

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

On Petition for Writ of Certiorari to Richland County
Howard P. King, Trial Judge
Brian M. Gibbons, Post-Conviction Relief Judge

Nov 23 2022
S.C. SUPREME COURT

Appellate Case No. 2022-000026

BRANDON J. BERRY, #352671,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

STATEMENT OF ISSUES ON CERTIORARI.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW12

ARGUMENT

 I. THE POST-CONVICTION RELIEF COURT CORRECTLY
 FOUND TRIAL COUNSEL WAS NOT INEFFECTIVE AND
 PETITIONER SUFFERED NO PREJUDICE WHERE THE
 RECORD SUPPORTS PETITIONER WAS AWARE THE STATE
 INTENDED TO USE HIS JAILHOUSE PHONE CALLS AND HE
 WAS AWARE OF THE CONTENT OF THOSE CALLS BEFORE
 HE REJECTED THE STATE'S SECOND PLEA OFFER
 BECAUSE HE WAS THE ONE WHO MADE THE CALLS13

 II. THE POST-CONVICTION RELIEF COURT CORRECTLY
 FOUND TRIAL COUNSEL WAS NOT INEFFECTIVE AND
 PETITIONER WAS NOT PREJUDICED BY TRIAL COUNSEL'S
 PERFORMANCE IN THE MATTERS INVOLVING WITNESS
 WALLACE AND FOR NOT PROPERLY OBJECTING TO THE
 ADMISSION OF THE PHONE CALLS OR MOVING FOR A
 CONTINUANCE BECAUSE TRIAL COUNSEL CANNOT BE
 FOUND DEFICIENT FOR FAILING TO MAKE A NON-
 MERITORIOUS OBJECTION AND THE RECORD REFLECTS
 A MOTION FOR A CONTINUANCE WOULD NOT LIKELY
 HAVE BEEN SUCCESSFUL17

CONCLUSION.....22

STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of the Issue

- I. Did the post-conviction relief court err by finding trial counsel effective and no resulting prejudice when the record establishes that she failed to ensure that Petitioner was aware of the State's evidence and properly advised prior to the rejection of the final plea offer?
- II. Did the post-conviction relief court err by not finding that trial counsel rendered ineffective assistance for failing to make a proper record and move for a continuance due to the matters of the recorded phone calls and issues involving witness Wallace?

Respondent's Counterstatement of the Issue

- I. Whether the post-conviction relief court properly found Trial Counsel was not ineffective and Petitioner suffered no prejudice where the record supports Petitioner was aware the State intended to use his jailhouse phone calls and he was aware of the content of those calls before he rejected the State's second plea offer because he was the one who made the calls?
- II. Whether the post-conviction relief court correctly found Trial Counsel was not ineffective and Petitioner was not prejudiced by Trial Counsel's performance in the matters involving Wallace and for not properly objecting to the admission of the phone calls or moving for a continuance because Trial Counsel cannot be found deficient for failing to make a non-meritorious objection and the record reflects a motion for a continuance would not likely have been successful?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Petitioner following a traffic stop and subsequent car and foot chase between Petitioner and officers. Following an investigation, the Richland County Grand Jury indicted Petitioner for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol (2015-GS-40-015, -017, -018, -020, -062).

On November 30, 2015, Petitioner proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King presiding. On December 4, 2015, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol, and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of twenty-five years imprisonment.

Petitioner filed a timely notice of appeal, and an appeal was perfected on his behalf. Appellate Defender Lara M. Caudy, Esquire, with the South Carolina Commission on Indigent Defense-Office of Appellate Defense, represented Petitioner on appeal. Megan Harrigan Jameson, Esquire, of the South Carolina Attorney General's Office, represented the State. On appeal, Petitioner argued the following issues:

1. whether the trial court erred by finding Petitioner did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home; and
2. whether the trial court abused its discretion in finding Petitioner's girlfriend voluntarily consented to a search of her apartment.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion without oral argument. State v. Brandon Berry, Op. No. 2017-UP-380 (Ct. App. filed Oct. 18, 2017). The Remittitur was returned on November 3, 2017.

On July 25, 2017, Petitioner filed an application for post-conviction relief (PCR). The State filed its Return and Motion for a More Definite Statement on May 8, 2018, and requested an evidentiary hearing. Through counsel, Petitioner filed an amended application on October 4, 2019. An evidentiary hearing into the matter convened on October 30, 2019, at the Richland County Courthouse before the Honorable Brian M. Gibbons. Petitioner was present at the hearing and represented by Tricia A. Blanchette, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented the State. (App. 825 – 826). On May 10, 2021, Judge Gibbons denied Petitioner's PCR application and dismissed it with prejudice. (App. 976 – 1005).

On May 27, 2021, Petitioner filed a Motion Pursuant to Rule 59(a) & (e), SCRCPP. In that motion, Petitioner argued there were specific examples of conflict between the Order of Dismissal and the PCR transcript. (App. 1009 – 1011). On November 22, 2021, a hearing on Petitioner's motion was held before Judge Gibbons. (App. 1013 – 1041). After hearing arguments from both parties, Judge Gibbons denied Petitioner's Rule 59, SCRCPP, motion. (App. 1013 – 1040).

On January 11, 2022, Petitioner timely filed a notice of appeal on Judge Gibbons' May 10, 2021, filed Order of Dismissal. On July 25, 2022, Petitioner filed his Petition for Writ of Certiorari and Appendix.

This Return to Petition for Writ of Certiorari follows.

SUMMARY OF RELEVANT TRIAL TESTIMONY

On the second day, before trial began, the State informed the court that a second plea offer was being considered and they needed to time to consult the victim. (App. at 188). After consulting with the victim, the State informed the court that a second plea offer was made ranging from "fifteen to twenty years" and it was the State's understanding that Petitioner "rejected that plea offer." (App. at 189 – 90). The State also informed the court that it had discovered that morning that Petitioner had made jailhouse phone calls using other inmates' PIN numbers, and they were sending those to Trial Counsel that afternoon. (App. at 190). Trial Counsel indicated to the court that Petitioner did reject the plea offer. (App. at 191). The trial court then conducted the following colloquy with Petitioner:

THE COURT: All right. 11 let me ask you. You understand Mr. Berry, the offer that the State has presented in connection with this matter as set forth by the solicitor?

PETITIONER: Yes, sir.

THE COURT: And your lawyer has advised the Court that you wish to reject that offer; is that correct?

PETITIONER: Yes, sir.

THE COURT: Okay. Ms. Walker, the status of it then would be that offer is revoked; is that correct?

MS. WALKER: Yes, Your Honor. That offer is no longer on the table and will not be placed back on the table.

THE COURT: All right. Do you understand that that offer is no longer on the table if you reject it today and you would be subject to the full — if you are convicted, you would be subject to the full amount of punishment on all five charges. Do you understand that?

PETITIONER: Yes, sir.

THE COURT: Okay . Do you have any questions that you want to ask me about the plea offer?

PETITIONER: No, sir.

THE COURT: All right. The Court will find that the Defendant has -- or does understand the plea offer as communicated to him by his lawyer from the solicitor's office and that he has freely and voluntarily waived —or freely and voluntarily rejected that offer, fully understanding that that offer is revoked as of now, and he would be subject to the full amount of punishment in the event that he's found guilty of the charges.

(App. at 191 – 92).

The next day, the State informed the court that Wallace initially indicated that he wanted to testify for the State, but he would now be invoking the Fifth Amendment. (App. at 193 – 94). The State informed the court that they discovered a phone call from last week made by Petitioner to Wallace where Petitioner asked Wallace "not to talk or not to testify or something to that effect." (App. at 194). The court determined that the matters would be addressed later and informed Trial Counsel to "remind" Petitioner he was to have no contact with witnesses. (App. at 194 – 95).

Later in the trial, the State requested the opportunity to proffer testimony from Wallace since he was going to invoke the Fifth Amendment. (App. at 294). During the proffer and as expected, counsel for Wallace objected to the question of who Wallace was with the night before because Wallace had probation revocation proceedings pending any his answers could incriminate him. (App. at 334 – 37). The court sustained the objection. (App. at 337). The State informed the court that Wallace was willing to cooperate until a phone call from Petitioner to Wallace was found where Petitioner "told [Wallace] he should not testify." (App. at 339).

Trial Counsel rebuffed the State's accounting of the phone call and asserted that Petitioner merely stated, "I don't want you to testify" to Wallace. (App. at 339). The State clarified that Petitioner in the call stated, "'When you get up there, you just plead the Fifth because you're gonna say something that you think is going to try to help me and its going to hurt me, so you just plead the Fifth, you plead the Fifth, you plead the Fifth.'" (App. at 341). The court ordered that the call be transcribed for everyone, and the court would determine if any witness intimidation occurred on that phone call and would take up the proffer matter with Wallace at a later time. (App. at 343 – 46).

Later in the trial, the court revisits the Wallace matter and works to flesh out whether Wallace would be in violation of his probation if he testified to who he was with and whether he could invoke his Fifth Amendment rights. (App. at 446 – 50). Trial Counsel argued that she would be "hamstring'd" on cross-examination if Wallace invoked his Fifth Amendment rights, and it would violate Petitioner's Sixth Amendment rights. (App. at 450). The State indicated that the transcribed call would be emailed to everyone that afternoon, and Trial Counsel asked the court to read the transcript and listen to the phone call. (App. at 452). The next morning, Trial Counsel informed the court that she had arguments regarding relevance to make on the introduction of the phone calls if the State intended to put those up at that time. (App. at 454). According to the transcript, the State indicated, by a head nod, it was not putting the calls up at that time, and the matter was not addressed at that time. (App. at 454).

After taking testimony from Tricia Collins Odom, the court excused the jurors and indicated there was an evidentiary matter to handle. (App. at 530 – 31). As to the call from Petitioner to Wallace, Trial Counsel argued that it was hearsay, and the court ruled that "the hearsay objection is not applicable because Mr. Wallace is not available." (App. at 532 – 33). Trial Counsel also objected to one of the phone calls on the basis of relevance, but if the court found it relevant, then it was more prejudicial than probative. (App. at 533 – 37). The court found that the call was relevant and that it was probative because the jurors needed to hear the whole conversation in context. (App. at 537 – 39). Upon the jury's return, Lieutenant Margita Friedley of the Alvin S. Glenn Detention Center authenticated the calls. Subject to Trial Counsel's previous objections, the calls were entered into evidence and published to the jury. (App. at 540 – 42).

During closing argument, the State discussed the call to Wallace and Kayla, which were evidence for the jury's consideration. (App. at 652 – 55). The State asserted that Petitioner's phone

calls amounted to a confession. Id. Specifically, the State referenced that Petitioner repeatedly pointed out that he was in the position he was in because of the stuff he did, and Petitioner discussed the prison time he would take if offered. Id. The State's position was that Petitioner never said he was innocent in these calls, which logically follows that his statements in these calls were confessions. Id.

Trial Counsel, in closing argument, submitted that the phone calls were "played for one reason and one reason only, and that was so [the jury] would dislike or hate [Petitioner]" (App. at 658). Trial Counsel proceeded to tell the jury that she feared the jury would base their decision on the three phone calls and alluded to the other calls, not in evidence, that were "good phone calls." (App. at 660 – 61).

During jury deliberations, the jury asked for a transcript of the phone calls, but there was not one entered into evidence. (App. at 700). Instead, the court provided the jury with the recordings to listen to. (App. at 700 – 01). The jury returned a verdict of guilty as indicted. (App. at 713 – 14). Trial Counsel renewed her previous motions and motioned to set aside the verdict on the attempted murder and attempted armed robbery "for the previous reasons set forth." (App. at 721 – 22). The court denied Trial Counsel's motion to set aside the verdict. (App. at 722 – 23).

SUMMARY OF TRIAL COUNSEL'S RELEVANT PCR EVIDENTIARY HEARING TESTIMONY

On direct examination of Trial Counsel, she recalled having upwards of six hundred jailhouse phone calls made by Petitioner being delivered by the Solicitor's office. (App. at 865 – 66).¹ Trial Counsel testified that the first plea offer extended by the State was for a sentence of

¹ Petitioner argues that the Order of Dismissal misconstrues the testimony provided by Trial Counsel in regard to whether she did not review the phone calls with Petitioner because he was at the detention center. While Trial Counsel did not testify it was "because" Petitioner was in the detention center, it is a logical continuation of thought that Petitioner's confinement would affect

thirty years which Petitioner rejected. (App. at 867). Trial Counsel testified that she discussed that the State had discovered phone calls Petitioner made with another inmates' PIN number. They decided they would counter and try and get a "more reasonable" plea offer. (App. at 867 – 68). Trial Counsel testified that the State offered a second plea range of fifteen to twenty years and Petitioner rejected that offer. (App. at 869). Trial Counsel testified that she could not recall why she did not ask for a continuance, and she did not recall why she did not ask for the plea offer to remain open until she reviewed the new evidence. (App. at 870). Trial Counsel then testified that the plea rejection was confirmed after the disclosure of the new evidence. Id.

Trial Counsel testified that co-defendant Wallace was called as a state's witness, but that he intended to invoke his Fifth Amendment rights. (App. at 871). Trial Counsel recalled discovery concerns and did not recall any specific reason she did not ask for a continuance. (App. at 872 – 75). Trial Counsel explained that the court deferred its ruling on Wallace until later in the trial, and the parties proceeded to opening statements. (App. at 873 – 74). Trial Counsel testified that if Wallace invoked his Fifth Amendment rights, the State would have had foundational issues with the jailhouse phone calls; however, the State called Lt. Friedley, who laid the foundation for the phone calls. (App. at 876 – 78). Trial Counsel testified that she did not raise an authentication issue on the jailhouse phone calls because she was "hoping maybe the jury wouldn't be able to identify who they were." (App. at 878).

Trial Counsel testified that she argued to the court that if Wallace invoked his Fifth Amendment rights, then she would be precluded from meaningful cross-examination. (App. at 881 – 84). Trial Counsel remembered that the court asked for briefing on the matters surrounding

the way in which Trial Counsel could review the evidence with Petitioner. (App. at 866; 988; 1009).

Wallace, but she could not recall if she submitted a brief. (App. at 885). Trial Counsel testified that the record showed a bench conference was held over her objections, but she could not recall the substance of that bench conference. (App. at 886). Trial Counsel testified to her hearsay objection and her Rule 403, SCRE, objection to the phone calls. (App. at 888 – 89). Trial Counsel was then asked if it would have been effective representation for her to have asked for a continuance and she replied:

Well, yes, now that I know what was on this tape. Like before I didn't know all of the things that were on the calls because I didn't have them. So, yes, I probably should have asked for a continuance, but then once I get into it -- you know, I think I probably did need a continuance, but I don't know why I didn't ask for one.

(App. at 890).

Trial Counsel testified that she would "never force a client to take a plea." (App. at 891). Trial Counsel further testified that Petitioner was "very specific about the plea that he wanted" and that Petitioner has even discussed that in his jailhouse call. (App. at 891).

On cross-examination, Trial Counsel agreed that there was "significant evidence" against Petitioner "regardless of the phone calls." (App. at 905). Then the following colloquy occurred:

Question: Okay. Let's just go back to the phone calls then. So Okay. -- you've seen -- you've seen in the transcript and testified about it that this -- the issue of the second plea offer, the fifteen to twenty-year range. I think you testified on direct that you sort of knew that this phone call issue was percolating and so you went back to the State to see if there was anything else they would do other than the thirty years?

Answer: Yeah. I know -- I know that they said that they had found phone calls, but I hadn't heard them yet.

Question: Okay. So at the time that Mr. Berry rejects the plea offer, he at least knows that the State is saying we have phone calls that we're gonna use that aren't good for you?

Answer: Yes.

Question: Even if he doesn't know the specific content of the calls?

Answer: Yeah, neither of us knew the content.

Question: Okay. Did Mr. Berry ever tell you I don't know what they're talking about, I didn't make any phone calls like that?

Answer: No.

Question: Okay. And in the rejection of the plea offer, the State actually puts that on the record, that I've told Ms. Zmroczek I have these phone calls, I'm gonna give them to her, and then after that the judge goes through it with Mr. Berry, are you sure you want to reject this plea offer, it's gonna be revoked unless you accept it now. As of now it's gonna be revoked if you say no.

Answer: Right.

(App. at 905 – 06). Trial Counsel testified that Petitioner never indicated it was not him on the phone calls and agreed that the State wanted to use the phone calls because Petitioner made admissions on them. (App. at 909 – 10).

On recross-examination, Trial Counsel testified that Petitioner would have received the warning she tells all her clients, and that is to stay off the phones.

SUMMARY OF PETITIONER'S RELEVANT PCR EVIDENTIARY HEARING TESTIMONY

On direct examination, Petitioner testified that he wanted a new trial because he did not feel that he received a fair trial or "for [him] to be able to go back on the plea that [he] would have taken prior - - if [he] would have heard the phone calls prior to that." (App. at 940). Petitioner testified that Trial Counsel never went over the jailhouse phone calls with him. (App. at 942). Petitioner testified that Trial Counsel never discussed the phone calls the State found including the one he used another inmate's PIN on and was going to introduce into evidence. (App. at 943). Petitioner testified that he did not know he could ask for more time to consider the plea offer. (App. at 944). Petitioner testified that he wanted Trial Counsel to ask for a continuance to review the new evidence. Id. Petitioner testified that he was unaware that Wallace intended to invoke the Fifth Amendment. (App. at 945).

Petitioner admitted that the voice on the jailhouse phone calls was his own voice. (App. at 946). Petitioner again testified that if he had known the contents of the jailhouse phone calls, he would have taken the second plea offer. (App. at 947).

On cross-examination, Petitioner testified that he did not remember or know what he said on the jailhouse phone calls. (App. at 948 – 49).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue 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 any probative evidence in the record supports 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. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. 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

- I. The post-conviction relief court correctly found trial counsel was not ineffective and Petitioner suffered no prejudice where the record supports Petitioner was aware the State intended to use his jailhouse phone calls and he was aware of the content of those calls before he rejected the State's second plea offer because he was the one who made the calls.**

Petitioner contends Trial Counsel was deficient because he was not adequately apprised of the contents of three of his jailhouse phone calls to have made a decision as to whether he should have accepted or rejected the State's second plea offer. Specifically, the jailhouse phone calls Petitioner asserts Trial Counsel did not adequately review with him were two phone calls to his girlfriend, Kayla, and one to Nickilous Wallace² (Wallace), his co-defendant and a state's witness. Certainly, Trial Counsel cannot be deficient for failing to apprise Petitioner of the content of the calls because if anyone knew the content of those phone calls, it is Petitioner who was a party to those calls and initiated them. Also, Petitioner cannot establish prejudice where he ultimately had knowledge of the content of the calls he made at the time the State extended the second plea offer, and he rejected it. Finally, the PCR court found Petitioner's testimony was not credible. Therefore, this Court should deny Certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee 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). Petitioner bears the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that 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, 466 U.S. at 686. In evaluating

² Notably, Petitioner was on notice that he was not permitted to contact Wallace and used another inmate's PIN number to contact him to avoid detection.

allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668.

First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id. 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. 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. Strickland, 466 U.S. 668.

"Surmounting Strickland's high bar is never an easy task" Padilla v. Kentucky, 559 U.S. 356, 371 (2010). The PCR court's credibility findings are entitled to great deference on appeal. Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) ("[W]e defer to the PCR court's credibility findings as to witnesses who testified before the PCR court. . . ."); Goins v.

State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence" Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

When a plea offer is conveyed but rejected due to alleged ineffective assistance of counsel, the two-prong Strickland test for deficiency and prejudice still applies. Lafler v. Cooper, 566 U.S. 156, 162-63 (2012). The ultimate outcome of the ineffective assistance of counsel claim rests on whether the applicant can prove he would have accepted the offer and whether the favorable plea actually would have been entered. In Missouri v. Frye³, the Supreme Court of the United States stated, "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" 566 U.S. at 147.

In addition to Petitioner being required to show he would have accepted the plea offer, Petitioner "must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it if they had the authority to exercise discretion under state law" Id. The Supreme Court in Frye further stated, "[t]o establish

³ 566 U.S. 134 (2012).

prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal proceeding would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time" Id.

The South Carolina Supreme Court held in Davie v. State⁴, "[b]ecause presumed prejudice is reserved to very limited situations... a defendant must show actual prejudice" when alleging plea counsel was ineffective in his or her handling of a plea offer. 381 S.C. at 613, 675 S.E.2d at 422. An applicant "must demonstrate a reasonable probability that: (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting Frye, 566 U.S. at 147); see Lafler, 566 U.S. at 164 (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

As an initial matter, Petitioner's reliance on Lafler, Missouri, and Davie, as applicable to the current case, is misguided and misconstrues the scope of the issue before the Court. Frye and Davie discuss factual scenarios in which counsel failed to communicate plea offers to defendants. Lafler discusses a factual scenario in which counsel's erroneous advice on what the State could or

⁴ 381 S.C. 601, 675 S.E.2d 416 (2009).

could not prove led to defendant rejecting a plea offer. Furthermore, Lafler's factual scenario dealt with the defendant's rejected plea offer ranging from fifty-one to eighty-five months and the court's imposed sentence after trial ranging from one hundred eighty-five to three hundred sixty months. The facts and allegations in the case at bar are distinguishable from those cases as there is no allegation the offer was not communicated or that Trial Counsel advised Petitioner to reject the plea offer. Also, Petitioner's second plea offer was fifteen to twenty years, and he received an aggregate sentence of twenty-five years at trial. (App. at 731 – 32).

In this case, the PCR court correctly found Petitioner failed to prove he would have accepted the plea offer had he known the contents of the jailhouse phone calls. Despite his self-serving testimony to the contrary, Petitioner stated he would not accept a fifteen-year plea deal if offered in his phone call with Wallace just three days before trial. Also, Trial Counsel testified that Petitioner was adamant about the plea offer he would accept. (App. at 891 – 892; 961).⁵ The only support for Petitioner's assertion that he would have accepted the fifteen to twenty-year plea offer was the self-serving testimony made by Petitioner at his PCR hearing, which the PCR court specifically found not credible. (App. at 998); see also Thompson, 423 S.C. at 247, 814 S.E.2d at 493; Goins, 397 S.C. at 573, 726 S.E.2d at 3.

Moreover, Petitioner's assertion that he had no knowledge of the content of the phone calls is absurd. By Petitioner's own admission, it was his voice on the calls. Petitioner was on notice from the jail that the calls were being recorded. These calls were made the week before trial and

⁵ Petitioner also erroneously relies on Jackson v. State. In Jackson, the court held that self-serving testimony is enough to meet the prejudice prong of Strickland when there was "no evidence contradicting or conflicting with petitioner's testimony that would support the PCR judge's finding that petitioner would not have pled." 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000). Here, there was testimony presented and evidence that Petitioner would not have pled. Contrary to Petitioner's testimony at his PCR hearing, the record reflects that Petitioner was not willing to accept a fifteen-year plea offer.

not over some long period where Petitioner would have disregarded or forgotten the content. Also, when Petitioner rejected the second plea offer, he was aware of the substantial evidence the State intended to introduce at trial, including DNA evidence, bloody clothing, and firearm evidence linking Petitioner to the crime. Knowing the mountain of evidence the State had against Petitioner, he rejected the first plea offer, and he rejected the second plea offer, which logically flows that Petitioner was intent on a trial.

Respondent submits Petitioner has failed to show, but for Trial Counsel's performance, there was a reasonable probability he would have accepted the plea offer. Furthermore, Respondent submits Petitioner decided to proceed to trial knowing the potential consequences. Accordingly, this court should deny the petition for certiorari because there is probative evidence to support the PCR court's findings that Petitioner failed to meet his burden of proof under Strickland.

II. The post-conviction relief court correctly found trial counsel was not ineffective and Petitioner was not prejudiced by Trial Counsel's performance in the matters involving witness Wallace and for not properly objecting to the admission of the phone calls or moving for a continuance because Trial Counsel cannot be found deficient for failing to make a non-meritorious objection and the record reflects a motion for a continuance would not likely have been successful.

Petitioner alleges Trial Counsel was constitutionally ineffective for failing to properly object to the admission of the jailhouse phone calls and for failing to move for a continuance. Specifically, Petitioner avers Trial Counsel's performance was deficient because she did not effectively object to the jailhouse phone calls, did not object to the unavailability of Wallace because he invoked his Fifth Amendment right not to testify, and for not requesting a continuance to have more time to review the telephone calls. Petitioner also avers that the PCR court's Order of Dismissal fails to provide reasoning for not finding Trial Counsel ineffective. (PWC at 22 –

23).

For an applicant to be granted PCR as a result of ineffective assistance of trial counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984); Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding a PCR applicant must show both error and prejudice to win relief) (citation omitted). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id., at 690. In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State. 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Here, Petitioner relies on Skeen v. State⁶ and Collins v. State⁷ to support the allegation of ineffective assistance of counsel when counsel fails to request a continuance. In both Skeen and Collins, this Court found that the record did not support a finding of deficiency. Skeen, 325 S.C. at 213-214, 482 S.E.2d at 131-132, Collins, 422 S.C. at 258-259, 810 S.E.2d at 875-876; PWC at 23. Also, in Skeen and Collins, this Court found that prejudice was not established since it was unclear what further time would have yielded or any specific testimony of how additional time would have aided the defense. Skeen, 325 S.C. at 213-215, 482 S.E.2d at 131-132, Collins, 422 S.C. at 258-260, 810 S.E.2d at 875-876; PWC at 23.

⁶ 481 S.C. 210, 481 S.E.2d 129 (1997)

⁷ 422 S.C. 250, 810 S.E.2d 871 (2018)

At the PCR evidentiary hearing, Trial Counsel testified that in hindsight, she should have asked for a continuance. (App. at 890). Specifically, Trial Counsel stated:

Well, yes, now that I know what was on this tape. Like before I didn't know all of the things that were on the calls because I didn't have them. So, yes, I probably should have asked for a continuance, but then once I get into it -- you know, I think I probably did need a continuance, but I don't know why I didn't ask for one.

(App. at 890). Petitioner and Trial Counsel also testified that more time would have allowed Trial Counsel time to advise Petitioner regarding the plea offer properly "and/or have time to properly assess the weight of the evidence against him." (PWC at 23 – 24). Here, the PCR court found Trial Counsel "was not deficient for not moving for a continuance as such a motion was unlikely to be successful where the record reflects Counsel had at least two days before the phone call was introduced into evidence to listen to it, and a transcript of the call was prepared for the parties and the Court to review as well." (App. at 1001). Even if Trial Counsel had moved for a continuance and it was denied, that denial on the record would not likely be a winnable issue on appeal.⁸

Further, Petitioner avers Trial Counsel did not properly object to the jailhouse phone calls, however, the record reflects Trial Counsel did object to the jailhouse phone calls on the basis of hearsay. Trial Counsel also had concerns with the foundation of the calls and authentication. Any assertion by Petitioner that the Order of Dismissal fails to address this issue is refuted by the record. The Order of Dismissal summary substantively addresses the admissibility issues testified to at length, including the foundation of the calls, the fact that Trial Counsel hoped the jury could not identify the caller, and Trial Counsel's belief she had raised authentication or foundation sufficiently. The Order of Dismissal additionally summarized Trial Counsel's testimony about the bench conference arguments when the calls were to be admitted and that it came down to the

⁸ Appellate Counsel Lara Caudy testified at the PCR evidentiary hearing that appellate courts never overturn a trial judge's decision to deny a continuance request. (App. at 938).

admissibility of two out of three calls, that the statements by Petitioner's girlfriends were hearsay, the calls were prejudicial because Petitioner discussed speaking with an attorney and argued relevance. The Order of Dismissal additionally summarized how Trial Counsel testified she argued anything she could think of and did not feel limited to any specific issues. (App. at 990 – 91).

Also, the Order of Dismissal clearly addressed the issue with Wallace and his decision to assert his Fifth Amendment right not to testify. Seemingly, Petitioner asserts that because Trial Counsel testified that she was not in a position to effectively represent Petitioner regarding the admission of the phone calls and the matters involving Wallace, the PCR court had to agree and grant Petitioner's application for post-conviction relief. However, the PCR court's Order of Dismissal contains all the necessary findings of fact and conclusions of law to dispense with Petitioner's application for post-conviction relief.

Respondent submits that the record fully supports the PCR court's Order of Dismissal, and Petitioner has failed to establish any constitutional deprivations. Accordingly, this Court should deny certiorari.

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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, Respondent requests the opportunity to fully brief the issues raised.

Respectfully Submitted,

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A handwritten signature in black ink that reads "D. Russell Barlow II, Esq." The signature is written in a cursive style with a horizontal line underneath the name.

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ATTORNEYS FOR THE RESPONDENT