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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Union County
Court of Common Pleas

The Honorable L. Casey Manning, Post-Conviction Relief Judge
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-000496

KEITH TATE, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to communicate a favorable six year plea offer to Petitioner before the offer was withdrawn, and where counsel's deficient performance prejudiced Petitioner since (1) he was ultimately sentenced to sixteen years and (2) there is a reasonable probability Petitioner would have accepted the offer had he known about the offer before it was withdrawn, the state would have honored the offer, and the trial judge would have accepted the terms.

Respondent's Counterstatement of Issue Presented

The post-conviction relief court correctly found counsel was not constitutionally ineffective where Petitioner has failed to show counsel was deficient for allegedly failing to convey a six-year plea offer, and even if his counsel failed to convey a six-year plea offer, Petitioner was not prejudiced by counsel's failure because Petitioner has not proven he would have accepted the terms of the plea offer before it expired, since accepting the offer would have required Petitioner to admit guilt and Petitioner has always maintained his innocence.

STATEMENT OF THE CASE

On February 4, 2011, an Abbeville County Grand Jury indicted Petitioner for nine counts of criminal sexual conduct (CSC) with a minor in the second degree (2011-GS-01-0045, -46, -47, -49, -50, -51, -52, -53, -54). App. 765-782. Assistant Solicitors C. Yates Brown and Lance Sheek represented the state. Applicant was initially represented by Earnest Charles Grose, Jr., Esquire, while Mr. Grose worked as a Circuit Defender for the Eighth Judicial Circuit. However, Mr. Grose left this position on August 16, 2012, to go into private practice. After Mr. Grose left his position, Applicant's case was then handled by Ms. Jana Nelson, Esquire, with assistance from Mr. Shane Goranson, Esquire. App. p. 687 l. 4- p. 688 l. 2, p. 705 l. 4-6, p. 711 l. 8-20.[1]

On May 27-29, 2014, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker. App. 1. On May 29, 2014, the jury convicted Petitioner of one count of CSC with a minor in the second-degree (2011-GS-01-0046) and acquitted Petitioner on the remaining eight counts. Judge Hocker sentenced Petitioner to sixteen years in prison.

After the trial, Petitioner filed a timely motion for a new trial. A hearing on the motion commenced on July 15, 2014. Judge Hocker denied the motion by a written order filed on July 23, 2014.

Petitioner filed a timely Notice of Appeal, and the appeal was perfected by Appellate Defender Susan B. Hackett of the South Carolina Commission of Indigent Defense – Appellate Defense Division. On appeal, Petitioner raised the following issues:

1. Did the trial judge's failure to declare a mistrial based on the alleged victim's multiple emotional outbursts that disrupted the trial improperly influence the jury to decide the case on emotion instead of the evidence presented violate Petitioner's state and federal constitutional rights to a fair and impartial jury trial?

[1] Petitioner's issue on appeal is focused only on the conduct of Mr. Grose.

2. Did the trial judge's failure to require the state to open in full during closing argument and reply only to the defense's closing argument violate Petitioner's state and federal constitutional rights to a fair trial and due process of law?
3. Did the trial judge's refusal to permit Petitioner to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Petitioner violate Petitioner's state and federal constitutional rights to present a defense and confront his accuser?

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence on October 19, 2016. State v. Tate, Op. No. 2016-UP-436 (S.C. Ct. App. filed October 19, 2016). Petitioner petitioned for rehearing on November 3, 2016. On December 14, 2016, the Court of Appeals denied the petition for rehearing and attached a substituted opinion once again affirming Petitioner's conviction and sentence. Petitioner filed a second petition for rehearing on December 29, 2016. Petitioner's second request for rehearing was denied on January 10, 2017. Applicant timely submitted a Petition for Writ of Certiorari to the South Carolina Supreme Court, arguing the same issues, which was subsequently denied. The remittitur issued on October 25, 2017.

On February 28, 2018, Petitioner filed an application for post-conviction relief (PCR). Petitioner raised the following issues:

1. "Trial counsel failed to convey a plea offer."
2. "Trial counsel failed to object to the testimony of states witness."
3. "Trial judge erred in his ruling of chain of custody."

Respondent filed its return on June 11, 2018, requesting an evidentiary hearing. Petitioner filed an amended post-conviction relief application on September 27, 2019, wherein Petitioner added the following allegations:

1. "Ineffective assistance of counsel by Charles Grose- failure to convey a plea offer. Once plea offer was discovered by Ms. Nelson, the solicitor refused to honor it."

2. "Ineffective assistance of counsel by Janna Nelson and Shane Gorason- Failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt."

On October 14, 2019, an evidentiary hearing convened at the Greenwood County Courthouse before the Honorable L. Casey Manning. On January 31, 2020, Judge Manning issues an Order of Dismissal denying relief and dismissing Petitioner's PCR application. On March 16, 2020, Petitioner timely filed a notice of appeal, and on November 9, 2020, Petitioner filed his petition for writ of certiorari.

STATEMENT OF THE FACTS

In 2009 and 2010, Petitioner and Minor's mother lived in a three bedroom apartment in Calhoun Falls. Minor and her two brothers, one of whom was Petitioner's son, lived in the apartment as well. App. p. 72, l. 1- App. p. 74, l. 16; App. p. 132, l. 17- App. p. 133, l. 2. Petitioner and Minor's Mother dated for three or four years and lived together for the entirety of their relationship. App. p. 74, l. 9-11. Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. To treat her various illnesses, Mother took around thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. App. p. 74, l. 17- p. 75, l. 10. As a result of being heavily medicated, Mother slept most of the day. Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. App. p. 75, l. 13- p. 76, l. 2. Due to Mother's poor health, Petitioner primarily cared for the children. App. p. 135, l. 10-14.

Rebecca Holland worked at Calhoun Falls Charter School, where Minor was a student. Holland was a substitute teacher, bus supervisor, track coach, band director, and bus driver. App. p. 232, l. 13-p. 233, l. 4. During the 2009 season and part of the 2010 season Minor was in the color guard in the Calhoun Falls Charter School marching band. App. p. 233, l. 9-18. Holland took Minor home from school every day after practice. App. p. 236, l. 10-13. Holland testified that Minor would cry on the way home. Minor would ask not to go home. Holland also claimed that she would see Petitioner waiting for Minor and he would grab Minor by the arm when she arrived home. App. p. 234, l. 23- App. p. 235, l. 20; App. p. 236, l. 14-16.

On August 23, 2010, Minor told Holland, that Petitioner had sexually assaulted her ten times. App. p. 170, l. 15-23; App. p. 226, l. 13-17; App. p. 232, l. 13-24; App. p. 233, l. 19-23. "Because it was so late in the afternoon, there were no people at the school" for Holland to make a formal report to. Therefore, she decided she would address the matter the following day at school. App. p. 233, l. 25- App. p. 234, l. 5; App. p. 236, l. 17-20. Subsequently on August 24, 2010, Holland informed Lori Lindler, the school's guidance counselor and the assistant principal, about the accusations. App. p. 170, l. 24- App. p. 171, l. 7; App. p. 235, l. 21-23; App. p. 247, l. 6-16.

Sometime earlier in 2010, Minor also disclosed the abuse to T.C., her boyfriend at the time. App. p. 112, l. 18-23. Minor detailed Petitioner's abuse to T.C. around five or six months after the abuse began. App. p. 115, l. 3-9. Minor did not immediately disclose the abuse because she did not know who to tell. App. p. 137, l. 12-14. Minor did not think anyone would believe her, as it would be her word against Petitioner's. App. p. 138, l. 5-7. Petitioner also told Minor that if she told her mother, it would cause her mother to have a seizure. App. p. 350, l. 13-17. Minor did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Minor told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. App. p. 121, l. 4-11.

On August 25, 2010, Lori Lindler spoke with Minor regarding her allegations of sexual abuse. App. p. 248, l. 1-8. Lindler testified that Minor came to speak with her after confiding in Rebecca Holland, who subsequently referred the matter to her. App. p. 247, l. 17-21. In her conversation with Lindler, Minor recounted Petitioner's abuse. App. p. 248, l. 1-8. Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. App. p. 248, l. 13-18. During their meeting, Minor and Lindler used a school calendar to

identify the ten dates when the sexual assaults occurred as closely as possible.[2] The dates of the nine assaults that occurred in Abbeville County were August 26, 2009; October 31, 2009; December 14, 2009; February 6, 2010; February 13, 2010; March 3, 2010; March 14, 2010; March 15, 2010; and March 18, 2010. Minor also indicated Petitioner sexually assaulted Minor on a tenth occasion in Greenville County on December 26, 2009, at the home of Minor's aunt. Tr. p. 169; App. p. 141, l. 18- App. p. 142, l. 10; App. p. 142, l. 18- App. p. 143, l. 16; App. p. 164, l. 21-25; App. p. 227, l. 16- App. p. 228, l. 3; App. p. 248, l. 7- App. p. 249, l. 1. Following her conversation with Minor, Lindler contacted the Calhoun Falls Police Department. App. p. 171, l. 8-10; App. p. 249, l. 23-24. The officers subsequently obtained a search warrant for the residence and an arrest warrant for Petitioner. App. p. 265, l. 23-25. The day after Minor talked to the school officials and police officers, her mother took her to the hospital. App. p. 173, l. 21-24.

On September 28, 2010, Jessica Bell interviewed Minor at The Child's Place. App. p. 328, l. 21-25. The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. App. p. 329, l. 5-14. The case was referred to The Child's Place by Monique Bell of the Calhoun Falls Police Department. App. p. 329, l. 1-4. Jessica Bell testified that she did not ask Minor about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. App. p. 332, l. 4-12. Following her interview with Minor, Bell prepared a written report. App. p. 329, l. 19-p. 330, l. 2.

Several weeks after the forensic interview, on November 23, 2010, Dr. Lyle Pritchard performed a forensic medical examination on Minor at The Child's Place. App. p. 291, l. 9-15. Dr.

[2] Lindler and Minor used the school calendar the aid them in selecting dates because Minor could remember when certain assaults occurred based on what school events were happening at the time. App. p. 248, l. 21- App. p. 249, l. 1.

Pritchard is part of the South Carolina Child Abuse Medical Response System. App. p. 290, l. 1-5. Dr. Pritchard testified that during his examination of Minor, he noticed a transection of Minor's hymen. App. p. 292, l. 24- p. 293, l. 6. While at the Child's Place for her physical examination, Minor told a nurse that she never had sexual contact with anyone other than Petitioner. App. p. 179, l. 14-16.

At trial, Minor recounted the extensive abuse she suffered at the hands of Petitioner. Minor was sixteen years old at the time of trial. App. p. 130, l. 22-23. In August of 2009, when the sexual assaults began, Minor was twelve years old. App. p. 132, l. 8-9. Minor testified that Petitioner penetrated her vagina with his penis. App. p. 141, l. 2-3. Minor testified the sexual assaults would happen after Minor's mother took her medicine and went to sleep. App. 189, l. 25- p. 190, l. 5. During all ten of the sexual assaults, Petitioner penetrated Minor's vagina with his penis. App. p. 142, l. 14-17. Minor also recalled Petitioner penetrating her anus. App. p. 151, l. 19-21. Minor testified that on the last occasion, Petitioner put his penis in her mouth. App. p. 151, l. 13-14. Minor testified that she bled the first time Petitioner penetrated her vagina and on the occasion when he penetrated her anus. Minor bled onto a sheet, which Petitioner subsequently took away. App. p. 151, l. 22- p. 152, l. 9. Minor claimed the Petitioner would not stop the abuse even if she were bleeding. She further claimed "that blood was on the sheets, it was coming out quick, but he wouldn't stop." App. p. 120, l. 17- App. p. 121, l. 3.

Minor testified the first assault took place at their home in August of 2009. App. p. 145, l. 17-20. The assault took place on the couch in the living room of the home while Minor's mother and siblings were home. App. p. 145, l. 21- p. 146, l. 6. No one else was in the room at the time of the assault. App. p. 149, l. 17-18. Minor testified Petitioner would make her brothers go to bed before the assaults would occur. App. 181, l. 4-5. Petitioner told Minor he wanted to see what size

bra and panties she wore. Petitioner then began kissing her neck and rubbing her bottom. Petitioner tried to take Minor's shirt off and told her "he was helping her for her bra." App. p. 146, l. 10- p. 147, l. 11. Petitioner eventually took Minor's clothes off and lay on top of her, telling her "don't act like you don't want it." App. p. 150, l. 1-4. Petitioner then penetrated her with his penis. App. p. 150, l. 5-8.

According to T.C., Minor told T.C. that her brother walked in during the assault. When Minor told her brother to get her mother, Petitioner told him no, whipped the brother, and slapped Minor. Minor "passed out and woke up in a tub full of bloody water." App. p. 117, l. 4- App. p. 118, l. 16.[3] Minor testified that after the first assault, she was afraid to go home from school. App. p. 157, l. 3-4. Following the first incident, Minor began writing poetry about her feelings. App. p. 157, l. 9-20. Following the first incident, Minor's journal read:

> So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - - would she still love my [sic] for me or hate me for something that wasn't my fault. Will she kick me out because she didn't believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

App. p. 162, l. 15-24.

Petitioner's second sexual assault of Minor occurred on October 31, 2009. Minor recalled the date because there was a school football game on October 30th. App. p. 189, l. 9-24. Minor reported to Jessica Bell that on this particular incident, she screamed and Petitioner hit her in the face, busting her lip open. App. p. 190, l. 21- p. 191, l. 14. Minor's mother also recalled noticing Minor had a busted lip at some point in time. When Mother asked why Minor's lip was busted,

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[3] Minor denied that her brother ever walked in on one of the alleged sexual assaults. App. p. 215, l. 15-19. However, Minor agreed that she passed out and woke up in a tub full of bloody water. App. p. 215, l. 20-22; App. p. 216, l. 12-20.

she was told that Minor injured herself while playing. App. p. 80, l. 22- p. 81, l. 10. After the assault on October 31st, Minor woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. App. p. 194, l. 14-21.

During Petitioner's final assault of Minor, Petitioner put her on the couch and put his penis in her mouth. App. p. 208, l. 22-25. Minor testified she bit Petitioner's penis and he began screaming. Minor then ran down the hallway and barricaded her bedroom door with her dresser. App. p. 209, l. 1-14. Minor also told T.C. about this incident, disclosing to him that one night when she was asleep, Petitioner put his penis in her mouth. App. p. 120, l. 17-20; App. 209, l. 17-22. Minor told T.C. that Petitioner got angry with her and grounded her. App. p. 120. Eventually, Minor began sleeping with her mother to get away from Petitioner. Minor stated the assaults stopped once she started sleeping with her mother App. 190, l. 9-20.

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 give great deference 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 179, 810 S.E.2d at 839-40 (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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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).

ARGUMENT

The post-conviction relief court correctly found counsel was not constitutionally ineffective where Petitioner has failed to show counsel was deficient for allegedly failing to convey a six-year plea offer, and even if his counsel failed to convey a six-year plea offer, Petitioner was not prejudiced by counsel's failure because Petitioner has not proven he would have accepted the terms of the plea offer before it expired, since accepting the offer would have required Petitioner to admit guilt and Petitioner has always maintained his innocence.

Petitioner contends the PCR court erred in finding Petitioner's counsel was not constitutionally ineffective for failing to communicate a favorable six-year plea offer to Petitioner before the offer expired. Petitioner claims he would have accepted the plea offer had Grose communicated the offer to him. However, the post-conviction relief court correctly found Petitioner failed to prove Grose did not convey the offer, and even if he did not, Petitioner was not prejudiced because Petitioner did not prove he would have admitted guilt as required to accept the six-year offer.

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 post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove "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." Id., 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. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

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.

The United States Supreme Court, in Missouri v. Frye, stated defense counsel have responsibilities in the plea bargain process which must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. 566 U.S. 134, 145 (2012). "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." Id.

Petitioner failed to meet his burden of proving Grose failed to inform Petitioner of the six-year plea offer and was therefore constitutionally ineffective. At the evidentiary hearing, Petitioner stated the first time he heard about the six year offer was from Nelson. App. p. 698, l. 1-8. However, Grose testified he had no recollection whether he did or did not tell Petitioner about the six-year offer. App. p. 690, l. 20- App. p. 691, l. 7. Although Grose stated it concerned him that there was no record in the file showing the offer was communicated to Petitioner, Grose testified it was his usual practice to communicate plea offers to his clients, and he could not confirm or deny whether or not the plea offer had been communicated to Petitioner. App. p. 694, l. 20- App. p. 695, l. 10.

Nelson represented Petitioner after Grose left the office and noticed the original six-year offer in the file after she took over the case. Nelson testified during her meetings with Petitioner he did not indicate to Nelson that he had been given the initial six year plea offer. App. p. 712, l. 9-12; Supp. App. p. 1. Nelson's emails to Sheek, the prosecutor, at the time did not mentioned that Applicant had not been told of the initial plea offer prior to Nelson's attempt to resurrect it. Additionally, Sheek testified he could not recall whether he was told the original six-year plea

offer was not communicated to Petitioner, but if he had known, it might have made a difference in his decision as to whether to revive it. App. p. 736, l. 7-12. Sheek testified he did not consider Nelson's email as an acceptance of the original six year offer, but instead he construed Nelson's email as a counteroffer. Sheek testified Nelson was asking for the plea to be an Alford plea, which was different from the original six year offer. Additionally, Sheek testified Nelson indicated she had not spoken with Petitioner and confirmed that he would accept a six year Alford plea, instead Nelson was simply asking if it was still an option. App. p. 729, l. 24- p. 730, l. 8. Sheek further testified, at the time, he believed Nelson was merely attempting to resurrect a plea offer which Sheek believed had been conveyed to Petitioner prior to their email conversation. App. p. 739, l. 12-20.

Petitioner, Grose, Nelson, and Sheek all testified at Petitioner's evidentiary hearing. At this hearing, Petitioner testified he would have accepted the initial six-year plea offer if it was conveyed to him. However, the PCR court expressly stated, after listening to the testimony and observing the witnesses, it found Grose, Nelson, and Sheek credible, and the testimony of Applicant not credible. App. p. 762. On appeal, the South Carolina Supreme Court gives great deference to a PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (Citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)); Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) ("[W]e defer to the PCR court's credibility findings as to witnesses who testified before the PCR court..."); Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."); Foye v. State, 335 S.C. 586, 589, 518 S.E. 265, 267 (1999) ("Where matters of credibility are involved, this Court gives great deference to the judge's findings, because this Court lacks the opportunity to directly observe the witnesses.").

During the evidentiary hearing, the only evidence Petitioner presented that the offer was in fact not conveyed to him was his own self-serving testimony, which the PCR court determined was not credible. The remaining testimony from Grose, Nelson, and Sheek was equivocal on the issue of whether Petitioner knew about the offer prior to Nelson's involvement. It is Petitioner's burden to prove his allegations by a preponderance of the evidence, and based on the record and the testimony from the evidentiary hearing, Petitioner failed to prove the plea offer was not communicated to him before it expired or was withdrawn by the State. Therefore, Petitioner has failed to meet his burden of proving Grose was deficient, and the PCR court correctly denied relief.

However, regardless of whether the offer was properly communicated, Petitioner has failed to prove he was prejudiced by Grose's actions. Petitioner asserts he was prejudiced by Counsel's failure to communicate the plea offer because, according to Petitioner, he would have accepted the offer if he had known about it. To the contrary, the PCR court properly determined Petitioner failed to meet his requisite burden of proof as to prejudice because he did not establish he would have accepted the original offer.

The Supreme Court of the United States has previously considered the test for ineffective assistance of counsel in a similar situation, where either a plea offer was not conveyed at all, or it was conveyed but counsel was deficient in advising the defendant about whether to accept the plea offer. In both instances, the ultimate outcome of the ineffectiveness claim rests on whether the applicant can prove he would have accepted the offer and the favorable plea actually would have been entered. In Missouri v. Frye, the Supreme Court of the United States stated, "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of

counsel." In addition to Petitioner being required to show he would have accepted plea offer, Petitioner "must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise discretion under state law." The Supreme Court in Frye further stated, "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal proceeding would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Frye, 566 U.S. at 147.

This Court held in Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), "[b]ecause presumed prejudice is reserved to very limited situations... a defendant must show actual prejudice" when alleging plea counsel was ineffective 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) (quoting Frye, 566 U.S. at 147); 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"). An applicant must establish not just that a favorable plea offer was not communicated, but also that "the plea would have been entered. . . ." Id.

In this case, the PCR court found Petitioner failed to prove he would have accepted the plea offer had he been presented with the offer before it was withdrawn. Despite his self-serving testimony to the contrary, the contemporary evidence in the form of emails between Nelson and Sheek show Petitioner staunchly maintained his innocence and was unwilling to admit guilt, which he would have had to do in order to accept the original six-year, non-Alford plea. Supp. App. p. 1, p. 5. The only support for Petitioner's assertion that he would have accepted the six year plea offer was a self-serving statement made by Petitioner at his PCR hearing, which the PCR court specifically found not to be credible. App. p. 702, l. 15-21. Specifically, in the Order of Dismissal denying Petitioner's application for post-conviction relief, the court stated:

> "This Court finds the testimony of Grose, Nelson, and Sheek very credible as to this allegation and Applicant's testimony not credible. This Court finds Applicant has failed to meet his burden to show he would have accepted the original cap of six year offer from Bolen as it was not an Alford plea and the credible testimony of Nelson and Sheek show Applicant was only interested in an Alford plea as he was adamant about maintaining his innocence."

App. p. 760.

However, the record reflects Petitioner was not willing to accept any offer requiring him to admit guilt. At the evidentiary hearing, although Petitioner testified he would have accepted the six-year offer, he also conceded he wanted an Alford[4] plea because he did not want to admit guilt. App. p. 702, l. 10-13. Similarly, both Nelson and Sheek testified to Petitioner's unwillingness to admit guilt and his consistent pursuit of an Alford plea instead. The six-year plea offered by Solicitor Bolan was not an Alford plea. App. p. 689, l. 19-20.

Petitioner told his counsel Nelson he "did not do these things," and she repeatedly raised the issue of a potential Alford plea to the solicitor because, "[Petitioner's] position was, was pretty

[4] Alford v. North Carolina, 400 U.S. 25 (1970).

adamant that he was not guilty of any of these charges." Additionally, when Nelson reached out to Sheek to ask if the six-year plea was available, she stated that it would have to be an Alford plea. App. p. 714, l. 3-20; App. p. 721, l. 2-10; App. p. 717, l. 3-6; Supp. App. p. 1. Nelson testified her discussion with Sheek of the original offer of a six-year cap was not an attempt to accept that offer for Petitioner because "...one of the things I said was I can't swear that Mr. Tate would take that [offer.]" App. p. 717, l. 11-18. At the evidentiary hearing, Sheek stated he was not advised that Petitioner wanted to accept any offer for a plea deal. Sheek stated, he believed through his communications with Nelson, that Petitioner would only accept an Alford plea. Nelson specifically told Sheek she did not believe her client could stand up and say he was guilty, and he consistently maintained to her throughout her representation that he was not guilty.[5] App. p. 732, l. 2-14.

Based on Nelson and Sheek's credible testimony regarding Petitioner's unwillingness to admit guilt, the PCR court correctly found Petitioner failed to prove he was willing to admit guilt, and accept the six-year plea offer. Accordingly, Petitioner cannot meet his burden as to prejudice, regardless of whether he was informed of the plea offer.

[5] Petitioner also failed to establish the trial court would not refuse the plea offer. Petitioner argues Nelson's emails to Sheek stated Judge Hocker *would* have accepted the initial six- year plea offered to Petitioner. Pet. for Writ of Cert. p. 16. However, this is speculation, and it is unclear from the record whether Judge Hocker would have accepted a six- year cap for all ten counts, given Judge Hocker ultimately sentenced Petitioner to sixteen years for one count after he was convicted at trial. App. p. 446, l. 20-23.

CONCLUSION

For the foregoing reasons, this Court should deny this certiorari and affirm the decision of the PCR court. Should this Court grant certiorari, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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