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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable R. Kirk Griffin, Circuit Court Judge

TOABY ALEXANDER TRAPP,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000283

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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Whether the PCR Court erred in finding trial counsel provided effective representation where trial counsel did not perform any independent investigation into the facts and circumstances of the case, did not discuss the discovery and evidence with Petitioner, and admitted that he was not prepared to handle critical evidentiary matters in the case?

II.

Whether the PCR Court erred in finding trial counsel provided effective representation when counsel failed to ensure that Petitioner was informed and questioned about his right to testify where Petitioner wanted to testify in his own defense and where Petitioner did not voluntarily and intelligently waive his right to testify?

III.

Whether the PCR Court erred in finding trial counsel provided effective representation when counsel did not call Petitioner to testify during the *Jackson v. Denno* hearing and where Petitioner wanted to testify and where counsel had no strategic reason to excuse the failure to call Petitioner to testify?

STATEMENT

On October 8, 2011, at approximately 10:00 p.m., Officer Brad Epps with the Newberry County Sheriff's Office responded to a report of a burglary at the home of Toaby Trapp, Petitioner. App. 145, l. 19-App. 146, l. 25. Petitioner informed Epps that about $7,000.00 that he had stored in a shoebox in his closet had been stolen.[1] Epps observed that the rear door to the home had been pried open and that Petitioner's bedroom had been ransacked. Based on the scene, Epps requested the on-call investigator respond to Petitioner's home. App. 147, l. 2-App. 148, l. 19.

Investigator Robert Spreng[2] was the on-call investigator dispatched to the scene. App. 147, ll. 12-14; App. 191, ll. 13-15. According to Epps, after Spreng arrived on scene he walked into Petitioner's bedroom to look around and noticed a pill bottle with suspected crack cocaine sitting in plain view on the dresser. App. 154, l. 24-App. 155, l. 3; App. 168, ll. 16-18. Upon discovering the suspected drugs, Spreng contacted Nick Bouknight[3], who was the narcotics investigator for the Sheriff's Office at that time. Bouknight advised Spreng to stop processing the scene while he obtained a search warrant for Petitioner's home. Both Spreng and Bouknight contacted their Lieutenant, Investigator Robert Dennis, who also responded to the scene. App. 191, ll. 7-22; App. 193, l. 20-App. 194, l. 7.

Dennis and Bouknight executed the search warrant on Petitioner's home. During the search the officers recovered, among other items, the pill bottle with suspected crack cocaine

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1 Petitioner additionally reported that a piggy bank and a large beer bottle, both filled with various coins and dollars, had been stolen. App. 148, ll. 15-19.

2 At the time of Petitioner's trial, Spreng was no longer employed with the Newberry County Sheriff's Office and was believed to be living somewhere in Florida. App. 149, ll. 5-19.

3 Investigator Bouknight passed away prior to trial. App. 193, ll. 1-11.

found on the dresser, two plastic baggies with suspected crack cocaine from in front of the dresser, a digital scale with white residue, and a spoon with white residue. App. 200, l. 12-App. 201, l. 6; App. 237, ll. 1-12. The suspected crack cocaine was sent to SLED for analysis. The drug analysis confirmed that the substance in the pill bottle and the two baggies was crack cocaine weighing a total of 21.3 grams. App. 267, ll. 9-24; App. 282, ll. 2-24.

Petitioner was subsequently indicted by the March 2012 Newberry County Grand Jury for one count of trafficking crack cocaine, 10-28 grams. App. 534-535. On October 30-31, 2014, the State, represented by Dale Scott and Taylor Daniel, called the case for trial before the Honorable Eugene C. Griffith, Jr., and a jury. Petitioner was represented by Dietrich Lake.[4] App. 1. Prior to the start of trial, the court held a hearing pursuant to *Jackson v. Denno*[5] to determine the voluntariness of a statement Petitioner purportedly gave to Investigator Dennis. Dennis testified that Petitioner was handcuffed in investigative detention by the time that he arrived on scene. He provided Petitioner with his *Miranda*[6] warnings partly from memory and partly from a card he carried in his wallet. Dennis stated that Petitioner replied that he understood his rights and when asked by Dennis if he was willing to speak with him, Petitioner nodded his head yes. App. 112, l. 1-App.114, l. 11.

After being advised of his rights, Dennis asked Petitioner about the narcotics found in his bedroom. Petitioner purportedly replied that he had forgotten the drugs were in the room and admitted that the bottle contained crack cocaine. When asked how he could have forgotten the

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4 Petitioner was represented by Dennis Bolt from the time of the incident in 2011 until Mr. Bolt retired due to personal and health problems in 2014. Counsel Lake was hired October 1, 2014. App. 125-127; App. 430-431.

5 378 U.S. 368 (1964)

6 384 U.S. 436 (1966)

drugs, Petitioner said when he called 911 to report the burglary that he was told not to touch anything and to wait outside for law enforcement, which is what he had done. App. 115, ll. 10-23; App. 116, ll. 5-7. Dennis testified that after the execution of the search warrant, he asked Petitioner about the two baggies that had been found in front of the dresser and Petitioner acknowledged that the baggies also contained crack cocaine. At that point, Dennis stated they talked to Petitioner about trying "to work with him a little bit." App. 116, ll. 12-20.

On cross-examination Dennis admitted that he did not prepare any documentation that showed Petitioner being read, acknowledging, and waiving his *Miranda* rights, he did not prepare a report, and was testifying primarily from his memory and the report of Bouknight. Dennis admitted that Petitioner was not taken into custody the night of the incident because he was going to cooperate with law enforcement. App. 117, l. 24-App. 119, l.19. No other witnesses were called to testify at the hearing. The trial court ultimately found the statement was voluntarily made and was admissible at trial. App. 125, ll. 11-12.

Following the *Denno* hearing, Counsel Lake informed the trial court that Petitioner was requesting a continuance to give him "an opportunity as his attorney I guess to counsel him a little bit more in this particular case." App. 125, ll. 18-25. Counsel Lake went on to state that he had been hired on October 1 and that Petitioner wanted him to make the continuance motion so that he would have "a little bit more time to make sure that I've done it thoroughly, explained everything to him and things of that sort. So that's my motion." App. 126, ll. 1-App. 127, l. 3. The trial court denied the motion for continuance finding that although Counsel Lake was new to the case, he was an experienced attorney. App. 127, ll. 4-14.

At the conclusions of the State's case, Counsel Lake made a motion for a directed verdict, which was denied. The trial court inquired whether Counsel Lake intended to put up any

evidence to which Counsel Lake responded he did not. The parties then moved directly into closing arguments. App. 317, l. 22-App. 320, l. 18. At no point was Petitioner ever advised of his right to testify or given an opportunity to assert his right to testify. Petitioner was found guilty as indicted and sentenced to twenty-five years imprisonment and a $50,000 fine. App. 350, ll. 3-9; App. 356, ll. 15-20.

Petitioner appealed his conviction and sentence. Following oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence in a published opinion. *State v. Trapp*, 420 S.C. 217, 801 S.E.2d 742 (Ct. App. 2017). Petitioner filed an application for post-conviction relief on April 9, 2018. App. 360-368. The State filed a return and motion for a more definite statement dated July 10, 2018. App. 371-375. Petitioner, through PCR Counsel Ashley McMahan, filed an amended application dated October 6, 2019. App. 376-378. A second amended application was filed on October 12, 2021. App. 380-381. The State filed an amended return dated October 22, 2021. App. 383-406.

An evidentiary hearing was convened via WebEx before the Honorable R. Kirk Griffin on October 26, 2021. Petitioner was represented by Ashely McMahan. The State was represented by Michael Neubauer. App. 407. At the hearing, Petitioner proceeded forward on all the claims contained in his original PCR application and in both amended applications. App. 413-417.

Petitioner testified that the only time he met with Counsel Lake was when he hired him. Prior to trial they never met to discuss the case. He stated Counsel Lake was his attorney for twenty-eight days. Counsel Lake did not have enough time to investigate the case or prepare for trial, and never discussed the case or evidence with Petitioner. App. 429, l. 25-App. 430, l. 12; App. 435, ll. 10-25; App. 440, ll. 2-25. Petitioner testified on cross examination that the only

communication he had with Counsel Lake prior to trial was a phone call about a bench warrant that had been issued and then lifted. App. 445, ll. 14-22. He maintained that they did not review the discovery in the case, and that he only received a copy of his discovery once he was prison. App. 445, l. 23-App. 446, l. 1.

Petitioner testified that Counsel Lake should have subpoenaed the digital camera used to document the scene in order to show the order and timing of the pictures. He maintained the pill bottle was not in plain view and that the sequence of the pictures would show it was not on the dresser when officers originally arrived on scene. He believed if Counsel Lake could have shown the court the actual timing of the photographs that the search warrant would have to have been suppressed. App. 419, l. 3-App. 420, l. 25.

Petitioner stated that this case was the first time he had ever gone through a trial. App. 425, ll. 16-18; App. 446, ll. 10-11. Petitioner told Counsel Lake he wanted to testify both during the *Denno* hearing and during the actual trial. Regarding the *Denno* hearing Petitioner maintained that Dennis did not provide him with his *Miranda* warning, that he did not confess to the drugs, and that he should have been able to take the stand to counter that testimony. App. 424, ll. 3-12; App. 443, ll. 13-22. Petitioner also thought it was important that the jury hear his side of the story. Petitioner stated that when there were breaks during trial that he would talk to Counsel Lake about testifying, but Counsel Lake told him he did not want Petitioner to testify because Petitioner could open the door for things to come in, such as his prior convictions. App. 424, l. 12-App. 426, l. 11; App. 429, ll. 7-22.

No one questioned Petitioner about whether he wanted to testify or talked about his right to testify. App. 446, ll. 2-8. Petitioner testified that he never waived his right to testify and that he would have taken the stand in his own defense despite Counsel Lake's advice. App. 427, ll.

13-App, 429, l. 6; App. 450, ll. 8-19. On cross-examination, Petitioner stated that Counsel Lake did not talk to him about his right to testify or remain silent and only ever said he did not want him testifying because his prior convictions could be used against him. App. 446, ll. 2-8. Once Counsel Lake told him that he did not want him testifying Petitioner "just left it there" because he had never been through a trial and did not know any better. App. 446, ll. 17-22. Petitioner consistently testified that neither the trial court nor Counsel Lake talked with him about his right to testify.

Counsel Lake testified that he received the discovery in the case the Friday before trial. The discovery he received was not complete and he brought that to the attention of the solicitor the Monday and Wednesday prior to trial. The photographs that were critical to Petitioner's case were not provided to him until Wednesday evening and he printed them Thursday as he was going to court to start the trial. He stated that the incomplete discovery was the basis of his continuance motion. App. 457, ll. 3-19; App. 484, ll. 4-21. When asked about meeting with Petitioner, Counsel Lake stated that he thought he had met with him once the Friday before trial, and that he might have talked to him that day. He testified that if he had spoken to him that day, it had not been an extensive conversation because he still did not have all of the discovery. App. 460, ll. 18-23.

Counsel Lake admitted that the sequence and timing of the pictures showing the dresser was critical to Petitioner's case. He stated he had asked the solicitor if the photographs were sent to him in order and that initially the State said yes but then changed its position. He inquired about the location of the digital camera; however, he did not subpoena it and it was not present for Petitioner's trial. Counsel Lake noted that after Petitioner's trial he began sending

"something" to the sheriff's office requesting they preserve the digital camera and sequencing of photographs taken at a scene. App. 468, l. 15-App. 469, l. 25.

Counsel Lake testified that he did not reach out to any of the State's witnesses prior to trial because he did not know who they were since he had not received full discovery. App. 461, ll. 16-24. He knew Bouknight would not be at trial because he had passed away, but he did not know that Spreng was unavailable for trial until the day trial began. App. 460, ll. 4-14. Counsel Lake stated that he did not think he would have interviewed the officers prior to trial because he expected the officers would testify to their reports. However, once he realized Spreng was not available for trial he testified that he would have wanted to speak with him and Dennis prior to trial. App. 462, ll. 4-10.

Counsel Lake testified that he would have cautioned Petitioner and recommended that he not testify at trial because he could open the door to certain things. App. 464, l. 18-App. 465, l. 2. Regarding the *Denno* hearing, Counsel Lake could not offer a reason for not calling Petitioner to testify and stated that they probably would have talked about Petitioner testifying but did not remember any specific conversation. App. 465, ll. 11-21. Counsel Lake could not recall whether Petitioner had indicated to him that he wanted to testify and repeated that they probably would have talked about if he should testify sometime during pretrial. App. 470, l. 12-App. 471, l. 8. Counsel Lake did not offer a reason for failing to have the trial court question Petitioner about his right to testify but stated that "it [the case] just kind of flowed" into closing arguments. App. 474, ll. 9-21.

On cross-examination Counsel Lake admitted that he did not have a lot of time to do some of the things that he would normally do in a case. He maintained he did not specifically recall Petitioner saying he wanted to testify but stated he always talked to his clients about

whether they should testify. App. 476, l. 16-App. 477, l. 7. He confirmed that he would have advised Petitioner against testifying because he was worried about him opening the door to things during cross-examination but that he was not concerned with prior convictions being a source of character evidence. App. 477, l. 8-App. 478, l. 16. Counsel Lake also testified on cross-examination that he received discovery late, that he had not received everything in the case, and that he was scrambling trying to get the case continued. App. 480, ll. 3-10.

On re-direct examination Counsel Lake stated that based on things that became an issue during trial, he would have wanted more time to prepare. There were things he felt he was prepared for and things that he felt he was not prepared for. He further stated he had expected to receive full discovery prior to going to trial and that having had adequate time with the discovery would have impacted whether the case even made it to a trial. Counsel Lake admitted that he was not prepared to handle the State's inability to produce the camera or provide date/time information for the photographs to show the order that they were taken in, nor was he prepared to handle the scope of testimony provided by Dennis due to Spreng's absence from trial. App. 482, l. 19-App. 483, l. 23.

At the end of the hearing the PCR court took the matter under advisement. App. 494, ll. 4-13. An order of dismissal was filed on February 18, 2022. App. 496-532. Regarding Counsel Lake's failure to investigate and prepare for trial, the PCR court ruled that Petitioner had failed to present any evidence of what Counsel Lake could have done in further preparation for trial and that he had not shown how he was prejudiced by Counsel Lake's performance in the case. The PCR court also found that Counsel Lake spoke with applicant regarding the discovery he received and that Counsel Lake's assumption that the officers would testify consistent with their reports was a valid reason for failing to interview them. The PCR court also intimated any

prejudice from counsel's failure to prepare should be attributed to Petitioner because he "hired counsel less than a month before [Petitioner's] trial" and Counsel attempted to continue the case but was unsuccessful. App. 504-509.

Regarding Counsel Lake's failure to ensure Petitioner was questioned about his right to testify, the PCR court found that the record did not contain evidence that Petitioner was questioned about his right to testify at trial. The PCR court found that this was excusable because Counsel Lake credibly testified that Petitioner never indicated a desire to testify and because the trial court instructed the jury at the start of the case that Petitioner was not required to testify in his own defense. The PCR court ruled that Petitioner had failed to show how he was deprived of his right to testify because the trial court asked Counsel Lake if he intended to put up a case and Counsel Lake responded no. The PCR court found Petitioner was not prejudiced because he was given the opportunity to testify and ultimately decided not to exercise that right. App. 526-528.

Regarding the *Denno* hearing, the PCR court found that Counsel Lake did not articulate a reason for failing to call applicant during the *Denno* hearing. However, the PCR court excused this failure by finding that Counsel Lake had spoken with Petitioner and used those conversations to challenge the admissibility of Petitioner's statement, raising all possible arguments for suppression of Petitioner's statement. The PCR court further ruled that Petitioner had not established prejudice because he did not present evidence which would suggest that the trial court's decision would have changed had he testified. App. 517-519.

ARGUMENT

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." *Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) *citing* U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 683, (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.*

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is 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." *Id.* at 694.

1.

The PCR Court erred in finding trial counsel provided effective representation where trial counsel did not perform any independent investigation into the facts and circumstances of the case, did not discuss the discovery and evidence with Petitioner, and admitted that he was not prepared to handle critical evidentiary matters in the case.

It is well established that counsel has a duty to undertake reasonable investigations. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original). There can be no question that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

In *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008), trial counsel was found ineffective for failing to adequately investigate and prepare for trial. Lounds was on trial for the armed robbery and kidnapping of Todd Garrett. *Id.* at 457, 670 S.E.2d at 647. At trial Garrett alleged that Lounds initially approached him at his place of business about a job but when he told Lounds that he needed to apply at a different location, Lounds produced a gun and demanded money. Garrett only had a few dollars but told Lounds he could get more money, so they took Garrett's truck to his parents' house. Once there Garrett punched Lounds in the face and escaped. *Id.*, 670 S.E.2d at 647-648.

Lounds testified in his own defense that Garrett purchased crack cocaine from him on numerous occasions and owed him about five hundred and fifty dollars. On the day of the alleged incident, Lounds went to Garrett to ask for the money he was owed, and Garrett offered to take him to "his people's home" to get some money. Lounds maintained he did not have a gun and never threatened Garrett. When they arrived at the house Lounds stated Garrett "got out and took off running." *Id.* at 458, 670 S.E.2d at 648. On reply, Garrett testified that he had never purchased drugs from Lounds and had never used crack cocaine. *Id.*

The morning of trial counsel for Lounds informed the court that Lounds' family was supposed to bring several witnesses to trial. Counsel requested a continuance because he had "found out the names of these people just this morning" and therefore had not subpoenaed them. Counsel opined to the trial court at various points during pre-trial and trial that the witnesses would not "add much" to Lounds' case. Ultimately Lounds ended up being the only witness called for the defense. *Id.* at 460-61, 670 S.E.2d at 649.

At the PCR hearing Lounds testified that his trial counsel had not done anything to investigate the case. Of significance was the fact that trial counsel had never reviewed the discovery with Lounds and had only met with Lounds once – on the morning of trial. *Id.* at 461, 670 S.E.2d at 649. Lounds also presented the testimony of two witnesses that would have testified at trial. The witnesses testified that Garrett regularly bought crack cocaine from Lounds and was often seen doing drugs with Lounds. Counsel for Lounds did not appear or testify at the PCR hearing despite the State's attempts to subpoena him. *Id.* at 461-62, 670 S.E.2d at 649-650.

The PCR court ultimately ruled that "trial counsel adequately conferred with [Lounds], conducted a proper investigation, and was competent in his representation." Further, the PCR court found that counsel's decision to not call the witnesses was strategic because counsel had

told the trial court the witnesses would not add much to Lounds defense. The PCR court also found it unlikely that the testimony of the witnesses would have overcome the testimony of Garrett at trial. *Id.* at 462, 670 S.E.2d at 650.

Our Supreme Court ultimately reversed the PCR court finding no probative evidence to support the court's findings. The Supreme Court noted that counsel did not articulate a valid trial strategy because counsel did not testify at the PCR hearing. Further, the Supreme Court found counsel's statement that the witnesses would not add much to Lounds defense was "objectively unreasonable given the defense theory of the case." The Supreme Court also noted that the trial transcript and PCR hearing testimony pointed inescapably to the conclusion that counsel simply had not adequately prepared the case. Counsel had admitted to the trial court he had only learned of the witnesses that morning, and that they had not been interviewed or subpoenaed. This was corroborated by Lounds' PCR testimony that they had only discussed the case the morning of trial. Regarding prejudice, the Court wrote that Lounds was "clearly prejudiced by [counsel's] failure to subpoena and call witnesses who would have supported [Lounds'] own testimony at trial." *Id.* at 462-63, 670 S.E.2d at 650-51.

Much like the counsel in *Lounds*, Counsel Lake was not adequately prepared to defend Petitioner's case at trial. Petitioner maintained that after initially hiring Counsel Lake, he did not meet with him about his case prior to the morning of trial. Petitioner further testified they never discussed the discovery in the case. Counsel Lake admitted that he received discovery in the case the Friday before trial, that the discovery he received was incomplete, and that he continued to receive discovery up until the Wednesday night before trial started. App. 457, ll. 3-19. Further, Counsel Lake could not definitively state if he had met with Petitioner prior to trial but only "thought he met with him at least once" the Friday before trial. However, he admitted that

even if they did meet the Friday prior to trial, it was not an extensive conversation because Counsel Lake still did not have the discovery in the case. App. 460, ll. 18-23. The testimony of Counsel Lake corroborated that of Petitioner that the pair did not discuss the case and discovery in a meaningful fashion, if at all, prior to trial.

Counsel Lake also admitted that he did not interview any of the witnesses in the case. He testified that while he knew Bouknight would not be a trial, he was unaware that Spreng would not be at trial until the morning trial started. App. 460, ll. 4-14. He couched his failure to interview witnesses by stating that he did not know who he would need to talk to because he had not received discovery until right before trial. App. 461, ll. 16-24. Notably, he admitted that had he known Spreng would not be at trial, he would have wanted to speak to him. He also stated he would have wanted to speak with Dennis prior to trial but did not because officers typically testified from their reports, and so he could have anticipated what they were testifying to. App. 462, ll. 4-13. However, Dennis did not create a report in Petitioner's case and Spreng was not there to be cross-examined about the report he created.

The record is replete with evidence that Counsel Lake was unprepared for Petitioner's trial. Counsel never received the full discovery, did not know that the key witness who discovered the alleged drugs in plain view would not be at trial, did not meet with Petitioner prior to trial, and did not review the discovery with Petitioner. Importantly, at no point during the PCR hearing did Counsel Lake offer valid reasons for these failures. This was deficient performance that prejudiced Petitioner.

The PCR court stated that Petitioner failed to present any evidence of what Counsel could have done to further prepare for trial. Respectfully, Petitioner argued that Counsel Lake should have gotten the digital camera to confirm the timing of the photographs – photographs which

Counsel Lake himself referred to as critical to Petitioner's case. Further, Counsel Lake admitted he wanted to speak with Spreng once he knew he was not going to be at trial. A major point of contention in Petitioner's case was whether the pill bottle containing crack cocaine was in plain view on his dresser at the time Spreng entered the room. The photographs showed the dresser without the pill bottle and the dresser with the pill bottle. When those photographs were taken was vitally important to Petitioner's defense. Had Counsel Lake fully prepared the trial he could have discovered the sequencing of the photographs supported the theory that the bottle was not in plain view.

The PCR court also found that Petitioner was not prejudiced because he hired Counsel a month before trial and Counsel made every effort to obtain more time to prepare. Respectfully, Counsel Lake was promptly hired after the order relieving Petitioner's original counsel was filed. App. 126, ll. 19-24. Further, at the time he was hired, neither Counsel Lake nor Petitioner had notice that the trial would occur in October. App. 479, ll. 17-23. Admittedly, Counsel Lake asserted to the PCR court that he moved to continue the case because he had only just received discovery. App 457, ll. 8-19. He stated "by the time I got discovery, again, we're kind of late in the game; don't have everything. So, I'm just trying to scramble, trying to get this case continued." App. 480, ll. 3-10. However, this assertion was directly refuted by the trial transcript wherein Counsel Lake only made a perfunctory request for a continuance which he told the trial court he was making at the behest of Petitioner. At no point in the request for a continuance did Counsel Lake inform the trial court that he had only received discovery in the days preceding trial and that he had never discussed the evidence with Petitioner. App. 125, l. 18-App. 127, l. 3.

Counsel Lake did not investigate Petitioner's case, he did not interview the witnesses in the case, and he did not meet with Petitioner about the discovery. This was deficient performance that prejudiced Petitioner and that was not excused by any valid strategic reasoning. This Court should find that Counsel Lake provided ineffective assistance of counsel to Petitioner in failing to adequately investigate the case and prepare for trial. *See Lounds*, *supra*.

2.

The PCR Court erred in finding trial counsel provided effective representation when counsel failed to ensure that Petitioner was informed and questioned about his right to testify where Petitioner wanted to testify in his own defense and where Petitioner did not voluntarily and intelligently waive his right to testify.

The right of a criminally accused to testify or not to testify is fundamental. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("[F]undamental to a personal defense ... is an accused's right to present his own version of the events in his own words") (internal citations omitted). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id.* at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.' " *Id.* "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* at 52. "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* " 'The choice of whether to testify in one's own defense ... is an exercise of [that] constitutional privilege.' " *Id.* at 53. Stated plainly, " '[a] person's right ... to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; ....' " *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

In *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000), trial counsel was found ineffective for failing to inform Brown of his Fifth Amendment privilege and the consequences of waiving that privilege. Brown testified in his own defense at trial. During the PCR hearing Brown testified that his attorney never informed him that he did not have to testify and that if he

did not testify that the jury would be instructed not to hold his failure to testify against him. The PCR court found as a fact that Brown was not informed by the trial judge or defense counsel of his right not to testify, of the consequences of waiving that right, and that the jury must be instructed not to hold his failure to testify against him. *Id.* at 594-595, 533 S.E.2d at 310. While this Court stopped short of creating an affirmative duty on the part of the trial court to obtain an on the record waiver of a constitutional right it did conclude that the "[f]ailure [of defense counsel] to inform a client of his Fifth Amendment rights and the consequences of exercise and wavier of those rights falls below an objective standard of reasonable representation." *Id.*

Neither Counsel Lake nor the trial court informed Petitioner about his right to testify or not testify in his own defense. The PCR court admitted that the record was devoid of a colloquy between the trial court and Petitioner about his right to testify. Counsel Lake could not give a reason for failing to have the court advise Petitioner of his right to testify or not testify. He merely stated that the case "just kind of flowed" and they went directly into closings. App. 471, ll. 9-21. Notably, the PCR court did not find that Counsel Lake employed a valid strategy in not having the court inform Petitioner of his right to testify or not testify.

Instead, the PCR court found that Counsel Lake credibly testified that Petitioner never indicated a desire to testify at trial and that Petitioner never informed Counsel Lake of his desire to testify. Additionally, the PCR court seemingly indicated that Petitioner was not denied the opportunity to testify at trial because the trial court asked Counsel Lake if he was going to put up a case and Counsel Lake responded that he was not. The PCR courts findings are not supported by the record.

Petitioner repeatedly testified that he wanted to take the stand in his own defense and that he informed Counsel Lake that he wanted to testify. He stated that the only thing Counsel Lake

ever told him was that he did not recommend that he testify at trial because he would be subjected to cross-examination. Importantly, Petitioner testified he would have taken the stand, against the advice of counsel, had he been given the opportunity to do so. App. 446, ll. 2-8; App. 427, l.13-App. 429, l. 6; App. 450, ll. 8-19

Counsel Lake only equivocally testified that he "**would've** cautioned [Petitioner] and **probably** recommended that he not testify, based upon the fact that he may open the door to certain things." App. 464, ll. 21-25. He never affirmatively stated that they discussed Petitioner's constitutionally safeguarded right to testify or not testify. In fact, Counsel Lake repeatedly testified that he did not recall any specific conversations with Petitioner regarding his right to testify. App. 470, ll. 16-App. 471, l. 8; App. 476, l. 16-App. 477, l. 7. Counsel Lake stated "he [Petitioner] was correct that, you know, we didn't have a lot of time to do some of the things that we normally would do. But as it relates to testifying, you know, I will – I'm going to always talk to my client about whether I think they should testify or not testify," indicating that **if** he spoke with Petitioner about testifying, it was not to discuss his rights but to discuss Counsel Lake's opinion on **whether he should** testify. App. 476, l. 22-App. 477, l. 2.

At no point was Petitioner questioned as to whether he wanted to testify or not. His rights were not explained to him by the court or by Counsel Lake, therefore they were not known. Further, he was never given an opportunity to exercise those rights and cannot be deemed to have waived them. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotations omitted). Courts have recognized that a "wavier is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.*

As then Chief Justice Finney wrote in his dissent in *Brown v. State*, *supra*, "[w]hen a post-conviction relief applicant alleges he was denied the right to exercise one of his constitutional rights, the sole inquiry is whether he was **informed** of that right and if so **whether he validly waived it**. If there is no knowing and intelligent waiver, then the remedy is a new trial." *Id.* at 596, 533 S.E.2d at 311. Petitioner was denied his right to take the stand in his own defense. Further, the record reflects that the trial court did not conduct a colloquy to inform Petitioner of his rights, and that Counsel Lake, if he discussed the matter with Petitioner at all, only offered his opinion on whether Petitioner should take the stand. Finally, there was no valid waiver by Petitioner of his right to testify. Accordingly, Counsel Lake should be found ineffective, and Petitioner should be granted a new trial.

3.

The PCR Court erred in finding trial counsel provided effective representation when counsel failed to call Petitioner to testify during the *Jackson v. Denno* hearing where Petitioner wanted to testify and where counsel had no strategic reason to excuse the failure to call Petitioner to testify.

In deciding *Jackson v. Denno*, the United States Supreme Court wrote,

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

Denno, 378 U.S. 368, 376–77 (1964) (internal citations omitted). The Court went on to state that "[e]xpanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative." *Id.* at 390.

It logically follows then that during a *Denno* hearing "the trial judge must examine the totality of the circumstances surrounding the statement and determine whether the State has carried its burden of showing the statement was made voluntarily. Where there is conflicting evidence as to whether [a] defendant's statement is voluntary, it is, in the first instance the province of the trial court to determine this factual issue by the preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 383, 652 S.E.2d 444, 450–51 (Ct. App. 2007).

Trial counsel is undoubtedly afforded considerable leeway to make reasonable, strategic decisions. *Stone v. State*, 419 S.C. 370, 383-384, 798 S.E.2d 561, 568 (2017). It is well settled

that trial counsel's decision to employ a certain strategy will not be found to be deficient performance if counsel articulates a valid reason for employing the strategy. *Id.* at 384, 798 S.E.2d at 569). However, "[t]he necessary converse of this principle is that **counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound.**" *Id.* (emphasis added).

In determining the voluntariness of a defendant's statement, a trial court must consider the totality of the circumstances surrounding the making of the statement. It is reasonable that a defendant's testimony regarding the circumstances of his purported statement is vitally important to the determination of the voluntariness of the statement. When a defendant does not testify it is difficult, if not impossible, for the trial court to have a full view of the circumstances surrounding the statement upon which it can issue its finding.

Petitioner testified that he wanted to take the stand during the *Denno* hearing to contradict the testimony of Dennis. Petitioner maintained he was not given *Miranda* rights and that he did not confess to the drugs being in his bedroom. App. 424, ll. 3-12; App. 443, ll. 13-22. Petitioner was the only person who could testify to his side of the story. Considering that Dennis did not prepare a report memorializing the alleged statement, that there was no waiver of rights form signed by Petitioner, and there were no other witnesses to this allegedly confession, the testimony of Petitioner was necessary to give the trial court the full totality of the circumstances surrounding the statement.

Counsel Lake admitted that he did not have a reason for failing to call Petitioner to testify during the *Denno* hearing. App. 465, ll. 11-21. Without an articulable valid strategy, the failure to call Petitioner cannot be deemed objectively reasonable. The PCR court noted that Counsel Lake failed to provide any reason for the failure to call Petitioner but incorrectly found that he

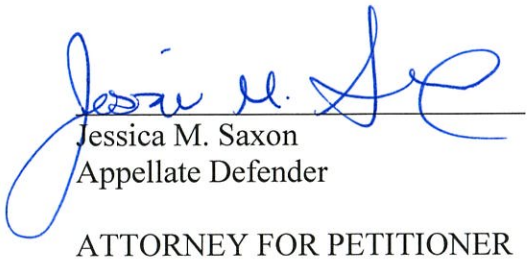
was not deficient. The standard is clear, trial counsel failed to provide any reason, much less a valid strategic reason, for not calling Petitioner to testify to the circumstances surrounding his alleged confession. Therefore, the decision not to call Petitioner did not meet an objective standard of reasonableness and Petitioner has shown that Counsel Lake was deficient. *See Stone, supra.*

Turning to prejudice, the PCR court found that Petitioner failed to present any evidence which would suggest that the trial court's decision would have changed had Petitioner testified. The PCR court also found that Counsel Lake had raised all possible arguments for suppression based on his conversations with Petitioner. There is no evidence in the record to support these findings. The PCR court could only speculate as to how the trial court would have weighed Petitioner's testimony in considering the totality of the circumstances. Further, Petitioner maintained that he and Counsel Lake did not meet prior to trial and Counsel Lake only speculated that they met the Friday before trial for a short conversation. The record is devoid of reference to conversations that the pair could have had about the statement at issue.

Counsel Lake was deficient in failing to call Petitioner to testify during the *Denno* hearing. As such, Petitioner was prejudiced because he was unable to fully present his version of what happened during the alleged statement to the trial court. Petitioner was the only other person who could provide testimony as to what happened that day and his testimony as to whether the statement occurred, whether *Miranda* was given, and whether he confessed to the drugs was highly relevant. The failure to call Petitioner to testify was not excused by reasonable trial strategy. Petitioner received ineffective assistance of counsel and is entitled to a new trial.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully request this Court grant the petition for writ of certiorari to allow full briefing on these issues.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2022.