

STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2018-000289

Shondre Williams, ..... Petitioner,

v.

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

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

QUESTION PRESENTED .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS .....	4
STANDARD OF REVIEW .....	5
ARGUMENT	
The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by trial counsel’s failure to object to closing statements by the Assistant Solicitor about the defense of entrapment because the Assistant Solicitor made correct statements of law which made them not objectionable, Counsel could not be deficient for not objecting to such statements, and there was no reasonable probability that but for this alleged error a different outcome would have occurred at trial... .....	7
The PCR court found Counsel was not deficient, nor was Petitioner prejudiced by Counsel’s failure to admit audio recordings into evidence to assist with the defense of entrapment, Petitioner did not allege a failure to review discovery in the original or supplemental application, and it is not appropriate to make new allegations at this stage.....	12
The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel’s failure to object to line of questioning about drug dealings between confidential informant and Petitioner, Counsel is not deficient in not objecting to admissible evidence, and these questions were asked to explain contents of a video already in evidence... .....	16
The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel’s alleged erroneous advice about potential sentencing at trial, Counsel gave credible testimony about giving accurate advice, and Petitioner was motivated to reject a plea offer based upon certain demands.....	19
CONCLUSION.....	21

## QUESTION PRESENTED

- I. Did Counsel render ineffective assistance of counsel, based upon a failure to object to closing arguments, where the trial court gave accurate jury charges and Petitioner was not entitled to an entrapment defense?
- II. Did Counsel render ineffective assistance of counsel, based upon a failure to review discovery, where Petitioner decided not to plea based upon dissatisfaction with the offer and the discovery was not introduced at trial?
- III. Did Counsel render ineffective assistance of counsel, based upon a failure to object to testimony from confidential informant, where the evidence was admissible and had already been introduced in a video played for the jury?
- IV. Did Counsel render ineffective assistance of counsel, based upon a failure to give accurate sentencing advice, where the PCR court found Counsel credibly testified to giving accurate sentencing advice and Petitioner did not accept a plea for other reasons in the record?

## STATEMENT OF THE CASE

Shondre Williams (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the August 2012 term of the Spartanburg County Grand Jury for possession with intent to distribute cocaine base (2012-GS-42-5626) and trafficking cocaine (2012-GS-42-4098). Petitioner was represented by J. Falkner Wilkes, Esquire. On February 25, 2013, a jury trial began in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole, presiding. On February 27, 2013, a jury found Petitioner guilty of the lesser included offense of possession of cocaine base and as indicted for trafficking cocaine. Judge Cole sentenced Petitioner to concurrent terms of twenty-five years for trafficking and ten years for possession.

Petitioner filed a timely Notice of Appeal. An appeal was perfected by Carlyle R. Cromer, Esquire, and Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Williams, Op. No. 2014-UP-367 (S.C. Ct. App. Filed October 29, 2014). Petitioner's Petition for Rehearing was denied in an Order filed December 17, 2014.

Petitioner then petitioned the Supreme Court of South Carolina for a Writ of Certiorari to the Court of Appeals on January 16, 2015. The Supreme Court of South Carolina denied the Petition in an order filed June 18, 2015. The Remittitur was returned on June 24, 2015.

Petitioner then timely filed an application for post-conviction relief on August 5, 2015. Respondent made its Return on July 1, 2016. The circuit court convened an evidentiary hearing into the matter on November 13, 2017, before the Honorable G. Thomas Cooper at the Spartanburg County Courthouse. Petitioner was present at the hearing and represented by William G.

Yarborough, III, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf. J. Faulkner Wilkes, Esquire, testified on behalf of Respondent. Judge Cooper issued an order filed March 2, 2018, denying and dismissing the application with prejudice. Petitioner filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on May 23, 2019. This return follows.

## STATEMENT OF THE FACTS

On March 1, 2012, the Spartanburg County Sheriff's Office and Greenville County Sheriff's Office executed a search warrant on Shondrell Williams' residence. App. Pp. 230. Thereafter, Williams decided to cooperate with law enforcement. App. Pp. 230. Williams proceeded to name Petitioner as somebody whom he had engaged in multiple drug transactions with. App. Pp. 230. Williams then contacted Petitioner to see if there was interest in setting up drug transaction. App. Pp. 230.

Subsequently, the Spartanburg County Sheriff's Office supplied Williams with a quarter kilogram of cocaine. App. Pp. 230. Thereafter, Williams wore a wire to the Petitioner's residence in anticipation of engaging in a drug transaction. App. Pp. 231. At the residence, Petitioner gave Williams \$4,000 in exchange for cocaine. App. Pp. 231. Moreover, Petitioner relieved Williams from a previous debt of \$5,000 in exchange for cocaine.<sup>1</sup> App. Pp. 231.

Thereafter, the Spartanburg County Sheriff's Office got a search warrant for Petitioner's residence. App. Pp. 232. Law enforcement recovered a quarter kilogram of cocaine from Petitioner's residence. App. Pp. 232. Law enforcement also recovered a digital scale. App. Pp. 233. Law enforcement also discovered a white rock-like substance. App. Pp. 232. This substance was later determined to be 4.91 grams of crack-cocaine. App. Pp. 232.

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<sup>1</sup> Ashley Harris was qualified as an expert at trial. She testified \$ 4,000 was worth about one-hundred and twelve grams, which was less than half the amount Petitioner received in this transaction. App. 231.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, a Petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a Petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. 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). The Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner 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 Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 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. at 688.

## ARGUMENT

**I. The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by trial counsel's failure to object to closing statements by the Assistant Solicitor about the defense of entrapment because the Assistant Solicitor made correct statements of law which made them not objectionable, Counsel could not be deficient for not objecting to such statements, and there was no reasonable probability that but for this alleged error a different outcome would have occurred at trial.**

The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by trial counsel's failure to object to closing statements by the Assistant Solicitor about the defense of entrapment because the Assistant Solicitor made correct statements of law which made them not objectionable, Counsel could not be deficient for not objecting to such statements, and there was no reasonable probability that but for this alleged error a different outcome would have occurred at trial.

Petitioner argues he was prejudiced, repeatedly, when Counsel failed to object to emphasis on an inaccurate legal standard by the Assistant Solicitor. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted).

However, “[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. The Assistant Solicitor made comments during closing arguments on entrapment as follows:

The judge is going to charge you on what in South Carolina we call entrapment. That means that the defendant—in order for you to find the defense of entrapment applies you have to find that the defendant had no predisposition to commit the crime.

App. 234, L. 20-5. Shortly after the Assistant Solicitor said as follows:

Now, normally in a criminal trial the state bears the burden, and for the rest of this stuff we do. And that proof is beyond a reasonable doubt. And I believe that every element of every charge that we put before you trafficking cocaine and [PWID crack cocaine] that we’ve met that burden.

But on this instance for him to meet the burden the law puts on him for the defense of entrapment you’re going to find that that applies. The defendant has to prove to you that he was not predisposed to commit this crime. I submit he absolutely has not.

As a matter of fact, the evidence that’s in the case, the fact that he had prior dealings with the informant without the government being involved, they had a working relationship beforehand, that is proof beyond a reasonable doubt the absolute opposite way that he was completely predisposed to commit this crime. So I do not believe, and I do not believe you should find, that the defense of entrapment applies in this case.

App. 234, L. 6 – 24. In reality, the defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998); State v. Brown,

362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). Accordingly, the Assistant Solicitor argued Petitioner had to prove he had no predisposition to commit the crime in error. However, the trial court instructed the jury, on the law, as follows:

You must however under your oath as a juror **accept the law as I provide it** to you as being the law that you are to apply the facts in the case. In other words, you're not to concern yourself with what you thought the law was before you came to serve as a juror or what you think the law ought to be.

Under your oath as a juror **you must simply accept the law as I provide it to you as being the law that you apply to in the case.** Then you take that law and you apply it to the facts as you 12 jurors determine those facts to be in order to arrive at your decision in the case.

Sup. App. 63, L. 21-5. Sup. App. 64, L. 1-6. Thereafter, the trial court instructed the jury, on entrapment, as follows:

Entrapment is a defense to a crime where it is shown that there is the conception and planning of a criminal offense by a law enforcement officer or governmental agent and the procurement of the commission of the criminal offense by one who would not have perpetrated the offense except for trickery, enticement, inducement or persuasion by a law enforcement officer or other governmental agent.

Where a criminal design originates with and is conceived by a governmental agent and not the defendant, and the defendant by persuasion, enticement or other inducement of the governmental agent is lured into the commission of a criminal offense that he would not have otherwise committed, then the defendant is not guilty of the criminal offense for which he has been induced into committing.

The defense of entrapment is not however available to a defendant where the evidence established that he had a predisposition to commit the crime even in the absence of the inducement or influence of the governmental agent.

The mere providing of the opportunity and the facilities to commit a crime by a governmental agent to a person otherwise disposed to commit a criminal offense does not constitute entrapment.

In order for the defense of entrapment to be made out it must be shown that the crime was conceived, planned, initiated or instigated by a law enforcement officer or someone acting as an agent of the law enforcement officer and that the officer or the agent enticed, persuaded, or otherwise induced the defendant to commit the crime and would not have committed the crime but for the inducement or persuasion or enticement of the governmental officer or agent.

**Where the defendant presents evidence tending to establish elements of the defense of entrapment it becomes incumbent upon the state to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime in the absence of any inducement or persuasion of the governmental officer or agent.**

The phrase predisposed to commit a crime means the defendant had the intent or purpose or readiness or willingness to commit the crime without any inducement or persuasion by the governmental officer or agent and that the government agent merely provided an opportunity for the defendant to commit the crime.

If you find that the defendant had the predisposition without any governmental inducement or influence to commit the crime alleged, then the defense of entrapment will not have been made out.

In your determination as to whether the defendant had a predisposition to commit the crime you should consider any evidence presented during the trial relating to any existing course of criminal conduct by the defendant similar to the crime charged, any already formed plan by the defendant to commit the crime and any willingness to commit the crime charged as shown by the defendant's ready response to inducement.

If you find the defendant without any predisposition to commit a crime was induced or persuaded to commit the crime by the governmental agent, then you must find the defendant not guilty.

Supp. App. 76, L. 1-25, Supp. App. 77, L. 1-25.

Here, the jury charge had appropriate instructions to only deliberate based upon law administered by the trial court. Additionally, the jury charge had accurate instruction on what law to use in deliberating on an entrapment defense. Therefore, Petitioner is not entitled to a new trial

because no prejudice occurred when the trial court gave accurate instructions after isolated comments. State v. King, 349 S.C. 142, 161, 561 S.E.2d 640, 649 (Ct. App. 2002) (“Even if the solicitor's comments were improper, such comments do not automatically mandate reversal if they do not result in prejudice to the defendant.”). Petitioner received a fair, but not perfect, trial which means no constitutional violation occurred. State v. Mizell, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct. App. 1998) (“As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.”). Accordingly, the post-conviction relief court correctly concluded there was no reasonable probability a failure to object to these comments would have impacted the outcome.

Petitioner cites to *Doyle* in arguing there was improper burden-shifting because he had no legal duty to put forth evidence. Doyle v. Ohio, 426 U.S. 610 (1976). However, in that case, the defendant *literally* remained silent after being arrested and administered Miranda warnings. Doyle, 426 U.S. at 617-8. At trial, he gave an entirely plausible explanation about what happened. Doyle, 426 U.S. at 613. Thereafter, the prosecution requested an explanation from him about remaining silent after he was arrested. Doyle, 426 U.S. at 614. The court overruled every objection from defense counsel during this line of questioning. Id. Here, Petitioner did not testify. Supp. App. 23, L. 24. However, the State did not mention Petitioner’s failure to testify during closing arguments. Moreover, the trial court charged the jury not to consider Petitioner’s failure to testify “in any way during deliberations.” Supp. App. 78, L. 13-9.

Petitioner’s argument fails on the merits because he was not entitled to the jury charge for entrapment.

Alternatively, Petitioner did not suffer any prejudice because he did not introduce evidence to warrant the jury to be charged on entrapment. It is a well settled principle of law the defense of

entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence. State v. Johnson, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988). Entrapment does not apply just because a government official “merely afford[s] opportunities or facilities for the commission of the offense” Id. The issue of whether defense of entrapment has been established is not a jury question where there is undisputed evidence and only one reasonable conclusion can be reached. Id. Additionally, charging entrapment to the jury is not proper if the defendant acted under his own volition. State v. Porter, 251 S.C. 393, 403, 162 S.E.2d 843, 849 (1968) (finding there was no evidence defendant was persuaded or lured where he acted under his own volition).

Here, there is undisputed evidence Petitioner had a predisposition to buy drugs. Specifically, the informant testified Petitioner bought drugs from him for about a year. App. 179, L. 20. On this day, Petitioner claimed he already had drugs. App. 179, L. 10-3. App. 180, L. 6-7. App. 191, L. 3-5. During the deal, he admitted the informant previously sold him cocaine. App. 187, L. 9-25). App. 188, L. 1-4. Petitioner complained about the quality of cocaine this informant previously supplied him. App. 187, L. 9-20. App. 188, L. 1-4. Petitioner was arrested with crack-cocaine not sold to him in this transaction. App. 106, L. 6-8.

Additionally, there is undisputed evidence Petitioner was not induced into this drug transaction. Charging entrapment to the jury is not proper if the defendant acted under his own volition. State v. Porter, 251 S.C. 393, 403, 162 S.E.2d 843, 849 (1968) (finding there was no evidence defendant was persuaded or lured where he acted under his own volition). Here, Petitioner told the informant he had drugs during the initial phone conversation. App. 180, L. 10-3. App. 181, L. 6-7. App. 191, L. 3-5. However, Petitioner called back when he ran out. App. 194, L. 19-22. He instructed the informant he had four-thousand dollars to put towards a drug

transaction. App. 194, L. 5-6. They later met at Petitioner's residence. App. 184, L. 6. Petitioner made a four thousand dollar down payment for the cocaine. App. 183, L. 1-21. App. 184, L. 6, 21. Sup. App. 28, L. 12. Petitioner then incurred a five-thousand dollar debt to get the rest. App. 183, L. 1-12. Based upon the undisputed evidence, Petitioner was not entitled to a jury charge for entrapment.

Accordingly, Petitioner was not prejudiced by any alleged failure to object to improper burden shifting.

**II. The PCR court found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's failure to admit audio recordings into evidence to assist with the defense of entrapment, Petitioner did not allege a failure to review discovery in the original or supplemental application, and it is not appropriate to make new allegations at this stage.**

Petitioner's argument fails because it has not been appropriately preserved for appellate review.

For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court, otherwise it will not be considered on appeal. State v. King, 424 S.C. 188, 818 S.E.2d 204 (2018), reh'g denied (Sept. 21, 2018). In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. State v. Simmons, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018), reh'g denied (Aug. 2, 2018). "To preserve an issue for appellate review, an appellant must object at his first opportunity." State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). Moreover, it is the responsibility of counsel to preserve issues for appellate review. State v. Rivers, 411 S.C. 551, 555, 769 S.E.2d 263, 266 (Ct. App. 2015).

Here, Petitioner is mischaracterizing a previous allegation to improperly raise a new one. State v. King, 424 S.C. 188, 818 S.E.2d 204 (2018), reh'g denied (Sept. 21, 2018). (“For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court, otherwise it will not be considered on appeal.”); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to grounds raised at trial”); See State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (A party may not argue one ground at trial and an alternate ground on appeal). Petitioner did not allege a failure to review discovery in his original or supplemented application. App. 413-4. Furthermore, the order of dismissal does not address any failure to review discovery claims. App. 412-30. Instead, the PCR court addressed an allegation of the “failure to admit phone recordings at trial.” App. 426. There is no record Petitioner’s PCR Counsel filed a motion to reconsider on this issue. Finally, Petitioner did not object to the absence of this issue in his motion to alter or amend the order of dismissal. App. 432-8. Therefore, Petitioner has not properly preserved this argument to be reviewed on appeal.

However, if it is preserved, Petitioner’s argument fails on the merits because there is probative evidence in the record to support the PCR court finding Counsel was not deficient.

Petitioner’s argument is premised upon the inability to personally review tapes before rejecting the plea offer. “[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Missouri v. Frye, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting “rule that counsel's failure to convey a plea offer constitutes deficient performance”). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant “**must demonstrate a reasonable probability that:** (1) he ‘would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;’ (2) “**the plea**

would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (emphasis added) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If Petitioner is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.").

Here, Petitioner has not established a reasonable probability of his ability to personally review the tapes without the State withdrawing the plea offer. The PCR court found Counsel gave credible testimony on this issue. App. 427. Counsel testified Spartanburg County typically hold off on giving information about the confidential informant until the last minute. App. 375, L. 22-5. App. 376, L. 1. Thereafter, Counsel testified Spartanburg County traditionally revokes plea offers when disclosing informant about the confidential informant. App. 376, L. 1-2. Accordingly, it can be reasonably inferred disclosure of the tape would have triggered revocation of this plea offer. Therefore, Petitioner has failed to meet his burden to show there was a reasonably probability the State would not have canceled the deal.

Additionally, the South Carolina Supreme Court held counsel is not unreasonable in failing to file a motion to compel disclosure of evidence, for personal review by the defendant, where the manner and extent of it was appropriate under the factual circumstances.<sup>2</sup> Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012), abrogated, on other grounds, by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In that case, the State disclosed a material video's existence then made it available for plea counsel to review. Id., 397 S.C. at 47, 726 S.E.2d at 381. The State did not permit personal review by the defendant, during plea negotiations, in an effort to protect and conceal the identity of a confidential informant. Id. However, plea counsel individually reviewed the video before discussing details with the defendant. Id., 397 S.C. at 39, 723 S.E.2d at 377. Thereafter, the defendant chose to waive video disclosure in exchange for a plea agreement. Id., 397 S.C. at 39, 47, 726 S.E.2d at 377, 381.

Here, Petitioner did not listen to conversations, on tape, with the confidential informant before rejecting a plea offer. App. 336, L. 10. App. 380, L. 6-7. Spartanburg County traditionally does not disclose discovery involving confidential informants until pleas are off the table. App. 375, L. 22-5. App. 376, L. 1-2. This County policy is intended to protect confidential informants. App. 375, L. 23-4. However, Counsel listened to the tape. App. 374, L. 14-6. Counsel then told Petitioner what was on the tapes.<sup>3</sup> App. 375, L. 15-6, 22. Thereafter, Petitioner turned down the plea offer. App. 379, L. 41-25. App. 380, L. 1-4. Accordingly, the manner and extent of disclosure

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<sup>2</sup> The rules of discovery permit inspection of evidence in the State's possession "which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant" upon request by the defendant. Rule 5(a)(1)(C), SCRCrP.

<sup>3</sup> Moreover, Petitioner identified himself on a video with the confidential informant before rejecting the plea offer. App. 374, L. 18-20. App. 374, L. 21-2. App. 380, L. 3-10. In Hyman, the State similarly offered still photographs that "obviously" identified Petitioner during plea negotiations. 397 S.C. at 47, 726 S.E.2d at 381.

was appropriate based upon the policy in place to protect confidential informants. Therefore, Counsel was not unreasonable in failing to file a motion to compel disclosure so Petitioner could personally review these tapes before rejecting the plea.

Petitioner's argument fails on the merits because there is probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced.

Petitioner contends the outcome would have been different because he would have pled guilty after reviewing the tapes. However, the S.C. Supreme Court held a defendant could not prove prejudice where his decision to plea was not based upon the error by counsel. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012). In that case, the PCR court found a defendant chose to plea based upon the State's promise to dismiss multiple charge and recommend a ten year sentence. Id. This finding was affirmed based upon "evidence in the record" which included counsel testifying his client "became interested in negotiating a plea" after an offer to drop multiple charges. Id. Additionally, the PCR court had specifically found the defendant's testimony, about the reason he accepted a plea, to not be credible.

Here, the PCR court concluded any alleged error in handling the tapes would not have impacted the outcome. App. 427. Counsel testified Petitioner wanted a plea offer of ten to twelve years. App. 378, L. 20-2. Thereafter, Counsel testified Petitioner wanted a ten year offer. App. 378, L. 22-3. Counsel also testified Petitioner "had an understanding of exactly what he sought" in pleading guilty. App. 703, L. 3-4. Thereafter, Counsel testified they discussed variables that could impact mandatory incarceration time. App. 403, L. 3-8, L. 10-5. Counsel testified Petitioner agreed to certain sentences that fit what he wanted. App. 403, L. 10-5. Counsel testified he received a ten to fifteen year offer then discussed it with Petitioner App. 379, L. 3-10. Counsel testified Petitioner rejected the offer because he was "stuck" ten to twelve. App. 402, L. 5-7.

Thereafter, Counsel testified Petitioner became stuck on ten so the offer was not accepted. App. 402, L. 5-7. Accordingly, it can be reasonably inferred Petitioner rejected a plea offer based upon the numbers. Therefore, the evidence in the record supports any mishandling of the tapes would not have impacted the outcome.

Petitioner cites to *Lawton* to argue the PCR court erroneously failed to rule he had a right to review the discovery before deciding whether to plea prior to trial. 382 S.C. 122, 675 S.E.2d 454 (2009). In that case, the State failed to turn over a statement written by the defendant in response to standard discovery requests. *Lawton*, 382 S.C. at 127-8, 675 S.E.2d at 457. At trial, the State introduced it to impeach the defendant on cross examination. *Id.* Here, Petitioner decided not to testify at his trial. Supp. App. 53, L. 24. He was never impeached on the witness stand. The tapes were never played at trial. App. 31. App. 192, L. 6-15. App. 377, L. 22-5. Therefore, this case is distinguishable from the prejudice suffered in *Lawton*. As a result, it is not appropriate authority to support Petitioner's prejudice argument for this issue.

**III. The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's failure to object to line of questioning about drug dealings between confidential informant and Petitioner, Counsel is not deficient in not objecting to admissible evidence, and these questions were asked to explain contents of a video already in evidence.**

Petitioner's argument fails on the merits because there is probative evidence in the record to support the PCR court finding Counsel was not deficient.

Trial counsel is not ineffective where they do not object to admissible evidence. *Blakely v. State*, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (finding a failure to object to evidence of previous threats did not constitute ineffective counsel where they were admissible to show malice or intent). Evidence of crimes, wrongs, or acts is inadmissible unless it goes to show "motive,

identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” SCRE 404. Evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession with intent to distribute. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001); State v. Gore, 299 S.C. 368, 370, 384 S.E.2d 750, 751 (1989). Here, Petitioner was charged and tried on possession with intent to distribute. App. 314. The testimony at issue concerns Petitioner referencing the quality of drugs from prior drug transactions with this confidential informant. App. 187-88. Therefore, the testimony was admissible based upon it establishing intent where Petitioner was on trial for possession with intent to distribute. Accordingly, Counsel was not deficient in not objecting to this line of testimony.

Petitioner’s argument fails on the merits because there is probative evidence in the record to support the PCR court’s finding Petitioner was not prejudiced.

Petitioner argues he was prejudiced by Counsel’s failure to object because it misled the jury to believe he was a big-time drug dealer. The PCR court conducted the following analysis on this issue:

This Court finds Applicant has failed to meet his burden of proving Counsel was deficient or that **he was prejudiced by any deficiency**. Applicant has failed to prove, either by presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to the testimony elicited by the State **from Informant regarding communications on the undercover DCD during the sale of the cocaine to Applicant. The Solicitor was requesting explanation for the street language used during the sale. The video showed a prior batch of drugs he purchased from Informant, complaining that they were not cooked the way he wanted.**

App. 428.

The State intended for this line of questioning to center on the confidential informant explaining a video played for the jury. App. 186, L. 7-12. The State also repeatedly referenced

the video during this line of questioning. App. 186, L. 13, 16, 24. App. 187, L. 2, 7. Interestingly, Petitioner left out the following questions in his argument:

Q: Yeah, said it wasn't dropped.

A: I guess it wasn't cooked. I guess it wasn't cooked for him the way he wanted to, yes.

Q: What does that mean? What is – **if you were trying to explain to somebody who didn't know about cooking cocaine, what do you cook cocaine to make?**

A: Crack.

Q: Crack. Okay.

App. 187, L. 16-25. Counsel gave the following testimony on this issue:

Not a winning [objection]. But I certainly could have objected because [it] does get into the prior dealings that the two had. **But what I took that to be was asking the C. I. to explain the language they used in the video like you would in translation of a foreign language,** because [the] discussion on video, if I remember they played it for the jury. **And I think if you listen to the video some of the language would not be understandable to the normal run-of-the-mill citizen** who would not know what dropped means. And I think that's in the transcript, it wouldn't drop. And I think that's what [Solicitor] was getting [C. I.] to explain.

In the video you just heard what does that mean. So [that] would be the reason it didn't—my not objecting didn't have to do with predisposition. [It] was because I just recognized that. **I thought it was a legitimate question to have the witness explain the context of what was said in the video that the jury just heard.**

App. 384, L. 16-25. App. 385, L. 1-9. Therefore, it can reasonably be inferred evidence of prior bad acts was introduced on the video, not the questions. Further, it can reasonably be inferred the bad acts introduced were based upon deals between Petitioner and the confidential informant. Accordingly, Petitioner's argument this line of questioning introduced evidence to improperly suggest he was a bigtime drug dealer is without merit.

**IV. The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's alleged erroneous advice about potential sentencing at trial, Counsel gave credible testimony about giving accurate advice, and Petitioner was motivated to reject a plea offer based upon certain demands.**

Petitioner's argument fails on the merits because there is probative evidence in the record to support the PCR court finding Counsel was not deficient.

Petitioner argues his testimony, at the PCR hearing, supports the allegation he received erroneous advice. However, the PCR court specifically found his testimony not to be credible on this issue. App. 425-6. In South Carolina, the appellate court gives great deference to a judge's findings where matters of credibility are involved since the appellate court lacks the opportunity to directly observe the witnesses. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521-2 (1993) (Concluding no evidence of prejudice based, in part, on PCR court originally finding petitioner's witness to not be credible). Accordingly, Petitioner's testimony is an improper foundation of this argument.

Petitioner argues Counsel erroneously said he would only serve eighty-five percent of a sentence. However, at the PCR hearing, Counsel testified as follows:

**I don't say** if you go to trial it'll be you're facing up to 25 years but don't worry, you'll only really do 85 percent or 65 percent.

I tell people that if you're facing 25 years, you consider that 25 years the same way as a plea if you think you're going to do a plea.

I usually tell people -- I always tell people if you're going to plead guilty and it's ten years would you take plea if it were ten years, **take out any idea of 65-85**, good time, anything else. Would you do the ten years? If they say yes, then I know I've got valid decision on the plea.

App. 388, L. 11-21.

Thereafter, the PCR court specifically found Counsel gave credible testimony on this issue. App. 425-6. Accordingly, there is probative evidence in the record to support the PCR court's subsequent finding that Counsel did not deficiently give erroneous advice. App. 426.

Petitioner's argument fails on the merits because there is probative evidence in the record to support the PCR court finding he suffered no prejudice.

Petitioner intends for this Court to believe there is a "reasonable probability" he would have pled with accurate sentencing advice. To reiterate, the S.C. Supreme Court held a defendant could not prove prejudice where his decision to plea was not based upon the error by counsel. Goins, 397 S.C. at 575, 726 S.E.2d at 4.

Here, the PCR court found "Counsel credibly testified Applicant wanted a plea offer of ten years, but did not receive an offer better than a range of 10-15 years." App. 426. At the evidentiary hearing, Counsel testified Petitioner knew exactly what he wanted in a plea offer. App. 403, L. 3-4. Counsel testified Petitioner originally wanted an offer in the ten to twelve year range. App. 379, L. 12. Counsel testified Petitioner then decided he would only accept an offer of ten years. App. 379, L. 12-3. Counsel testified the best offer Petitioner received was ten to fifteen years. App. 379, L. 5. Finally, Counsel testified Petitioner rejected the offer because it did not meet either demand. App. 379, L. 14-6. On the other hand, Petitioner testified he would have pled guilty if he knew the sentence at trial would be day for day. App. 345, L. 22-5. App. 346, L. 1. However, the PCR court found Petitioner's testimony to not be credible on this issue. App. 426. Specifically, the PCR court found it "strained credulity" to believe Petitioner would have pled if he was facing a day to day sentence. App. 426. Therefore, Petitioner's failure to secure his desired plea offer is well supported by probative evidence in the record. Accordingly, there is evidence in

the record to support the PCR court's finding that Petitioner failed to prove prejudice on this issue.  
App. 426.

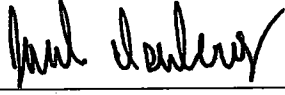
### CONCLUSION

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the post-conviction relief court's dismissal of Petitioner's application for relief.

Respectfully submitted,

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Attorney General

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Assistant Attorney General  
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BY:   
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October 23, 2019

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas  
G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2019-000289

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SHONDRE WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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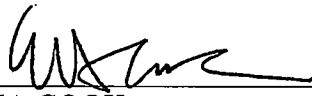
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Elizabeth Anne Franklin-Best, Esquire**  
**Blume Norris & Franklin-Best, LLC**  
**2725 Devine Street**  
**Columbia, South Carolina 29205**

This 23<sup>rd</sup> day of October, 2019.

  
\_\_\_\_\_  
EVA COOK  
Legal Assistant for Respondent



ALAN WILSON  
ATTORNEY GENERAL

October 23, 2019

RECEIVED  
OCT 23 2019  
S.C. SUPREME COURT

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

**RE: Shondre L. Williams, #198544 v. State of South Carolina**  
**Appellate Case No. 2019-000289**  
**Lower Court Case No. 2015-CP-42-3439**

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,

Jacob A. Isenberg  
Assistant Attorney General  
S.C. Bar No. 103830

JAI/ec  
Enclosures

cc: Elizabeth A. Franklin-Best, Esquire