

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000054

THEODORE DAVID WILLS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

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STATEMENT OF THE CASE

Theodore Wills, Jr. (Petitioner) was initially charged with obstruction of justice and accessory after the fact of murder in connection with the murder of Julian Lee. (App.p.108-p.109). He was subsequently indicted at the April 2006 term of the grand jury of Horry County for murder (2006-GS-26-01652). (App.p.479-p.480). Petitioner was represented by William I. Diggs, Esquire, of the Horry County Bar. The State was represented by Assistant Solicitor Bradley C. Richardson of the Fifteenth Circuit Solicitor's Office. On October 1-3, 2007, Petitioner proceeded to trial by jury before the Honorable Steven H. John, pursuant to which he was found guilty as indicted. (App.p.290-p.295). At the request of Petitioner and over the objection of the State, sentencing was delayed. (App.p.302-p.303). On October 29, 2017, Judge John conducted a sentencing hearing, at the conclusion of which he sentenced Petitioner to forty (40) years' imprisonment. (App.p.303-p.334).

Petitioner timely filed a notice of intent to appeal his conviction and sentence and a direct appeal was perfected by Senior Appellate Defender Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. Petitioner raised the following issue on appeal: "The trial judge committed reversible error by allowing Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE." The State submitted a brief in response and in a published opinion filed September 22, 2010, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Wills*, Op. No. 4742 (S.C. Ct. App. filed September 22, 2010). (App.p.449-p.453).

Petitioner subsequently petitioned this Court for a writ of certiorari, and certiorari was granted by order dated February 13, 2012. By and through counsel, Assistant Appellate Defender LaNelle C. DuRant, Petitioner briefed this Court as to the following issue:

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

The parties proceeded to oral arguments on December 6, 2012. In a 3-2 opinion authored by Justice Pleicones and filed July 16, 2014, this Court affirmed the Court of Appeals. *State v. Wills*, 409 S.C. 183, 762 S.E.2d 3 (2014). (App.p.454-p.475). The Remittitur was issued on August 22, 2014.

On December 1, 2014, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. "Ineffective Assistance of counsel"
 - a. "counsel's failure to object . . . jury charge"
 - b. "counsel's failure to properly advise [Petitioner] against agreeing to provide the prosecution with a proffered statement"
 - c. "counsel's failure to object to hearsay testimony"
 - d. "counsel's failure to object to video showing [Petitioner] dressed in prison clothes"
 - e. "counsel's failure to object to admission of evidence of prior bad acts"
 - f. "counsel's failure to object to improper 'golden rule' argument"
2. Insufficiency of indictment
 - a. Grand Jury didn't meet during April.

(App.p.335-p.356). The State filed its Return on February 2, 2016, requesting an evidentiary hearing be held. (App.p.357-p.361).

On June 1, 2017, Petitioner filed an Amendment to his PCR application alleging he was being held unlawfully for the following reasons:

1. "The plea agreement was null and void after the material breach of the terms and thus [Petitioner]'s alleged admissions in conjunction with the plea agreement are inadmissible per se and were improperly admitted at trial."
 - a. "The terms of the plea agreement should be construed strictly against the State as the drafter. The terms stated that the agreement would be rendered null and void upon violation of the agreement. By claiming that [Petitioner] violated the agreement and then withdrawing it, the State nullified the entire agreement including the waiver provision. Thus, the [Petitioner]'s alleged admissions should have been excluded under Rule 410 since the terms of the agreement were nullified and no longer controlling."
2. "The Government improperly used the [Petitioner]'s alleged admissions in its case-in-chief when such admissions are only usable as impeachment evidence."
 - a. "The government used the [Petitioner]'s alleged admissions in its case-in-chief when such evidence should only be usable as impeachment evidence."
3. "The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the [Petitioner], claiming that the [Petitioner] had violated the agreement by being untruthful without identifying any specific statements where the [Petitioner] had deceived the State."
 - a. "The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the [Petitioner]. The State claimed that the [Petitioner] had made deceptive statements but never identified the deception which rendered the plea agreement proceeding fundamentally unfair to the [Petitioner]."
4. "The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the [Petitioner], especially considering that the State later used the same polygraph evidence as the only evidence against [Petitioner]."
 - a. "The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the [Petitioner], especially considering that the State later used the same polygraph evidence as the only evidence against [Petitioner]. The State withdrew the agreement alleging that the [Petitioner]'s statements were false only to present those same statements later to the jury as true. This turnabout produced a patently unfair

proceeding for the [Petitioner] that impaired the integrity of the judicial process and resulted in a miscarriage of justice.”

5. “There was insufficient evidence of the [Petitioner]’s guilt since the State’s only evidence was the [Petitioner]’s alleged admissions which were admitted improperly. Thus, the trial court erred in denying the [Petitioner]’s motion for a directed verdict in violation of the [Petitioner]’s 4th and 14th Amendment due process rights.
 - a. “The only substantive evidence against the [Petitioner] was his alleged admissions which were wrongfully admitted. Due to the lack of evidence, the trial court erred in denying the [Petitioner]’s motion for a directed verdict in violation of his due process rights under the 4th and 14th Amendments.”
6. “Ineffective assistance of counsel pursuant to Strickland v. Washington.”
 - a. “Trial counsel was ineffective pursuant to Strickland v. Washington for failing to object to an erroneous jury charge regarding implied malice.”

(App.p.364-p.370).

An evidentiary hearing into the matter was convened on September 19, 2017, at the Horry County Courthouse in Conway, South Carolina, before the Honorable William H. Seals. Petitioner was present at the hearing and represented by William G. Yarborough, III, Esquire. The State was represented by Assistant Attorney General Johnny E. James, Jr., Esquire, of the South Carolina Office of the Attorney General. At the evidentiary hearing, Petitioner called Mr. Diggs (Counsel) to testify on his behalf. Petitioner also testified on his own behalf. The State called Chief Deputy Solicitor Scott Hixon in response. (App.p.372-p.435).

The PCR court had before it a copy of Petitioner’s records from the Horry County Clerk of Court, Petitioner’s records from the South Carolina Department of Corrections, the trial transcript, Petitioner’s direct appeal records including a copy of the proffer agreement and the polygraph report related to the issue being raised in this PCR appeal, the PCR application and amendments, and Respondent’s return. (App.p.436). At the conclusion of the evidentiary

hearing, the PCR court took the matter under advisement. (App.p.433). On December 19, 2017, Judge Seals issued a written order finding counsel provided effective assistance in this case and denying relief. (App.p.436-p.448). On January 10, 2018, Petitioner filed a Notice of Appeal appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on October 30, 2018. This Return on behalf of the State now follows.

STATEMENT OF FACTS

A summary of the facts of the offense, as portrayed in the solicitor's opening statement, is as follows. Late on the night of October 12, 2001, Petitioner called Julian Lee and asked him to come with him to "pull a rip," which meant they were going to rip-off some drug dealers in order to score some quick cash. Lee agreed and got dressed for a robbery, wearing dark jeans, a black long sleeve t-shirt, a black stocking cap, and gloves. Later, in the early morning hours of October 13, 2001, Petitioner drove to Lee's house, picked him up, and drove him to a remote area in Horry County. After Lee got out of the car and walked forward, he was shot twice in the back. Lee bled-out and died in a field as a result of the two gunshot wounds. Petitioner collected \$10,000 for having made sure Lee died. The solicitor explained that Petitioner admitted he was at the scene of the murder but claimed his other passenger, Mark Willard, was the shooter, and that he did not know Willard was going to shoot Lee. The solicitor argued, however, this was not true and that Petitioner instead had conspired with Willard to execute Lee, and then split the \$10,000 bounty, keeping \$5,000 for himself. (App.p.154-p.158).

Petitioner was initially charged with obstruction of justice and accessory after the fact in connection with Lee's murder. (App.p.108-p.109). However, as result of the events described

below, Petitioner was ultimately indicted for the murder of Lee and was taken to trial solely on that indictment. Prior to being indicted for murder and the ensuing trial, Petitioner entered into a proffer agreement with the State, reviewed and signed by both Counsel and Petitioner, whereby he agreed to truthfully divulge the events and circumstances surrounding Lee's death in exchange for the State's consideration and a recommended sentence on the pending charges, as well as the State's agreement not to seek any additional charges in connection with the subject of the proffer.

The agreement contained several conditions, including Petitioner's submission to a polygraph examination to test the veracity of his proffered statement. Specifically, the enumerated paragraphs of the proffer agreement provided as follows:

1. Theodore David Wills Jr. shall submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter. *He shall be **completely truthful** concerning his involvement in this matter, and **completely truthful** concerning the involvement of all other individuals in this matter. He shall **truthfully and completely answer all questions** posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by direct question.* Any and all information provided by Theodore David Wills Jr. under the terms of this proffer may be recorded in any fashion at the election of the State;
2. Theodore David Wills Jr. *shall submit himself to a **polygraph examination(s) to verify all information provided to the State at the election of the State.*** The polygraph examiner(s) shall be selected by the State and, for the purpose of this Proffer, are designated agent(s) of the State; upon examination(s) by polygraph, *if the responses given by Theodore David Wills Jr. show **deception**, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. **may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial** of Theodore David Wills Jr. and impeachment;*

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

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

5. *In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer, the State shall take into consideration the materiality of his truthful testimony and degree of cooperation in the election of charge(s) and recommendation of sentencing for your client in this matter;*

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

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

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

(App.p.481-p.483) (emphasis added). Petitioner and Counsel signed the proffer agreement on August 26, 2005.

Subsequently, Petitioner signed a written waiver of his *Miranda* rights. He then provided a statement that was video-recorded in the presence of Counsel, police detectives, and the assistant solicitor. In his statement, Petitioner claimed he drove his brother Donnell Green, Mark Willard, and Lee to the remote location during the early morning hours of October 13, 2001. According to Petitioner, he and Lee believed they were going to rob some drug dealers and

“score some quick cash.” Petitioner stated he saw Willard shoot the victim and that he heard a second shot as he ran back to the car. (App.p.459).

On September 19, 2005, Petitioner submitted to a polygraph examination with SLED. The exam was administered by Special Agent Ricky Charles's intern, Julie Duff, under Agent Charles' direction and supervision. Duff later became a full-time employee of SLED and had a rank of Sergeant by the time of trial. Based on his review of the polygraph results, and after comparing his review and scoring with the separate and independent reviews and scoring conducted by Sergeant Duff and Agent Charles' supervisor, Lieutenant Coggins, Agent Charles concluded that Petitioner was deceptive in his response to two critical questions during the exam. In regard to question R4, the question and answer were as follows: “Are you lying about Mark Willard shooting Julian Lee in that field? Examinee Response: No.” In R6, the question and response were as follows: “Did you shoot Julian Lee? Examinee Response: No.” (App.p.53-p.107; p.484). As a result of the determination of deception, the State claimed the proffer agreement had been violated and proceeded to charge Petitioner with murder. (App.p.108-p.109).

Trial

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

(App.p.42-p.44). Counsel objected to the admission of the statement as it was given “in exchange for participation by the State in a plea agreement process.” (App.p.45). Counsel challenged the proffer agreement as “inherently flawed and unfair” because an “unreliable” polygraph examination was used to determine Petitioner's truthfulness. Based on these circumstances, counsel asserted the statement was involuntary and should be suppressed. Counsel also argued that even if the State determined Petitioner was being deceptive, the terms of the proffer agreement itself were not clear in regard to the State being allowed to use his statement as evidence at trial. The solicitor responded that the agreement specifically allows for using the statement for any legal purpose, including disposition of the charges through trial, and that the agreement speaks for itself. (App.p.45-p.52).

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

The trial court then heard additional arguments from the parties and reviewed the recorded statement. Counsel argued again that the proffer agreement was not clear because “it

doesn't tell me or Petitioner that this statement is going to be introduced during the trial." He claimed it was not a voluntary, knowing, intelligent decision that either he or Petitioner made with respect to entering into the agreement. Counsel also argued the issue of the voluntariness of the statement and the State's use of a polygraph were so intertwined that there was no way the jury could make that determination under the circumstances of the case. (App.p.125-p.128). Ultimately, after hearing again from the solicitor, the trial court concluded the statement was given voluntarily as Petitioner was apprised of his *Miranda* rights and signed the proffer agreement with the participation and advice of Counsel. The judge, however, cautioned the parties not to make any reference to the use of a polygraph examination. The judge also permitted defense counsel to explain to the jury that Petitioner made the statement in response to the proffer agreement. (App.p.128-p.139). The case then proceeded to trial.

The trial judge gave preliminary jury instructions emphasizing the State's burden of proof and the jury's duty to determine the facts. (App.p.150-p.154). The parties then gave opening statements and the State began calling witnesses in its case-in-chief. (App.p.154-p.163). First, the State called Department of Public Safety Officer Ann Hayes Pitts who had worked with the Horry County Police Department as a crime scene technician at the time of the murder. She responded to the scene where Lee's body was found. Pitts described all the steps she took to process that scene for evidence including taking photographs. (App.p.163-p.187). Next, the State called Dr. Cynthia A. Schandl, a forensic pathologist from M.U.S.C. who performed the autopsy on Lee. She was admitted as an expert without objection and then described the steps she took during the autopsy as well as her findings as to Lee's injuries, the cause of death, and the trajectory of the two gunshots to Lee's back based on entry and exit wounds. (App.p.193-

p.218). Finally, the State called Detective Neil Livingston of the Horry County Police Department to the stand. He explained he was present when Petitioner was interviewed and witnessed Petitioner sign the *Miranda* rights form. Livingston then went over the *Miranda* warnings and identified the video recording of the statement Petitioner gave to the police. Over Petitioner's objection, the video recorded statement was then played for the jury. Following cross-examination, the State rested. (App.p.223-p.233).

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

On appeal, Petitioner argued the trial judge erred in allowing the jury to hear the statement as it arose out of a proffer agreement and, thus, was inadmissible under Rule 410 of the South Carolina Rules of Evidence. Because the inculpatory admissions were the "centerpiece" of the State's case, Petitioner asserted his conviction should be reversed and the case remanded for a new trial. The Court of Appeals disagreed, holding as a matter of first impression that Petitioner's proffer agreement waived the protections of Rule 410 and were admissible for impeachment purposes absent some affirmative indication it was entered knowingly or involuntarily. (App.p.449-p.453). This Court agreed with the Court of Appeals that a criminal defendant may waive the protections afforded by Rule 410. It further concluded: "Applying the rules of contract construction here, 'regardless of the agreement's wisdom or lack thereof,' we agree with the Court of Appeals that, on this record, petitioner's Proffer Agreement,

entered into with the advice and consent of counsel, waived the protections of Rule 410, SCRE.” (App.p.454-p.456).

PCR Hearing

At the September 19, 2017 evidentiary hearing Petitioner presented testimony focusing primarily on his allegation that Counsel was ineffective for advising him to enter into the proffer agreement. First, he called Counsel to the stand. Counsel explained that at the time Petitioner signed the proffer agreement he was facing charges of obstruction of justice and accessory after the fact, but not murder. He first testified his understanding of the agreement was that if Petitioner was truthful, the case would basically end (App.p.377-p.378); however, on cross-examination he clarified he did not believe the obstruction and accessory charges would be dismissed as a result of Petitioner’s cooperation, but that entering the proffer agreement was still the best thing for Petitioner to do under the circumstances of the ongoing murder investigation. (App.p.389-p.390). Counsel noted the only evidence introduced at trial which implicated Petitioner was his videotaped statement and that from his perspective, the State breached the proffer agreement by introducing that statement at trial. He acknowledged, however, that hindsight is 20/20. Counsel testified he felt like Petitioner had always been truthful with him, and pointed out the solicitor’s comments during the interview that if Petitioner was truthful, he did not have anything to worry about. Counsel testified he was mad the State used Petitioner’s statement to prosecute him and was still very angry that no one else was ever prosecuted for the murder. He said he personally believed Petitioner told the investigators the truth during the interview but acknowledged the proffer agreement itself provided that the only mechanism for making the determination of truthfulness was a polygraph. Counsel testified he questioned the

polygraph results in the pretrial hearing but did not hire an independent person in regard to the polygraph examination. He said looking back in hindsight, attacking the polygraph was one area where he felt he could have done things differently. Counsel opined that when the solicitor told Petitioner during the interview that he did not need to worry and everything was going to be okay, this assurance should have superseded the *Miranda* waiver and the proffer agreement, as long as Petitioner was not the trigger man, which Counsel still believes he was not. Counsel testified he made every argument he could think of at the pretrial hearing to try to keep the statement out, but was not successful. He said he did not believe the statement would be used against Petitioner and that the proffer agreement would ultimately be to Petitioner's benefit when he advised Petitioner to go forward with the proffer. (App.p.376-p.387).

On cross-examination Counsel testified the information Petitioner provided him about the murder was consistent with the information Petitioner gave in his statement to the police, and that Counsel had no reason to anticipate the polygraph would show signs of deception. He testified that in hindsight, maybe it would have been better to give Petitioner different advice about the proffer agreement; however, because he felt like Petitioner had been truthful with him, he was comfortable going ahead with the strategy of entering into the proffer agreement as proposed by the State. Counsel testified he specifically counseled Petitioner to enter into the proffer agreement because he felt like it was the best thing for him to do. He said that when the State later said it was going to use the statement at trial, he made every argument against admission he could think to make. Counsel testified this was not the first proffer agreement he advised a client to enter and that he did not see anything unusual in the terms of this proffer that jumped out as a problem. He said that if he had a similarly situated client at the time of the PCR

hearing he would advise that client to enter into the same proffer agreement, and the only thing he would do differently would be to “be a lot stronger on the science and the procedure behind the polygraph and . . . how to go about challenging it better and making a stronger argument to the judge.” Counsel finally testified that he believed he made a challenge to the science behind the polygraph to the best of his ability at the time of Petitioner’s trial. (App.p.387-p.395).

Next, Petitioner testified on his own behalf. He testified he had known Counsel for nine years and trusted him with his life. Petitioner said he had never heard of a proffer agreement until Counsel tried to explain it to him, which consisted of Counsel saying if he simply did what the State asked him to do he would not be charged with a crime and would be able to go home after the court proceeding. He testified he was shocked when he was later charged with murder and did not understand the terms of the proffer agreement. Petitioner claimed he did not know the agreement could hurt him because both Counsel and the solicitor only told him it would help. He said everybody told him he had nothing to worry about and that he could be truthful and honest and tell them everything, which he did. Petitioner testified that after he took the polygraph he got charged with murder, but Counsel said they could not use anything from the proffer agreement against him. He said he did not know the proffer agreement said anything about a polygraph, claiming he skimmed it and told Counsel he did not understand, but Counsel advised him to go forward anyway because the solicitor said he had nothing to worry about. Petitioner testified Counsel was not with him when he was given the polygraph and that no one, not even Counsel, told him he was going to take a polygraph before it was administered. He insisted he told the truth even though the polygraph showed deception. Petitioner claimed Counsel never went over the results of the polygraph with him and though they talked about him

taking another polygraph, they never got around to it. He testified he never understood the statement could be used against him and only entered into the proffer agreement because of Counsel's advice. (App.p.401-p.413).

The State called Chief Deputy Solicitor Scott Hixon in response. He testified he was the assistant solicitor in charge of Petitioner's case during the relevant time frame and he recalled entering into the proffer agreement with Petitioner, but not the specific terms of that agreement. Hixon said he remembered telling Petitioner to tell the truth and that if he passed a polygraph he would not be facing a whole lot of liability. He testified that at the start of the proffer Petitioner was saying things he believed were not true because they seemed inconsistent with some of the physical evidence. Hixon suggested to Counsel that they stop, but Counsel met privately with Petitioner and they elected to continue. At that point, Petitioner showed a level of involvement in the murder and seemed so forthright that Hixon believed Petitioner was telling the truth. Hixon testified he could not believe Petitioner would fail a polygraph, but because it was normal to verify a statement given by proffer, Petitioner was later given a polygraph. He insisted he did not make any firm promises to Petitioner or Counsel about how the case would be disposed of with a valid proffer. (Tr.p.416-p.423).

On cross-examination, Hixon acknowledged his statement to Petitioner during the proffer that if Petitioner answered the questions and told the truth completely he would not have anything to worry about, particularly in regard to telling the truth about the trigger man. He noted that the benefits Petitioner would get from complying with the proffer agreement were meaningful, because if he was truthful and was not the trigger man, he would never be charged with murder. Hixon testified that once he heard information from Petitioner that suggested he

was involved with a murder for hire, he began to think the proffer agreement was a big mistake for the State and perhaps a stroke of genius on the part of Counsel. He explained that if Petitioner's statements were verified as true, the State could not use them pursuant to the proffer agreement, and Petitioner could avoid additional charges even though he effectively admitted to splitting the proceeds for participating in the commission of the murder. (App.p.423-p.433). Petitioner did not offer any expert testimony or other scientific evidence at the PCR hearing to call into question the reliability or accuracy of the polygraph examination conducted by SLED which concluded he had violated the proffer agreement by not being truthful. Petitioner also did not introduce any competing results from any independent polygraph examination despite questioning Counsel about his failure to do so at the time of the trial.

At the conclusion of the hearing, the PCR court took the case under advisement. (App.p.433). In an Order of Dismissal dated December 19, 2017, and filed January 5, 2018, Judge Seals denied and dismissed Petitioner's PCR Application with prejudice. The PCR court addressed the individual allegations, finding each to be without merit. Ultimately, the PCR court concluded: "[Petitioner] has not established any constitutional violations or deprivations that would require this Court to grant his application" and denied and dismissed the application with prejudice. (App.p.436-p.448).

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of

law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

ARGUMENT

The post-conviction relief court properly denied relief on grounds that Petitioner failed to carry his burden of proving trial counsel was ineffective for advising him to enter into a written proffer agreement because Counsel articulated a valid strategy for giving the advice based on his belief Petition would tell the truth during the proffer and the meaningful potential benefits the proffer agreement presented to Petitioner in the context of the ongoing murder investigation.

Petitioner asserts Counsel provided ineffective assistance in advising him to enter into the proffer agreement and asks this Court to reverse the denial of relief. He claims “the PCR court committed various errors of law and misapplied *Strickland v. Washington* on various fronts,” and that there is otherwise no evidence of probative value to support the PCR court’s findings. (Petition, p.9). The State disagrees and submits Petitioner’s argument is entirely without merit. The PCR court’s ruling is supported by probative evidence in the record and therefore, certiorari should be denied.

Law

In a post-conviction relief action, the Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an Applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance

is whether an attorney provided representation within the range of competence required in criminal cases. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An Applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel’s assistance after conviction or 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. In assessing counsel’s performance, counsel’s decisions must be evaluated at the time in which they were made and “every effort [must] be made to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, “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 689. Moreover, “representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 693. “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In fact, *Strickland* requires extreme deference to counsel’s strategic judgments that are adequately

investigated. *Strickland* explains “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” *Strickland*, 466 U.S. at 690-91.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel’s deficient performance must have 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*, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief Applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside *the wide range* of professional competent assistance” required of a criminal defense attorney.” *Id.* at 690 (emphasis added).

Discussion / Analysis

Here, the PCR court “reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly.” (App.p.439). It described the relevant portions of the testimony offered by Counsel, Petitioner, and the solicitor, and concluded Petitioner had failed to meet his burden of proving Counsel was ineffective for advising him to enter into the proffer agreement. The Court made every effort to set aside the distorting effect of hindsight and considered the decisions of Counsel based on the information and circumstances available to him at the time they were made. It recognized that proffer agreements are a common element of plea negotiations and that the testimony consistently recognized the deal was very advantageous to Petitioner, as long as he told the truth. The PCR court concluded there was no deficiency on the part of Counsel in his advice to Petitioner to enter into the proffer agreement, nor prejudice therefrom, and denied relief. This conclusion was based primarily on the finding that: “Counsel thoughtfully and strategically considered the potential benefit of the proffer presented to his client and advised his client appropriately.” (App.p.445-p.446). The PCR court’s findings of fact and conclusions of law are supported by evidence in the record and therefore should result in the denial of certiorari.

Indeed, although Counsel first testified his understanding of the proffer agreement was that if Petitioner was truthful, the case would basically end (App.p.377-p.378), after more fully examining the transcript from the ten-year-old trial, he clarified he did not believe the obstruction and accessory charges would if fact be dismissed as a result of Petitioner’s cooperation, but that **entering the proffer agreement was nevertheless the best thing for**

Petitioner to do under the circumstances of the ongoing murder investigation. (App.p.389-p.390). Counsel testified that even looking back in hindsight, attacking the polygraph was the only area where he felt he could have done things differently. (App.p.376-p.387). On cross-examination Counsel testified the information Petitioner provided him was consistent with the information Petitioner gave in his statement to the police, and that Counsel had no reason to anticipate the polygraph would show signs of deception. He testified that in hindsight, maybe it would have been better to give Petitioner different advice about the proffer agreement; however, because he felt like Petitioner had been truthful with him, **he was comfortable going ahead with the strategy** of entering into the proffer agreement as proposed by the State. Counsel testified **he specifically counseled Petitioner to enter into the proffer agreement because he felt like it was the best thing for him to do.** Counsel testified this was not the first proffer agreement he advised a client to enter and that he did not see anything unusual in the terms of this proffer that jumped out as a problem. He said that **if he had a similarly situated client at the time of the PCR hearing he would advise that client to enter into the same proffer agreement,** and the only thing he would do differently would be to “be a lot stronger on the science and the procedure behind the polygraph and . . . how to go about challenging it better and making a stronger argument to the judge.” (App.p.387-p.395).

Under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. *See State v. Smith*, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) (“Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial.”); *State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) (“The trial judge, not this Court, is in the best position to be arbiter

of [the witness'] credibility.”); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) (“The determination of a witness’s credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.”). The PCR judge was in the best position to weigh Petitioner’s credibility and assess his unbelievable claims about having no knowledge of the possibility of a verification polygraph when he signed the agreement despite it being the entire focus of paragraph 2 of the agreement. Furthermore, the PCR court was in the best position to assess Counsel’s credible testimony about the advantages of the proffer agreement and his belief he pursued the best strategy under the circumstances of the case by advising Petitioner to make the proffer.

In light of the PCR court’s credibility considerations and all of the circumstances of the case, Counsel’s advice to enter into the proffer agreement was within the wide range of professionally competent assistance required of a criminal defense attorney. Counsel testified the even with the knowledge of how Petitioner’s direct appeal turned out, he strategically chose to advise him to enter into the proffer agreement and would do exactly the same for a similarly situated client today. This strategy must be considered in the context of Petitioner facing exposure to a murder charge. As noted by the solicitor, he began to think the proffer agreement was a big mistake for the State and a stroke of genius for Counsel. Simply because it did not ultimately result in acquittal or some other tangible benefit because Petitioner lied to police, does not warrant either the PCR court or this Court second guessing Counsel’s tactics through the distorting lens of hindsight. Because Counsel articulated a valid strategic reason for his advice, his performance was properly found not to be ineffective, and certiorari should be denied.

Each of Petitioner's arguments on appeal as to why he believes the PCR court committed errors of law appears to be misplaced. Petitioner first complains the PCR court "primarily focused on testimony and circumstances concerning events that took place after the proffer agreement had already been struck" and claims the PCR court "failed to isolate the relevant time period within Counsel's representation of Petitioner." (Petition, p.9-p.10). However, it appears the PCR court was simply summarizing the testimony presented at the hearing rather than improperly considering information gained in hindsight. In fact, it was entirely appropriate that the PCR court consider Counsel's explanation for why he chose the particular strategy he chose at the time of trial. Here, even in hindsight, Counsel never wavered from his belief that, at the time of trial, he intentionally chose a trial strategy of advising Petitioner to enter the proffer agreement. This strategy was entirely reasonable where Counsel believed, albeit mistakenly, that Petitioner was telling the truth about his participation in Lee's murder, and where Petitioner stood to gain both immunity from any additional charges stemming from the incident (including murder), and consideration in the election of charges and recommendation of sentencing on the pending charges he was already facing. (App.p.482).

Next, Petitioner complains the PCR court improperly referenced the appellate opinions from his direct appeal regarding "the law applicable to this question." He contends that where Counsel did not have these appellate opinions to inform his decision-making process, the PCR court in effect impermissibly evaluated the issue in hindsight in contravention of *Strickland*. (App.p.11). Yet, Counsel did not need the appellate opinions to understand basic contract law and that the parties would be bound by the explicit terms of that contract. Counsel's advice was based on his absolute belief Petitioner was telling the truth. Although Counsel argued

strenuously to exclude Petitioner's statement at the pretrial hearing, this was an argument of necessity because, after hoodwinking Counsel with his lies in hopes of avoiding a murder charge, Petitioner was unable to deceive the polygraph and thereby materially breached the terms of that contract. Counsel thereafter made a sufficient challenge to the introduction of the statement to preserve the novel Rule 410, SCRE, issue for appeal, and the issue was addressed on the merits. The PCR court recognizing the appellate opinions as stating the applicable law was thus, not improper. Instead, it was a recognition that, where there was no feasible way to know what the appellate courts would rule when Counsel made the strategic decision to pursue the proffer agreement, Counsel appears to have approached the proffer agreement in the most effective way available at the time of trial.

Petitioner's next complaint centers around the claim that Counsel was deficient in his interpretation and decision-making regarding the potential benefit of entering the proffer agreement, because his advice was premised on Counsel's mistaken belief that Petitioner's compliance would result in all the pending charges being dropped. (Petition, p.13-p.16). Initially, the State notes that where Petitioner failed to be completely truthfully and breached the agreement, Petitioner would have gained no benefit regardless of what that purported benefit was. Regardless, Counsel clarified this initial mistake in his later testimony, explaining he never believed the obstruction and accessory charges would be dismissed as a result of Petitioner's cooperation, but that entering the proffer agreement was nevertheless the best thing for Petitioner to do under the circumstances of the ongoing murder investigation. (App.p.389-p.390). Ultimately, the terms of the agreement control, and those terms are clear and unambiguous. Counsel and Petitioner both signed the agreement with knowledge of its terms.

Finally, Petitioner complains Counsel was deficient in his interpretation and decision-making regarding the Rule 410 waiver because he was not successful in preventing the use of Petitioner's statement despite the clear terms of the contract. But again, this argument must be taken in the context in which it was made—after Petitioner was shown to have been deceptive with the police. Counsel explained he made every argument he could for exclusion, including that the agreement was ambiguous, but believed entering the proffer agreement was the best strategy at the time he gave the advice. This does not show ineffectiveness. On the contrary, it shows Counsel tried to obtain the benefits of the proffer agreement for Petitioner even while maintaining a fall-back position to argue ambiguity and a violation of Rule 410 in the event Petitioner did not meet its terms. Counsel was nearly successful in this regard – with the direct appeal only narrowly being affirmed in a 3-2 decision. By comparison, under Petitioner's theory, Counsel could only be effective if he convinced Petitioner to enter a proffer agreement he knew ahead of time would not be binding on the parties. This cannot be the standard for evaluating effective performance under *Strickland* and reeks of being unconscionable. If Counsel was successful in convincing the trial court to exclude the statement, even after seeking the benefits of that agreement, Petitioner would have been able to have his cake and eat it too. Petitioner seems to believe the State should have been bound by the proffer agreement if he passed the polygraph, but that the State should have been prohibited from using his statement at trial if he failed. As properly found by the PCR court, this belief does not support a grant of relief. Counsel made a strategic decision to advise Petitioner to enter into the proffer agreement under the belief Petitioner would tell the truth and gain the meaningful benefits of that

agreement. As Petitioner failed to meet his burden of proof in this PCR action, his application was properly denied and dismissed with prejudice.

CONCLUSION

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

Respectfully submitted,

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S.C. Bar No. 8729
Senior Assistant Deputy Attorney General

By: 
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April 10, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 15 2019
S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000054

THEODORE DAVID WILLS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

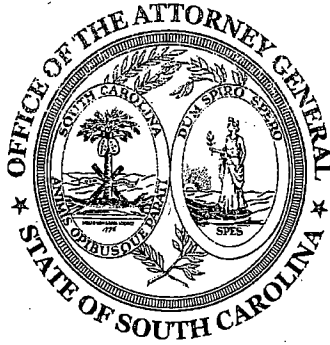
I, J. Benjamin Aplin, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
Lauren C. Hobbs, Esquire
522 North Church Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served. This 10th day of April, 2019.



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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 15 2019
S.C. SUPREME COURT

April 10, 2019

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

Re: Theodore Wills, Jr. v. State of South Carolina
Appellate Case No. 2018-000054
Lower Court Case No. 2014-CP-26-7915

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
SC Bar No. 8729

JBA/mm

cc: William G. Yarborough, III, Esquire