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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable J. Cordell Maddox, Circuit Court Judge

APPELLATE CASE NO. 2024-001761

ABIN LOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Did the PCR court err in finding trial counsel not ineffective for failing to adequately investigate and then cross-examine two co-defendants about their potential for bias due to their plea deals with the federal government and pending charges with the solicitor, particularly where one of the promises of the deal was to request the solicitor dismiss all charges?

RESPONDENT'S ISSUE PRESENTED

Where the State had no agreement for a deal or non-prosecution with State witnesses Wilson and Darien and indicated that the Federal prosecutors should stay out of the State's way in their prosecution and Lowman's prosecution, and the federal government prosecutors had indicated to the witness Wilson that it would make a non-binding request for no prosecution or concurrent time, *unknown to the state prosecutors or the defense counsel*, a failure to further investigate potential plea resolutions Applicant's co-defendants had does not entitled the Applicant to post-conviction relief because Sixth Amendment prejudice has not been shown where it was developed that the State had no agreement with the witnesses, the fact of a potential downward departure of the federal charges of Darien was developed to the jury, and there was independent corroborating evidence of Lowman's involvement in the crime.

STATEMENT OF THE PROCEEDINGS

This matter comes before this Court by an appeal by Petitioner Abin Lowman to the denial of his post-conviction relief proceeding. The Petitioner made a *pro se* application for post-conviction relief dated March 9, 2022. In his application, he challenged his convictions for burglary in the first degree, armed robbery, 2 counts of kidnapping and criminal conspiracy. The Respondent filed a Return in the matter on March 15, 2024. The Petitioner, through counsel

Chelsey Marto, filed an amended application on March 15, 2024. He alleges allegations of ineffective assistance of counsel and prosecutorial misconduct.

On March 19, 2024. An evidentiary hearing was convened before this Court. The Petitioner was present and represented by his appointed counsel, Chelsey Marto. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received by the Petitioner, his trial counsel Robert "Theo" Williams, Solicitor Rick Hubbard, and Assistant Solicitor Sutania Fuller. On October 8, 2024, the Honorable J. Cordell Maddox, Presiding judge, denied the application as amended App.p. 1290-1366. This appeal follows.

Procedural History

Abin Lowman is presently confined in the South Carolina Department of Corrections, pursuant to orders of commitment from the Saluda County Clerk of Court. Petitioner was indicted at the June, 2018 term of the Saluda County Grand Jury for the offenses of burglary in the first degree, armed robbery, two counts of kidnapping, and criminal conspiracy. APP. 1065 - 1074. His case was called to trial on June 18, 2018, before the Honorable Eugene C. Griffith, Jr., and a jury. Robert Theodore Williams, Sr., represented Petitioner. Solicitor Rick Hubbard and assistant solicitor Sutania Fuller represented the state. App.1.

On June 22, 2018, the jury found Petitioner guilty on all counts. App. 1057, 11. 13-20. Judge Griffith sentenced Petitioner, based upon his prior record and the service of statutory notice for the life without parole sentence, to life imprisonment without parole concurrent on all of the convictions with the exception of criminal conspiracy. On the criminal conspiracy conviction, Judge Griffith sentenced Petitioner to five years imprisonment, concurrent. App. 1062, 11. 14-19.

Direct Appeal

The Petitioner appealed to the South Carolina Court of Appeal. He was represented in the

appeal by Chief Appellate Defender Robert M. Dudek. On July 29, 2019, counsel made an Anders Brief of Appellant and petition to be relieved as counsel pursuant to *Anders v. California*. 386 U.S. 738, 87 S.Ct. 1396 (1967). On May 18, 2021, the South Carolina Court of Appeals dismissed the appeal after *Anders* review. *State v. Lowman*, Unpublished Op. No. 2021-UP-172 (S.C. Ct. App. May 18, 2021). The remittitur was issued on June 28, 2021.

PCR ALLEGATIONS

In his original applications, Petitioner alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
2. Prosecutorial Misconduct

(PCR App. at 3).

Amended Application

In the Amended application dated March 11, 2024, the Petitioner, through counsel Chelsey Marto, pertinent to the certiorari petition alleged:

1. Ineffective assistance of counsel for:

   . . .

   i. **Failure to investigate potential plea resolutions Applicant's co-defendants had.**

   j. **Failure to cross-examine Wilson concerning the federal plea resolution he had entered several months before the trial.**

2. Prosecutorial Misconduct:

   a. **Applicant believes prosecutorial misconduct occurred because of alleged falsehoods the investigators and Applicant's co-defendants stated at trial.**

   b. For not disclosing that Wilson had entered a plea agreement months before Applicant's trial.

APP. 1080-1102, 1124- 1128.

FACTUAL BASIS OF STATE'S CASE AT TRIAL

Danny Tidwell and his wife, Lynda, were the owners of Tidwell's Jewelry Store in Johnston, South Carolina. They had owned and operated that jewelry store for forty-two years. APP. 162, l. 12 - 163, l. 3. They owned three jewelry stores, although the main store was in Johnston. APP. 163, 11. 7-20.

The Tidwells lived in a large house on the Persimmon Hill golf course subdivision in Saluda, South Carolina. APP. 164, 1. 14 - 165, 1. 13. Mr. Tidwell remembered on March 8, 2017, he and Lynda followed their usual routine of driving home from Johnston to Saluda after the jewelry store closed for the evening at six o'clock. However, on this particular night, Mr. Tidwell stopped at a Mexican restaurant near their home to purchase a take-out dinner. APP. 167, 1. 11 - 172, 1. 24.

At around seven o'clock that night, they went by his daughter's house in the same golf course subdivision, and then Tidwell drove the extra block or so home. “I noticed a car that was not familiar to me at all. It's only seven neighbors that live back in that part and I know all of them and I know what they drive, and it just was different. I didn't really think about it other than that's odd. I wonder who they are visiting, or it was just strange. I had never seen that car before.” APP. 172, l20-173, l. 25. The strange car was a Mercury Marquis owned by Petitioner's mother. APP. 174, ll. 1-5.

As usual, Tidwell went to sleep at about 8:30 that night, and he testified that his wife usually was "not too far behind me. Tidwell remembered awakening to a noise that he thought was their under-the-counter ice machine in his kitchen. APP. 175, 11. 9-23. However, Tidwell said the next thing that happened was "I hear men in my house hollering, 'ATF. ATF. Come out with your hands up.' I rolled over and wake [awakened] my wife. She might have already been

awakened. I don't know. But I asked her, I said, we need to cooperate thinking that it was law enforcement." APP. 182, 11. 1-15. Tidwell thought it was law enforcement but that they had "the wrong address." Tidwell and his wife were placed on the carpet, and they had their hands tied behind their backs with zip ties. APP. 182, 11. 16-24.

Tidwell said he quickly realized the men were not law enforcement based on their vulgar language, and from them demanding to know "Where's your valuables? Where's your belongings? Don't lie to me. I'll blow your F'ing head off." APP. 182, l. 25 - 183, l. 11. Tidwell told one of the three inquiring men that he did not have a safe in his house. One of the men then asked Tidwell how he could own a jewelry store and not have a safe in his house. APP. 183, l. 12- 190, l. 23. Tidwell gave one of the men the alarm codes, the safe combinations for the jewelry store safe, as well as the store keys. APP. 191, 1. 7 - 197, 1. 14. Tidwell said the men assured him that they would not hurt his wife or him as long as they cooperated.

At one point, Tidwell said he asked one of the men, "If I could pray. I didn't want to offend anybody. And then he said, 'What are you, a Jew?' And I said no. I'm Christian. And he said, 'Yeah. You can pray.'" APP. 197, 1. 21 - 198, 1. 11.

Tidwell remembered it became quiet, and he saw headlights from a car leaving the area on his ceiling. Mrs. Tidwell was free, untied Danny Tidwell, and they searched for a phone to call the police, but all of the phones were gone. Tidwell and his wife then came up with a plan where they would run out of different doors in the house to different neighbor's houses to ensure one of them could safely call the police. No one was injured, and Saluda police officer Dale Hallman was the first police officer on the scene that morning. APP. 199, 1. 2 - 203, 1. 18.

Other police officers soon arrived. The robbers had taken Tidwell's car, a .380 caliber pistol, a silver money clip with about $3,000 in it, and another $1,000 from the house. An additional .45 caliber pistol, a pocketknife, and their cell phones were also all stolen. APP. 205, 1. 17-214, 1. 12.

Neither Tidwell nor his wife could identify any of the burglars. They did, however, remember that there were only three men inside the house. One black man was said to be wearing dark glasses, and another man apparently wore "military" like boots. APP. 215, 1. 10 - 236, 1. 19.

Tidwell also remembered that about $100,000 in jewelry was stolen from their bedroom drawers, as well as his wife's diamond ring. APP. 247, 11. 5-24. However, the jewelry store was not burglarized and robbed that night or in the early morning as allegedly was planned. APP. 236, 11. 3- 10.

The state's theory of the case was that one of the accomplices gave Petitioner the key to the jewelry store, the alarm code, and the safe combination given to him by Mr. Tidwell during the burglary. Petitioner was driving his Grand Marquis to the jewelry store in Johnston to burglarize and rob it when he was stopped by the police There was a lengthy pre-trial motion to suppress the fruits of the traffic stop of Petitioner's Grand Marquis on the basis that the traffic stop was a pretext to assist a repossession agent, James Rutland, in repossessing the Grand Marquis, and not for any legitimate law enforcement reason. This, the defense argued, rendered the traffic stop illegal. The trial judge ruled the traffic stop was legal because the repossession agent, Rutland, told the Johnston police that Lowman was driving without insurance, a legitimate reason to stop Lowman. In addition, the judge accepted the state's claim that law enforcement also had the right to stop

Lowman because of the very dark tint on the Grand Marquis, which appeared to be illegal. APP. 93 - 141. [1]

Tidwell's wife, Lynda Tidwell, remembered the burglary lasted approximately two hours. Her necklace, bracelet, three rings, and a watch were among the items stolen during the burglary. APP. 278, 1. 4. - 279, 1. 25. Mrs. Tidwell also remembered after the men left and the car lights disappeared that they went to the neighbor's house and were able to get the neighbors to call the police. APP. 296, 1. 20 - 298, 1. 24.

The Tidwells' car had an OnStar tracking device on it. Consequently, the police were able to trace the stolen car to "Old Camp Log Road in Aiken County," where they found the car abandoned not far from a Waffle House. APP. 307, 1. 12 - 308, 1. 1 1; APP. 321,11. 8-18.

When law enforcement went to the nearby Waffle House in Aiken County, they went through the trash can in the men's room. They found Mr. Tidwell's apparent silver money clip and a white glove there. APP. 328, 1. 22 - 329, 1. 25. Mr. Tidwell never identified the money clip as being his clip.

As a result of surveillance tapes at the Waffle House and one of the Wal Marts in Aiken County where the ammunition was purchased, the suspects, in addition to Petitioner, became Joshua Darian, James Christopher Wilson, and Robert Goodwin. APP. 386, 11. 3-7.

Lowman's mother purchased the Grand Marquis for Lowman from Jiggie's Truck and Auto Sales in October 2016. APP. 407, 1. 11 - 409, 1. 24. The car came with a GPS contract which

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[1] There was no contemporaneous objection by the defense when the ammunition found in Lowman's trunk, or a shell casing found on the passenger side of the vehicle, or other incriminating items were entered into evidence. APP. 515, 1. 1 - 517, 1. 23.

allowed the car lot to disable the vehicle if there was no insurance on the vehicle, or if the purchaser was behind on the payments. APP. 411, 1. 9 - 418, 1. 22. The owner of the car lot was Sheila Rutland. Her husband, James Rutland, was the repossession agent for Hook and Book Recovery Services.

James Rutland remembered that the Grand Marquis was traced on the night of March 7, 2019, to the golf course near the Tidwell home. APP. 427, 1. 12 - 431, 1. 22. Rutland found the vehicle there but was unable to repossess it because of the narrow dirt road it was on. Rutland actually had to drive on the golf course to turn around. He was worried about "tearing up the golf course or getting stuck." APP. 441, 11. 6-25; APP. 470, 1. 20 - 471, 1. 8.

In the interim, Petitioner returned to the car and drove away in it. Rutland followed Petitioner in the vehicle from the golf course to Johnston. Rutland informed a female police officer in Johnston that there was no insurance on the Grand Marquis Lowman was driving, and that he intended to repossess the vehicle that night. APP. 441, 11. 6-25; APP. 470, 1. 20 - 471, 1. 8.

Both Rutland and the Johnston police officers claimed that Lowman was not stopped that evening so that Rutland could repossess the car. When Lowman was stopped, he did not have a driver's license. He was arrested for driving under suspension. APP. 481, I. 24-489, l. 20. He was arrested on the night of the robbery, March 8, 2017. No ticket was apparently issued because the tint on the car windows being illegal. APP. 652, 11. 10-16.

A box of nine-millimeter ammunition was found in the trunk of the vehicle. APP. 494, l. 1 - 495, l. 3; APP. 515, l. 1 - 516, 1. 11. In addition, a nine-millimeter shell casing was found inside the front passenger seat of the car, along with multiple cell phones and identification cards for

Robert Goodwin and Lowman. In addition, walkie talkie handheld radios were found inside the car. APP. 556, l. 2 - 557, l. 18.

James Wilson was arrested in Maryland on March 11, 2017. APP. 652, 11. 17-23. Joshua Darian was also arrested in Maryland on March 24, 2017. APP. 653, 11. 4-14. Robert Goodwin was arrested in Maryland on July 10, 2017. APP. 653, 11. 16-21. James Wilson and Joshua Darian testified for the state against Lowman.

James Wilson

James Wilson was charged with burglary in the first degree, two counts of kidnapping, armed robbery, and criminal conspiracy in this case, the same charges for which Lowman was also indicted. APP. 689, 11. 14-24. Wilson claimed the solicitor had not promised him anything in return for his testimony against Lowman. Wilson then maintained that Lowman, Robert Goodwin, and Joshua Darian were the other participants in this crime. APP. 689, 1. 14-690, 1. 12.

Wilson was from Guyana, South America. He lived in Maryland. Before March, 2017, he had never been to South Carolina. He was twenty-two years old at the time of the burglary. Joshua Darian was eighteen years old. APP. 691, 1. 17 - 692, 1. 5.

Wilson claimed that Lowman told him he could come to South Carolina and participate in the robbery of some drug dealers who ran a jewelry store. There was going to be at least $300,000 involved in the robbery. APP. 694, 1. 1 - 695, 1. 1.

Wilson said he was told that Lowman would provide a rental car, guns, and that they would be given money for hotels, food, and any extra expenses. "Pretty much all we had to do would be to go in there and pretty much rob them, tie them up, lay them down. I was to get the codes." APP. 695,1. 11 - 696,1.25.

Wilson said on the day of the robbery, Joshua Darian was driving because Lowman's driver's license had been suspended. Wilson said Lowman went to the Tidwell Jewelry Store that afternoon to buy a ring. APP. 710, 1. 3 - 711, 1. 22. Wilson said the purpose of this purchase was so Petitioner would know the layout of the jewelry store he was to burglarize later that evening. APP. 711, 11. 19-22; APP. 738, 11. 7-11. Lowman was supposed to rob the jewelry store while the other three men held Mr. and Mrs. Tidwell as prisoners in their golf course home. APP. 738, 11. 4-11.

Wilson explained that that night, he went into the Tidwell home with Darian and Goodwin while Lowman remained on the back porch. APP. 751, 11. 7-10. Wilson said he was led to believe that the Tidwell Jewelry Store was a front for a drug operation. "People come in there and they look to buy, act like they're buying jewelry . . .but they're buying drugs. He said it was an old bank, had a bank vault in the business and he was going to clean the bank vault out." APP. 752, 1.9-753, 1. 12.

Wilson said the men entered the house; they beamed their flashlights into their eyes and screamed: "ATF." APP. 753, 1. 13 - 754, 1. 7. They then tied up Mr. and Mrs. Tidwell with the zip ties, obtained the security codes, the combination to the safe, and the store keys for Lowman. They then held the Tidwells as prisoners. APP. 754, 1. 17 - 757, 1. 20.

A short time later, Lowman sent a text message to Wilson informing him that he had been "pulled over" by the police. "I really thought he was lying. I didn't believe him to be honest with you because I kind of figured once I realized there was nothing in the house, I kind of figured it was, he kind of used us to go and rob the jewelry store so I'm thinking that he just robbed the jewelry store and just left us. I didn't believe him at all but just to be on the safe side I left. I left the house." APP. 766, 1. 23 - 767, 1. 8.

Wilson, Darian, and Goodwin then traveled in the Tidwells' stolen car to Aiken, South Carolina. Wilson explained: "I knew it had OnStar on it, so I knew we had limited time in the car. So once we got back to Aiken, I figured it was time to get rid of the car, so I parked it in this like in the woods or whatever." APP. 769, 11. 15-22. Wilson saw police officers swarming in the area, and he threw his gun into a bush by the Waffle House. Wilson would later lead the police to find the gun he threw into the bushes there. APP. 772, 1. 4 - 773, 1. 19.

Wilson related that the men were chased through the woods by the police from the Waffle House area for about two hours. They then called a cab and got a ride back to the Econo Lodge in Aiken. From there, Wilson caught a cab to Columbia, and he took a Greyhound bus back to Maryland. APP. 774, 1. 15 - 776, 1. 6. Wilson said he only received about $700 for his part in the crime. APP. 823, 11. 19-23.

Joshua Darian

Joshua Darian also claimed there was "no deal" in return for his testimony against Lowman. Darian, like Wilson, was facing the same charges. APP. 892, 1. 5 - 893, 1. 2. Darian testified that "Wilson let him in on the plan" to rob drug dealers located in South Carolina. The burglary and jewelry store robbery were expected to result in about $250,000 in stolen money. APP. 896, 1.2-897, 1. 23.

On the night of the robbery at the Tidwell home on the golf course, Darian said Lowman remained outside while he went inside the Tidwell home with Wilson and Goodwin. APP. 925, 11. 15-22. The men inside were going to provide Lowman with the keys to the jewelry store, the alarm code, and the safe code. APP. 926, 11. 16-20.

Darian said his role was "like to be a scavenger over the house, look around in the house trying to find the drugs." APP. 928, 11. 15-17. Darian testified once they had the keys and code that Lowman left to go to the jewelry store. Darian said they repeatedly assured the Tidwells that they were not going to harm them. Darian said he got a blanket and a pillow for Mrs. Tidwell while she lay on the floor. APP. 929, 1. 13 - 931, 1. 24.

The solicitor again had Darian repeat that he had no deal with him for his testimony against Lowman. Darian also said he had no promises from the federal government for his testimony against Lowman. The federal authorities had apparently charged the men with firearms violations and impersonating federal officials. APP. 945, 11. 5-25.

Darian Recalled by the State after it was revealed he had been made a proffer by the Federal Government

However, the solicitor later asked to recall Darian so Darian could admit that he was making a proffer with federal authorities that would cause a decrease in his federal sentence. Darian still claimed the deal with the federal authorities would have no effect on his state court charges, although this Court can take judicial notice of the fact Darien's state court sentence ran ultimately was ordered to run concurrent to his federal sentence. APP. 980, 1. 5 - 981, 1. 4.

At the end of the state's case, the judge read to the jury a stipulation that Lowman had two prior convictions for burglary in Edgefield County on March 17, 1998, and March 20, 2000. APP. 995,11. 13-23.

STANDARD OF REVIEW IN A PCR APPEAL

The standard of review in PCR cases depends upon the specific issue presented. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). A reviewing court “defer[s] to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them.” *Id.*;

see also Putnam v. State, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016) (stating an appellate court "gives great deference to the PCR court's findings on matters of credibility"). However, questions of law are reviewed de novo, "with no deference to trial courts." *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839.

Strickland v. Washington Standard

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* Moreover, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland,* at 689. It is an applicant's burden to prove, by a preponderance of the evidence, an entitlement to relief. Rule 71.1 (e), SCRCP. See also *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation

is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id*. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; *see id*. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial*." *Id*. at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id*. at 691. The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. The applicant's burden of proving both *Strickland* components is heavy considering the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the

adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

ARGUMENT ON WHY CERTIORARI SHOULD BE DENIED

The Petitioner asserts that counsel Theo Williams was deficient, and his deficiency was prejudicial related to the unknown negotiations the federal government had made with witnesses Joshua Darien and James Wilson related to their federal charges arising from the incidents they were involved in with Abin Lowman. The Petitioner asserts that counsel should have learned that the U.S. Attorney had indicated in their federal plea agreements that the federal government and the Assistant U. S. Attorney had indicated to the witnesses that they would recommend a downward departure on the federal crimes and a recommendation to the solicitor that "the Defendant (witness) not be prosecuted for the state crimes or alternately, be sentenced to concurrent time for any similar or related crimes . . . " App.p. 1269.[2] The Petitioner asserts that this alleged failure by counsel Williams prejudiced the Petitioner because the request by the federal government to have the state drop the state charges was significant. He argues that with Wilson being unimpeached by the federal agreement it also bolstered Darien's testimony and was of a high impeachment value. The PCR Court rejected the assertions, concluding, in pertinent part, that the federal plea was not

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[2] The Wilson plea agreement also stated the agreement was not binding on the 11th Circuit Solicitor's Office and that the Defendant understood that he had no right to withdraw his guilty plea should the federal government's recommendation not be followed by the 11th Circuit Solicitor's Office. APP. 1269. The PCR court found that Solicitor Hubbard had credibly testified that he was unaware of the federal plea agreements and had made no deals not only with Wilson and Darien, but also with the federal government. Hubbard indicated that this was a major case in Saluda County and indicated to the federal prosecutors to stay out of the state's way. APP. 1223. The Solicitor asserted that he never received a call from Assistant U. S. Attorney Holloway after the conversation about any potential agreement (implicitly including the lack of any request for non-prosecution of either Darien or Wilson). APP. 1337-1338.

with the state government nor sanctioned by the Solicitor's office as credibly revealed by the testimony of Solicitor Hubbard. APP. 1316-1318. Further, it noted that the testimony of similar value was revealed within Joshua Darien's testimony. Finally, prejudice was also not supported that the corroborating evidence of Lowman's involvement in the crime. Certiorari should be denied since probative evidence supports these conclusions by the PCR judge.

Petitioner claims his counsel should have more effectively cross-examined witnesses. He felt counsel did not have adequate information. Counsel was aware that the state's theory was that nothing would have happened without Lowman's involvement. Lowman testified that with the evidence he has now, the state's theory does not match the evidence because his co-defendants lied.

Counsel used reasonable tactics when he impeached Darien and Wilson on Inconsistent Statements.

A review of the examinations of Wilson and Darien shows that counsel did examine Wilson and Darien about the inconsistent statements they made. Counsel Williams inquired of Wilson about what he told law enforcement as to why he came to S.C. on whether it was to buy a car or commit a robbery. APP. 802-803. He inquired about whether he was straight with law enforcement when he told them about what went on originally and where the jewelry was left and when it was sold in Maryland. APP. 805-807. Counsel challenged Wilson on whether he had been accurate in his statements to law enforcement on where the gun was purchased and when he purchased the items. APP. 808-810. He also challenged him with what he told law enforcement that when he bought the bullets on whether they were in there looking at video games and at which Walmart. APP. 811-812. Counsel inquired about his statement to law enforcement that he did not want to

give them the names of whom he sold the jewelry to in Maryland because he did not want them to get into trouble. APP. 824. [3]

Similarly, counsel Williams sought to impeach Joshua Darien with his prior statements. He inquired about the first interview with law enforcement after the arrest while he was in the hospital due to a head injury. APP. 952. He sought to impeach him on whether he told law enforcement that he went to Summerville rather than Spartanburg to pick up the gun. APP. 955. Counsel Williams also inquired about the number of times Darien went over his testimony with the Solicitor or law enforcement. APP. 967. In particular, Williams questioned the reason to be riding around was to buy a car for Lowman's mother. APP. 968-969.

"Trial counsel's decisions regarding the selection of the best defense plan... involved tactics well within professionally reasonable conduct that should not be second-guessed by this Court

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[3] Without the knowledge of the existence of the plea agreement, counsel did not err in inquiring about the plea agreement in speculation about its existence. Counsel was not deficient in failing to do so. *See Moss v. Hofbauer*, 286 F.3d 851, 864–65 (6th Cir.2002) (holding that speculation as to possible lines of cross-examination is insufficient for ineffective assistance of counsel where no evidence was presented on how witness would have testified had the cross-examination been pursued). *Matylinsky v. Budge*, 577 F.3d 1083, 1093 (9th Cir. 2009) (counsel cross-examined jail inmate sufficiently to put inmate's credibility thoroughly at issue and extra impeaching would not have changed result of trial). *See also Woods v. Sinclair,* 655 F.3d 886, 910 (9th Cir. 2011) (ample impeachment existed which overcame alleged deficiencies in an overwhelming evidence case); *Hayes v. Ayers*, 632 F.3d 500, 519 (9th Cir. 2011)(actual cross-examination conducted gave ample opportunity for the jury to evaluate the witness); *Little v. Johnson*, 162 F.3d 835, 861 (5th Cir. 1998) (record showed vigorous cross). The Ninth Circuit also said that the defendant had failed to show that the result would be different with further cross-examination (*U.S. v. Claiborne*, 870 F.2d 1463, 1469 (9th Cir. 1989)); *Richie v. Mullin*, 417 F.3d 1117 (10th Cir. 2005)

If the Court assumes, despite counsel's lack of knowledge about the April 26, 2018 plea agreement, that witness Wilson would have revealed it, for the reasons set forth above in the earlier section, the Petitioner had failed to show prejudice under *Strickland*. Independent of Wilson's testimony, there was corroboration of much of the information he revealed, as well as Darien's testimony that the jury had accepted. Wilson was also impeached based upon his inconsistent statements. The failure to question Wilson about the potential existence of the plea agreement does not undermine confidence in the verdict. Further for the additional reasons set forth in the preceding allegation, prejudice has not been shown.

under Strickland." Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995); see DeLozier v. Sirmons, 531 F.3d 1306, 1326 (10th Cir. 2008) ("[C]ounsel's decisions regarding how best to cross-examine witnesses presumptively arise from sound trial strategy"); U.S. v Nersesian, 824 F.2d 1294, at 1321 (2d. Cir. 1987) ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature.").[4]

As such, counsel's cross-examination was reasonable, and Lowman failed to satisfy the first prong of Strickland. The PCR Court's conclusion is supported by probative evidence. APP. 1336-1338.

Where the State had no agreement for a deal or non-prosecution with State witnesses Wilson and Darien and indicated that the Federal prosecutors should stay out of the State's way in their prosecution and Lowman's prosecution, and the federal government prosecutors had indicated to the witness Wilson that it would make a non-binding request for no prosecution or concurrent time, *unknown to the state prosecutors or the defense counsel*, a failure to further investigate potential plea resolutions Applicant's co-defendants had does not entitled the Applicant to post-conviction relief because Sixth Amendment prejudice has not been shown where it was developed that the State had no agreement with the witnesses, the fact of a potential downward departure of the federal charges of Darien was developed to the jury, and there was independent corroborating evidence of Lowman's involvement in the crime.

a. **Joshua Darien**

Counsel Williams testified that he was only aware prior to the trial that Wilson had been giving proffer statements. APP. 1199. It did not surprise him that the Lowman's codefendants claimed they had not been promised anything and that there was nothing tempting them to lie.

[4] "Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). Where trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of ineffective assistance of counsel claim. Cardwell v. Netherland, 971 F. Supp. 997, 1019 (E.D. Va. 1997).

APP. 1219. Counsel Williams testified that he knew of the proffer to Wilson, but he did not know of specific amounts of time or any reductions in an plea agreement to Wilson and he was also not aware of any federal agreement with Darien. APP. 1199-1200. He also knew that the state time Wilson and Darien faced was more than federal time they faced which was on weapons charges. Williams stated the only thing known by him prior to trial was the federally issued proffer agreement to Wilson, but not any agreement on time. APP. 1200. Williams had received from the federal public defender information on the two proffers about a week or two before the trial.[5] APP. 1200. At this trial, the existence of an agreement related to downward departure with Darien was entered right before the redirect with Mr. Darien. Williams already knew that Wilson had a proffer but was not aware of anything more related to an agreement concerning a downward departure. Williams stated that he did not want to go back into it with Darien after the State had presented the matter on re-direct, noting it was based upon the obligation to tell the truth, where they were still facing the state charges.

Solicitor Hubbard also credibly stated at the PCR hearing that he was not aware of any proffer agreement or proffers by Darien with the federal government prior to the trial. APP. 1223-1224.

How the Darien matter was presented at trial

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[5] As the PCR Court notes that the federal plea agreement with Wilson was dated April 26, 2018. APP. 1258. There is no evidence of the date of the proffer agreement or the actual proffer agreement with Darien was presented to the Court or the trial court. It is unclear if Williams is referring to the same matters that were presented to him two weeks prior was about the proffered statements made pursuant to the agreement or the proffered agreement. The PCR Court noted that in the PACER online Federal Court Public Index in Mr. Darien's case the signed plea agreement was dated July 19, 2018, **subsequent to the testimony in Mr. Lowman's trial in June 2018.** The federal record shows that Daren entered a guilty plea in federal court on the same date. It is not clear whether there was an earlier plea agreement or if Solicitor Hubbard was misstating that it was actually a proffer agreement as Darien corrected him in the later questioning as to it being a proffer.

During the trial, Solicitor Hubbard inquired of Joshua Darien about being interviewed by both the State and Federal Government. Darien acknowledged that he was cooperating on those charges. APP. 945, l. 12-13. The following then occurred in the direct examination:

Q. Are there any promises by the Federal Government on what we're doing here today?

A. No Sir.

Q. And you know I'm the one in charge of your charges here?

A. Yes Sir.

Q. What deals do you have with me?

A. None

APP. 945, l. 7-21.

On cross-examination by counsel Williams, Darien stated that the federal charges pending against him were possession of a firearm and brandishing a firearm during a robbery under 18 U.S.C. §924(c), and impersonating law enforcement. APP. 976, l. 21-25. Darien stated on the state side, he was charged with burglary first degree, armed robbery, two counts of kidnapping, grand larceny, possession of a firearm during a violent crime and impersonating a law enforcement officer. APP. 977, l. 1-3. Darien also specifically asserted that had not had any discussion with "them" about "downward departure" on the federal cases and asserted he had not heard that before. APP. 977, l. 4-8.

After a brief redirect by Solicitor Hubbard there was a brief break. An issue related to federal charges was presented to the trial court. Solicitor Hubbard reported that he had just learned that Darien had entered into a "plea agreement" with the federal government with a downward

departure and wanted the information known to the jury. APP. 978.[6] The solicitor declared he had not been aware of it, although he knew they were entering discussions to talk about pleading. Solicitor Hubbard indicated that with the federal dispositions he wanted to stay out of it, indicating he had no involvement in the discussions or agreement by the federal government because he does not have any business (in the federal charges). Judge Griffith with this information decided to recall Darien to the stand since his lawyer was present. APP. 979, l.11-13.

In front of the jury, Solicitor Hubbard stated that the lawyer who represents Darien on the state and federal charges was present in the courtroom. Darien confirmed that he had a "proffer" with the federal government which indicated the possibility of a downward departure.[7] Darien further confirmed that with the state charges, the federal proffer has no effect on what the Solicitor does with the state charges. APP. 980, l.5-17.[8]

On cross-examination by Williams, Darien stated the understood that the downward departure was based upon his testimony and will decrease the amount of time he will serve on the federal charges in the federal system. APP. 981.

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[6] This may have been a misstatement as to it being a "plea agreement" rather than a "proffer agreement" with an expectation of a downward departure. As noted above, Darien referred to it was a proffer.

[7] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a 'proffer session.'" State v. Wills, 409 S.C. 183, 186 n.4, 762 S.E.2d 3, 4 n.4 (2014) (Beatty, J., dissenting) (quoting United States v. Lopez, 219 F.3d 343, 345 n.1 (4th Circ. 2000)). Wills v. State, 437 S.C. 385, 389, 878 S.E.2d 330, 332 (Ct. App. 2022), reh'g denied (Oct. 20, 2022), cert. denied (May 24, 2023). It can also be referred to as a "cooperation agreement.

[8] The actual agreement with Darien was not made part of the record in the trial court or in this proceeding. The only agreement in the federal court public index PACER is the July 19, 2018 plea agreement between Darien and the U.S. Attorney's Office, signed and entered subsequent to Lowman's trial.

The PCR Court found that with respect to Joshua Darien, the Petitioner had failed in his burden of proof to show Sixth Amendment prejudice – whether had Williams investigated the federal resolution of Darien federal matter, there was a reasonable probability the result of the proceeding would have been different. APP. 1335-1336.[9] The fact is that the jury became aware of the status of Darien plea negotiations with the federal government.[10] It is also clear that there were no plea offers or negotiations with the State or Eleventh Circuit at the time of Darien's testimony based upon the credible testimony of Solicitors Hubbard and Fuller. Since the jury became aware of the status of the federal negotiations prior to its decision, the Court must conclude that Petitioner has failed to show prejudice under the Sixth Amendment.[11]

b. James Wilson

There is also probative evidence in the record to support the PCR Court's finding that counsel did not further investigate the negotiations between the federal government and state

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[9] Counsel Williams testified that he was aware that Wilson had been giving proffer statements. APP. 1199. It did not surprise him that the codefendants claimed they had not been promised anything and that there was nothing tempting them to lie. APP. 1219.

[10] A review of the PACER Public index for the Federal Courts related to U.S. v. Darien, 8:18-00030 reveals that Darien entered a plea agreement dated and on July 19, 2018 ***after his testimony in the Lowman state court case.*** He pled guilty on the day he signed the plea agreement on July 19, 2018 before U.S. District Court Judge Timothy Cain, with sentencing deferred. On January 17, 2019, the defendant is sentenced on both charges he pled to a total term of 135 months imprisonment and 5 years supervised release. $200.00 special assessment; $108,320.00 restitution. Defendant remanded to the custody of the United States Marshal.

[11] The PCR Court did not address whether counsel was deficient in failing to investigate the federal court index or further inquire the federal defense team about the status of his federal case. This contact was implicitly with Lowman, not Darien's defense team who advised Williams about the proffers that Darien or Wilson had made to federal authorities, including the information about the Wilson proffered statement that the State had also provided in discovery to Williams. What is clear is the actual agreements for either Darien or Wilson were not provided to either the State or the state defense counsel by the federal prosecutor or federal defense counsel for any party.

witness and codefendant Wilson beyond what he learned about the proffer and existence of the knowledge that Wilson was speaking with the federal government. APP. 1326-1329. This Court also finds that had Williams investigated further by seeking out the witness's federal counsel, Lowman's defense counsel would have learned of the existence of the April 26, 2018 plea agreement which would allow the Federal Government to move for a downward departure if Wilson complies with the terms which includes testifying truthfully in any court proceeding. From a review of the federal court's online court system PACER related to Darien's federal case, U.S. v. Wilson, 8:18-00030 – TMC, defense counsel could have learned the existence of the federal plea agreement as docket no. 80 on April 26, 2018, before the Lowman trial. The agreement would also require the federal government to request that any state charges not be prosecuted or that any state sentence runs concurrent with the federal sentence. However, the agreement made with the federal government was not binding on the State or 11th Circuit Solicitor's office.

As to Wilson, as set more fully below in ineffective assistance allegations (j) and prosecutorial misconduct allegation (b), the Petitioner's counsel, as well as the State, were aware of the fact that the witness Wilson had made a statement to the federal government pursuant to a proffer agreement with the federal government. However, neither Williams nor Hubbard were aware that there had been a plea agreement between federal government and Wilson prior to or during the trial. The record shows that counsel with the knowledge of the Wilson proffer statement did not inquire about the Wilson's proffer agreement when he had knowledge of the statement's existence at the trial with Wilson.[12]

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[12] A review of the PACER Public index for the Federal Courts related to U.S. v. Wilson, 8:18-00030 reveals that Wilson entered a guilty plea on the day he signed the plea agreement on April 26, 2018 before U.S. District Court Judge Timothy Cain. On January 17, 2019, the defendant is sentenced on both charges he pled to a total term of 135 months imprisonment and 5 years

The PCR Court reasonably found that Sixth Amendment prejudice has not been shown. In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different Id. at 696.

Although the information about the federal plea agreement could have been used to impeach the witness had the Petitioner's counsel discovered it from the federal sources, Respondent submits the failure to do so did not undermine confidence in the outcome. Importantly, the federal plea agreement was not with the State and Solicitor's office related to the State charges on Wilson. This would have been clarified by Wilson as it was with Darien in his later testimony. The same potential situation that Wilson had was the same situation Darien had for a downward departure if he testified truthfully in any court proceeding, including state court proceedings.

The only difference to the information was that Wilson had already pled guilty already according to the federal court public index whereas Darien had not and that neither had been sentenced. Nevertheless, even the federal offer related to the requirement of truthful testimony in state court could result in a downward departure in the pending federal charges and sentence, the PCR Court found that after the jury received similar information in Darien's testimony, the jury still convicted Lowman. The evidence from Darien and Wilson at trial was similar as to their roles and the roles of Lowman and Goodwin. As noted in the earlier factual summary there was additional corroborating evidence tying Lowman to the crime including the GPS tracking of

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supervised release. $200.00 special assessment; $108,320.00 restitution. Defendant remanded to the custody of the United States Marshal.

Lowman in the area of the crime, the evidence showing the conspirators being together in the area at stores when matters were being purchased, and the connection between the phone used by Petitioner and Wilson during the crime for communication. Simply put, there was independent corroborating evidence which made further credibility issues with Wilson mitigated. Wilson was already impeached during his testimony by the defense counsel related to his inconsistent statements that he had given to law enforcement earlier as compared with his trial testimony. This Court finds that the Petitioner has failed to prove ineffective assistance of counsel because he has failed to prove Sixth Amendment prejudice.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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