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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
Appellate Case No. 2018-000054
Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2022-001625

Theodore Wills Jr.,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE PRESENTED FOR CERTIORARI

I. Whether the Court of Appeals erred in holding Trial Counsel was not ineffective based upon his objectively unreasonable mistaken interpretation of the proffer agreement as a valid reason for providing erroneous advice to Petitioner to enter into the proffer agreement.

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Rules, Counsel for Petitioner hereby certify that the Petition for Rehearing made in this case was finally ruled upon by the Court of Appeals.

STATEMENT OF THE CASE

Petitioner was arrested for accessory to murder after the fact and obstruction of justice in connection with the murder of Julian Lee on November 01, 2001. App. pp. 476-477. William Diggs, Esquire represented Petitioner. Assistant Solicitor Scott Hixson[1] and Assistant Solicitor Brad Richardson prosecuted the case. Petitioner entered into a proffer agreement with the State on August 25, 2005. App. pp. 481-483. An indictment charging Petitioner for the murder of Lee was subsequently presented to the Horry County Grand Jury, which returned an indictment on April 27, 2006 (2006-GS-26-1652). App. pp. 479-480.

Petitioner was tried by jury on the murder charge only before the Honorable Steven H. John on October 1st through 3rd, 2007. The jury found him guilty and he was sentenced to forty (40) years imprisonment with credit for time served. App. p. 292, p. 334, ln. 1-7.

Represented by Joseph L. Savitz, III of the South Carolina Commission on Indigent Defense, Petitioner timely appealed his conviction. App. p. 449. The Court of Appeals affirmed his conviction on September 22, 2010. App. pp. 449-453; *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). Petitioner subsequently sought review of the Court of Appeals's decision with this Court. This Court granted certiorari and held oral argument on December 6, 2012. This Court affirmed the decision of the Court of Appeals on July 16, 2014. App. pp. 454-456; *State v. Wills*, 409 S.C. 183, 184-85, 762 S.E.2d 3, 3-4 (2014). Chief Justice Beatty dissented in a separate

[1] Deputy Solicitor Hixson later recused himself from the case as a precaution due to concern that he may possibly be called by the Defense to testify in regard to certain statements he made to Petitioner at the time of Petitioner was giving his statement pursuant to the proffer agreement. App. p. 420, ln. 20-24. Assistant Solicitor Richardson was consequently assigned to the case and brought it to trial. App. p. 420, ln. 23-24.

opinion joined by Justice Hearn. App. pp. 457-475; *Wills*, 409 S.C. at 184-206, 762 S.E.2d at 4-15.

Petitioner filed an application for post-conviction relief *pro se* on December 1, 2014. App. pp. 335-356. Respondent made its Return to Petitioner's PCR application on February 2, 2016. App. pp. 357-361. Represented by Undersigned Counsel, Petitioner amended his PCR application on June 1, 2017. App. pp. 362-371. An evidentiary hearing was held before the Honorable William H. Seals on September 19, 2017. Undersigned counsel appeared for Petitioner. Assistant Attorney General Johnny E. James, Jr. represented Respondent. Petitioner and Trial Counsel were presented and testified. Respondent called Solicitor Hixson to testify as well. The PCR Court denied relief on January 5, 2018. App. pp. 436-448.

Petitioner subsequently sought review of the PCR Court's decision and the Court of Appeals ultimately granted the certiorari on October 21, 2020. App. p. 543. Following oral argument held on March 9, 2022, the Court of Appeals affirmed the decision of the PCR Court on July 20, 2022. App. pp. 597-604. Petitioner's petition for rehearing was Court of Appeals denied on October 20, 2022. App. p. 616. This appeal follows.

STATEMENT OF THE FACTS

In October 2001, Julian Lee was found deceased as a result of two gunshot wounds to the back in a rural area of Horry County. App. pp. 168-169. Petitioner's accessory to murder charge and obstruction of justice charge were pending for approximately four (4) years before the proffer agreement was ultimately struck.

Under the agreement, Petitioner was to submit to a debriefing with law enforcement concerning his knowledge of Lee's murder and cooperate with the State in exchange for the State's "consideration" of his cooperation in sentencing on the pending accessory and obstruction charges. Specifically, the agreement obligated Petitioner to give a completely truthful statement on the involvement of all individuals involved in Lee's murder, including his own involvement, if any, as well as provide information on "all other matters materially bearing on this matter." App. p. 481 ¶ 1. This included providing information "without prompting....even if such information is not elicited by agent(s) of the State by direct question." App. p. 481 ¶ 1. Petitioner was also bound to submit to a polygraph and would be considered in breach of the agreement upon any showing of deception, inconsistency with any portion of his proffer statement, or indication Petitioner was the shooter. App. p. 482, ¶ 2. Upon such a breach, the agreement was "null and void" and the State was permitted to use Petitioner's proffered statements for "any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of [Petitioner] and impeachment." App. p. 482, ¶ 2. The agreement also authorized the State to use Petitioner's statement for these same purposes in the event some other individual was ever prosecuted and tried for Lee's murder and Petitioner failed to appear as a witness for the State or

testify truthfully at trial.[2] App. p. 482, ¶3. Likewise, a catchall provision at the end of the agreement provided that upon any violation of its terms, the agreement was null and void and "the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral to this matter." App. p. 483 ¶ 7.

Upon Petitioner's full compliance with these terms, the State agreed not to use his statements "in a criminal prosecution currently pending against him" and would "not seek any additional charges against [Petitioner] in connection with the subject of this Proffer." App. p. 482 ¶ 4. The State would also "take into *consideration* the materiality of his truthful testimony and degree of cooperation in the election of charge(s) and recommendation of sentencing" and to "fully inform the Court of [his] degree of cooperation and the relative benefit to the State at the of sentencing." App. p. 482 ¶ 5-6.

On August 26, 2005, Petitioner gave a statement pursuant to the proffer agreement, which was recorded (Ex. 22), and sat for a polygraph examination on September 19, 2005. The State considered Petitioner in breach of the agreement because his responses to several polygraph questions were determined to be "indicative of attempted deception." App. p. 484. The State consequently tried Petitioner with the murder of Lee. App. p. 479-480.

At trial, Trial Counsel attempted to exclude the proffered statement from admission into evidence pursuant to *Jackson v. Denno*. App. pp. 42-136. Trial Counsel also zealously argued that Petitioner's proffer statement was inadmissible because the proffer agreement was vague and unconstitutional, particularly with regard to its terms on breach and the use of a polygraph due to

[2] Trial Counsel testified that to his knowledge, no one else was ever prosecuted for the murder of Lee or for any other related offense.

its known potential to yield unreliable results. App. pp. 125-137. The trial judge ultimately denied the *Jackson v. Denno* motion and ruled the statement admissible.

The State called only a handful of witnesses to prove its case at trial. A Horry County crime scene technician testified regarding the location of the crime scene and evidence collection. App. p. 165, ln. 10 — p. 184. The State pathologist testified that Lee died of two gunshot wounds to his back. App. p. 201, line 14-25. Detective Neil Livingston, who previously testified during the in camera *Jackson v. Denno* hearing, laid the foundation for the admission of Petitioner's taped statement into evidence. App. pp. 223-233. Detective Livingston testified to the setting for the interview, the reading of Petitioner's *Miranda* rights, and the waiver thereof. The State's case then concluded with playing the recording of Petitioner's proffered statement before the jury. In the taped statement, Petitioner stated he picked up Lee with another individual named Mark Willard on the day of the murder. See Ex. 22. Petitioner stated they then drove to a secluded area where Willard ultimately shot and killed Lee. See Ex. 22. Petitioner had stayed in the car during and after the shooting because he was scared. See Ex. 22. Willard later threw the gun into a nearby river. See Ex. 22. The gun was never recovered.

It was the State's theory that there was a bounty placed on Lee's life as the result of an unrelated drug deal with individuals referred to as the "Johnson Brothers." App. pp. 264-266. The State argued that Petitioner and Willard were paid $5,000 each to kill Lee. The State did not try to call Willard or the Johnson Brothers to testify and apart from bare forensics, none of the three State witnesses had information on the actual shooting, the underlying motives, or the identities of those suspected to be involved. No witness or evidence admitted at trial tied Petitioner to Lee or the shooting except for Petitioner's own statement. The State did not present any testimony or

evidence to corroborate the information in Petitioner's statement. No one else was ever prosecuted for the crime.

At the PCR hearing, Petitioner testified he had not understood that the proffer could ultimately hurt him or that his proffered statement could potentially be used against him, explaining: "[I]t was only told to me that it would help me." App. p. 402, lines. 20-23; p. 403, line 25; p. 404, line 1; p. 412, lines 16-24; p. 414, lines 12-22. Petitioner's understanding of the agreement mirrored that of Trial Counsel's: "He told me that if I done what they asked me to do, that I wouldn't be charged for a crime and I would leave and...be able to go home after the court proceeding." App. p. 402, ln. 20-23; p. 412, In. 16-24; p. 414, In. 12-22. Petitioner also testified that he trusted Trial Counsel and entered into the agreement because of his advice. App. p. 401, lines 22-23; p. 410, lines 4-5

At the PCR hearing, Trial Counsel testified that "his understanding of the agreement was that if [Petitioner] was truthful, all of the charges would be dropped and that the State would, with [Petitioner's] assistance, prosecute the others involved in the killing." App. p. 444. *See also* App. p. 389, ln. 17-25; p. 390, ln. 1-18. In regard to the terms on the use of Petitioner's proffered statement at trial in the event of breach, Trial Counsel testified that he understood the agreement as allowing the State to use Petitioner's proffer statement for impeachment only. App. pp. 441-443. Before advising Petitioner to enter into the agreement, Trial Counsel did not clarify with Assistant Solicitor Hixson regarding the extent of the State's use of the statement in the event of breach and did not consider trying to renegotiate or amend the agreement. Trial Counsel also testified that to his knowledge, no one else was ever prosecuted for the murder of Julian Lee or for any other related offense.

ARGUMENT

I. The Court of Appeals erred in holding Trial Counsel was not ineffective because Trial Counsel's objectively unreasonable interpretation of the proffer agreement cannot serve as a valid reason for providing erroneous advice to Petitioner to enter into the proffer agreement.

The Court of Appeals held that Trial Counsel was not deficient because he had articulated a valid reason for advising Petitioner to enter the proffer agreement based upon Trial Counsel's opinion at the time that the agreement that was advantageous in that it would have "mitigated the consequences of the pending charges" and prevented the State from bringing additional offenses. The Court of Appeals also cited Trial Counsel's belief that Petitioner had been truthful with him.

The Court of Appeals erred because the record makes clear that Trial Counsel only believed that the agreement was advantageous to Petitioner at the time because his understanding of the agreement's terms regarding the State's use of the proffered statement, the benefits Petitioner could receive, and the consequences of breach was simply wrong. Deficiency cannot be excused in this case because Trial Counsel's objectively unreasonable, mistaken interpretation of the agreement directly conflicts with the bare language of its terms, as well as the contractual legal principles used to interpret agreements between the State and a criminal defendant.

First, Trial Counsel failed to recognize that the very language of the agreement effectively waived the provisions of Rule 410, thereby allowing the State to use the proffered statement during its case in chief. Trial Counsel testified he understood the agreement as providing that Petitioner's statement could not be used against him (App. p. 382, lines 2-5; p. 387, lines 11-12). Trial Counsel

stated he was surprised, even angry that the State was using Petitioner's statements as evidence of his guilt in its case in chief at trial and felt that the State had actually breached the agreement by doing so. (App. p. 382, lines 2-5; p. 379, line 23—p. 380, line 1; p. 378, In. 23-25, p. 379, ln. 1-4). In addition to his PCR hearing testimony, Trial Counsel's arguments at trial to exclude the statement also make it abundantly clear that he failed to recognize that the text of the agreement effectively waived the protections of Rule 410, SCRE. (App. p. 51, line 12-15; p. 51, line 25—p. 52; p. 125, line 6-17; p. 127, line 8 p. 131, line 3-10; p. 135 pp. 297-298). Trial Counsel had also vigorously argued, among other points, that the agreement was vague in that it failed to specifically state that Petitioner's statements would be admitted against him in the State's case in chief at trial in the event of breach. (App. p. 51, line 12-15; p. 51, line 25—p. 52, line 3). In Trial Counsel's view, the agreement rather only permitted the State to use Petitioner's statements for the purpose of decision-making for the disposition of the case and in the plea negotiation process. (App. p. 131, lines 3-10; p. 298). In his view, to "allow the State to expand beyond the scope of the literal language contained in the agreement" and admit the statements as evidence of Petitioner's guilt was inherently unfair and in violation of due process. Notably, Trial Counsel also informed the trial judge that entering into an agreement that permitted admissibility of his statements for this purpose was "not a voluntary, knowing, or intelligent decision that either of us made with respect to entering into the agreement." (App. p. 125, lines 18-20).

Trial Counsel's interpretation of the agreement directly conflicts with its express terms. The agreement provides for using the statement during the State's case-in-chief multiple times. For instance, upon the determination that the polygraph results show deception or inconsistency with Petitioner's proffered statement, or indicate he was the shooter, the State was then authorized

to use Petitioner's proffered statement for "*any legal purpose, including, but not limited to,* considerations for....*disposition of charges through....trial*....and impeachment." App. p. 482, ¶ 2 (italics added). The agreement provides the same authorization for use of Petitioner's statement in the clause relating to any failure in his obligation to testify at the trial of any individual prosecuted in the case, as well as in a catchall provision that upon any violation of the agreement, "the State shall have the *right to use any information* through this Proffer *in any fashion, whether direct of [sic] collateral* to this matter." App. p. 482, ¶ 3; p. 483, ¶ 7 (italics added). Likewise, the inverse of these provisions in the State's promise that upon Petitioner's "full compliance, the "statements provided during his debriefing would not be used in a criminal prosecution currently pending" lends further support. Coupled with the overbreadth of these terms, the State's discretion to use the statement in the "disposition of charges through...trial" further demonstrate the State's intention to use Petitioner's statements at trial in the event of the breach. Moreover, the agreement specifically lists both "disposition of charges...through trial" and for "impeachment" as uses for the statement in the event of breach. Thus despite Counsel's interpretation of the agreement that the statement could only be used for impeachment only; it is illogical to conclude that impeachment was the only intended use of the statement at trial since the agreement specifically and separately listed both "through trial" and "impeachment" as potential uses of the statement. Trial Counsel's failure to recognize that the language of the agreement clearly waived Rule 410 was thus objectively unreasonable.

Next, Trial Counsel's belief that the agreement was advantageous was also based upon his erroneous and objectively unreasonable interpretation of the agreement's benefits to Petitioner.

Trial Counsel explained his understanding of the agreement's benefits at several points on both direct and cross-examination at the PCR hearing as: that in return for Petitioner's truthfulness and compliance with the terms, the agreement would "get him out and basically, the case would end"; "all of the charges would be dropped" or "be handled in a way that would set him free." (App. p. 378, line 4-6; p. 389, ln. 17-22; p. 390, ln. 1-18). Trial Counsel also believed that Petitioner would not be prosecuted on additional charges related to the murder of Julian Lee: Counsel maintained that his interpretation of the agreement would have materialized had the State not breached the agreement:

> Q: And you believe when you entered into… the proffer agreement that Mr. Wills was not gonna be prosecuted?
> A: Correct.
> Q: And what happened? What - - -
> A. I think the State breached the agreement if you want to know from my perspective.

App. p. 378, ln. 23-25, p. 379, ln. 1-4.

The express terms of the agreement directly conflict with Trial Counsel's interpretation. Contrary to Trial Counsel's interpretation and the PCR Court's findings, the agreement contains no such term or language to this effect. In return for Petitioner's full cooperation according to the agreement's terms, the State merely promised that the "statements provided during his debriefing [would] not be used in a criminal prosecution *currently pending* against him by this Office" and that "the State [would] not seek any *additional* charges against [Petitioner] in connection with the subject of this proffer." App. p. 482, ¶ 3-4 (italics added). Nothing in these terms suggest that in return for Petitioner's full compliance with the agreement, his then pending charges — obstruction of justice and accessory to murder after the fact — would be dropped. Likewise, no language in

the agreement suggested that "it was gonna be handled in a way that would set him free", as Trial Counsel had testified. App. p. 389, ln. 17-20. *See generally, Baughmans v. State*, 311 S.C. 547, 548-549, 430 S.E.2d 505, 506-07 (1993) (holding that to construe the State's promise to dismiss the defendant's *pending* charges as applying to additional charges not yet filed at the time of the plea agreement would be to imply a term the parties did not agree to), *cert. denied*, 510 U.S. 991 (1993).

Further, the agreement has no dispositive effect on the two then-pending charges apart from the State's promise to merely "*take into consideration* the materiality of his truthful testimony and degree of cooperation in the election of charge(s) and recommendation of sentencing for your client in this matter", and the State's mere promise to "fully inform the Court of [Petitioner's] degree of cooperation and the relative benefit to the State at the time of sentencing." App. p. 482, ¶ 5-6. (italics added). The agreement's repeated references to Petitioner's sentencing on the then pending charges further demonstrate that the parties did not agree or contemplate that dismissal of the pending charges was contingent on the extent of Petitioner's cooperation.

State v. Compton addresses a similar issue involving a misinterpretation of a cooperation agreement and is instructive here. 366 S.C. 671, 677-78, 623 S.E.2d 661, 664-65 (Ct. App. 2005). In *Compton*, the defendant was indicted and convicted of a murder based upon the statements he made while assisting law enforcement in the same case. Using general contractual principles, the Court held the agreement did not entitle Compton to immunity, but was rather a cooperation agreement in which he contracted for reduced sentences on unrelated charges for which he had already pleaded guilty to. *Id*. The Court focused on the precise language used within the four corners of the agreement, finding a complete absence of necessary terms or words such as

"immunity" and synonymous variations. *Id.* at 678, 623 S.E.2d at 678. As a result, the Court concluded the agreement was unambiguous, as there was "nothing to evidence an understanding between the parties that Compton could not be prosecuted for the… murder." *Id*. The agreement also clearly demonstrated the State's intention in entering the agreement to "get reliable information that could assist in solving a murder case" and Compton's intention to "get a reduction in the sentences for his burglary convictions." *Id*. To read more into the agreement's terms or characterize it as anything more than a simple contract to cooperate would be to insert terms into the agreement that simply were absent. *Id*. Similar to *Compton*, the proffer agreement here also contains nothing as to dismissal of the pending of the charges; and instead contains only the State's promising to take Petitioner's cooperation into "consideration" for sentencing on those charges. The State's promise to consider the degree of Petitioner's compliance for the "election of charges" is equally as tenuous to justify Trial Counsel's interpretation that the agreement would lead to the dismissal of the pending charges. Although the agreement does provide for immunity or something like it on any additional charges related to Lee's murder upon Petitioner's fulfillment of the conditions, the then-pending charges would still remain and there is no promise of their dismissal. Thus, when interpreting the agreement as resulting in the dismissal Petitioner's charges or set him free, Trial Counsel read terms into the agreement that were simply not there.

Thus, because Trial Counsel's belief that the agreement was advantageous was based upon his objectively unreasonable and erroneous interpretation of the agreement, his belief is not a valid reason to excuse his ineffective performance. An attorney's ignorance or misinterpretation of contract principles cannot form the basis of a sound strategy. An attorney's failure to contemplate or lack of knowledge as to a critical fact or point of law likewise cannot provide the basis for a

sound or reasonable strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 383, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Williams v. Taylor,* 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Foye v. State* 335 S.C. 586, 518 S.E.2d 265 (1999). Further demonstrative of this point is to frame Trial Counsel's performance and decision-making in this case in the hypothetical setting of a guilty plea in which defense counsel's erroneous understanding of the State's plea offer and misadvice to his client to accept it resulted in a much harsher sentence than counsel had advised, as well as rendered the client's plea as involuntarily, unknowingly, or intelligently entered. In South Carolina cases addressing this scenario, counsel's misinformed, erroneous belief that the plea offer was advantageous to his client would not be deemed as a valid reason for advising his client to accept the plea offer nor would it preclude a finding of ineffectiveness. *See e.g. Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1987).

Additionally, Trial Counsel's belief that Petitioner had been truthful with him when discussing the shooting and the extent of his involvement cannot excuse a finding of deficiency as a valid reason for advising Petitioner to enter the agreement. Trial Counsel testified: "I knew [Petitioner's] family and had known him for a long time, cousins and related people, and I felt like he would've been truthful with me and would've been comfortable in opening up about it, so I felt comfortable that he was telling me the truth and to go ahead and move forward with this strategy or this approach." (App. p. 389, lines 11-16). The basis Trial Counsel provided for his belief on Petitioner's truthfulness is unsound because it is not based in investigation or reasoned professional judgement but is rather founded upon an emotional attachment, social familiarity, or sheer blind faith that Petitioner was truthful with him. Indeed, Trial Counsel had acknowledged that there was no independent evidence provided by the State to corroborate Petitioner's account and likewise no

way for him determine the veracity of his account prior to the State's polygraph. (App. p. 381, lines 4-10; p. 384, lines 19-20). At the time Trial Counsel advised Petitioner to enter the agreement, he was aware that the terms dictated that a polygraph was rather the only mechanism to determine the veracity of Petitioner's account. (App. p. 381, lines 4-10; p. 384, lines 19-20;. p. 398, line 22—p. 399, line 13). Yet, his testimony and trial arguments demonstrate that he was also generally aware from his experience as a criminal defense attorney of the unreliability of polygraph examinations and potential for erroneous results, even commenting that "there is no truth serum." Trial Counsel proceeded upon his unsupported belief of Petitioner's truthfulness despite the fact that under the terms of the agreement, the State's opinion Petitioner had been untruthful, and thus in breach, could be based on any deviation, or "indication of deception" or indication of attempted deception. (App. p. 398, line 22—p. 399, line 13). Trial Counsel's belief as to Petitioner's truthfulness is thus not a valid reason to excuse his deficient performance.

Furthermore, Petitioner and Solicitor Hixson's testimony that they believed was advantageous is inconsequential. Petitioner's opinion was based upon Trial Counsel's unreasonable, mistaken interpretation in regard to the use of his statements in the event of breach, as well as the benefits he would be entitled to upon compliance with its terms. Moreover, Solicitor Hixson's view on the advantageousness of the agreement and surprise that Petitioner had failed the polygraph is not probative to the issues at hand. *See Love v. State*, 428 S.C. 231, 242-43, 834 S.E.2d 196, 202 (2019). Solicitor Hixson also stated several times that he did not recall the specifics of the agreement in this case several times during his PCR hearing testimony.

Because the Court of Appeals found that Trial Counsel's deficiency was excused for the reasons he articulated, the resulting prejudice is not addressed in the Court of Appeals's opinion. However, Petitioner was prejudiced as a result of Trial Counsel's ineffective performance. First, Trial Counsel's errors were prejudicial because Petitioner relied upon Trial Counsel's advice and entered the agreement because of his advice. The prejudice stemming from this error is clear in that there was no evidence incriminating Petitioner at trial but for his own statement. Even prior to making the statement and entering the agreement, as Trial Counsel testified, the State had little if any evidence against Petitioner for the "periphery" charges of obstruction of justice and accessory to murder, let alone any evidence that Petitioner was more involved with the murder, such as being the trigger man. App. p. 378, ln. 10-12, p. 384, lines, 19-21. Thus, without Petitioner entering the agreement and providing the statement, he would not have been charged, let alone convicted of murder because the State did not previously have enough evidence to indict him for murder. Indeed, Petitioner's obstruction of justice and accessory charges were pending for a few years prior to the agreement.

Thus, but for Trial Counsel's errors, there is a reasonability that the outcome of Petitioner's case would have been different.

Additionally, in affirming the PCR Court's decision, the Court of Appeals also noted that the courts of this State had yet to specifically opine on the validity of Rule 410 waivers at the time this case was decided. However, this is not determinative because the State and a criminal defendant have always had the freedom stipulate to certain evidentiary matters, to draft agreements with relatively little oversight. Resolution of whether Trial Counsel was ineffective in this case

does not depend on what would have been a novel issue of law at the time of Trial Counsel's decision-making, and this is not a case where deficiency and prejudice are precluded due to an attorney's inability to foresee a change in the law. *See Hill v. State*, 350 S.C. 465, 470-71, 567 S.E.2d 847, 850-51, (2002) (holding that the rule in *Gilmore* is inapplicable and will not excuse counsel's deficiency where counsel need not have anticipated a change in the law); *Chappell v. State* (Ct. App. 2019) (concluding counsel is not excused from being found ineffective where the issue was not a novel issue of law and is rather an application of an existing rule to a new set of facts); *Thompson v. State*, --- S.E.2d ----2018 WL 1404480, No. 27785 (Mar. 31, 2018) (affirming the PCR Court's findings that trial counsel was deficient for failing to object to improper vouching of a CSC victim's credibility because counsel was on notice this was improper even though the case law on this issue was in relatively early stages of development at the time of trial).

Additionally, the Court of Appeals erred in affirming the decision of the PCR Court because the PCR Court used the holdings from Petitioner's direct appeal in making its determination.

In determining whether Trial Counsel was ineffective for misadvising Petitioner, the PCR Court provided that the "law applicable to this question is, as noted by Respondent, at the evidentiary hearing, set forth by the holdings on Applicant's own direct appeal...While Rule 410...generally renders inadmissible any statements made in the course of plea discussions, a defendant may waive the protections afforded by Rule 410." App. p. 441 (citing *Wills*, 409 S.C. 183, 185, 762 S.E.2d 3, 4 (2014)). This was an error of law as Trial Counsel of course did not have the opinions from Petitioner's direct appeal to inform his decision-making when

interpreting the agreement's terms or weighing its risks and advantages to Petitioner. Considering the case's appellate opinions when evaluating Counsel's decision-making and performance is equivalent to impermissibly evaluating the issue in hindsight in contravention of *Strickland v. Washington.* Further, the issue addressed on direct appeal and reviewed upon certiorari does not speak to the specific issue here as to whether Trial Counsel was ineffective for advising Petitioner to agree to the proffer agreement in violation of the Sixth Amendment. The PCR Court also cannot logically use the appellate opinions as the law as the law governing the PCR issues and find at the same time that Counsel "faced a new ground" regarding the Rule 410 waiver issue. As previously discussed, this is not a case where deficiency and prejudice are precluded due to an attorney's inability to foresee a change in the law and the errors in Trial Counsel's interpretation of the agreement, decision-making, and advice to Petitioner are made clear by the very language of the agreement and the record.

In light of the foregoing, the Court of Appeals erred in affirming the decision of the PCR Court. Trial Counsel's interpretation of the agreement, decision-making, and consequent advice to Petitioner was objectively unreasonable and cannot be excused by way of the reasons he provided during his PCR hearing testimony. Therefore, Petitioner met his burden in proving Trial Counsel's performance was deficient and prejudicial.

CONCLUSION

In light of the foregoing, this Court should grant certiorari and order further briefing of the issues raised herein.

Respectfully Submitted,

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