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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000054

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner was arrested on the charges of accessory to murder after the fact and obstruction of justice in connection with the murder of Julian Lee on November 01, 2001. App. pp. 476-477. William Diggs, Esquire[1] represented Petitioner. Assistant Solicitor Scott Hixson and Assistant Solicitor Brad Richardson prosecuted the case.[2] Petitioner entered into a proffer agreement with the State on August 25, 2005. App. pp. 481-483. An indictment charging Petitioner for the murder of Lee was consequently presented to the Horry County Grand Jury, which returned a true bill on April 27, 2006 (2006-GS-26-1652). App. p. 480. Petitioner was tried on the murder charge before the Honorable Steven H. John on October 1st through 3rd, 2007. The trial court held a lengthy pre-trial *Jackson v. Denno* hearing on the defense's motion to exclude the taped statement Petitioner made to law enforcement pursuant to the proffer agreement. App. pp. 42-143. The judge ultimately found Petitioner's statement and waiver of *Miranda* rights freely and voluntarily made, as well as admissible during the State's case in chief. App. pp. 131-134. The recorded statement[3] was played before the jury during the State's case in chief with all references or mention of the polygraph examination Petitioner took redacted. App. p. 134; p. 226. The jury found Petitioner guilty and he was sentenced to forty (40) years imprisonment with credit for time served. App. p. 334, ln. 1-7.

Represented by Joseph L. Savitz, III of the South Carolina Commission on Indigent Defense, Petitioner timely appealed his conviction. App. p. 449. The Court of Appeals affirmed his conviction on September 22, 2010. *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App.

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[1] Hereinafter referred to as Counsel.

[2] Solicitor Hixson recused himself from the case after concern arose that he may be called as a witness due to statements he made to Petitioner during the proffer. App. p. 420, ln. 20-24. Solicitor Richardson thereafter took over prosecuting the case and brought the case to trial. App. p. 420, ln. 23-24.

[3] State's Ex. 22

2010). The Supreme Court granted certiorari and held oral argument on December 6, 2012. App. p. 454. On July 16, 2014, the Supreme Court affirmed the decision of the Court of Appeals. *State v. Wills*, 409 S.C. 183, 762 S.E.2d 3 (2014). The Supreme Court agreed that pursuant to the rules of contract construction, Petitioner had waived Rule 410 by entering the agreement, which he did with the advice and consent of counsel and he thus entered the agreement knowingly and voluntarily. *Id.* at 185, 762 S.E.2d at 4. *See also Wills*, 390 S.C. at 145-46, 700 S.E.2d at 269. Joined by Justice Hearn, Chief Justice Beatty dissented in a separate and impassioned opinion. 409 S.C. at 186-206, 762 S.E.2d at 5-15.

On December 1, 2014, Petitioner filed an application for post-conviction relief (APCR) *pro se* raising a number of grounds. App. pp. 335-356. Represented by Assistant Attorney General Jessica E. Kinard, the Respondent made its return to Petitioner's APCR on February 2, 2016. App. p.p. 357-361. Represented by undersigned counsel, Petitioner amended his APCR on June 1, 2017. App. pp. 364-371. An evidentiary hearing was held before the Honorable William H. Seals on September 19, 2017. Undersigned counsel appeared for Petitioner. Assistant Attorney General Johnny E. James, Jr. represented Respondent. Petitioner and Trial Counsel were presented and testified. App. pp. 376-415. Respondent called Solicitor Hixson to testify as well. App. p. 416. The PCR Court denied relief on January 5, 2018. App. pp. 436-448. This appeal follows.

STATEMENT OF THE FACTS

In October 2001, the victim, Lee, was found deceased as a result of two gunshot wounds to his back in a rural area of Horry County. App. pp. 168-169. Petitioner's accessory to murder charge and obstruction of justice charge was pending for a few years prior to the agreement stuck here. Under the agreement, Petitioner would provide a statement on his knowledge of Lee's murder and cooperate in the prosecution of other individuals in return for the State's "consideration" of the cooperation in sentencing on the pending charges. Petitioner was also to submit to a polygraph in which the State would decide if the polygraph results showed inconsistency or deception in Petitioner's proffered statement or indicated Petitioner was the shooter. App. p. 482, ¶ 2. Upon any such decision by the State, the agreement authorized the State to then use Petitioner's proffered statement and any other statement(s) for "any legal purpose, including, but not limited to, considerations for....disposition of charges through....trial....and impeachment." App. p. 482, ¶ 2. The agreement provides the same authorization for use of Petitioner's statement in the clause relating to any failure in his obligation to testify at the trial of any individual prosecuted in the case[4], as well as in a catchall provision that upon any violation of the agreement, "the State shall have the right to use any information through this Proffer in any fashion, whether direct of [sic] collateral to this matter." App. p. 482, ¶ 3; p. 483, ¶ 7. The agreement also provided that "any statements made by [Petitioner] may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging.....In return for [Petitioner'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

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

additional charges against Theodore David Wills Jr. in connection with the subject of this Proffer.....the State shall take into consideration the materiality of his truthful testimony and degree of cooperation in the election of charge(s). " App. p. 482.

The State ultimately decided that Petitioner had shown some unintelligible level of deception during the polygraph and charged him with murder thereafter. At trial, the State called only a handful of witnesses to prove its case. Ann Hayes, a crime scene technician with Horry County testified to the location of the crime scene and evidence gathering. App. p. 165, ln. 10 – p. 184. Dr. Cynthia Schandl, a forensic pathologist, testified that Lee died of two gunshot wounds to his back. App. p. 201, ln. 14-25. Detective Neil Livingston, who previously testified during the *Jackson v. Denno* hearing, laid the foundation for the admission of the taped statement into evidence by testifying to the setting for the interview Petitioner gave, the reading of Petitioner's Miranda rights, and the waiver thereof. App. p. 223-233. In the taped statement, Petitioner admits to being at the scene with an individual named Mark Willard, and they drove and picked up Lee, a friend. *See* Ex. 22. They drove to a secluded to a secluded area where Willard ultimately shot and killed Lee. *See* Ex. 22. Petitioner stated that he had been in the car during the shooting and stayed in the car afterwards because he was scared. *See* Ex. 22. They then came across a nearby river where Willard threw the gun into the river. *See* Ex. 22. The gun was never recovered. It was the State's theory that there was a bounty placed on Lee's life as the result of an unrelated drug deal with individuals referred to as the "Johnson Brothers." *See* App. pp. 264-266. The State argued that Petitioner and Willard were paid $5,000 each to kill Lee. *See* Ex. 22. No other individual, including Willard, was ever prosecuted for the crime. The State did not call Willard or the Johnson Brothers to testify and apart from the testimony of law enforcement and the medical examiner, no trial witness gave any information on the shooting or

underlying motives or the other individuals suspected to be involved. No witness or evidence tied Petitioner to Lee or the murder except for Petitioner's own statement. The State did not produce any witness to corroborate the information in Petitioner's taped statement.

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

At the PCR hearing, Counsel could not recall whether South Carolina higher courts had previously encountered the issue of the "admissibility of the proffered statement based upon a polygraph" during his representation of Petitioner. App. p. 391. Counsel also testified that "his understanding of the agreement was that if Applicant was truthful, all of the charges would be dropped and that the State would, with Applicant's assistance, prosecute the others involved in the killing." App. p. 444. *See also* App. p. 389, ln. 17-25; p. 390, ln. 1-18. In regard to the terms on the use of Petitioner's proffered statement at trial in the event of breach, Counsel testified that he understood the agreement as allowing the State to use Petitioner's proffer statement for impeachment only. App. pp. 441-443. Before advising Petitioner to enter into the agreement, Counsel did not clarify with Solicitor Hixson the extent of the State's use of the statement in the event of breach and did not approach Solicitor Hixson to renegotiate or amend the proffer

agreement. Of note, Counsel testified that to his knowledge, no one else was ever prosecuted for the murder of Julian Lee or for any other related offense.

ARGUMENT

I. THE PCR COURT ERRED IN CONCLUDING THAT COUNSEL WAS NOT INEFFECTIVE FOR ADVISING PETITIONER TO ENTER INTO THE PROFFER AGREEMENT.

Counsel was ineffective for advising Petitioner to enter into the proffer agreement, in violation of Petitioner's Sixth Amendment right to the effective assistance of counsel. In denying relief on this allegation, the PCR Court committed various errors of law and misapplied *Strickland v. Washington*[5] on several different fronts, and there is otherwise no evidence of probative value to support the PCR Court's findings.

In finding Counsel was not deficient for advising Petitioner to enter into the proffer agreement, the PCR Court acknowledged the Supreme Court's admonishment in *Strickland* to avoid the "distorting effect of hindsight" by evaluating Counsel's performance through "the decisions of counsel based on the information and circumstances available to him at the time they are made." App. p. 445 (citing *Strickland*, U.S. at 669, 104 S.Ct. 2052).[6] The PCR Court essentially concluded that it could only find Counsel deficient if it were to consider information gained in hindsight: "[T]his Court finds no deficiency on the part of Counsel. Looking back, the decision to enter into the proffer agreement obviously did not inure to Applicant's benefit." App. p. 445. Yet in denying relief, the PCR Court primarily focused on testimony and circumstances concerning events that took place after the agreement had already been struck and Petitioner had already partially performed his obligations thereunder by proffering a statement. Specifically, the PCR Court focused on: testimony regarding the assurances of leniency made to Petitioner during the proffer; the parties' opinions after Petitioner failed the polygraph, including Trial Counsel

[5] 466 U.S. 668, 104 S.Ct. 2052(1984)

[6] In denying relief on any of the allegations raised in Petitioner's APCR, the PCR Court stopped its analysis at the deficiency prong.

and Solicitor Hixson's surprise that Petitioner failed the polygraph; and Counsel's opinion that the State breached the agreement at trial by seeking to admit Petitioner's statements during its case in chief. App. pp. 441-446. The PCR Court failed to isolate the relevant time period within Counsel's representation of Petitioner when evaluating this issue because the aforementioned instances bear little on Counsel's decision-making that the agreement was advantageous to Petitioner before advising him to enter it. *See Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (explaining the relevant time period to the analysis is at the time of the deficient performance, which in *Thornes* was at the time counsel advised the defendant to plead *nolo contendere*, as opposed to a few years thereafter when the victim in the case recanted her statement). Specifically, the aforementioned instances do not delve into the reasonableness of how Counsel interpreted the agreement or how he evaluated its inherent risks and potential benefits. These instances also do not relate to the adequacy of Counsel's explanation to Petitioner on the substance of the agreement, its potential advantages and possible consequences, or what was expected of him thereunder. The deficiency analysis for the issue on Counsel's decision-making and advisement to Petitioner is rather properly focused upon the events and circumstances prior to Petitioner entering into the agreement and beginning to perform because once he started to give a statement, any harm that could be done was done. Specifically, under the agreement, once Petitioner proffered a statement, he could not then withdraw from or otherwise rescind the agreement without breaching and subjecting himself to an array of penalties or consequences, such as the State charging him with additional crimes and using the proffered statement "for any legal purpose,...including disposition of charges...through trial.[7]

[7] See infra.

Therefore, the PCR Court failed to evaluate Counsel's performance based upon the information and circumstances available to Counsel at the time of his decision-making. Instead, the PCR Court viewed Counsel's decision-making looking back from the point of all these post-agreement events.[8]

In the same vein, in determining whether Counsel was ineffective for misadvising Petitioner, the PCR Court provided that the "law applicable to this question is, as noted by Respondent, at the evidentiary hearing, set forth by the holdings on Applicant's own direct appeal...While Rule 410...generally render inadmissible any statements made in the course of plea discussions, a defendant may waive the protections afforded by Rule 410." App. p. 441 (citing *Wills*, 409 S.C. 183, 185, 762 S.E.2d 3, 4 (2014)). The PCR Court committed an additional error of law here. Counsel of course did not have the opinions from Petitioner's appeal to inform his decision-making when interpreting the agreement's terms or weighing its risks and advantages to Petitioner. Considering the case's appellate opinions when evaluating Counsel's decision-making and performance is equivalent to impermissibly evaluating the issue in hindsight in contravention of *Strickland.* Further, the issue addressed on direct appeal and reviewed upon certiorari[9] does not speak to the specific issue here as to whether Counsel was ineffective for advising Petitioner to agree to the proffer agreement in violation of the Sixth Amendment. The PCR Court also cannot logically use the appellate opinions as the law governing the PCR issues and find at the same time that Counsel "faced a new ground" regarding the Rule 410 waiver issue. *See* App. p. 444.

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[8] This is not to say though that the events and circumstances occurring after Petitioner entered the agreement and began performance are wholly irrelevant. Rather, post-agreement events that were *foreseeable* to Counsel at the time he decided the agreement was advantageous and advised Petitioner to enter the agreement are relevant.

9 "Whether 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." Brief of Petitioner, p. 3.

Therefore, the PCR Court committed an error of law by misapplying *Strickland* by evaluating Counsel's performance through facts subsequent and irrelevant to Counsel's decision-making and advisement to Petitioner on taking the proffer and the appellate opinions from the case, thus allowing the effects of hindsight to invade the analysis. Because the crux of Counsel's error is Counsel's evaluation of the potential risks and benefits to Petitioner by entering into the agreement, the proper focus is rather on his decision-making. This assessment considers everything available to inform Counsel's decision-making at the time and what Counsel could reasonably foresee. Relevant factors include the reasonableness of Counsel's interpretation of the agreement itself; then-existing case law relating to the relevant issues; and the circumstances at the time the agreement was proposed and up until the agreement became binding,[10] including: the facts of the case, the stage and nature of the pending charges against Petitioner, and the strength of the State's evidence.

A. THE PCR COURT ERRED IN FINDING COUNSEL NOT DEFICIENT FOR ADVISING PETITIONER TO ENTER INTO THE PROFFER AGREEMENT BECAUSE COUNSEL ERRONEOUSLY AND UNREASONABLY INTEPRETED THE PROFFER AGREEMENT AND ADVISED PETITIONER PURSUANT THAT INTEPRETATION.

In light of Counsel's interpretation of the agreement and decision-making from his perspective at the time, Counsel was ineffective in advising Petitioner to enter into the agreement and the PCR Court erred in denying relief. Counsel's error was deficient and prejudicial in light of Counsel's erroneous interpretation of the agreement according to its very terms and the disproportion of its inherent severe risks to the potential benefits.

i. Counsel was deficient in his interpretation and decision-making regarding the potential benefit of entering the proffer agreement.

10 The agreement became binding once performed. *See generally Reed v. Becka*, 333 S.C. at 686-88, 511 S.E.2d at 401-02

In denying relief, the PCR Court found that "Counsel thoughtfully and strategically considered the potential benefit the proffer presented to his client and advised his client appropriately." App. p. 446. There is no evidence of probative value to support this finding because Counsel's interpretation is refuted by the very terms of the agreement and the PCR Court committed an error of law by incorrectly applying the rules of contract construction through its acceptance of Counsel's interpretation and finding the interpretation and consequent advisement to Petitioner not deficient.

In so concluding, the PCR Court relied upon Counsel's testimony that "his understanding of the agreement was that if Applicant was truthful, all of the charges would be dropped and that the State would, with Applicant's assistance, prosecute the others involved in the killing." App. p. 444. *See also* App. p. 389, ln. 17-25; p. 390, ln. 1-18. Counsel maintained that his interpretation of the agreement would have materialized had the State not breached the agreement:

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

App. p. 378, ln. 23-25, p. 379, ln. 1-4. Contrary to Counsel's interpretation and the PCR Court's findings, the agreement contains no such term or language to this effect. In return for Petitioner's full cooperation according to the agreement's terms, the State merely promised that the "statements provided during his debriefing [would] not be used in a criminal prosecution *currently pending* against him by this Office" and that "the State [would] not seek any *additional* charges against [Petitioner] in connection with the subject of this proffer." App. p. 482, ¶ 3-4

(italics added). Nothing in these terms suggest that in return for Petitioner's full compliance with the agreement, his then pending charges — obstruction of justice and accessory to murder after the fact — would be dropped. Likewise, no language in the agreement suggested that "it was gonna be handled in a way that would set him free", as Counsel had believed. App. p. 389, ln. 17-20. *See generally, Baughmans v. State*, 311 S.C. 547, 548-549, 430 S.E.2d 505, 506-07 (1993) (holding that to construe the State's promise to dismiss the defendant's *pending* charges as applying to additional charges not yet filed at the time of the plea agreement would be to imply a term the parties did not agree to), *cert. denied*, 510 U.S. 991 (1993). Further, the agreement has no dispositive effect on the two then-pending charges apart from the State's promise to merely "*take into consideration* the materiality of his truthful testimony and degree of cooperation in the election of charge(s) and recommendation of sentencing for your client in this matter", and the State's mere promise to "fully inform the Court of [Petitioner's] degree of cooperation and the relative benefit to the State at the time of sentencing." App. p. 482, ¶ 5-6. (italics added). These repeated references to Petitioner's sentencing on the pending charges further demonstrate that the parties did not agree or contemplate that dismissal of the pending charges was contingent on the extent of Petitioner's cooperation.

The Court of Appeals has addressed a similar issue involving a misinterpretation of a cooperation agreement in *State v. Compton*, where the defendant was indicted and convicted of a murder based upon the statements he made while assisting law enforcement in the same case. 366 S.C. 671, 677-78, 623 S.E.2d 661, 664-65 (Ct. App. 2005). Using general contractual principles, the Court held the agreement did not entitle Compton to immunity, but was rather a cooperation agreement in which he contracted for reduced sentences on unrelated charges for which he had already pleaded guilty to. *Id.* The Court focused on the precise language used

within the four corners of the agreement, finding a complete absence of necessary terms or words such as "immunity" and synonymous variations. *Id.* at 678, 623 S.E.2d at 678. As a result, the Court concluded the agreement was unambiguous, as there was "nothing to evidence an understanding between the parties that Compton could not be prosecuted for the... murder." *Id.* The agreement also clearly demonstrated the State's intention in entering the agreement was to "get reliable information that could assist in solving a murder case" and Compton's intention was to "get a reduction in the sentences for his burglary convictions." *Id.* To read more into the agreement's terms or characterize it as anything more than a simple contract to cooperate would be to insert terms into the agreement that simply were absent. *Id.*

The proffer agreement here also contains nothing as to dismissal of the pending of the charges; and instead contains only the State's promises to take Petitioner's cooperation into "consideration" for sentencing on those charges. The State's promise to consider the degree of Petitioner's compliance for the "election of charges" is equally as tenuous to justify Counsel's interpretation that the agreement would lead to the dismissal of the pending charges as the PCR Court accepted here. Although the agreement does provide for immunity or something like it on *any additional* charges related to Lee's murder upon Petitioner's fulfillment of the conditions, the then-pending charges would still remain and there is no promise for their dismissal. Thus, when interpreting the agreement to dismiss Petitioner's charge or set him free, Counsel read terms into the agreement that were simply not there. Moreover, any reliance Counsel put on statements indicating leniency made by law enforcement or Solicitor Hixson during the actually proffer or polygraph was unreasonable because the agreement contained a clear merger clause and the statements cited by Counsel fell outside of the four corners of the agreement. There is thus no evidence of probative value to support this finding and the PCR Court committed an

error of law in regard to applying contractual construction rules in accepting Counsel's interpretation.

ii. Counsel was deficient in his interpretation and decision-making regarding the Rule 410 waiver

Further, even though the reasonableness of Counsel's interpretation of the agreement and decision-making is determinative to this ground, the PCR Court again did not delve into the provisions on the use of Petitioner's proffer statement. In its findings, the PCR Court simply restated specific terms of the agreement and noted Counsel's testimony that he understood the agreement as allowing the State to use Petitioner's proffer statement for impeachment only at trial in the event of breach. App. pp. 441-443. The PCR Court erred in this way because it could not have found Counsel thoughtfully and strategically came to the decision the agreement was advantageous to Petitioner without first both examining this term and assessing whether Counsel's interpretation was reasonable in light of prevailing professional norms. The PCR Court also further erred by again using the post-facto appellate opinions as a guide. *See* App. pp. 441-442; pp. 445-446.[11] As provided thoroughly herein, Counsel was deficient for unreasonably interpreting this clause of the agreement and concluding that the agreement was overall advantageous. Pursuant to general contract principles and related, established case law *in existence at the time*,[12] Counsel was or should have been put on notice that the trial court may

[11] It is also inconsistent and illogical for the PCR Court to find Counsel not deficient when Counsel had thoroughly argued the agreement was ambiguous due to the Rule 410 waiver and fundamentally unfair and was thus unenforceable at trial. Under the PCR Court's view, an attorney is not ineffective for advising his or her own client to enter into an agreement that the attorney concludes is ambiguous and fundamentally unfair.

[12] Please note that Petitioner is not arguing that resolution of this issue requires assuming Counsel had the responsible for anticipating or foreseeing the outcome of Petitioner's case upon review by the Court of Appeals or the Supreme Court. *Cf. Gilmore,* 314 S.C. at 456, 445 S.E.2d

find the Rule 410 waiver encompassed the use of Petitioner's statement in the State's case in chief and should have weighed this risk accordingly when advising Petitioner to enter into the agreement.

At the PCR hearing Counsel indicated that he was unfamiliar with authority relating to this issue at the time. App p. 391, ln. 1-12. Attorneys have an obligation to be generally knowledgeable on the law pertinent to his or her clients' case and courts have found ineffective assistance of counsel when an attorney fails to fulfill this obligation. *See e.g., Hill,* at 470-71, 567 S.E.2d at 850 (finding counsel deficient, but finding no prejudice, for lack of knowledge on a relevant case that was decided three months prior to the defendant's trial); *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding counsel ineffective because his lack of familiarity with relevant case law caused him to misadvise defendant on guilty plea); *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997). Moreover, the waiver of certain constitutional rights and safeguards has been a long-accepted practice in the criminal adjudication context. *See generally; State v. Armstrong*, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975) ("I[t] is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced") (quoting authority omitted). The use of general contract principles by courts as a guide when addressing agreements between the State and a defendant has enjoyed equally recognized acceptance. *See e.g., State v. Gates*, 299 S.C. 92, 94-95, 382 S.E.2d 886, 887 (1989) (use of contractual principles to analyze plea agreement with cooperation provision); *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347; fn. 7 (1994) (use of contractual

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at 457. Rather, Counsel should have been familiar with related then-existing case law because Counsel would have been put on notice that there was a risk the trial court could find the waiver extended to use of the statements in the State's case in chief. *See Hill v. State*, 350 S.C. 465, 470-71, 567 S.E.2d 847, 850-51, (2002) (holding that the rule in *Gilmore* is inapplicable and will not excuse counsel's deficiency where counsel need not have anticipated a change in the law).

principles to analyze plea agreement and immunity agreement); *State v. Hamilton*, 333. S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). Courts have routinely used the rules of construction typically applied when interpreting commercial contracts to construe such agreements between the State and a criminal defendant. *See Gates*, 299 S.C. at 95, 382 S.E.2d at 887 (holding when the language of a plea agreement "is perfectly plain and capable of legal construction, such language determines the force and effect" of the agreement); *Baughmans,* 311 S.C. at 549-50, 430 S.E.2d at 507 (drawing from Black's Law dictionary and other sources for the definition and common usage of certain words contained in the agreement to construe its terms and determine whether a certain effect was intended and contemplated by the parties); *see also Id.* at 506-07, ("In interpreting plea agreements, it is error for a court 'to imply as a matter of law a term which the parties themselves did not agree upon.'") (quoting *United States v. Benchimol*, 471 U.S. 453, 456, 105 S.Ct. 2103, 2105, (1985)). *See also*, *State v. Edwards*, No. 2005–UP–256, 2005 WL 7083612 (explaining that a court cannot view a term in isolation when interpreting a contract) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495–96, 579 S.E.2d 132, 134 (2003)). *See Schulmeyer*, 353 S.C. at 495–96, 579 S.E.2d at 134 (2003) ("When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense...[Contracts] are to be read as a whole document...The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the [contract] as a whole and considering the context and subject matter.")) (internal citations omitted). Likewise, contract rules regarding enforcement have also been applied in this context. *See, Thrift* 312 S.C. at 293, 440 S.E.2d at 347 (courts will enforce agreements made between the State and a defendant according to its terms regardless of whether the agreement is wise or in the best interest of a party).

Pursuant to Counsel's duty to be generally knowledgeable of the relevant law and exercise his professional judgment when interpreting the agreement, Counsel's interpretation of the provision on the use of Petitioner's statement and consequent decision-making were objectively unreasonable in light of prevailing norms. The terms of the agreement and the law existing at the time put Counsel on notice that upon the State alone finding a Petitioner in breach, the trial court might construe the agreement as waiving the protections of Rule 410 and thus allow the State to admit Petitioner's statement in its case in chief rather than only for impeachment uses. The agreement provides for such potential use multiple times. Upon the State's decision that the polygraph results show inconsistency or deception in Petitioner's proffered statement or indicates Petitioner was the shooter, the agreement authorized the State to then use Petitioner's proffered statement and any other statement(s) for "*any legal purpose, including, but not limited to*, considerations for....*disposition of charges through....trial*....and impeachment." App. p. 482, ¶ 2 (italics added). The agreement provides the same authorization for use of Petitioner's statement in the clause relating to any failure in his obligation to testify at the trial of any individual prosecuted in the case, as well as in a catchall provision that upon any violation of the agreement, "the State shall have the *right to use any information* through this Proffer *in any fashion, whether direct of [sic] collateral* to this matter." App. p. 482, ¶ 3; p. 483, ¶ 7 (italics added). Likewise, the inverse of these provisions in the State's promise that upon Petitioner's "full compliance, the "statements provided during his debriefing would not be used in a criminal prosecution currently pending" lends further support. Coupled with the overbreadth of these terms, the State's discretion to use the statement in the "disposition of charges through...trial" should have put Counsel on notice of the extent at which the State intended to use Petitioner's statements at trial in the event of the breach. Moreover, the agreement specifically

lists both "disposition of charges...through trial" and for "impeachment" as uses for the statement in the event of breach. Thus despite Counsel's interpretation of the agreement that the statement could only be used for impeachment only; there would be no reason for the agreement to specifically and separately list both potential uses of the statement if impeachment was the only intended and contracted for use of the statement at trial. Pursuant to general principles of contract construction, courts do not interpret terms in a way that they are rendered meaningless. *See, e.g., Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)); *Schulmeyer*, 353 S.C. at 495–96, 579 S.E.2d at 134 (2003).

This language to describe the ways in which the State may choose to use Petitioner's statement from the pre-trial stage through trial in the event of breach is broad and all encompassing, but it does not render the agreement ambiguous or excuse Counsel's misinterpretation. The entire agreement was capable of being understood and capable of legal enforcement. The provision that "Violation of any term of this Proffer renders all terms null and void" does not render the agreement ambiguous by effecting a rescission of the agreement and all terms, and thus the use of Petitioner's statements, in the event of breach. App. p. 482, ¶ 4. *See Reed v. Becka*, 333 S.C. at 686-88, 511 S.E.2d at 401-02 (explaining that a plea bargain is merely an offer until the plea is accepted by the court and neither the State nor the defendant are bound to the agreement and are free to withdraw until then). Further the repeated provisions on the State's use of statement through trial in the event of breach did not render the agreement ambiguous or "[in]capable of legal enforcement" merely because South Carolina appellate courts had not by that time specifically ruled upon whether a criminal defendant could waive the

protections of Rule 410. Had Rule 410 waivers been previously held as unenforceable or unconstitutional, the agreement then may have been rendered ambiguous and unenforceable.

Moreover, a defendant's statement has been admitted during the State's case in chief even though the statement was elicited in the context of an agreement or negotiations thereof between the State and the defendant. *See Hutto v. Ross*, 429 U.S. 28, 29-30, 97 S.Ct. 202, 203 (1976) (*per curiam*) (rejecting the argument that any statement made as a result of a plea bargain is inadmissible or rendered not voluntarily made); *but see Id.* at 203, fn. 3. *See also State v. Davis* , – S.E.2d – , No. 2004–UP–251, 2004 WL 6251549, *1 (Ct. App. 2004); *but see Id.* at *3, fn. 3. Pursuant to his duty to be acquainted with the law pertinent to relevant issues in a client's case, Counsel would also have been aware that United States v. Mezzanato opened the door for the enforceability of the waiver here and would have also been on notice that waiver of numerous other evidentiary rules and constitutional rights and have been routinely enforced and upheld upon review. Similar to the South Carolina evidence rules, the federal evidence rules do not bar waiver of evidentiary protections, and the Supreme Court held that a defendant can waive the protections of Rule 410, thereby rendering the proffered statement admissible for impeachment purposes. *Mezzanato,* 513 U.S. 196, 205, 115 S.Ct. 797, 803 (1995) (also explaining that Congress's silence further demonstrated "the background presumption" of the evidence rules "that legal rights...and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties."). *See also Id.* at 200-202, 115 S.C.t. at 801-02 (citing cases upholding waivers of constitutional rights and evidentiary rules). *See also Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (acknowledging that waivers of direct appeal or appeal from dismissal of PCR action are permissible if so waived knowingly and intelligently); *Hughes v. State,* 367 S.C. 389, 626 S.E.2d 805 (2006); *State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856

(Ct. App. 2002) (acknowledging permissibility of the defendant stipulating to prior convictions where one or more prior convictions is element the State must prove at trial).

Further, Counsel should have been aware that notwithstanding Rule 410, a finding that Petitioner's proffered statement was given involuntarily or that the agreement was entered involuntarily was the only bar remaining to the admission of the statement during the State's case in chief. *See generally, Mezzanato.* For example, in *State v. Davis*, police asked the defendant to come into the station for questioning on the suspicion the defendant and another unidentified individual committed a very violent kidnapping and robbery. *Davis* , –No. 2004–UP–251, 2004 WL 6251549 at *1. The defendant and the State thereafter entered an agreement that obligated the defendant to proffer a statement in exchange for the State's promise for a 10 year sentencing cap on the delineated non-violent charges. *Id.* The State decided the defendant breached the agreement by not disclosing all crimes he had ever been involved in pursuant to the agreement and refused to honor the agreement. *Id.* Over defense counsel counsel's objections, the trial court found the statement made pursuant to the agreement both voluntary and admissible in the State's case in chief. *Id.* at. *1-*2. On appeal, the Court of Appeals rejected the defendant's argument that because the plea agreement induced him to confess, his statement became involuntary once the Solicitor decided not to honor the plea agreement. *Id.* at *2. The Court reasoned that "[b]ecause the totality of the circumstances is considered to determine if the defendant's will is overborne by the acts of the police at the time the confession is given, it would be inappropriate to review the circumstances existing after the confession was given." *Id.* The Court of Appeals ultimately affirmed the trial court's finding of the statement voluntary and thus admissible, noting that just like in Petitioner's case, the only factor weighing against the voluntariness of the statement was a promise of leniency. *Id.* at *2-3. *See also generally State v.*

Brewer, 351 S.C. 226, 231, 569 S.E.2d 340, 342, fn. 6 (2002). Moreover, long before the agreement here was struck, the United States Supreme Court had already rejected an argument that a defendant's statement is *per se* inadmissible if it was made as a result to a plea bargain. *Hutto,* 429 U.S. at 30, 97 S.Ct. at 203-204. Also long before Petitioner's case, the Supreme Court held that the admission of a defendant's statement against him does not offend due process if it voluntary, regardless of its truthfulness or falsity. *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774 (1964).

The cases described above should have put Counsel on notice the agreement contained a Rule 410 waiver regarding Petitioner's proffered statement. These cases also teach that the voluntariness inquiry may be found unaffected by the fact Petitioner's statement was elicited pursuant to a proffer, and that the trial court would likely find Petitioner's statement voluntarily given and thus admissible when the only factor supporting involuntariness was a promise of leniency. Further, Counsel's belief (as contained in Counsel's trial argument and repeated at the PCR hearing) that Petitioner's statements could not be admitted in the State's case in chief because it was given in connection with a failed agreement and was thus no longer voluntary was well done but had already been rejected by the Court of Appeals in *Davis*. Counsel was also put on notice that the agreement would likely be found to be voluntarily and knowingly entered into, and thus enforceable, because Petitioner had Counsel at his side in doing so. Thus, the PCR Court erred in finding Counsel not ineffective when Counsel's interpretation and decision-making when Counsel should have been on notice that the Rule 410 waiver in the agreement may be enforced, and evaluated this risk accordingly when advising Petitioner to enter into the agreement.

In denying relief, the PCR Court also discounted the risk of irretrievable consequence inherent in the agreement's nature and terms. By the agreement's very terms, Petitioner was unable to rescind or withdraw from the agreement once he began performance by providing a statement during the proffer because it would have constituted as a breach. The harm to Petitioner that could be done would be done after Petitioner had given a statement and then had attempted to withdraw or not comply in any way because the State was then entitled under the agreement to forego its obligations, charge Petitioner with more severe or additional offenses, and use the statement against him as outlined. The agreement's disproportion of risk to benefit is further evident in the disparity between Petitioner and the State in the extent of performance and its timing. Under the agreement, the State's obligations were not triggered until Petitioner had fully performed to the State's satisfaction, which in the best case scenario, would have been at Petitioner's sentencing for the then-pending charges. Unless and until another person was indicted and prosecuted, Petitioner remained subject to being called upon by the State to testify at any of the proceedings for such person. Due to the lack of any designated end point to Petitioner's obligations, inherent is the possibility that no such person would ever be indicted, prosecuted, or convicted. The risk that Petitioner would never receive the benefit of the bargain appears increasingly likely when considering that Petitioner's receipt and extent of the benefit depends upon the "relative benefit to the State", "materiality", and "degree" of his cooperation. The agreement provided the State with the sole discretion to define these benchmarks and breach, except for the aid of a polygraph examination. The PCR Court found it significant to the question of deficiency that Counsel did not foresee Petitioner would fail the polygraph because he believed Petitioner had been truthful with him and had no mental or emotional difficulties. Yet, a material breach under the polygraph clause required much less than failure of the exam.

Pursuant to this term, the State was entitled to arbitrarily deem any degree or form of deception, inconsistency, or "indication" Petitioner shot the victim a material breach of the agreement. The error in the PCR Court's finding that Counsel was not deficient is further evidenced by Counsel's own admission that polygraphs were objectively unreliable because: "There is no truth serum." The unreliability of polygraph examinations was also the crux of Counsel's argument at trial to exclude the statement. The deficiency in this error is further evidenced by Counsel's failure prior to entering the agreement to reach out to the State for an amendment to allow for a second polygraph or second opinion, or for more specificity to what would constitute as "deception", "inconsistency", or "indication" Petitioner shot the victim that would amount to a material breach. Moreover, following the polygraph, Counsel did not attempt to seek arrangements for an independent opinion of the results or second polygraph examination. Hence, Counsel's view that polygraphs are inherently unreliable further demonstrates that he knew of the risks in entering the agreement but chose not to follow up on those risks and sent Petitioner into a risky agreement without a safety net.

Moreover, apart from considering how the State could use the statement at trial on any charge under the agreement, Counsel was aware that upon breach, Petitioner's proffered statement could arm the State with evidence against Petitioner it did not have and would not otherwise obtain to file new charges against Petitioner. Thus, even at the time of Counsel's first reading of the agreement and before any of the events unfolded, it was clear that the potential product of the agreement was equipping the State with evidence to file more charges against Petitioner it did not and would not otherwise have. Yet any discussion or mere mention of this portion of the agreement is completely absent from the PCR Court's findings.

iii. Counsel was deficient in his advisement to Petitioner to enter the agreement.

Counsel's advisement of Petitioner about entering the agreement was in turn deficient and unreasonable. Petitioner testified he relied upon Counsel and entered into the agreement because of Counsel's advice. Petitioner did not understand that the proffer could ultimately hurt him, "it was only told to [him] that it would help me" or that his proffered statement could potentially be used against him. App. p. 402, ln. 20-23; p. 403, ln. 25; p. 404, ln. 1; p. 412, ln. 16-24; p. 414, ln. 12-22. The deficient advisement is perhaps most evident in Petitioner's understanding of the agreement mirroring that of Counsel's: "He told me that if I done what they asked me to do, that I wouldn't be charged for a crime and I would leave and...be able to go home after the court proceeding." see also p. 402, ln. 20-23; p. 412, ln. 16-24; p. 414, ln. 12-22.

In light of the severe mistakes in Counsel's interpretation made patent by the very terms of the agreement and fundamental contract principles, Counsel's unreasonable interpretation and consequently, erroneous advisement to Petitioner constituted objectively unreasonable performance expected of attorneys. The PCR Court thus erred in denying relief.

B. COUNSEL'S ERRORS WERE PREJUDICIAL.

First, Counsel's errors were prejudicial because he relied upon Counsel's advice and entered the agreement because of his advice. The prejudice stemming from this error is patent in that there was no evidence incriminating Petitioner at trial but his own statement. Even prior to making the statement and entering the agreement, as Counsel testified, the State had little if any evidence against Petitioner for the "periphery" charges of obstruction of justice and accessory to murder, let alone any evidence that Petitioner was more involved with the murder, such as being the "triggerman." App. p. 378, ln. 10-12, p. 384, lines, 19-21. Thus, without Petitioner entering the agreement and providing the statement, he would not have been charged,

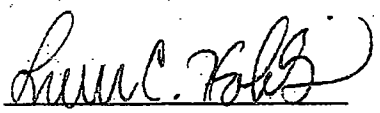
let alone convicted of murder because the State did not previously have enough evidence to indict him for murder. Indeed, Petitioner's obstruction of justice and accessory charges were pending for a few years prior to the agreement.

CONCLUSION

For the reasons discussed thoroughly herein, the PCR Court committed errors of law in denying relief and there is no evidence of probative value to support its findings. Petitioner satisfied his burden of proving Counsel was ineffective and urges this Honorable Court to reverse the findings of PCR Court and remand for a new trial.

Respectfully submitted,

WILLIAM G. YARBOROUGH III
LAUREN C. HOBBIS

By: 

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COUNSEL FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
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S.C. SUPREME COURT

Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000054

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

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that six (6) bound copies of the petition for writ of certiorari and (1) unbound copy of the petition were filed with this Court, this day October 30th, 2018, through the United States mail with sufficient postage attached addressed to:

The Honorable Daniel E. Shearouse, Clerk of Court
SC Supreme Court
Post Office Box 11330
Columbia, SC 29211

The undersigned further certifies that one (1) bound copy of the petition for writ of certiorari was served upon the Respondent this day October 30, 2018, through the United States mail with sufficient postage attached addressed to:

Assistant Attorney General Johnny E. James, Jr.
SC Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

The undersigned further certifies that all parties required to be served pursuant to the appellate court rules have been served.

This 30th day of October, 2018

Lauren C. Hobbis

LAUREN C. HOBBIS, #103190
William G. Yarborough III, Attorney at Law, LLC

Sworn before me this 30th day
of October, 2018

Notary Public of South Carolina
My commission expires: 06-08-2022

RACHAEL L. ALEJANDRO NOTARY PUBLIC MY COMMISSION EXPIRES 6/8/2022 SOUTH CAROLINA

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October 30, 2018

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: *Theodore Wills Jr. v. State of South Carolina*
Appellate Case No. 2018-000054

Dear Mr. Shearouse,

Enclosed you will find six (6) bound copies and one unbound copy of the petition for writ of certiorari in the above-captioned case to correct the filing made in person on October 23, 2018 that was insufficient in form and quantity. The cover of the petition has been amended in regards to the caption. A bound copy of the petition has also been served upon counsel for Respondent, Assistant Attorney General Johnny E. James Jr., today as well.

Please do not hesitate to contact my office should you have any questions or concerns.

Thank you.

Sincerely,

Lauren C. Hobbis

LAUREN C. HOBBIS, #103190

WILLIAM G. YARBOROUGH III
William G. Yarborough III, Attorney at Law, LLC

Enclosures

CC:

Assistant Attorney General Johnny E. James, Jr.

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INS

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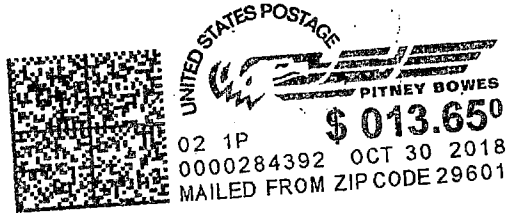

The Honorable Daniel Shearouse
Supreme Court of SC
P.O. Box 11330
Columbia SC 29211