

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
R. Lawton McIntosh, Trial Judge
Edward W. Miller, Post-Conviction Relief Judge

Appellate Case No. 2020-000712

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Jan 21 2021

S.C. SUPREME COURT

CARL STANLEY AIKEN.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Issue on Petition for Writ of Certiorari

- I. Did the PCR court err in finding trial counsel was not ineffective where counsel failed to move for a directed verdict on the basis that a future promise cannot form the basis for a conviction for obtaining goods under false pretenses which requires a false representation of a present or past fact?

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

- I. Did the post-conviction relief court properly find Petitioner failed to establish any constitutional ineffectiveness of counsel for not moving for a directed verdict for the charge of obtaining goods under false pretenses where there was no basis to argue the indictment was based on any future promise as Petitioner testified he was paid for work purportedly completed, and trial counsel properly moved for direct verdict on applicable grounds based on the facts and circumstances of the case?

STATEMENT OF THE CASE

Petitioner Carl Aiken is not presently confined within the South Carolina Department of Corrections. During its May 2016 term, the Greenville County Grand Jury indicted Petitioner for exploitation of a vulnerable adult (2015-GS-23-3451). The Greenville County Grand Jury subsequently indicted Applicant for unlawful practice of a regulated profession (2016-GS-23-06461A) and obtaining goods under false pretenses (2016-GS-23-06460A) during its July 2016 term.

On April 3, 2017, Petitioner proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable R. Lawton McIntosh on charges of exploitation of a vulnerable adult and obtaining goods under false pretenses. Dorothy Manigault, Esquire (Counsel) represented Petitioner on the charges and Assistant Solicitors Jonathan Gregory and Jena Hendricks prosecuted the case. On April 4, 2017 the jury returned verdicts on both indictments, finding Petitioner guilty of obtaining goods under false pretenses and not guilty of exploitation of a vulnerable adult. Judge McIntosh sentenced Petitioner to ten-years imprisonment suspended upon the service of four-years imprisonment followed by five years of probation. The judge further ordered restitution in the amount of \$14,250.

Counsel Manigault filed timely notice of appeal on Petitioner's behalf and Appellate Defender Robert M. Pachak filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals dismissed Petitioner's direct appeal. *State v. Aiken*, No. 2018-UP-375 (Filed October 10, 2018). Petitioner then timely sought post-conviction relief on a number of grounds, including on the basis that trial counsel was purportedly ineffective for failing to move for a directed verdict. On April 17, 2019 the Court convened an evidentiary hearing before the Honorable Alex Kinlaw, Jr. Petitioner was not present but counsel Susannah Ross, Esquire was

present on Petitioner's behalf. Assistant Attorney General Samuel L. Key represented the State. Judge Kinlaw dismissed the application on the State's motion for failure to prosecute, but gave Petitioner thirty days to respond with sufficient reason as to why the dismissal should not become final.

Petitioner filed a timely 59(e) motion and Respondent consented to Petitioner's request to rescind the order. An evidentiary hearing was held on October 23, 2019 before the Honorable Edward W. Miller. Petitioner was represented by Susannah Ross and Respondent was represented by Lillian Meadows. Petitioner testified on his own behalf, and Respondent presented testimony from trial counsel Dorothy Manigault. At the conclusion of the hearing, Judge Miller denied and dismissed the application by order filed January 27, 2020.

STATEMENT OF FACTS

Petitioner's charges stem from home improvement work that he allegedly performed for Raymond Poore (victim) from December 1, 2012 to February 23, 2013. Petitioner claimed he performed extensive external improvements ranging from removing and installing gutters, painting, pressure washing, and installation of wood products. Petitioner also claims to have painted three interior rooms, and installed a shower ceiling and drywall in the victim's bathroom. For this work, Petitioner received thirteen checks totaling \$14,250 over the course of three months, with \$6,950 of the checks containing legible memos of the reason for payment such as, "For painting."

In April of 2012, Poore received a diagnosis of dementia from his neurology specialist, Dr. Kistler (App. 127). On April 27, 2012, due to Poore's cognitive decline, his cousin, Terry Ford, was granted a durable power of attorney (App. 126-27). Ford testified that she also took Poore to the doctor, organized his medications for him, and took him out to eat for almost every meal (App.

72-73). In March of 2013, Poore's condition deteriorated to the point where Ford hired someone to stay with Poore throughout the day. As part of her power of attorney, Ford helped Poore pay his bills and balance his checkbook (App. 81). While reviewing Poore's financial statements and bank records, she noticed several checks for large amounts written to Petitioner. Ford called Petitioner and spoke to him about the payments, which Ford testified was "not matching up to what [Ppetitioner claimed] was being done around the house." (App. 83). She indicated she saw Petitioner at Poore's house once or twice during that period but did not know what he was doing (App. 84). Ford stated the only change she noticed was a few spots painted on the exterior of the home, and that no painting occurred on the interior (App. 84-85). After asking Petitioner to provide the receipts for the supplies he purchased on two or three occasions and never receiving the documents, Ford called Jerry Brown, a licensed contractor, to look at the house (App. 88). Ford then took Poore to the bank and the Sheriff's Department (App. 88).

Jerry Brown testified that Terry Ford called him and asked him to come over and look at the home to see what was, and was not, done (App. 145). Brown testified that Petitioner called Ford after he arrived at Poore's home, and that he briefly spoke to Petitioner and asked about the work on the home and for receipts (App. 145). Brown alleges Petitioner did not indicate what work he had done and hung up when Ford again asked for receipts (App. 145-46, 147-48). Brown inspected the property and testified that the only part of the house he noticed had new paint was a two by six foot spot next to the front door. He testified that no trim, windows, or doors were painted, only one side of a column was painted, and that it appeared no gutters were installed (App. 146).

Ford's granddaughter Elizabeth Eudy testified that she spent regular time at Poore's house, including visits numerous times during the week to help him with his computer, internet, and eating

lunch with him regularly (App. 101). She stated Poore's home looked the same as it did since she was little (App. 102). Further, Poore's neighbor Dennis Larson testified that he began looking after Poore two days a week in December of 2012 at Ford's request (App. 108). Larson testified that when he visited Poore's home in March of 2013, after the Petitioner claimed to have completed all improvements, it appeared that the exterior of the home was dirty and had not been repainted for seven or eight years (App. 111).

Before the second day of trial, Petitioner's counsel moved for directed verdict based on Rule 804- declarant unavailability as Poore was not present and did not testify due to his cognitive incapacity (App. 178-79). The Court denied the motion as the rule concerned hearsay statements and the State had not attempted to enter in a statement made by Poore into evidence. The Court further denied trial counsel's second motion based on the Confrontation Clause, and third motion based on a violation of the Brady Rule and Rule 5 (App. 182).

Petitioner elected to testify and indicated he first met Raymond Poore in Powdersville in 2008, and had a conversation with Poore about work he was doing on a project at the time. Poore then told the Petitioner in unspecified terms that when Petitioner is on his side of town Poore had work for the Petitioner to do (App. 192). Petitioner then detailed the conversations had with the Poore in 2012 and 2013, where they went around Poore's house where he showed the Petitioner everything he wanted painted, and the Petitioner replied that he would have to pressure clean the woodwork as a first step (App. 194). Petitioner testified that he told Poore he would need payment as he went along completing projects (App. 215). The State presented the checks to Petitioner and Petitioner recognized and extensively described the work completed in exchange for each payment, stating that "[t]he work was completed when [Poore] gave me the last check around February 23rd." (App. 203). Petitioner denied speaking with Ford or Brown, denied anyone asked

for receipts, and testified that he never saw anyone at Poore's home while performing work between December 2012 and February of 2013 (App. 227). At the trial's conclusion and after receiving the guilty verdict on the charge of obtaining goods under false pretenses, trial counsel renewed her motions before the court and added a motion for a new trial as she didn't believe the testimony presented by the State satisfied the required element of a false representation for the conviction (App. 294). The Court denied this motion.

During Petitioner's post-conviction relief hearing, PCR counsel indicated that trial counsel erred in not explaining the correct legal framework to the Court, stating that Petitioner's agreement to do the work not performed essentially constituted a promise to do something in the future consistent with *State v. McCutcheon*, 284 S.C. 524 (1985) (App. 401). Assistant Attorney General Lillian Meadows clarified that Petitioner testified all work had been completed by the time he received the last check, and that *McCutcheon* involved post-dated checks for items to be delivered on a specific date, which is not comparable to the circumstances of Petitioner's case (App. 403). During cross, Petitioner affirmed that he testified that when he received the final check on February 23, 2013, all work was completed. (App. 413). Trial counsel testified that she did not argue for a directed verdict based on the "future promise" holding of *McCutcheon* because "the monies were received on an ongoing basis as the work was being completed according to my client." (App. 415). Trial counsel testified that she did not see the need to argue *McCutcheon* because Petitioner told her he would "get the check, do the work, get the check, do the work." (App. 415). Trial counsel stated that when the judge denied her renewed motions based on the State failing to establish an element of false pretenses, it was because the judge found Petitioner agreed to do work that was not performed, constituting the false representations (App. 416).

Trial counsel reaffirmed that the overall trial strategy was that Petitioner performed all the work for money received; and that she relied on his statements of what happened (App. 416, 421). Trial counsel acknowledged that she cross-examined the State's witnesses, called Petitioner as a witness, and made motions when appropriate (App. 417-18). Trial counsel confirmed that Petitioner testified about each of the checks and the work that he did, even on the checks that did not contain information on the memo line (App. 419). Trial counsel indicated that Petitioner stated Mr. Poore would verify that the work was done, but that Poore was not subpoenaed for trial because counsel had learned of his dementia diagnosis and determined he would not have been a good witness (App. 420).

PCR counsel then introduced *State v. Holcomb*, 426 S.C. 557 (2019) for consideration of the issue of whether Petitioner's agreement with Mr. Poore was comprised of future promises (App. 422). PCR counsel argued that at the time of the trial there was no evidence presented that there was any false representation, that Petitioner said, "I've done this work, now pay me for it." Rather, PCR counsel argued that the evidence indicated that the relationship was akin to "pay me this and I'll go do this work," consistent with a future promise under *Holcomb* (App. 420). The PCR court disagreed with PCR counsel's interpretation. Attorney Meadows submitted that Petitioner testified all work was completed by the time he got the last check, and disputed the basis for a future promise application in the case (App. 425). The court agreed, and denied Petitioner's petition, finding that the Petitioner failed to establish how trial counsel's performance fell below an objective standard of reasonableness (App. 425).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner asserts the post-conviction relief court erred in denying him relief as to ineffective assistance of counsel. Petitioner claims counsel was ineffective for failing to move for a directed verdict on the charge that a future promise cannot form the basis for conviction for obtaining goods under false pretenses which requires a false representation of a present or past fact. However, the post-conviction relief court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective. Accordingly, this Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668.

First, Petitioner must prove counsel’s performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly

presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel’s deficient performance must have prejudiced 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.* 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 a rigid rule of representation. Rather, *Strickland* requires the 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.

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687. *Harrington*, 562 U.S. 86.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules

of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.* at 689; *see also Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is “reasonably likely” the result would have been different. *Id.* at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; *Harrington*, 562 U.S. 86. “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96

(explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

I. Did the post-conviction relief court properly find Petitioner failed to establish any constitutional ineffectiveness of counsel when counsel did not motion for a directed verdict for the charge of obtaining goods under false pretenses on the basis that a promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses where there was no basis to argue the indictment was based on a future promise and counsel properly moved for directed verdict on the applicable grounds based on the facts and circumstances of the case.

Petitioner claims trial counsel was constitutionally ineffective for failing to argue in her motions for directed verdict that “[a] promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.” Petitioner cites to *State v. McCutcheon*, 284 S.C. 524 (1985), and *State v. Dickinson*, 339 S.C. 194 (2000). Petitioner argues that the State failed to prove the essential element of his charged offense, specifically, that the State failed to provide direct evidence that Petitioner made a fraudulent misrepresentation of an existing or past fact to receive the checks from the victim, and as such Petitioner was entitled to a directed verdict. Petitioner further alleges that trial counsel failed to argue the correct applicable law in her motions for directed verdict, despite the continued corroboration from Petitioner and trial counsel that the theory of law which Petitioner now attempts to raise is contradictory to the facts and strategy that was presented at trial. Namely, Petitioner posited that the he was paid for work that he finished on an ongoing basis per project completion.

After hearing Petitioner’s testimony at the evidentiary hearing, in conjunction with counsel’s testimony and a thorough review of the record, the post-conviction relief court properly rejected Petitioner’s claims of constitutional ineffectiveness. Instead, the court found counsel’s performance was reasonable because Petitioner failed to establish he would have been granted a

directed verdict if counsel had argued he was entitled to a direct verdict on this ground. Particularly where the State's theory of the case and the evidence presented was not premised on any future promises, but rather, that Petitioner asserted he had indeed done the work that was not done. Petitioner now alleges the post-conviction relief court improperly denied his claim of ineffective assistance of counsel on the belief that Trial Counsel should have moved for a directed verdict on *McCutcheon* because arguing the issue at the directed verdict stage would not have precluded counsel from maintaining her original trial strategy that Petitioner did complete the work in closing arguments.

The function of the PCR 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." *Strickland*, 466 U.S. at 690. Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003).

Petitioner's argument for relief relies on an incorrect interpretation and application of *McCutcheon* to his own scenario. In *McCutcheon*, this Court found that a post-dated check to purchase gasoline constituted a future promise, which cannot constitute the basis of a prosecution for obtaining goods under false pretenses. 284 S.C. at 525. McCutcheon was engaged in the retail sale of gasoline, and while owing on a previous delivery, provided post-dated check for a future purchase. *Id.* While no explicit contract existed, this Court found that extrinsic evidence of conversations between the parties; including languages such as "will be delivered at a later date"

were framed in the future tense. As such, the alleged response by McCutcheon “can be construed only as a representation as to what he would be able to handle ‘at that date.’” *Id.* at 526. Ultimately, the language constituted a promise to act in the future and did not fraudulently represent a present or past fact. *Id.*

Thus, the nature and timing of the representation is central to determining whether goods were obtained under false pretenses. In *State v. Holcomb*, the Court of Appeals held that when Holcomb entered into a contract to replace the roof on a client’s home and make incidental repairs, his actions constituted a future promise. 426 S.C. at 565. Though Holcomb never installed the new roof, the court noted that when the representation was made, Holcomb *could* have used the client’s payment to replace the roof as promised. *Id.* (Emphasis added). As such, the State did not provide sufficient evidence to show the statement was false when made, because the agreement could have been fulfilled at a future date. *Id.*

This case is distinguishable from both *McCutcheon* and *Holcomb*. In both cases, the defendants received goods under the expectation of a future performance. Therefore, the agreements they entered into did not embody a misrepresentation of a present or past fact. The court in *Holcomb* found that the defendant could have used the money for the work when he made the representation, and given amount of time for performance, the representation could not be irrefutably established as false. *Id.* Contrary to the holding in *Holcomb*, here, the agreement that existed between Petitioner and Mr. Poore was that Petitioner would receive payments for work when he completed it, not for work he promised to complete. No future promise exists in this case, Petitioner testified that at the time he received his last check, all the work was purportedly completed (App. 203). Therefore, when Petitioner told Mr. Poore he completed work, but did not, and received payment for the incomplete work, he made a fraudulent representation of an existing

or past fact. As such, Petitioner's argument that moving for a directed verdict on the basis of *McCutcheon* to allege that a future promise was made is an incorrect interpretation and application of the law.

Petitioner further contends that the State failed to show that Petitioner made a false pretense and alleged that the State's evidence of thirteen checks with different work written on the memo line did not constitute substantial circumstantial evidence of an agreement. When ruling on a criminal defendant's motion for directed verdict, a trial court is concerned with the existence of evidence, not its weight. *State v. Wiggins*, 330 S.C. 538, 545 (1998). A case should be submitted to the jury if there is any substantial evidence, either direct or circumstantial, which tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. *State v. Williams*, 303 S.C. 274, 276 (1991). "Circumstantial evidence, . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567 (2013).

During trial, Petitioner provided testimony as to the purpose for each check, detailed the specific work completed for each check, and admitted he did the work and victim paid him as part of an agreement. Petitioner testified that pressure cleaning was the first job completed and that, "[w]e had figured all the price then, you know." (App. 195). Petitioner repeatedly testified that Poore requested improvement work, and that Petitioner completed the work at Poore's request (App. 195-96; 198). On cross-examination the State inquired about a specific project completed, which the Petitioner denied performing because "we didn't contract on the box." (App. 209). Petitioner testified that at the start of his work on Poore's house, he and Poore sat down and discussed the various work, and came to an initial agreement of \$5,500 starting. (App. 215).

Shortly after Petitioner indicated, “I told [Poore] I was going to have to have payment as we work along. . . [a]nd he agreed with that.” (App. 215). As such, the record includes sufficient evidence and testimony to support and corroborate the existence of an agreement between Petitioner and Poore, presented by the Petitioner himself.

Notably, in denying trial counsel’s motion, the Court agreed that there was “substantial circumstantial evidence based on the testimony in the record and the work that was done and the timing of it, that an agreement existed between defendant and the victim.” (App. 186-87). After the jury presented a guilty verdict, trial counsel renewed her previous motions before the court and attempted to move for a new trial based off her belief that the testimony of the State’s witnesses established no false representation as a required element for the charge. The Court disagreed, denying the motion by citing evidence that the Petitioner agreed to do work he did not perform, was compensated for that work, with those agreements constituting the representations. (App. 294). Petitioner ultimately admitted to cashing the checks received for *completed* work, not for accepting payment for future work.

In addition to a complete lack of prejudice, the post-conviction relief court also properly denied relief because trial counsel’s decision not to argue for a directed verdict through *McCutcheon* was valid. “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and ‘a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’” *Buckson v. State*, 423 S.C. 313, 321 (2018) (quoting *Strickland*, 466 U.S. at 689). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* Trial counsel testified she made a decision against presenting a *McCutcheon*

argument because “[m]y client said he’d performed all the work for the monies received . . . so I didn’t see the need to argue that” (App. 415, 417).

Petitioner cannot rebut the presumption that trial counsel rendered adequate assistance and trial counsel cannot be deemed ineffective for choosing not to argue a legal theory inapplicable and inconsistent with the theory of the case. The post-conviction relief court properly denied relief, as Petitioner failed to establish any constitutional ineffectiveness of counsel. Based upon this testimony and a review of the record as required, it is apparent that trial counsel’s decision not to move for a directed verdict on the application of *McCutcheon* was not deficient performance which prejudiced Petitioner. The post-conviction relief court properly dismissed Petitioner’s argument that the *McCutcheon* analysis for false pretenses was applicable in Petitioner’s case, disagreeing with Petitioner’s interpretation and finding trial counsel did not err or fall below an objective standard of reasonableness (App. 424-25).

Ultimately, Petitioner has failed to show that counsel was ineffective for failing to move for a directed verdict on the basis that a future promise cannot constitute a prosecution for false pretenses. Additionally, because Petitioner’s interpretation of *McCutcheon* is not applicable to the facts of this case, Petitioner cannot establish a substantial likelihood that the result of the proceeding would have been different had trial counsel argued that point. Accordingly, the post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

As Petitioner failed to meet his burden of establishing constitutional ineffectiveness as to the allegation challenged on appeal, this Court should deny certiorari.

Respectfully submitted,

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