

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 14 2023

CERTIORARI TO LANCASTER COUNTY
Brian M. Gibbons, Plea Judge
Daniel Dewitt Hall, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2023-000404

MICHAEL BRENT GAY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Petitioner's Questions

- I. Whether trial counsel's failure to develop and present evidence that the victim's death was the result of an accident constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel?
- II. Whether trial counsel's failure to offer mitigating evidence regarding Petitioner's opioid addiction during his guilty plea constitutes ineffective assistance of counsel depriving Petitioner of his Sixth Amendment right to counsel?
- III. Whether petitioner's plea was involuntary due to his lack of understanding of the elements of voluntary manslaughter and his belief he would receive a 12-year sentence?
- IV. Whether the PCR court erred in barring counsel from introducing evidence regarding Petitioner's fee dispute with trial counsel when evidence contained in the paperwork supported Petitioner's testimony that Petitioner informed trial counsel at the beginning of the case that the shooting was accidental?

Respondent's Counterstatement of Questions

- I. Does probative evidence support the PCR court's finding that counsel was not ineffective for failing to develop and present an accident defense when (1) the PCR court found credible counsel's testimony that Petitioner did not raise the defense of accident until seven to ten days before trial, (2) the PCR court found credible counsel's testimony that the pathologist relayed the evidence did not support an accident defense, (3) the PCR court properly found counsel's investigation and decisions regarding the accident defense reasonable under prevailing professional norms, and (4) it is not reasonably likely a jury would have found credible Petitioner's testimony about his accident defense?
- II. Does probative evidence support the PCR court's finding that counsel was not ineffective for failing to offer mitigating evidence of Petitioner's opioid addiction during his plea when (1) counsel did offer mitigating evidence during sentencing, thus rendering counsel's performance reasonable under prevailing professional norms, and (2) Petitioner did not present any additional evidence at the PCR hearing and thus did not prove prejudice?
- III. Does probative evidence support the PCR court's finding that Petitioner's plea was knowing and voluntary when (1) the PCR court found credible counsels' testimony about their lengthy advice to Petitioner and (2) the plea colloquy supports a finding that Petitioner understood the consequences of the plea and entered it knowingly and voluntarily?
- IV. Did the PCR court abuse its discretion in excluding evidence about Petitioner's fee dispute with counsel when (1) Petitioner did not establish the evidence was relevant to a consideration of whether plea counsel was constitutionally ineffective, and (2) Petitioner

did not inform the PCR court that he sought to introduce the evidence to corroborate his testimony or otherwise seek to enter that portion into evidence.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In March 2016, the Lancaster County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime (2016-GS-29-377).

On December 10, 2018, a jury trial convened before the Honorable Brian M. Gibbons. John Delgado and Dayne Phillips, Esquires, represented Petitioner. Solicitor Randy Newman and Deputy Solicitor Lisa Collins prosecuted the case. During the fourth day of trial, after the jury left for lunch, Petitioner pled guilty to the weapon charge and, as to the murder indictment, the lesser-included offense of voluntary manslaughter. Judge Gibbons sentenced Petitioner to concurrent terms of thirty years for voluntary manslaughter and five years for the weapon charge.

Petitioner timely filed a direct appeal. On February 28, 2019, the Court of Appeals dismissed the appeal for failure to provide an explanation for appealing from a guilty plea. The remittitur was sent March 18, 2019.

On August 6, 2019, Petitioner filed an application for post-conviction relief (PCR). On September 2, 2022, an evidentiary hearing convened before the Honorable Daniel Dewitt Hall. Following the hearing, Judge Hall issued an order denying relief and dismissing the application.

Pertinent Trial Testimony

Petitioner's charges stem from the fatal shooting of Joshua Flint McManus (Victim) on December 5, 2015. During trial, the State presented evidence that Victim was watching a football game at Petitioner's home along with Raymond Robinson and Stefan Perry on the day of the shooting. Robinson and Perry both testified Petitioner unexpectedly shot Victim in the head while they were watching the game. (Supp. App. 200-03, 395-97). Both witnesses also testified no one

was arguing prior to the shooting. (Supp. App. 206, 397). Ultimately, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter before the State rested its case.

Summary of PCR Testimony

At the PCR hearing, Petitioner testified he accidentally shot and killed Victim. (App. 189). He explained he had “taken an extremely large amount of opioids,” smoked marijuana, and taken methamphetamine that day and was “heavily intoxicated” at the time of the shooting. (App. 190). Petitioner acknowledged he did not have any disagreements with Victim prior to the shooting; he averred, “No one had any disagreements about anything.” (App. 194). Notwithstanding this, Petitioner testified he armed himself with a gun that had previously discharged accidentally; he claimed he armed himself because he (1) discovered his grandfather’s watch was missing from his closet and (2) saw Victim holding a pocketknife. (App. 194-96, 199). Petitioner stated he walked through his bedroom and tripped; when he fell, the “gun accidentally discharged and . . . hit [Victim] in the neck.” (App. 196). Petitioner testified he told plea counsel “[f]rom the very beginning” that he accidentally shot Victim. (App. 199-200).

In contrast, John Delgado testified Petitioner did not mention anything about the shooting being an accident “until possibly a week to ten days before trial.” (App. 224-25). He testified during the 911 call, Petitioner indicated he shot Victim because Victim “pulled out a blade” and “come at [him] with a knife.” (App. 225-26). However, Delgado stated Petitioner’s claim of self-defense was refuted by a picture of Victim’s deceased body, which depicted Victim “leaning back in his chair . . . [with] his feet crossed at his ankles” in “a very relaxed position.” (App. 224). He testified Petitioner’s claim of self-defense was also refuted by the two eyewitnesses who testified for the State. (App. 227).

Delgado testified he contacted the pathologist within a day or two of Petitioner telling him

the shooting was an accident to determine if the evidence supported an accident defense. (App. 225). However, the pathologist indicated “the shot was absolutely horizontal, right to left, there was nothing that would indicate that there was an upward trajectory of the shot.” (App. 225). As a result of the pathologist’s findings, Delgado concluded the facts did not support Petitioner’s story that the shooting was an accident. (App. 225).

Dayne Phillips testified Petitioner’s memory was “fluid” and much more “clear and specific” during the PCR hearing than during the time he represented Petitioner. (App. 259). He acknowledged Petitioner had raised a defense of accident prior to trial but explained Petitioner had also claimed self-defense. (App. 260). Phillips testified, “Any good defense lawyer knows that you can’t go to trial and give a jury two defense theories because there’s only one truth and they would know that you’re probably lying. So you had to have one theory.” (App. 260).

Petitioner testified he only pled guilty because he was promised a twelve-year sentence. (App. 202). In contrast, Delgado and Phillips both testified they never promised Petitioner a twelve-year sentence. (App. 231, 245-46, 257). Delgado stated “there was absolutely no guarantee or promise of the sentence.” (App. 257). Delgado testified Petitioner was entering an open plea without any negotiations. (App. 231). He averred that because it was an open plea, the State could ask for whatever they wanted. (App. 234). Likewise, Phillips testified it was an open plea with no promises, and Petitioner knew he was facing thirty years. (App. 258).

Delgado testified he met with Petitioner twelve to fifteen times over the course of his representation. (App. 223). He stated prior to the guilty plea, he and Phillips met with Petitioner “a good hour and-a-half.” (App. 230). Delgado testified they explained to Petitioner the sentences he faced, the risk of proceeding with the jury trial, and the constitutional rights Petitioner would waive by pleading guilty. (App. 230). Delgado explained they were in the fourth day of trial, and

Petitioner was very aware of his rights to have a jury decide his guilt, cross-examine witnesses, and testify because they had been exercising those rights. (App. 230-31). He stated they also explained the elements of voluntary manslaughter and murder. (App. 233). Delgado believed Petitioner was competent and understood their conversations. (App. 243).

Likewise, Phillips testified they left “no stone unturned” in their conversations with Petitioner. (App. 255). He stated Petitioner understood that by pleading guilty, he was waiving his right to raise on appeal issues that may have been preserved during trial. (App. 254). Phillips stated they explained to Petitioner “all of his rights, collateral consequences that come with a plea, [and] full sentencing ranges,” and Petitioner entered the plea with “eyes wide open.” (App. 255). He testified they reviewed with Petitioner all the rights he would be waiving by pleading guilty. (App. 257). Phillips averred Petitioner was competent and understood their conversations. (App. 255-56). Additionally, Delgado testified he and Phillips explained the elements of murder and voluntary manslaughter to Petitioner. (App. 233, 236-37, 252).

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, appellate courts defer to the PCR 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. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR 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. Probative evidence supports the PCR court's finding that counsel was not ineffective for failing to develop and present an accident defense when (1) the PCR court found credible counsel's testimony that Petitioner did not raise the defense of accident until seven to ten days before trial, (2) the PCR court found credible counsel's testimony that the pathologist relayed the evidence did not support an accident defense, (3) the PCR court properly found counsel's investigation and decisions regarding the accident defense reasonable under prevailing professional norms, and (4) it is not reasonably likely a jury would have found credible Petitioner's testimony about his accident defense.**

Petitioner asserts plea counsel was ineffective in not presenting a defense of accident. He contends counsel did not attempt to hire an expert to counter the pathologist's opinion that the trajectory of the bullet did not support an accident defense. Petitioner further contends he was acting lawfully at the time of the shooting, and thus the facts supported a defense of accident. However, the PCR court found credible plea counsel's testimony that Petitioner did not raise the defense of accident until a week or two before trial, and the pathologist relayed the evidence did not support a defense of accident. Based on these findings, which are supported by probative evidence, the PCR court properly found counsel's investigation and decisions regarding the accident defense was reasonable under prevailing professional norms. Finally, when reviewing the testimony as a whole, it is not reasonably likely a jury would have found credible Petitioner's testimony about his defense of accident.

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases."

Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

“A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial.” Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Here, the PCR court found credible counsel’s testimony that Petitioner did not raise a defense of accident until a week to ten days before trial, Petitioner asserted in the 911 call that he was acting in self-defense, and the pathologist relayed the evidence did not support a defense of accident. (App. 268-69). These findings are supported by probative evidence, and this Court should defer to the PCR court’s credibility findings. (App. 224-26). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts “defer to the PCR court's credibility findings as to witnesses who testified before the PCR court”). Likewise, the PCR court found not credible Petitioner’s testimony that he claimed accident defense from the beginning. (App. 269). Based on the credibility findings, the PCR court properly found counsel articulated a valid reason for not further pursuing a defense of accident, and Petitioner did not prove counsel was deficient.¹

¹ To the extent Petitioner asserts counsel was ineffective for not hiring an expert to counter the pathologist’s expected testimony, Petitioner is raising that argument for the first time, and thus it is not preserved. Further, Respondent did not present any expert at the PCR hearing to counter the pathologist’s testimony and cannot show prejudice from counsels’ failure to hire a contra-expert.

Further, based on the testimony and evidence, it is not reasonably likely a jury would have believed Petitioner's claim of an accident. Counsel testified the State had a picture of the deceased victim sitting back in a chair with his legs crossed in front of him in a relaxed position. (App. 224). Raymond Robinson, who was hanging out with Victim and Petitioner that evening, testified, "[Petitioner] come out of [his closet]—walked, took like five long steps past us in the chairs and come around and put the gun up to [Victim's] head [and] said, 'Did you take my daddy's watch?' And [Victim] blinked his eyes and he shot the gun right off in his head." Robinson also testified Victim did not have a knife at the time. (Supp. App. 201-022). Petitioner agreed this testimony did not support an accident defense. (App. 216-17). Likewise, Stephan Perry, who testified he was also at the home that evening, stated Petitioner came out of his closet where he had been looking for something, "walked by me, walked by [Victim], he went by [Victim] about four foot, turned around and said, 'You got my watch, and shot hm in the head, cold as ice.'" Perry stated no one had been arguing. (Supp. App. 396-97). Finally, as counsel explained, the pathologist's testimony did not support a defense of accident. (App. 225). Pertinently, the pathologist testified the trajectory of the bullet wound was "pretty much straight across"—from "somewhat below the right ear and the right mandible of the right jaw" to "the soft tissue below the left jaw." (Supp. App. 180-81). This testimony does not support Petitioner's claim that he was walking by with his arm all the way down and the gun pointing at the floor, he tripped, he put his arms out to catch himself as he was falling, and the gun accidentally discharged—hitting victim in the neck. (App. 219-21). Notably, the PCR court—who had an opportunity to observe Petitioner's testimony at the PCR hearing—did not find Petitioner's testimony credible in this regard. (App. 269). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court"). Based on the

pathologist's testimony about the trajectory of the bullet and the eyewitness testimony, it is not reasonably likely a jury would have believed Petitioner's defense of accident. Thus, Petitioner did not prove prejudice, and the PCR court properly denied this claim.²

II. Probative evidence supports the PCR court's finding that counsel was not ineffective for failing to offer mitigating evidence regarding Petitioner's opioid addiction during his plea when (1) plea counsel did offer mitigating evidence during sentencing, thus rendering counsel's performance reasonable under prevailing professional norms, and (2) Petitioner did not present any additional evidence at the PCR hearing and thus did not prove prejudice.

Petitioner contends counsel was ineffective for not presenting mitigation evidence regarding Petitioner's opioid addiction for at the sentencing hearing. He acknowledges counsel *did* raise Petitioner's prior drug use but avers counsel did not call any experts that evaluated Petitioner to speak on behalf of Petitioner at the sentencing hearing. (Pet. 8-9). However, probative evidence supports the PCR court's finding that counsel *did* present this information to the court at sentencing and thus was not deficient in this regard. Specifically, the PCR court found credible counsel's testimony that he had Petitioner evaluated by a neuropsychologist and neurologist to determine if Petitioner had an organic brain dysfunction, the reports indicated Petitioner had a mild to moderate frontal lobe dysfunction, and counsel provided the reports to the court as part of mitigation. (App. 231-32, 270). The plea transcript itself shows counsel discussed the findings of these reports and Petitioner's drug addiction at sentencing. (App. 146-49). Thus, probative evidence supports the PCR court's finding that counsel was not deficient.

Further, to the extent Petitioner complains that counsel did not call the experts testify at

² Petitioner attempts to distinguish Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992), wherein the Court found counsel was not ineffective in not discussing the defense of accident when the defendant was not acting lawfully at the time of the shooting. Specifically, Petitioner claims he was acting lawfully in grabbing his gun for protection. Respondent submits that based on Petitioner's testimony he was "heavily intoxicated" from methamphetamine and other illegal pills, he was not acting lawfully when he retrieved the gun. Nonetheless, the issue of whether Petitioner was acting lawfully is not dispositive when counsel articulated a valid reason for not further pursuing accident in that (1) Petitioner initially claimed self-defense and (2) the pathologist's testimony did not support an accident defense.

mitigation, Petitioner did not present any experts at the PCR hearing to testify as to what they may have said in mitigation and thus did not prove prejudice in this regard.³ See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (providing applicant did not prove prejudice from counsel's failure to call a witness when that witness did not testify at PCR hearing). Based on the foregoing, the PCR court properly found Petitioner did not prove counsel was ineffective.

III. Probative evidence supports the PCR court's finding that Petitioner's plea was knowing and voluntary when (1) the PCR court found credible counsels' testimony about their lengthy advice to Petitioner and (2) the plea colloquy supports a finding that Petitioner understood the consequences of the plea and entered it knowingly and voluntarily.

Petitioner contends the PCR court erred in finding his plea was knowing and voluntary because he believed he did not understand the elements of voluntary manslaughter and believed he would receive a twelve-year sentence. He further contends he believed the offense was parole-eligible and he did not know the victim's family would request the maximum sentence. However, probative evidence supports the PCR court's finding that Petitioner entered his guilty plea knowingly and voluntarily.

A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"To be knowing and voluntary, a plea must be entered with an awareness of its

³ Petitioner likewise did not enter the reports into evidence at the PCR hearing.

consequences.” Holland v. State, 332 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007).

The testimony of Delgado and Phillips and supports a finding that Petitioner knew he faced more than twelve years, understood the consequences of his plea, and thus pled guilty knowingly and voluntarily. Delgado and Phillips both testified they never promised Petitioner a twelve-year plea. (App. 231, 245-46, 257-58, 231). Delgado testified that prior to the plea, he and Phillips met with Petitioner “a good hour and-a-half” and explained the sentences he faced, the risk of proceeding with the jury trial, and the constitutional rights Petitioner would waive by pleading guilty. (App. 230). Delgado explained they were in the fourth day of trial, and Petitioner was very aware of his rights to have a jury decide his guilt, cross-examine witnesses, and testify because they had been exercising those rights. (App. 230-31). Delgado testified they explained the elements of voluntary manslaughter and murder. (App. 233, 236-37). Likewise, Phillips testified they left “no stone unturned” in their conversations with Petitioner; they explained to Petitioner “all of his rights, collateral consequences that come with a plea, [and] full sentencing ranges”; they explained the constitutional rights Petitioner would waive; and Petitioner entered the plea with “eyes wide open.” (App. 255, 257). Finally, Delgado and Phillips both believed Petitioner was competent and understood their conversations. (App. 243, 255-56).

The foregoing testimony, which the PCR court found credible, supports a finding that Petitioner pled guilty with an understanding of the sentence he faced and the consequences of the plea. (App. 270, 272, 274). Likewise, the plea colloquy itself supports this finding. At the plea hearing, the solicitor informed the Court that Petitioner was “exposed to the max,” and the plea

court advised Petitioner that voluntary manslaughter carried up to thirty years. (App. 134-35). Petitioner stated he understood. (App. 135). Likewise, Petitioner told the plea court he understood the constitutional rights he was waiving. (App. 136-37). Thus, probative evidence supports the PCR courts' finding that Petitioner pled guilty knowingly and voluntarily.

IV The PCR court did not abuse its discretion in excluding evidence about Petitioner's fee dispute with counsel when (1) Petitioner did not establish the evidence was relevant to a consideration of whether plea counsel was constitutionally ineffective, and (2) Petitioner did not inform the PCR court that he sought to introduce the evidence to corroborate his testimony or otherwise seek to enter that portion into evidence.

Petitioner asserts the PCR court erred in not allowing PCR counsel to introduce evidence of a fee dispute when the evidence contained within it would have supported Petitioner's claim that he informed his lawyers about his accident defense. Specifically, Petitioner avers he attempted to enter "letters written from trial counsel to Petitioner during the fee dispute where trial counsel explained the work he did to prepare for trial," which would have "demonstrate[d] Petitioner expressed his desire to pursue an accident defense in trial and trial counsel knew about Petitioner's defense." However, at the PCR hearing, Petitioner never relayed to the Court that the documents were relevant to show Petitioner "expressed his desire to pursue an accident defense"; thus, any argument that the documents were relevant for that purpose is not preserved. Further, based on counsel's stated reason for introducing the documents—to show Petitioner "may have reasonably understood that the agreed upon fee was for a full trial of his case to verdict—the PCR court did not abuse its discretion in determining the evidence was not relevant to a consideration of whether plea counsel was constitutionally ineffective.

"The admission of evidence is within the sound discretion of the trial court." State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 391 (Ct. App. 2000). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.”

Rule 401, SCRE.

During Petitioner’s cross-examination of Delgado, the following exchange occurred:

Q. And I’m not going to get very much into this. There’s just really one point I’d like to make. There was a fee dispute in this case, was there not?

A. There was what, ma’am, I’m sorry?

Q. I’m sorry. A fee dispute?

A. Yes, ma’am.

Q. And the resolution of that dispute. Did the panel make a finding that—

[Respondent]: I’m going to object to relevance.

The Court: Yes. I’ve sustained that objection and relevance to this particular case.

All right. I sustained that objection.

[PCR counsel]: At the conclusion of this, can I make a proffer of that, your honor?

Mr. Delgado: Your Honor?

The Court: I’m the judge and the jury. I’m not too concerned about—I’m not sure what you’re wanting to do. You just want to enter something to make it as part of the exhibit or the Court’s record here, but I find any fee dispute involved in hit case has no relevance whatsoever to the issues involved in the Applicant’s PCR application. I’m not going to allow it.

All right. Move on.

(PCR 58). At the conclusion of the hearing, the following exchange occurred:

[PCR counsel]: I still have one issue regarding the information that I was not allowed to get into on the stand. I guess I just want to be heard on that. I’ve got sort of a document that—

The Court: Let me hear you on the relevance of a fee dispute as a Postconviction Relief Hearing.

[PCR Counsel]: So the panel in that case made a finding. And the finding was that [Petitioner] may have reasonably understood that the agreed upon fee was for a full trial of his case to verdict, and that's it. That is the only point I wanted to get out.

The Court: Okay. Well, that point is now on the record.

(PCR 78-79).

At no point during the PCR hearing did Petitioner argue the fee dispute documents were relevant to support his claim that he wanted to pursue an accident defense. Thus, any argument that the documents were relevant for that purpose is not preserved. See Washington v. State, 324 S.C. 232, 235, 478 S.E.2d 833, 834 (1996) (providing an appellate court will not consider issues not raised to or ruled upon by trial judge).

Further, based on the stated purpose of the documents—to show Petitioner “may have reasonably understood that the agreed upon fee was for a full trial of his case to verdict”—the trial court did not abuse its discretion in finding the documents were not relevant.⁴ Notably, it was Petitioner’s decision to plead guilty—not plea counsel’s decision. There is no evidence to suggest plea counsel would not have tried the case to verdict had Petitioner decided not to plead guilty. Counsel did not articulate any other basis as to why the fee dispute was relevant to a consideration of whether counsel’s performance was constitutionally ineffective under Strickland. Thus, the PCR court did not abuse its discretion in finding the information was not relevant. Finally, Petitioner *did* proffer without objection the finding that supported his basis for relevance as to the fee dispute (i.e., that Petitioner “may have reasonably understood that the agreed upon fee was for a full trial of his case to verdict”); thus, Petitioner cannot demonstrate prejudice from the PCR

⁴ PCR proffered this finding to the PCR court without objection, making it a part of the record. (App. 261).

court's decision not to allow further information about the fee dispute for the purpose stated by
Petitioner at the hearing.

CONCLUSION

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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DANIELLE DIXON
Assistant Attorney General



Danielle Dixon
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

This 14th day of August, 2023