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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Court of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable William H. Seals, PCR Judge

Appellate Case No. 2022-001625

THEODORE WILLS, JR.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

RETURN TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Petitioner's Statement of Issue on Certiorari

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Respondent's Counterstatement of Issue on Certiorari

Did the Court of Appeals properly determine that Petitioner failed to establish counsel was ineffective for advising Petitioner to enter the proffer agreement after reasonably concluding that, if entered, Petitioner would likely be acquitted or otherwise substantially benefit from the agreement and, thus, there was no deficiency from which prejudice could flow from?

STATEMENT OF THE CASE

Theodore Wills, Jr. (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections. Petitioner was initially charged with obstruction of justice and accessory after the fact. (App. 108-09). During its April 2006 term, the Horry County Grand Jury indicted Petitioner for murder (2006-GS-26-1652). Petitioner was represented by William I. Diggs, Esquire (hereafter "Counsel"). Assistant Solicitor Bradley Richardson from the Fifteenth Circuit Solicitor's Office represented the State.

Petitioner and Counsel signed a proffer agreement with the State on August 25, 2005, whereby Petitioner agreed to truthfully divulge the events and circumstances surrounding the victim's death in exchange for the State's consideration and a recommended sentence on the pending charges, as well as the State's agreement not to seek any additional charges in connection with the proffer subject. (App. 135-36, 477-78). On September 19, 2005, Petitioner failed a polygraph examination with SLED. (App. 480). The State determined the proffer agreement was violated and charged Petitioner with murder. (App. 108-09).

On October 1-3, 2007, the case proceeded to trial before the Honorable Steven H. John. On October 3, 2007, the jury found Petitioner guilty as charged. Judge John sentenced Petitioner to forty years' imprisonment.

Petitioner timely filed a notice of appeal, which was perfected through appellate counsel Joseph L. Savitz, III, Esquire, who raised the following issue:

> The trial judge committed reversible error by allowing Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE.

The State submitted a brief in response and in a published opinion filed September 22, 2010, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v.*

Wills, Op. No. 4742 (S.C. Ct. App. filed September 22, 2010).

Petitioner subsequently petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated February 13, 2012. By and through counsel, Assistant Appellate Defender LaNelle C. DuRant, Petitioner raised the following issue:

> Whether the Court of Appeals erred by ruling the trial judge did not commit reversible error by allowing Petitioner Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE.

The parties proceeded to oral arguments on December 6, 2012. In a 3-2 opinion authored by Justice Pleicones and filed July 16, 2014, the Court affirmed the Court of Appeals. *State v. Wills*, 409 S.C. 183, 762 S.E.2d 3 (2014). Specifically, the court held Petitioner's proffer agreement waived Rule 410 protections and was admissible for impeachment purposes absent some affirmative indication it was not entered into knowingly or involuntarily. (App. 449-53).

The matter was appealed to the South Carolina Supreme Court. The matter was heard on December 6, 2012. By written opinion on July 16, 2014, the Court agreed with the Court of Appeals that a criminal defendant may waive the protections afforded by Rule 410. It further concluded: "Applying the rules of contract construction here, 'regardless of the agreement's wisdom or lack thereof,' we agree with the Court of Appeals that, on this record, petitioner's Proffer Agreement, entered into with the advice and consent of counsel, waived the protections of Rule 410, SCRE." (App. 454-56). The remittitur was issued on August 22, 2014.

Petitioner timely filed a PCR application on December 1, 2014. Respondent made its return on February 2, 2016, requesting an evidentiary hearing be convened. Petitioner filed an amendment to the PCR application on June 1, 2017. The evidentiary hearing occurred on September 19, 2017, before the Honorable William H. Seals. William G. Yarborough, III, Esquire was Petitioner's attorney. Assistant Attorney General Johnny E. James, Jr. of the South

Carolina Attorney General's Office represented Respondent. The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on December 19, 2017. Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective for advising Petitioner to enter a proffer agreement.

A notice of appeal was filed on January 16, 2018. The petition for writ of certiorari and appendix were filed on October 23, 2018, and the amended petition for writ of certiorari filed on November 5, 2018. The return to the petition for writ of certiorari was filed on April 15, 2019. The matter was transferred by the South Carolina Supreme Court to the South Carolina Court of Appeals on May 2, 2019. The brief of petitioner was filed on December 9, 2020. The brief of respondent was filed on May 6, 2021. Oral argument was held on March 9, 2022. The Court of Appeals issued a published opinion, finding that Counsel's failure to interpret the proffer agreement's benefits to Petitioner was not deficient performance and that the failure to understand that the trial court could find the proffer agreement waived Petitioner's protections of the rule governing statements made to prosecutors during plea negotiations was not deficient performance and, therefore, not ineffective assistance of counsel. *Wills v. State*, 437 S.C. 385, 878 S.E.2d 330 (S.C. Ct. App. 2022). The petition for rehearing was filed on August 5, 2022, and the return filed on August 19, 2022. A notice of appeal was filed with the South Carolina Supreme Court. The petition for writ of certiorari was filed on December 6, 2022. This return to petition for writ of certiorari follows.

STATEMENT OF FACTS

Late night on October 12, 2001, Petitioner called Julian Lee and asked him to come with him to rip-off some drug dealers for quick cash. (App. 156). Lee agreed and got dressed for a robbery, wearing dark jeans, a long black sleeve t-shirt, a black stocking cap, and gloves. (App. 156). In the early morning hours on October 13, 2001, Petitioner drove to Lee's house, picked him up, and drove him to a remote area in Horry County. (App. 154-56). After Lee got out of the car and walked forward, he was shot in the back twice. (App 155). Lee bled-out and died in a field from the wounds. Petitioner collected $10,000 for ensuring Lee died. (App. 156-58).

Prior to being indicted for murder, Petitioner entered into a proffer agreement with the State, reviewed and signed by both Counsel and Petitioner, whereby he agreed to truthfully divulge the events and circumstances surrounding Lee's death in exchange for the State's consideration and a recommended sentence on the pending charges, as well as the State's agreement not to seek any additional charges in connection with the subject of the proffer. (App. 477-78). The agreement contained several conditions, including Petitioner's submission to a polygraph examination to test the veracity of his proffered statement. Specifically, the enumerated paragraphs of the proffer agreement provided as follows:

> 1. Theodore David Wills Jr. shall submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter. *He shall be* ***completely truthful*** *concerning his involvement in this matter, and* ***completely truthful*** *concerning the involvement of all other individuals in this matter. He shall* ***truthfully and completely answer all questions*** *posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by direct question.* Any and all information provided by Theodore David Wills Jr. under the terms of this proffer may be recorded in any fashion at the election of the State;
> 2. Theodore David Wills Jr. *shall submit himself to a* ***polygraph examination(s) to verify all information provided to the State*** *at the election of the State*. The

polygraph examiner(s) shall be selected by the State and, for the purpose of this Proffer, are designated agent(s) of the State; upon examination(s) by polygraph, *if the responses given by Theodore David Wills Jr. show* ***deception***, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, *the terms of this proffer are null and void and any statements made by Theodore David Wills Jr.* ***may be used against him by the State for any legal purpose, including****, but not limited to, considerations for charging, bond,* ***disposition of charges through plea or trial*** of Theodore David Wills Jr. and impeachment;

3. Theodore David Wills Jr. shall appear as a witness in the trial(s) of all individuals in this matter who are designated as defendants by the State through indictment; and Theodore David Wills Jr. shall testify truthfully, completely, and consistently with prior statements made to the State upon being called upon to do so; failure to testify in the manner specified above will render the terms of this Proffer null and void and will subject Theodore David Wills Jr. to prosecution for perjury as well as full prosecution on all charges deemed appropriate by the State in connection with this matter; use of statement(s), should Theodore David Wills Jr. violate the terms of this Proffer, are the same as provided in Paragraph Two of this Proffer;

4. *In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer*, statements provided during his debriefing will not be used in a criminal prosecution currently pending against him by this Office. *The State will not seek any additional charges against Theodore David Wills Jr. in connection with the subject of this Proffer*;

5. *In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer*, the State shall 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;

6. The State agrees to fully inform the Court of Theodore David Wills Jr.'s degree of cooperation and the relative benefit to the State at time of sentencing;

7. Violation of any term of this Proffer renders all terms null and void; *the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral to this matter*.

8. This Proffer is the entire agreement between the parties; any agreement reached between the parties prior to the date of acceptance of this Proffer is made null and void by this Proffer; the terms of this Proffer may be amended only in writing and only by agreement of the parties.

(App. 477-79) (emphasis added). Petitioner and Counsel signed the proffer agreement on August 25, 2005. (App. 135-36).

Subsequently, Petitioner waived his *Miranda* rights in writing and provided a video-recorded statement in the presence of Counsel, police detectives, and the assistant solicitor. (App. 455, 481). In his statement, Petitioner claimed he drove his brother Donnell Green, Mark Willard, and Lee to the remote location during the early morning hours of October 13, 2001. (App. 157). According to Petitioner, he and Lee believed they were going to rob some drug dealers and "score some quick cash." (App. 455). Petitioner stated he saw Willard shoot the victim and that he heard a second shot as he ran back to the car. (App. 455).

On September 19, 2005, Petitioner submitted to a polygraph examination with SLED. (App. 480). Based on his review of the polygraph results, and after comparing his review and scoring with the separate and independent reviews and scoring conducted by Sergeant Duff and Agent Charles' supervisor, Lieutenant Coggins, Agent Charles concluded that Petitioner was deceptive in his response to two questions during the exam. (App. 71-72, 129-30). Regarding question R4, the question and answer were: "Are you lying about Mark Willard shooting Julian Lee in that field? Examinee Response: No." (App. 70). In R6, the question and response were as follows: "Did you shoot Julian Lee? Examinee Response: No." (App. 70). As a result of the determination of deception, the State claimed the proffer agreement was violated and charged Petitioner with murder. (App. 108-09).

The State indicated its intent to use Petitioner's videotaped statement at trial as part of its case-in-chief and requested a hearing on admissibility. The solicitor described the execution of the proffer agreement and the relevant terms of that agreement, Petitioner's statement made pursuant to the proffer agreement, and the polygraph examination administered after the statement was given. He explained he had SLED Special Agent Rick Charles ready to offer testimony in support of admissibility. (App. 42-44).

Counsel objected to the admission, arguing the statement was given "in exchange for participation by the State in a plea agreement process." (App. 45). Counsel challenged the proffer agreement as "inherently flawed and unfair" because an "unreliable" polygraph examination was used to determine Petitioner's truthfulness. Counsel asserted the statement was involuntary and should be suppressed. (App. 46). Counsel argued that even if the State determined Petitioner was being deceptive, the proffer agreement terms were not clear regarding the State's ability to use the statement at trial. The solicitor stated that the agreement allows for using the statement for any legal purpose, including disposition of the charges through trial. (App. 45-52).

The judge held a hearing concerning the admissibility of the statement and pursuant to *Jackson v. Denno,* 378 U.S. 368 (1964). The trial court heard extensive testimony from Agent Charles about his training and experience, the polygraph testing of Petitioner, and SLED's efforts to ensure the reliability of that testing; testimony from Detective Allen Large of the Horry County Police Department regarding the administration of *Miranda* warnings and Petitioner's waiver of his rights; and Petitioner's testimony about his understanding of the proffer agreement and the requirement that he tell the truth. Petitioner claimed that despite skimming and signing the proffer agreement, he did not understand the State would do a polygraph test and did not recall discussing such a test with Counsel or anyone else. (App. 53-124).

The trial court heard additional arguments from the parties and reviewed the statement. Counsel argued that the proffer agreement was not clear because "it doesn't tell me or [Petitioner] that this statement is going to be introduced during the trial." (App. 125). He claimed it was not a voluntary, knowing, intelligent decision that either he or Petitioner made with respect to entering into the agreement. (App. 125). Counsel argued the issue of the voluntariness

of the statement and the State's use of a polygraph were so intertwined that there was no way the jury could make that determination under the circumstances. (App. 125-28). The trial court concluded the statement was voluntarily given as Petitioner was apprised of his *Miranda* rights and signed the proffer agreement with assistance of Counsel but cautioned the parties not to refer to the polygraph examination. (App. 44-52). The judge permitted defense counsel to explain to the jury that Petitioner made the statement in response to the proffer agreement. (App. 128-39). The case proceeded to trial.

The trial judge gave preliminary jury instructions emphasizing the State's burden of proof and the jury's duty to determine the facts. (App. 150-54). First, the State called Department of Public Safety Officer Ann Hayes Pitts who had worked with the Horry County Police Department as a crime scene technician at the time of the murder. (App. 163-88). She responded to the scene where Lee's body was found. (App. 166-67). Pitts described all the steps she took to process that scene for evidence including taking photographs. (App. 163-87).

Next, the State called Dr. Cynthia A. Schandl, a forensic pathologist from M.U.S.C. who performed the autopsy on Lee. (App. 197-98). She was admitted as an expert without objection and then described the steps she took during the autopsy as well as her findings as to Lee's injuries, the cause of death, and the trajectory of the two gunshots to Lee's back based on entry and exit wounds. (App. 193-218).

Finally, the State called Detective Neil Livingston of the Horry County Police Department to the stand. (App. 223). He explained he was present when Petitioner was interviewed and witnessed Petitioner sign the *Miranda* rights form. (App. 225). Livingston then went over the *Miranda* warnings and identified the video recording of the statement Petitioner gave to the police. (App. 229). Over Petitioner's objection, the video recorded statement was

then played for the jury. (App. 229).

At the conclusion of the State's case, defense counsel moved for a directed verdict and renewed his objection to the admissibility of the statement. (App. 234-51). The trial court denied the motion and reaffirmed its previous rulings. (App. 234-51). Petitioner, who did not testify or present any evidence, was ultimately convicted of murder, and sentenced to forty years' imprisonment.

At the September 19, 2017, evidentiary hearing Petitioner presented testimony focusing primarily on his allegation that Counsel was ineffective for advising him to enter into the proffer agreement. Counsel explained that when Petitioner signed the proffer agreement, he was facing charges of obstruction of justice and accessory after the fact, not murder. He first testified his understanding of the agreement was that if Petitioner was truthful, the case would basically end (App. 377-78); however, on cross-examination he clarified he did not believe the obstruction and accessory charges would be dismissed because of Petitioner's cooperation, but that entering the proffer agreement was still the best thing for Petitioner under the circumstances of the ongoing murder investigation. (App. 389-90). Counsel noted the only evidence introduced at trial implicating Petitioner was his videotaped statement and that from his perspective, the State breached the proffer agreement by introducing that statement at trial but acknowledged that hindsight is 20/20. Counsel testified he felt like Petitioner had been truthful with him and pointed out the solicitor's comments during the interview that if Petitioner was truthful, he did not have to worry. Counsel testified he was mad the State used Petitioner's statement to prosecute him and that no one else was ever prosecuted for the murder. He said he believed Petitioner told the investigators the truth during the interview but acknowledged the proffer agreement provided that the only mechanism for making the determination of truthfulness was a polygraph. Counsel

testified he questioned the polygraph results in the pretrial hearing but did not hire an expert on this issue. He said in hindsight he would have attacked the polygraph more. Counsel opined that when the solicitor told Petitioner during the interview that he did not need to worry, this assurance should have superseded the *Miranda* waiver and the proffer agreement, if Petitioner was not the trigger man, which Counsel believes he was not. Counsel testified he made every argument he could think of at the pretrial hearing to try to keep the statement out but was unsuccessful. He said he did not believe the statement would be used against Petitioner and the proffer agreement would be to Petitioner's benefit. (App. 376-87).

On cross-examination, Counsel testified the information Petitioner provided about the murder was consistent with the information Petitioner gave in his police statement, and Counsel had no reason to anticipate the polygraph would reveal deception. He testified that, in hindsight, it may have been better to give Petitioner different advice about the proffer agreement; however, because he felt like Petitioner was truthful with him, he was comfortable going ahead with entering the proffer agreement. Counsel testified he counseled Petitioner to enter into the proffer agreement because he felt it was the option available. When the State later said it was going to use the statement at trial, he said he made every argument against admission he could think of. Counsel testified this was not the first proffer agreement he advised a client to enter and did not see anything problematic in this proffer's terms. He said that if he had a similarly situated client at the time of the PCR hearing he would advise them to enter into the same proffer agreement but would "be a lot stronger on the science and the procedure behind the polygraph and . . . how to go about challenging it better and making a stronger argument to the judge." Counsel testified that he believed he made a challenge to the science behind the polygraph to the best of his ability at the time of Petitioner's trial. (App. 387-95).

Petitioner testified he had known Counsel for nine years and trusted him. Petitioner said he never heard of a proffer agreement until Counsel tried to explain it to him, which consisted of Counsel saying if he did what the State asked, he would not be charged with a crime and would be able to go home after court. He testified he was shocked when he was later charged with murder and did not understand the terms of the proffer agreement. Petitioner claimed he did not know the agreement could hurt him because both Counsel and the solicitor told him it would help. He said everybody told him he had nothing to worry about and that he could be truthful and honest, which he was. Petitioner testified that Counsel said they could not use anything from the proffer agreement against him. He said he did not know the proffer agreement said anything about a polygraph, claiming he skimmed it and told Counsel he did not understand, but Counsel advised him to go forward anyway. Petitioner testified Counsel was not with him during the polygraph. He insisted he told the truth even though the polygraph showed deception. Petitioner claimed Counsel never went over the results with him and though they talked about him taking another polygraph, he never did. He testified he never understood the statement could be used against him and only entered into the agreement because of Counsel's advice. (App. 401-13).

The State called Chief Deputy Solicitor Scott Hixon. He testified he was the assistant solicitor in charge of Petitioner's case during the relevant time frame and he recalled entering into the proffer agreement with Petitioner but did not recall the terms. Hixon said he remembered telling Petitioner to tell the truth and that if he passed a polygraph, he would not be facing much liability. He testified that at the start of the proffer, Petitioner was saying things he believed were not true because they seemed inconsistent with some of the physical evidence. Hixon suggested to Counsel that they stop, but Counsel met privately with Petitioner, and they elected to continue. Petitioner showed a level of involvement in the murder and seemed so forthright that Hixon

believed Petitioner was telling the truth. Hixon testified he could not believe Petitioner would fail the test. He insisted he did not make any firm promises to Petitioner or Counsel about how the case would be disposed of with a valid proffer. (App. 416-23).

On cross-examination, Hixon acknowledged his statement to Petitioner during the proffer that if Petitioner answered the questions and told the truth he would not have anything to worry about, particularly regarding telling the truth about the trigger man. He noted that the benefits Petitioner would get from complying with the proffer agreement were meaningful, because if he was truthful and was not the trigger man, he would never be charged with murder. Hixon testified that once he heard information from Petitioner that suggested he was involved with a murder for hire, he began to think the proffer agreement was a big mistake for the State and perhaps a stroke of genius on the part of Counsel. He explained that if Petitioner's statements were verified as true, the State could not use them pursuant to the proffer agreement, and Petitioner could avoid additional charges even though he effectively admitted to splitting the proceeds for participating in the commission of the murder. (App. 423-33). Petitioner did not offer any expert testimony or other scientific evidence at the PCR hearing to call into question the reliability or accuracy of the polygraph examination conducted by SLED which concluded he had violated the proffer agreement by not being truthful. Petitioner also did not introduce any competing results from any independent polygraph examination despite questioning Counsel about his failure to do so at the time of the trial.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

The Court of Appeals properly determined that Petitioner failed to establish counsel was ineffective for advising Petitioner to enter the proffer agreement after reasonably concluding that, if entered, Petitioner would likely be acquitted or otherwise substantially benefit from the agreement and, thus, there was no deficiency from which prejudice could flow from.

Petitioner argues the Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's PCR application alleging Counsel was ineffective for advising Petitioner to enter a proffer agreement. Specifically, Counsel was allegedly deficient in his interpretation and decision-making concerning the potential benefit of entering the proffer agreement. However, the PCR court properly rejected this argument, finding that Counsel acted reasonably in concluding that the agreement was in Petitioner's best interest and because Counsel was not deficient, no prejudice could flow therefrom. The Court of Appeals properly affirmed the PCR Court's dismissal. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny relief.

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

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d

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

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S.

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

Proffer agreements "between defendants and the State should be interpreted 'in accordance with general contract principles." *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). Though Rule 410 of the South Carolina Rules of Evidence generally renders statements made during plea discussions inadmissible, this protection can be waived. *State v. Wills*, 409 S.C. 183, 185, 762 S.E.2d 3, 4 (2014).

Counsel was not deficient for encouraging his client to enter a proffer agreement. At the PCR hearing, Counsel credibly testified at the PCR hearing that if they "entered into [the] agreement basically it would result in a situation, if David [was] truthful, that it would get him out and, basically, the case would end." (App. 377-78). Further, Counsel testified that he thought Petitioner would not be prosecuted if he entered the agreement. (App. 378-79). Counsel stated he thought that, absent having all charges against Petitioner dismissed (which he recognized was not presented as an option), advising Petitioner to enter the proffer agreement was the best he could do. (App. 389-90). Counsel also stated he knew Petitioner's family for "a long time" and based upon the pre-existing relationship felt like Petitioner was honest with him about what happened, the statements given to him and the Solicitor's Office were consistent with one another. (App. 388-89). Counsel stated he had advised other clients to enter proffer agreements in the past but did not recall any of the other agreements being breached. (App. 393). He stated Petitioner's case was unique in this regard, but nothing in the agreement itself jumped out to Counsel as problematic. (App. 393). Counsel stated he would encourage a current, similarly situated client

to enter a proffer agreement and the only thing he would do differently would be to "be a lot stronger on the science and the procedure behind the polygraph and . . . how to go about challenging it better and making a stronger argument to the judge." (App. 394-95).

Also at the PCR hearing, the prosecutor testified that once he heard information from Petitioner that suggested he was involved with a murder for hire, he began to think the proffer agreement was a big mistake for the State and perhaps a stroke of genius on the part of Counsel. (App. 429-30). He explained that if Petitioner's statements were verified as true, the State could not use them pursuant to the proffer agreement, and Petitioner could avoid additional charges even though he effectively admitted to splitting the proceeds for participating in the commission of the murder. (App. 430). He also stated that in taking advantage of the proffer agreement Petitioner "felt like it was in his best interest to do what he was doing" and to the prosecutor it "seemed like he did a really good job of putting himself in a position to be protected." (App. 430-31).

Petitioner did not offer any expert testimony or other scientific evidence at the PCR hearing to call into question the reliability or accuracy of the polygraph examination conducted by SLED which concluded he had violated the proffer agreement by not being truthful. Petitioner also did not introduce any competing results from any independent polygraph examination despite questioning Counsel about his failure to do so at the time of the trial. *See Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (to show Petitioner was prejudiced by counsel's deficiency for failure to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or the testimony must otherwise be presented, consistent with the rules of evidence); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (mere speculation regarding the witness's testimony or evidence is insufficient to establish prejudice).

Based upon the above, Counsel acted reasonably given the circumstances. Simply because it did not ultimately result in acquittal or some other tangible benefit because Petitioner lied to police, does not warrant the PCR court, the Court of Appeals, or this Court second guessing Counsel's tactics through the distorting lens of hindsight. Instead, Counsel reasonably concluded that the agreement was in Petitioner's best interest because, according to the terms of the agreement, Petitioner was told that if he told the truth during the polygraph test he would be acquitted or released from jail. Counsel credibly testified this result, if it came to fruition, would be the best result Petitioner could obtain, given that a complete dismissal of all charges was not on the table. Further, Counsel credibly testified that he told Petitioner the agreement would benefit him *if he told the truth*; something that did not happen once Petitioner failed the polygraph test. Though Petitioner claimed he told the truth, thus implying the test was inaccurate, this claim was left unsupported by anything other than his own assertion. The proffer agreement was violated by Petitioner, not the State and likely would have benefited Petitioner if he did not actively break its terms himself. Counsel, assuming Petitioner would not actively work against his own self-interest in violating the terms of an otherwise advantageous agreement, acted reasonably.

Concerning Petitioner's contention that the South Carolina Courts had not specifically opined on the validity of Rule 410 waivers at the time the case was decided was not determinative. Specifically, Petitioner argues that defendants have always been permitted to waive their rights and evidence rules in agreements with the State and that the State and the defense have always had the freedom to stipulate to certain matters. However, at the time of trial, no South Carolina cases were instructive on whether a defendant can waive the exclusionary provisions of Rule 410, SCRE, until Petitioner's direct appeal matter was decided, and an

opinion published. *State v. Wills*, 390 S.C. 139, 144, 700 S.E.2d 266, 268 (Ct. App. 2010). Respondent contends that Counsel had no way of knowing that Rule 410, SCRE, protections could have been waived for more than impeachment purposes and it is unreasonable to Counsel to be clairvoyant about changes in the law non-existent at the time of trial. *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) (stating that Counsel has never been required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial."). Counsel is not deficient for failing to foresee how the appellate courts would decide Petitioner's direct appeal and the far-reaching consequences flowing from that decision.

In sum, Counsel articulated a valid strategic reason for his advice and, thus, was not deficient. No prejudice results from that lack of deficiency. Thus, the request for relief should be denied because Petitioner has failed to meet his burden of proof.

CONCLUSION

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

Respectfully submitted,

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