STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Newberry County
Hon. R. Kirk Griffin, Circuit Court Judge
Appellate Case No. 2022-000283

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Apr 19 2023

S.C. SUPREME COURT

Toaby Alexander Trapp, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

I. The PCR court properly concluded trial counsel was not ineffective in his representation of Petitioner especially in light of Petitioner's failure to provide any evidence of what additional investigation would have demonstrated beyond what trial counsel already knew and was prepared to address.

II. The PCR court did not err in finding trial counsel provided effective assistance of counsel where counsel testified he and Petitioner discussed Petitioner's right to testify and where Petitioner waived his right after counsel.

III. The PCR court did not err in in finding trial counsel provided effective assistance of counsel where counsel testified he and Petitioner discussed Petitioner's right to testify at the Jackson v. Denno hearing and where Petitioner waived his right after counsel.

STATEMENT OF THE CASE

Procedural History

In March 2012, the Newberry County Grand Jury indicted Petitioner for Trafficking Crack Cocaine (2012-GS-36-0267). Petitioner was represented by Dietrick A. Lake, Esquire. Deputy Solicitor Dale Scott, and Assistant Solicitor Taylor Daniel, of the Eighth Circuit Solicitor's Office prosecuted the case.

On October 30-31, 2014, Petitioner appeared for trial before the Honorable Eugene C. Griffith, Jr., and a jury. Petitioner was subsequently convicted of Trafficking Crack Cocaine. Judge Griffith Jr., sentenced Petitioner to imprisonment for a term of twenty-five years, Petitioner was given credit for time served.

Petitioner filed a timely notice of appeal. In Petitioner's brief he raised the following issues:

1. The trial court erred in admitting the drugs into evidence when the Respondent failed to establish a strict chain of custody.
2. The trial court erred in admitting testimonial evidence in violation of the Appellant's Right of Confrontation.
3. The trial court erred when it failed to grant the petitioner a hearing and suppress the evidence pursuant to a defective search warrant.
4. The trial court erred in failing to suppress an inadmissible statement.

After arguments, the South Carolina Court of Appeals issued a written opinion on May 25, 2017, affirming Petitioner's conviction and sentence. See State v. Trapp, 420 S.C. 217, 801 S.E.2d 742 (Ct. App. 2017). Petitioner filed a Petition for Rehearing which was denied.

On July 21, 2017, Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court raising the same issues Petitioner raised in his brief to the South Carolina Court of Appeals. On February 1, 2018, the South Carolina Supreme Court issued an order denying Petitioner's Petition for Writ of Certiorari. The Remittitur was issued on February 2, 2018.

Petitioner filed an application for post-conviction relief on April 9, 2018 and the State filed a Return and motion for a more definite statement. (App.360-375). After Petitioner was appointed counsel, his counsel filed an amended application in October 2019. (App.376-378). A second amended application was filed in October 2021. (App.380-381). The State filed an amended return. (App.383-406).

An evidentiary hearing was convened via WebEx before the Honorable R. Kirk Griffin. At the hearing, Petitioner proceeded forward on all the claims. (App. 413-417). After the hearing, the PCR court filed an Order of Dismissal on February 18, 2022, denying relief. (App.496).

Factual Background

On October 8, 2011, Petitioner's residence in Newberry, South Carolina, was burglarized by unknown subjects. Petitioner called 911 to report the burglary and deputies from the Newberry County Sheriff's Office responded to Petitioner's residence. (App.146-147). When deputies arrive, Petitioner told them $7,000 was taken from his bedroom along with other items. (App.147-148). As deputies were processing the scene, the deputies located cocaine inside a pill bottle in Petitioner's bedroom. (App.154-155). Based on the drugs in plain view, officers obtained a search warrant for Petitioner's residence and thereafter found two separate plastic baggies of crack cocaine inside the residence. (App.201). Petitioner was read his Miranda rights and in speaking with Captain Dennis indicated that he forgot the crack cocaine was in the medicine bottle. (App.200). The total weight of the crack cocaine seized from Petitioner's residence was 21.3 grams. (App.282).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter *de novo* and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner has raised three claims of ineffective assistance of his trial counsel. He contends counsel was ineffective for failing to investigate, failing to call Petitioner to testify, and failing to call Petitioner to testify at the Jackson v. Denno hearing. The PCR court considered the allegations and found them to be without merit. The PCR court found Petitioner failed to demonstrate any information which would have been obtained through further investigation that would have altered the outcome of the trial. The court found counsel provided correct advice regarding the possibility of Petitioner's prior conviction being admitted and that it was Petitioner's decision not to testify. Finally, the PCR court found, even considering Petitioner's testimony he intended to provide at the Jackson v. Denno hearing, there was no reasonable probability of the suppression hearing resulting in a different conclusion.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee

the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "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." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the

contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

Furthermore, the reviewing court will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively

amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687.

In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

I. The PCR court properly concluded trial counsel was not ineffective in his representation of Petitioner especially in light of Petitioner's failure to provide any evidence of what additional investigation would have demonstrated beyond what trial counsel already knew and was prepared to address.

The PCR court correctly found Petitioner failed to meet his burden that further investigation would have produced any evidence or testimony which would have led to a different result at trial. Petitioner raises mere speculation regarding the outcome of any investigation and has not met his burden of establishing any prejudice resulted from any deficiency.

Counsel's performance under the first prong of the Strickland test is judged under the standard of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "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). The South Carolina Supreme Court has stated previously "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, counsel need only interview potential witnesses "when it is reasonable to do so." Id. at 457, 710 S.E.2d at 65. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

In this case, Petitioner alleges counsel was not prepared to defend Petitioner's case because counsel did not interview witnesses or conduct an independent investigation. Petitioner asserts he should have interviewed multiple officers prior to trial, including Investigator Spreng who was not

present at trial. He maintains counsel failed to investigate the digital camera used to take photos of the crime scene which showed the pill bottle's location. He claims he further failed to have the photos investigated to determine the order in which they were taken because it *might* indicate the bottle was moved to the dresser from another location.

Petitioner has failed to demonstrate how he was prejudiced by counsel's failure to interview the officers prior to trial. Significantly, Petitioner never called Investigator Spreng to present any testimony which would have been beneficial to his case which counsel could have obtained with an interview. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding because the witnesses respondent claimed should have been contacted by trial counsel did not testify at the PCR hearing, respondent could not establish any prejudice from counsel's failure to contact the witnesses). Petitioner never presented the PCR court any evidence which would have refuted the testimony and evidence presented by the State at trial. Further, he failed to demonstrate any defense or other claim which could have been presented and would have had a reasonable probability of a different outcome had counsel spoken with the officer prior to trial. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding PCR judge erred in finding counsel ineffective in preparing respondent's case where respondent failed to show how his counsel's lack of preparation prejudiced him given respondent did not "present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial"); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding record did not support PCR judge's conclusion that counsel's deficient performance was prejudicial to respondent given respondent did not show how additional preparation would have resulted in a different outcome). Counsel articulated he did not talk with officers generally because they all testified according to their reports, and he did not believe he

would have obtained anything useful from them. (App.462). Additionally, when Captain Dennis indicated he did not create a report, this fact was used both during the Jackson v. Denno hearing and at trial to question Captain Dennis' credibility and recollection of the events. As a result, Petitioner has failed to demonstrate any prejudice resulting from the failure to interview witnesses prior to trial.

In addition, Petitioner has failed to present any evidence regarding the digital camera or the photos of his bedroom which could have been uncovered through further investigation. At the PCR hearing and on appeal Petitioner speaks in terms of speculation of what the photographs and their sequence could have shown. He presented no evidence demonstrating any investigation would have shown a different sequence to the one presented at trial or that the pill bottle of drugs found was not found where multiple officers testified it was located. The PCR court correctly concluded: "Petitioner has failed to show what Counsel could have discovered, or what defenses Counsel could have pursued if he was given more time to prepare for this case." (App.509). Petitioner has failed to meet his burden of establishing that but for any deficiency on the part of counsel, there was a reasonable probability of a different outcome with his trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding mere speculation and conjecture is insufficient to substantiate allegation that counsel's deficient performance was prejudicial to respondent) (citing Glover, 318 S.C. at 498, 458 S.E.2d at 540). Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question I.

II. The PCR court did not err in finding trial counsel provided effective assistance of counsel where counsel testified he and Petitioner discussed Petitioner's right to testify and where Petitioner waived his right after counsel.

The PCR court correctly found trial counsel was not ineffective for failing to have the trial court do an on the record waiver of Petitioner's right to testify. Further, there is evidence demonstrating that Petitioner knew of his right to testify and waived it with assistance of counsel.

"The right of a criminally accused to testify or not to testify is fundamental." State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). "An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). The Supreme Court in Brown further stated "review of this issue is better left to a post-conviction relief proceeding where the facts surrounding the trial can be fully explored." Id.

In this case, Petitioner asserted that he did not get an on the record, under oath colloquy regarding his right to testify. Most significantly, Petitioner never asserts he did not know he had a right to testify. Instead, he admitted discussing the right to testify with his counsel and his counsel articulating reasons why he would be better served not testifying at trial. (App.424; 446). Specifically, when asked whether Petitioner agreed he should not testify at trial, he admitted "I thought it was to the best ability, I mean, during the time, to listen to my attorney because I didn't know better." (App.446). He continued: "once he told me that . . . he don't want me to get on the stand, I just left it like there." (App. 446). Petitioner never asserted he did not understand he had a right to testify. Petitioner simply made the choice not to testify based on counsel's advice. See Brown, 317 S.C. at 273 n.2, 453 S.E.2d at 252 n.2 ("The record reveals that the defendant actually

received competent advice from counsel and strategically decided not to testify. Thus, he was in no way prejudiced by the lack of an on-the-record waiver of his right to testify.").

Additionally, the record belies any argument that Petitioner did not know he had a right to testify. The trial court, during opening instructions explained: "He may not testify. That's his decision and his alone." (App.128). Further, after his motion for directed verdict was denied, counsel was asked by the trial court: "Are you going to put anything up?" His counsel responded: "No, Sir." (App.320). As a result, Petitioner clearly should have known he had a right to testify, the decision was his, and his counsel believed they had decided he would not testify.

Counsel testified he had no recollection of Petitioner indicating a desire to testify and that he would have recommended he not testify. (App.471; 477). Counsel testified he always talks with his client about testifying. He indicated it was up to Petitioner whether he would testify or not, but he recommended not to testify. (App.477). Further, Counsel articulated valid reasons to recommend Petitioner not testify (App.477-478). As a result, Petitioner has failed to establish his burden counsel was ineffective. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

Further, Petitioner failed to proffer any testimony which would likely alter the outcome of the trial. Other than disavowing ownership of the drugs, Petitioner merely indicated he would be able to tell his own side of the story and would have helped his credibility by testifying. As a result, he has failed to demonstrate any prejudice from his failure to testify because he has not demonstrated how the outcome of the proceeding would have been different. "This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509

S.E.2d 807, 809 (1998). As a result, this Court should deny the Petition for Writ of Certiorari as to Question II.

III. The PCR court did not err in in finding trial counsel provided effective assistance of counsel where counsel testified he and Petitioner discussed Petitioner's right to testify at the Jackson v. Denno hearing and where Petitioner waived his right after counsel.

The PCR court correctly found Petitioner failed to establish how counsel's performance was deficient, or how Petitioner was prejudiced as a result of counsel's performance. Counsel made the strategic choice to challenge the statement while not exposing his client to the risk of cross-examination. Further, the PCR court clearly found Petitioner's testimony was not credible and concluded Petitioner failed to demonstrate prejudice from his failure to testify because the court specifically held Petitioner "has failed to present any evidence which would suggest that the [trial] court's decision would have changed if [Petitioner] were allowed to testify."

Under Jackson v. Denno, 378 U.S. 368 (1964), a criminal defendant "is entitled to a reliable determination as to the voluntariness of his confession by a tribunal other than the jury charged with deciding his guilt or innocence." State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). "A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury." State v. Miller, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007).

Further, "[trial c]ounsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of

ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290 (2010).

In this case, counsel articulated his belief he was more credibly able to attack the existence of a statement without placing Petitioner on the stand. Counsel testified he was able to establish through his examination of the officers that no one saw Miranda being given to Petitioner and that there was no report or record showing Miranda being given. (App.466). He believed he sufficiently challenged the existence of the Miranda warnings through the examination of the officers. He indicated "I didn't know how much benefit he would get from testifying" in particular in light of the fact he would be subject to cross-examination. (App.464-465). As a result, counsel was not deficient in advising Petitioner not to testify and in not calling Petitioner to testify at the Jackson v. Denno hearing.[1]

Most significantly, the PCR court clearly found Petitioner's testimony that he was never given Miranda to not be credible as the court found the testimony would not have caused the trial court to change its decision on the voluntariness of the statement. The appellate court should "afford great deference to a PCR court's credibility findings." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018); Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses.").

[1] It should also be noted, counsel testified he would have talked with Petitioner about testifying at the Denno hearing, and counsel explained he had no recollection of Petitioner requesting to testify during the hearing. (App.465; 477).

Petitioner maintains the PCR court "could only speculate" in holding that Petitioner's testimony would not have resulted in a different outcome for the Denno hearing. Determining whether there is a reasonable probability of a different outcome is exactly what the PCR court is called upon to do by Strickland. As noted above in order to prove prejudice, Petitioner must demonstrate counsel's deficient performance prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added). In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

In the instant case, the PCR court considered Petitioner's testimony at the PCR hearing in light of the testimony presented during the Denno hearing prior to trial. Part of the consideration by the PCR court would necessarily be a determination of the credibility of Petitioner based on being able to directly observe him during the hearing. The PCR court would be required to consider whether, in light of its determination of Petitioner's overall credibility, Petitioner's testimony would have been likely to affect the decision made at the Denno hearing regarding whether he was read Miranda rights and whether his statement was knowing and voluntary. After considering the totality of the evidence before it, the PCR court concluded any possible deficiency was not sufficient to undermine confidence in the outcome of the Denno hearing. This Court should find the holding supported by the overall evidence and deny the Petition for Writ of Certiorari as to Question III.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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