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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
The Honorable Diane S. Goodstein, Plea Judge
The Honorable Benjamin H. Culbertson, PCR Judge

Opinion No. 2021-UP-290 (S.C. Ct. App. filed August 4, 2021)
Appellate Case No. 2021-001098

RANDAL WILLIAM BENTON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ISSUE PRESENTED

Petitioner's Issue Presented

Did the Court of Appeals err by concluding Petitioner suffered no prejudice where the plea judge refused to accept Petitioner's guilty plea because he correctly answered he had not reviewed "every bit" of evidence against him where trial counsel admitted he withheld evidence from Petitioner prior to the attempted guilty plea?

Respondent's Issue Presented

The Court of Appeals properly found Petitioner suffered no prejudice where Petitioner failed to satisfy his burden of proving Counsel was ineffective because Petitioner cannot establish a reasonable chance the plea judge would have accepted the plea and where the record suggests the judge did not favor the plea.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. During its January 2011 term, the Dorchester County Grand Jury indicted Petitioner for murder (2010-GS-18-1675). John M. Loy, Esquire ("Counsel"), represented Petitioner. Russell D. Hilton, Esquire, and Barney Giese, Esquire, prosecuted the case. Petitioner originally appeared on January 6, 2012, before the Honorable Diane Schafer Goodstein to enter a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970). There was to be a negotiated sentence of imprisonment for forty years. Judge Goodstein refused to accept Petitioner's plea. Petitioner later proceeded to a jury trial before the Honorable Stephanie P. McDonald. Counsel, as well as Michelle R. Suggs, Esquire, represented Petitioner at trial. The jury found Petitioner guilty as indicted. On February 9, 2012, Judge McDonald sentenced Petitioner life imprisonment without the possibility of parole.

Petitioner filed a timely notice of appeal. Breen R. Stevens, Esquire ("Appellate Counsel"), of the Office of Appellate Defense, perfected the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). In his *Anders* brief, Appellate Counsel argued the trial court erred in admitting a hearsay statement of the decedent. On October 30, 2013, the South Carolina Court of Appeals dismissed Petitioner's appeal and granted Appellate Counsel's motion to be relieved. *State v. Benton*, Op. No. 2013-UP-400 (Ct. App. 2013). The remittitur was issued on November 18, 2013.

On May 23, 2014, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel for failing to effective counsel Applicant with regards to pleading guilty, failing to suppress evidence seized in Alabama, failing to highlight inconsistencies in witness testimony, and failing to argue for the lesser offense of manslaughter.

An evidentiary hearing into the matter was convened on May 18, 2016, before the Honorable Benjamin H. Culbertson. Petitioner was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General J. Clayton Mitchell, III, represented the State. Judge Culbertson denied and dismissed the application with prejudice by an order of dismissal filed September 20, 2017.

Petitioner filed a timely notice of appeal on September 28, 2017. Petitioner then filed a petition for writ of certiorari on June 1, 2018. Respondent filed a return to petitioner for writ of certiorari on October 17, 2018. The case was transferred to the Court of Appeals on October 31, 2018. On March 25, 2020, the Court of Appeals granted the petition and ordered briefing. Following briefing, the Court of Appeals issued an opinion affirming the decision of the PCR court. *Benton v. State*, Op. No. 2021-UP-290 (S.C. Ct. App. August 4, 2021). Petitioner filed a petition for rehearing on August 9, 2021. The Court of Appeals denied the petition on August 31, 2021. Petitioner thereafter submitted its petition for writ of certiorari on October 4, 2021. This return follows.

STATEMENT OF THE FACTS

Petitioner was convicted of murder after shooting his unarmed wife ("Victim") eight times in a restaurant parking lot. App. p. 129, l. 5-15; p. 147, l. 3-9; p. 267, l. 3-6. During the incident, Petitioner continued shooting Victim after his first shot brought her to the ground, paused to threaten the multiple eyewitnesses and order them back inside the restaurant, then proceeded to resume shooting Victim in the back. App. 130, l. 15-19; p. 147, l. 4-p. 148, l. 5; p. 161, l. 2-14; p. 164, l. 9-14; p. 274, l. 9-18; p. 275, l. 12-15; p. 277, l. 20-24.

Petitioner and Victim were married but had been separated for approximately six months when the murder occurred on October 30, 2010. App. 330, l. 1-11. Earlier that day, Petitioner and other family members had helped Victim move belongings into a storage unit as she prepared to move. App. 222, l. 1-20. Later that day, Petitioner returned to a residence of Victim's at which they had previously lived together to find she was not there. Victim's neighbor was standing outside and mentioned Petitioner had "just missed them." App. 218, l. 5-14. Victim's neighbor testified at trial Petitioner remarked, "[s]he is probably with her damn boyfriend," and sped off in his two-tone blue and silver Chevrolet truck. App. 218, l. 12-23. Petitioner, smelling of alcohol, later appeared at the back porch of Victim's condominium where her son was residing and asked if Victim could drive him home. App. 224, l. 6-23. While Petitioner testified he asked Victim for a ride home because he was intoxicated and felt strange after a recent altercation at a bowling alley, Victim's son testified Petitioner asked for a ride home claiming his truck had broken down. App. 225, l. 15-19; p. 351, l. 1-10. Victim agreed to drive Petitioner home but instructed her son to call her cell phone if she did not return in twenty minutes, and to call the police if she did not answer. App. 228, l. 8-25.

An argument ensued during the drive as Petitioner began to angrily question Victim about whether she had been spending time with a male friend with whom Petitioner suspected she was romantically involved. App. 357, l. 13-p. 359, l. 13. Victim eventually pulled over in the restaurant parking lot, where the two were seen arguing in the truck by numerous bystanders including restaurant employees. App. 125, l. 18-21; p. 144, l. 22-p.145, l. 6; p. 164, l. 4-8.

They exited the vehicle and continued arguing while Victim pleaded with Petitioner to leave her alone. App. 127, l. 5-11; p. 146, l. 12-25. Trial testimony indicated there was no physical struggle, only Petitioner aggressively "coming toward" Victim, and Victim acting defensively, at which point Petitioner's baseball cap was knocked off. App. 127, l. 23-p. 128, l. 2; p 154, l. 1-20. The argument persisted, and eventually employees walked outside to ask them to take the argument elsewhere. App. 126, l. 24-p 127, l. 4; p. 146, l. 5-9.

As Victim asked Petitioner to leave her alone, he drew his gun and fatally shot her. App. 129, l. 2-17; p. 147, l. 4-9; p. 164, l. 9-14. Victim fell to the ground after the first shot. App. 129, l. 10-17; p. 161, l. 10-14. Petitioner then threatened the employees standing outside and instructed them to go back inside. App. 130, l. 15-19; p. 147, l. 4-14; p. 164, l. 9-14. Two eyewitnesses testified Petitioner fired three or four shots into Victim before pausing to threaten the girls and then returned to fire more shots into Victim. App. 147, l. 15-p. 148, l. 5; p. 161, l. 3-14; p. 164, l. 11-14. Victim was shot a total of eight times including one shot through her eye and multiple shots in her back. App. 269, l. 22-25; p. 274, l. 9-p. 277, l. 24.

Police officers eventually made contact with Victim's son who feared for his mother's safety and was walking down the road with a baseball bat. App. 229, l. 18-p. 230, l. 5. Victim's son gave law enforcement a description of Petitioner including what Petitioner was wearing, which matched the eyewitness descriptions from the restaurant, at which time officers drove

Victim's son to the restaurant parking lot where his mother had been killed. App. 230, l. 10-p. 231, l. 1. Petitioner was eventually apprehended at a convenience store in Alabama the next day when he called his mother from the clerk's cell phone, and his mother informed the clerk Petitioner was wanted for murder in South Carolina. The clerk then pressed the panic button and law enforcement arrived to arrest Petitioner. App. 567, l. 9-23.

Petitioner's truck, which matched the descriptions given by the witnesses and had a tag listed in NCIC as being driven by a homicide suspect, was seized, and law enforcement found Petitioner's Smith & Wesson Sigma Series 9mm pistol. App. 238, l. 10-12; p. 246, l. 6-10. The South Carolina Law Enforcement Division (SLED0 verified that all four bullets recovered at the crime scene were fired from Petitioner's gun. App. 308, l. 9-18. SLED also found enough matching characteristics to conclude all eight of the cartridges cases recovered at the scene were fired by Petitioner's gun. App. 308, l. 25-p. 309, l. 3. Law enforcement additionally obtained a buccal swab from Petitioner, which matched the DNA on the baseball cap that fell off the shooter's head at the crime scene. App. 294, l. 20-25.

Rejected Guilty Plea

Petitioner originally appeared on January 6, 2012, before the Honorable Diane Schafer Goodstein to enter a guilty plea pursuant to *Alford*[1], with a negotiated sentence of forty years' imprisonment. App. 3, l. 1. At the guilty plea hearing, Counsel told Judge Goodstein he "certainly" believed the State could produce sufficient evidence to convict and establish Petitioner's guilt beyond a reasonable doubt, and he concurred with Petitioner's decision to plead guilty. App. 4, l. 20-p. 5, l. 1.

[1] 400 U.S. 25 (1970).

Judge Goodstein instructed Petitioner to not answer a question that he did not understand and to let her know if he did not understand something she asked. App. 5, l. 15-21. Moreover, Judge Goodstein explained there are many ways to "explain any one thing," and she would be happy to try to explain things in a different way if Petitioner did not understand the question. App. 5, l. 19-24. Petitioner was also told to feel free to take a break and talk with counsel at any point in the proceeding. App. 5, l. 25-p. 6, l. 6.

Judge Goodstein thoroughly explained the concept of an *Alford* plea to Petitioner, and Petitioner affirmed he still wanted to plead guilty under *Alford*. App. 14, l. 3-p. 15, l. 11. Petitioner asserted he wished to waive his constitutional rights in order to plead guilty. App. 18, l. 11-13. The solicitor recited the facts of the case and described the DNA evidence, ballistics evidence, and the testimony which the State later presented at trial. App. 20, l. 9-p. 26, l. 6. Notably, Petitioner testified at trial and claimed to have "blacked out" immediately before the shooting, but he did not challenge any of the facts recited by the solicitor at the plea proceeding except for a minor point about Petitioner having smashed a picture of himself and Victim the night before the murder and the conversation he had with Victim's neighbor. App. 21, l. 7-11; p. 392, l. 16-24.[2]

Nevertheless, when Judge Goodstein asked Petitioner whether those were the facts for which he believed the State could produce sufficient evidence to convict him and establish his guilt beyond a reasonable doubt, Petitioner replied, "I don't know, Your Honor." App. 26, l. 13-17. Judge Goodstein asked again, "And are those the facts for which you believe you would be found guilty?" Petitioner then asserted, "Yes ma'am." App. 26, l. 18-20. The exchange prompted Judge Goodstein to ask why Petitioner did not know if those were the facts which he believed the

[2] Petitioner later testified at trial the picture had been broken for days before the incident. App. 392, l. 23.

State had evidence to support, and inquired whether he had reviewed the evidence the State had available. App. 26, l. 21-25. Petitioner answered he had reviewed the State's evidence with his lawyer. App. 27, l. 1-4. However, when Judge Goodstein asked whether he had been over "every bit" of that evidence, Petitioner answered, "No ma'am, I wouldn't say every bit of it." App. 27, l. 5-7. At that point, Judge Goodstein announced: "I'm not going to take the plea. If he doesn't know the evidence and he can't tell me if he believes that that's the evidence that the State has and he's been over it and he thinks there's evidence he hadn't been over I can't take the plea." App. 27, l. 11-15. Petitioner eventually proceeded to a jury trial the next month in February of 2012 before the Honorable Stephanie P. McDonald. The jury found Petitioner guilty of murder, and Petitioner was sentenced to life imprisonment without the possibility of parole.

RELEVANT PCR TESTIMONY

At the evidentiary hearing convened May 18, 2016, the PCR court heard testimony from Petitioner and Counsel. After observing the witnesses, the PCR court found Counsel's testimony to be credible and persuasive. App. 592. By contrast, the PCR court found Petitioner's testimony and assertions to be not credible. App. 592.

Petitioner

Petitioner testified he met with Counsel "two or three times" prior to his rejected guilty plea and had not reviewed all the discovery prior to his guilty plea. App. 522, l. 21-p. 523, l. 5; p. 525, l. 13-16. According to Petitioner, Counsel did not attempt reschedule the guilty plea before another judge. App. 523, l. 24-p. 524, l. 15. Petitioner voiced his disagreement with what he perceived to be the State's characterization at trial of the broken picture of Petitioner and Victim found in Petitioner's bedroom. As Petitioner explained, "Best I can gather . . . they were trying to establish that I had destroyed a picture of my wife earlier that evening…" App. 535, l. 4-18.

On cross-examination, Petitioner conceded he understood the general evidence against him including the restaurant employees who were going to testify against him, as well as the gun found in his truck which matched the bullets fired at the Victim. App. 551, l. 1-8. Petitioner then conceded it was fair to say he had a general understanding, "maybe just not every little detail." App. 551, l. 9-11. When asked which portion of the evidence he had not reviewed before his abandoned guilty plea, Petitioner testified he was unable to "give a definite amount" or "answer to how much he did not study." App. 550, l. 15-25. At no time did Petitioner articulate or specify any evidence he was not apprised of prior to his abandoned guilty plea.

Counsel

Counsel testified he advised Petitioner to accept the plea deal for a negotiated sentence for forty years. App. 553, l. 18-22. Counsel testified he would have discussed the plea deal in chambers, and he "probably pushed pretty hard with both [the judge] and the State to get it through." App. 554, l. 1-8. Counsel recalled having difficulty reaching a plea agreement and explained the solicitors wanted to try the case, and the judge did not want to accept the plea either. App. 555, l. 14-20. Counsel noted there was no attempt to resurrect the plea deal contained in the transcript. However, Counsel recalled the plea judge did not want to accept the plea, and she was not pleased with it being put forward at all, being an *Alford* plea to murder and a negotiated forty years. App. 554, l. 1-5. Nevertheless, Counsel testified he suspected he tried to rehabilitate the plea deal in chambers, but "the plea judge essentially banged the gavel and said I'm not taking this plea. We're done." App. 554, l. 9-17. While Counsel could not specifically remember if the State held the plea deal open, Counsel testified the State wanted to try the case, so it was unlikely they agreed to keep the offer open. App. 565, l. 16-21.

Regarding Petitioner's claim that he had not seen all the evidence, Counsel testified he suspected Petitioner was referring to the pictures from Victim's autopsy. App. 554, l. 18-22. Counsel explained he told Petitioner they were not something Petitioner would want to see because, although Petitioner killed his wife, Counsel believed Petitioner still very much loved her. App. 554, l. 22-p. 555, l. 1. Counsel testified he did not feel this was enough reason for the guilty plea not to go forward, but it was enough for the judge to say that she would not accept it. App. 555, l. 1-4. Counsel pointed out the judge could easily have asked Petitioner what he had not seen, and Counsel could have showed Petitioner the pictures. App. 555, l. 7-9. Counsel noted Petitioner had previously expressed to Counsel that he did not want to see the photos of his deceased wife. App. 554, l. 23.

Counsel described the substantial evidence against Petitioner to the PCR court and remarked that any credibility Petitioner had would have been destroyed if Petitioner claimed he was not the shooter, as the State was definitely going to be able to prove Petitioner shot Victim. App. 574, l. 11-p. 576, l. 3. As Counsel explained, the plea fell through because the judge did not want to accept the plea before they ever entered the courtroom, the State wanted to try the case, "and when Judge McDonald came to town it was first up for trial." App. 555, l. 16-20.

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 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. 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). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner argues the Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's application claiming his counsel was constitutionally ineffective for allegedly failing to properly apprise Petitioner of all the evidence against him prior to attempting to enter a guilty plea, and thereby causing the judge to reject the guilty plea because Petitioner indicated he had not reviewed all of the evidence against him. However, the PCR court properly held Petitioner failed to demonstrate any ineffectiveness or prejudice on the part of counsel when the plea judge refused to accept Petitioner's *Alford* plea. The Court of Appeals properly affirmed the PCR Court's dismissal. Consequently, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner bears 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.

The Sixth Amendment right to counsel additionally extends to representation of defendants during guilty plea proceedings. A defendant has the right to effective assistance of counsel during the plea bargaining process. *Davie v. State*, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996)); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). A petitioner seeking to demonstrate that counsel did not meet the *Strickland* standard due to the Court's refusal to accept a guilty plea must establish a reasonable probability that the result of the plea process would have been different but for counsel's deficient performance. *Lafler*, 566 U.S. at 163; *Missouri v. Frye*, 566 U.S. 133, 147-48 (2012). Further, a petitioner must show a reasonable likelihood the plea would have been entered without the prosecution cancelling the plea, or the trial court refusing to accept it. *Frye*, 566 U.S. at 147-49.

The Court of Appeals properly found Petitioner suffered no prejudice where Petitioner failed to satisfy his burden of proving Counsel was ineffective because Petitioner cannot establish a reasonable chance the plea judge would have accepted the plea and where the record suggests the judge did not favor the plea.

As an initial matter, Petitioner's continued reliance on *Lafler*, *Frye*, *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), and *Bell v. State*, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014) as applicable to the current case is misguided, and misconstrues the scope of the issue before the Court. *Frye*, *Davie*, and *Bell* discuss factual scenarios in which plea counsel failed to communicate plea offers to defendants. The facts and allegation in the case at bar are distinguishable from those cases as there is no allegation the offer in this case was not communicated. Here, Petitioner alleges counsel was deficient when he failed to inform the plea judge that Counsel "withheld certain evidence" from Petitioner prior to the plea, and that this was the reason the judge refused to accept the guilty plea. However, a criminal defendant does not have an absolute right to under the Constitution to have his guilty plea accepted by the court. *Alford*, 400 U.S. at 38 n. 11.

As defendants do not have an "absolute right to have a guilty plea accepted," the court "may reject a plea in exercise of sound judicial discretion*." Santobello v. New York*, 404 U.S. 257, 262 (1971). Ultimately, it is Petitioner's burden to establish prejudice and show a reasonable probability that, but for trial counsel's alleged deficiency, the trial court would have accepted the plea within its discretion. The Court of Appeals correctly held that Petitioner failed to meet this burden.

According to Petitioner, Counsel was deficient for failing to show the autopsy photographs of Petitioner's wife to Petitioner, or explain to the plea judge that these images were the evidence that Petitioner indicated he had not reviewed. Petitioner alleges that had Counsel

done so, there is a reasonable probability the judge would have accepted Applicant's plea. However, this assertion is unsupported by the record. First, Petitioner never specified at any point what evidence Counsel allegedly did not review with him. In fact, during the guilty plea hearing, Petitioner initially conceded Counsel *had* reviewed the evidence with him. App. 27, l. 1. The Court of Appeals properly affirmed the PCR court's factual finding that Petitioner failed to present any evidence to support or corroborate his allegations, and failed to specify what evidence counsel allegedly failed to review with him. Petitioner was questioned during the hearing as to which portion of the State's evidence he had not reviewed prior to the guilty plea:

> Q. [ ] So in your attempted guilty plea before Judge Goodstein, that was – she did not agree to accept the guilty plea, right?
>
> A. Correct.
>
> Q. And that was because you were not – you had not reviewed all of the State's evidence in the case?
>
> A. Correct.
>
> Q. Which portion of the state's evidence had you not reviewed at that point?
>
> A. **I can't, I can't really give you a definite amount or answer to how much I did nor did not study.**

App. 550-51 (emphasis added).

It is therefore unclear how Petitioner can allege Counsel was ineffective for "withholding" evidence that Petitioner himself could not identify at any point prior to Counsel's testimony at the evidentiary hearing. Moreover, Counsel provided testimony at the hearing that he was not positive what evidence Petitioner claims he had not reviewed, but suspected Petitioner was referring to the autopsy photos of the Victim. App. 554, l. 18-22. Counsel explained that he did not provide those photos to Petitioner because while Petitioner may have killed his wife, he believed Petitioner loved her and the pictures were graphic. App. 554, l. 23-

25. Counsel further recalled that he warned Petitioner about the pictures prior to the plea, and Petitioner agreed he did not want to see them. App. 554, l. 18-p. 555, l. 4. Further, Petitioner's assertion that *this* was the evidence he referred to during the plea hearing is a post hoc fallacy. Petitioner never articulated the evidence Counsel failed to review with him until Counsel testified about the possibility of the photos at the PCR hearing. As such, it is unclear how Petitioner can allege deficiency on behalf of Counsel for not showing him evidence he never previously identified, and when Petitioner knew the photos existed and chose not to view them prior the plea.

Additionally, the Court of Appeals correctly found Petitioner's refusal to agree with the State's recitation of facts, his evasive communication when asked to admit the strong evidence against him, and Counsel's testimony of the plea judge's disfavor of the plea, points away from a reasonable finding that the judge would have accepted the plea. A comprehensive review of the guilty plea proceeding in its entirety shows that Petitioner's responses during the proceeding negatively contributed to the outcome of the plea, far more than his allegation of deficiency on the part of Counsel.

At several instances during the plea colloquy, Petitioner's responses to the court were indirect, and provided a sufficient degree of uncertainty upon which the court reasonably decided to reject Petitioner's plea. Petitioner's response when asked how he wished to plea was tentative:

THE COURT:	[. . .] Mr. Benton, how do you plead to the offense of murder?
MR. BENTON:	Well –
MR. LOY:	How do you plead?
THE COURT:	How do you plead, guilty or not guilty?
MR. BENTON:	I guess guilty, Your Honor.

App. 13, l. 18-23.

Petitioner's halted speech when first asked how he pled, followed up with "I guess guilty" implies a passive and hesitant acknowledgement of guilt rather than a knowing and affirmative answer. Petitioner additionally provided an evasive and uncertain response following the State's recitation of facts:

> THE COURT: Very well. Are those the facts, Mr. Benton, that you believe that the State could produce sufficient evidence to convict you and establish your guilt beyond a reasonable doubt?
>
> MR. BENTON: I don't know, Your Honor.

App. 26, l. 13-17.

To add further confusion to the plea, after initially demonstrating an apprehension of admitting guilt and the strength of the State's evidence, Petitioner then acknowledged he reviewed the evidence the State had available with his attorney, and affirmed his belief the State could produce sufficient evidence to convict him of the facts alleged. Yet immediately thereafter, Petitioner still told the court he had not been over "every bit" of evidence. App. 27, l. 1-7. Petitioner's insistence that Counsel's "withheld" evidence of the autopsy photos would have changed the outcome of the proceeding ignores the wider reality that his plea proceeding was plagued with his own indirect and uncertain responses to the court on several occasions.

The Court of Appeals also correctly found Applicant failed to establish deficiency because the PCR court found Counsel credibly testified at the evidentiary hearing that while there was no record of an attempt to rehabilitate the plea offer on the record, those discussions took place in chambers. App. 553, l. 23-p. 554, l. 10. Counsel credibly testified the plea judge never wanted to accept the plea as it was an *Alford* plea to murder of Petitioner's wife for a negotiated forty years, and that the plea judge was displeased that it was before her. App. 554, l. 1-6. Counsel testified he "probably pushed pretty hard with both her and the State to get the offer

through." App. 554, l. 6-8. Counsel elaborated in his testimony that "[t]he plea judge essentially banged the gavel and said I'm not taking this plea…. We're done," after Petitioner stated that he had not seen every bit of evidence. App. 554, l. 14-17. Counsel ultimately testified that it was a challenge negotiating a plea deal originally, and when it did not go forward, the State wanted to try the case and the plea judge did not want to accept it. App. 555, l. 16-20. These facts supported the Court of Appeals' finding there was not a reasonable chance the plea judge would have accepted the plea. Petitioner's inconsistent responses to questions during the colloquy in combination with Counsel's testimony that the plea judge was not favorable towards the plea weigh against finding that Counsel was in any way deficient.

Petitioner offered no evidence to support his position that there is a reasonable chance the judge would have accepted the plea but for the alleged deficiency of counsel aside from his own insistence on that fact. Ultimately, Counsel was not deficient nor the cause of the plea judge refusing to accept Petitioner's plea. The only evidence Counsel recalled not reviewing with Petitioner prior to the guilty plea was Victim's autopsy photographs, which Petitioner knew existed and made an affirmative decision not to review prior to the plea. Counsel successfully negotiated an offer from the State they were not pleased to provide, the plea judge gave no indication she was willing to accept the plea. Ultimately, the fact that the plea judge did not provide Counsel with an opportunity to explain the evidence that had purportedly not been reviewed during the hearing supports the finding that the judge disfavored the plea. Petitioner's assertion that Counsel should have presented every feasible explanation to the plea court to justify Petitioner's responses is an unreasonable requirement to place upon counsel or else risk being alleged deficient.

Importantly, judges are free to reject plea agreements, especially agreements which do not allow for any discretion. Ultimately, Petitioner has failed to show how Counsel was in any way constitutionally ineffective for properly reviewing the relevant evidence with Petitioner prior to his plea or how any prejudice resulted where the plea judge was free to reject the plea agreement and showed no indication she was willing to accept the agreement at any point. It is entirely within the sound discretion of a plea judge to reject a guilty plea which may raise questions of whether the plea is being intelligently and voluntarily made. *State v. Paris*, 354 U.S. 1, 3, 578 S.E.2d 751, 752 (Ct. App. 2003). The Court of Appeals correctly affirmed the PCR court's finding that Petitioner failed to carry his burden of proving Counsel was deficient or that he was prejudiced by any alleged deficiency. This Court should therefore deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari and affirm the PCR Court's and the Court of Appeals' findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition for writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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