two to compare in preparation for trial. (App. 203–04). Then, Counsel testified he decided his trial strategy would be to attack the victims' and Mother's credibility by showing the allegations were retaliation for the divorce. (App. 204).

The post-conviction relief court determined this testimony credible and controlling, finding Counsel was not deficient because Counsel's investigation was reasonable. (App. 303-04). Specifically, the post-conviction relief court found "Counsel's investigation and trial preparation well within the reasonable professional norms of criminal defense attorneys." (App. 303). These credibility findings are afforded great weight on appeal. *See Foye*, 335 S.C. at 589, 518 S.E.2d at 267 (stating the reason appellate courts give great deference to the post-conviction relief court's findings is because the court has the opportunity to directly observe the witnesses). There is evidence of probative value to support the post-conviction relief court's findings and these findings are not controlled by an error of law. This Court should deny certiorari.

Second, Petitioner specifically argues Counsel was constitutionally ineffective for failure to interview Mother. At the evidentiary hearing, Counsel testified he did not interview Mother because he knew she would not speak to him about the case because she was an adverse witness. (App. 200). Additionally, Petitioner's private investigator testified at the evidentiary hearing he unsuccessfully attempted to interview Mother. (App. 162). Based on the post-conviction relief court's observation of Mother's testimony at the evidentiary hearing, the court found Counsel's

decision to not interview Mother was reasonable because "she was in fact an adverse witness who was not willing to aid in [Petitioner's] defense." (App. 304). Therefore, the post-conviction court properly concluded that Petitioner failed to show that Counsel was deficient for deciding not to interview Mother. There is evidence of probative value to support the post-conviction relief court's findings and these findings are not controlled by an error of law. This Court should deny certiorari.

Third, Petitioner specifically argues Counsel was constitutionally ineffective for failure to investigate the Newberry County charge.[1] At the evidentiary hearing, Petitioner testified he and Counsel briefly discussed the Newberry case, and no charges ever came out of the incident report. (App. 191). Similarly, Counsel testified he was aware of the Newberry report and had seen it was unfounded. Counsel stated he chose not to pursue it any further because he saw no value in the report, only risk. (App. 144). Investigator Robert Dennis explained the Newberry charge was initiated by the victims' biological father. However, after further investigation, the report was unfounded because the allegations took place in Fairfield County, not Newberry County. (App. 104–05).

The post-conviction relief court found Counsel's testimony he was aware of the report credible. Further, the post-conviction relief court found Counsel's choice not to pursue the Newberry report any further because he saw no value in the report, only risk reasonable and valid because the report was declared unfounded, not because the allegations were untrue, but because

[1] At the evidentiary hearing, Investigator Robert Dennis of the Newberry County Sheriff's Department testified he received a sexual abuse complaint on December 8, 2011, from the Victim 1's and Victim 2's father. Dennis explained the father stated his daughter told him she was inappropriately touched by Applicant, and the father told his daughter to she needed to report the abuse to the police. Dennis's report was admitted into evidence without objection.

the allegations took place in a different jurisdiction—Fairfield County. (App. 309). Therefore, the post-conviction relief court found Counsel was not deficient for failing to investigate the Newberry County charge, or interview the investigators that initiated the report, based on Counsel's reasonable strategy. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). There is evidence of probative value to support the post-conviction relief court's findings and these findings are not controlled by an error of law. This Court should deny certiorari.

Fourth Petitioner alleges Counsel was ineffective for failing to interview potential character witnesses. At the evidentiary hearing, Petitioner testified he told Counsel of witnesses he wanted called at trial, but Counsel explained to him that calling those witnesses did not fit into Counsel's trial strategy. Petitioner recalled Counsel informing him he planned to attack the State's witnesses' inconsistencies to show reasonable doubt. Petitioner testified he agreed with this strategy. Petitioner stated that on the morning of trial, he was prepared to go to trial and not testify or present any character witnesses. Petitioner recalled Counsel suggested that he take the plea offer the morning of trial, but Counsel also told him they stood a good chance at trial. (App. 120). Counsel testified he was fully prepared to go to trial, and he told Petitioner he was prepared for trial the morning of trial. (App. 204). Counsel stated he spoke to everyone he believed he needed to in order to have a good understanding of the case and to understand the probability of Petitioner being convicted or acquitted. (App 224). Counsel testified he planned to attack the State's witnesses' inconsistencies at trial and preserve the last argument by not having Petitioner on the witness stand. (App. 216). Counsel testified he would not have called the witnesses presented at the post-conviction relief hearing because the risk of damaging testimony coming out was too

great. (App. 200–02).

The post-conviction relief court found Counsel's articulated strategy of not presenting a defense, but rather attacking that State's case through cross-examination of its witnesses, to be reasonable. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). Therefore, the post-conviction relief court properly concluded Counsel was not deficient for failing to investigate the character witnesses because Petitioner agreed with Counsel's reasonable strategy.

In addressing prejudice, the post-conviction relief court found not credible Petitioner's assertion he would have chosen to go to trial had his witnesses been present and ready to testify because Petitioner's own testimony at the evidentiary hearing—that he was prepared to go to trial without presenting any evidence or testimony—conflicted that assertion. (App. 187; 306). Therefore, the post-conviction relief court properly concluded Petitioner failed to show he was prejudiced by Counsel's alleged failure to interview character witnesses. There is evidence of probative value to support the post-conviction relief court's findings and these findings are not controlled by an error of law. This Court should deny certiorari.

II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel as to Petitioner's assertion his plea was involuntary where Petitioner knowingly and voluntarily chose to plead guilty pursuant to *Alford* to avoid a harsher sentence if convicted at trial after Counsel adequately prepared for trial and fully advised Petitioner of the sentencing exposure and consequences he faced by entering the plea.

Petitioner asserts Counsel failed to adequately prepare for trial based on an unreasonable trial strategy, provided coercive advice to plead guilty on the morning of trial, and failed to fully advise Petitioner of the sentencing consequences, rendering his plea involuntary. However, the

post-conviction relief court properly denied relief, as the record firmly establishes Petitioner actively engaged in the plea negotiation process, was properly advised of his potential sentence exposure if convicted at trial, and he chose to plead guilty pursuant to *Alford* to avoid a harsher sentence if convicted at trial. Petitioner failed to establish any constitutional ineffectiveness and was not entitled to relief on this claim. Accordingly, certiorari should be denied.

First, Petitioner argues his plea was involuntary because Counsel was unprepared based on an unreasonable trial strategy. However, as previously discussed, the post-conviction court properly found Counsel's articulated strategy of not presenting a defense, but rather attacking that State's case through cross-examination of its witnesses, to be reasonable. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). Further, Counsel testified he was fully prepared to go to trial. The post-conviction relief court found this testimony credible and dispositive. (App. 306). These findings should be given great deference on appeal. *See Foye*, 335 S.C. at 589, 518 S.E.2d at 267 (stating the reason appellate courts give great deference to the post-conviction relief court's findings is because the court has the opportunity to directly observe the witnesses). Accordingly, certiorari should be denied.

Second, Petitioner argues his plea was involuntary because Counsel provided coercive advice which caused him to plead guilty the morning of trial. Specifically, Petitioner claims he felt coerced due to Counsel being unprepared for trial, Counsel changing the trial strategy on the morning of trial and not preparing him to testify, and because there were no character witnesses subpoenaed to corroborate his credibility and reputation. However, the plea hearing transcript

clearly refutes Petitioner's claim his as the plea court conducted a thorough colloquy during the plea hearing.

During Petitioner's plea hearing, the plea court explained the meaning of an *Alford* plea. (App. 6). The plea court explained "while you're maintaining your innocence you have decided it's in your best interest based on the State's recommendation and your feeling that were you to go to trial a jury most probably or likely would find you guilty." Petitioner understood the meaning of an *Alford* plea. (App. 6). The plea court then explained the charges against Petitioner and the sentencing exposure Petitioner faced. Petitioner stated he understood. (App. 6–7). Petitioner affirmed he had not been promised or threatened into pleading guilty, he was not intoxicated, and he was pleading freely and voluntarily. (App. 8). The plea court then explained Petitioner's constitutional rights: to a jury trial; the presumption of innocence; the State always has the burden of proof beyond a reasonable doubt; to remain silent; to confront the State's witnesses; and the right to present witnesses in defense. (App. 8–9). Petitioner understood his constitutional rights, and Petitioner understood he waived those constitutional rights by pleading guilty. (App. 9).

The post-conviction relief court reviewed the plea transcript and determined the plea court conducted a thorough colloquy during the plea hearing, and Petitioner, under oath, informed the plea court no one had promised, threatened, or forced him into entering the plea. (App. 8). Additionally, at the post-conviction relief hearing, Petitioner and Counsel both testified it was Petitioner's decision to plead guilty. (App. 194; 222–23). Petitioner also testified Counsel did not force him to plead. (App. 192). Petitioner testified the morning of the plea, he knew he needed to accept the plea offer or go to trial later that day, and he chose to take the plea. (App. 189).

In sum, Petitioner's assertion that he pled guilty due to Counsel's coercion does not reflect the reality of the record—Petitioner chose to pleaded guilty to avoid a harsher sentence if convicted

at trial. Further, the post-conviction relief court found Counsel's sentencing advice was not coercive; it was reasonable. (App. 311). Accordingly, Petitioner cannot establish he is entitled to relief. *See Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012) (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a 10-year sentence); *Bennett v. State*, 371 S.C. 198, 203–04, 638 S.E.2d 673, 675 (2006) ("Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial."). The post-conviction relief properly denied relief. This Court should deny certiorari as to this issue.

Third, Petitioner argues Counsel failed to adequately advise him of the sentencing consequences of pleading to the charges. Specifically, Petitioner alleges he was unaware he would be required to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment demanding he accept responsibility for the offenses with polygraph testing. However, the record establishes that Petitioner had a full understanding of the consequences of his plea and the charges against him and Counsel did not misadvise Petitioner in regards to explaining the treatment requirements. Accordingly, certiorari should be denied.

"To find a guilty plea is voluntary and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." *Boykin*, 395 U.S. at 242. Defendants must be advised of the direct consequences of their plea, but not the collateral consequences. *Smith v. State*, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and

largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Dir., Patuxent Inst.*, 475 D.2d 1364, 1366 (4th Cir. 1973). "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." *Brown v. State*, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). However, if counsel chooses to advise the defendant of collateral consequences, he must provide correct advice. *Smith*, 329 S.C. at 283, 494 S.E.2d at 628.

At the evidentiary hearing, Petitioner and Counsel both testified that Counsel advised Petitioner he would have to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment. (App. 189–90; 219). Petitioner's allegation focuses on his assertion that Counsel was deficient for not specifically explaining the treatment requirements—accepting responsibility for the charges. However, the conditions of Petitioner's sentence requiring him to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment have no effect on the range of his punishment. Therefore, the conditions are a collateral consequence of sentencing. *See Williams v. State*, 378 S.C. 511, 515-16, 668 S.E.2d 615, 617-18 (Ct. App. 2008) (finding registration on the sex-offender registry is a collateral consequence of sentencing).

Counsel had no duty to advise Petitioner of these collateral consequences. However, Counsel did advise him of the consequences, and therefore, Counsel had an obligation to advise Petitioner correctly. Tellingly, Petitioner does not contend Counsel misadvised him at all. Instead, he alleges Counsel did not advise him as specifically as he wished, in hindsight. Therefore, because Counsel did not actively misadvise Petitioner of the collateral consequences, Counsel was not deficient. The record establishes that Petitioner had a full understanding of the consequences of

his plea and the charges against him. *Boykin*, 395 U.S. at 242. The post-conviction relief properly denied relief. Accordingly, this Court should deny certiorari as to this issue.

III. The post-conviction relief court did not violate the separation of powers doctrine by adopting the State's proposed order of dismissal as the procedures employed by the post-conviction relief court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the Court and comports with statutory and constitutional requirements.

Petitioner argues that the procedure followed by the post-conviction relief court violated section 17-27-80 of the South Carolina code and the separation of powers doctrine pursuant to Article I, Section 8 of the South Carolina Constitution and denied Petitioner his right to have his post-conviction relief claim adjudicated by a judicial officer. Petitioner takes issue with the post-conviction relief court adopting the State's proposed order after asking ***both*** parties to draft a proposed order for the Court's review and consideration. However, the procedures employed by the post-conviction relief court were proper, and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the Court and comports with statutory and constitutional requirements.

As recently as 2019, our Supreme Court has again recognized the practice of calling for proposed orders from litigants remains routine, though the "finalization of [the] order is often a collaborative effort." *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). The South Carolina Supreme Court has never required or even suggested that a post-conviction relief judge must write his or her orders from scratch. If the post-conviction relief court—after careful consideration—adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate.

In *Fishburne*, our Supreme Court provided guidance on the preferred method for submission of proposed orders in post-conviction relief cases:

> When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019).

The exact method as set forth in *Fishburne* was followed in this case. Here, ***both*** parties provided proposed orders to the post-conviction relief court, as requested. After reviewing the opposing orders, the post-conviction relief court elected to adopt the State's order denying relief. Once the post-conviction relief court signed the order and it was filed, the order was no longer that of an advocate, but that of the court. *See Fishburne, supra.*

Here, Petitioner's argument that the post-conviction relief court's procedures—as directly outlined in *Fishburne*—violates the separation of powers doctrine is without merit as the procedures employed by the post-conviction relief court were proper, and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the post-conviction relief court and comports with statutory and constitutional requirements. Therefore, the post-conviction relief court did not err, and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant Certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
S.C. Bar No. 104114

BY: Michael D. Davidson
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

May 24, 2021