

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO CALHOUN COUNTY
Honorable Paul M. Burch, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2024-001487

CHARLES WINSTON, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTIONS

1. Whether this PCR case should be remanded to the PCR court under *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) for a ruling on whether trial counsel “failed to subject [the] prosecution’s case to a meaningful adversarial testing” as alleged by petitioner in his pro se application (but not addressed in the Order of Dismissal) and whether the presumed prejudice from *United States v. Cronin*, 466 U.S. 648 1984) should apply where trial counsel waived petitioner’s right to a jury trial when he was not present, stipulated to a damning medical evaluation finding petitioner malingering, waived a *Jackson v. Denno* hearing on an incriminating statement by Petitioner, stipulated to the facts in the indictment, and stipulated that petitioner was competent over the opinion of his own expert witness, which undermined any shred of a strategy trial counsel had?
2. In the alternative, did the PCR court err in finding that trial counsel was not ineffective when he waived petitioner’s right to a jury trial in petitioner’s absence and no colloquy was conducted by the trial judge?
3. In the alternative, did the PCR court err in finding that trial counsel was not ineffective in stipulating to petitioner’s competency to stand trial when his stipulation destroyed the credibility of his expert witness and any chance of a GBMI or NGRI verdict?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

- I. Whether a remand is unwarranted under *Fishburne* because the PCR court specifically and adequately addressed all the issues raised in Petitioner’s PCR including the issue of whether Counsel subjected the “prosecution’s case to a meaningful adversarial testing” by determining that Counsel was not ineffective, and the issue of whether Petitioner was prejudiced by determining that Petitioner failed prejudice from any of the allegations that Counsel’s conduct was deficient, such that a presumption of prejudice under *Cronin* is unnecessary?
- II. Whether the PCR court correctly found Petitioner knowingly and voluntarily waived his right to a jury trial where Counsel credibly testified that he advised Petitioner of his right to a jury trial, and in response to the trial court’s denial of his motion to change venue, Petitioner made the decision to waive his right to a jury trial due to his concerns about the jury pool in Calhoun County?
- III. Whether the PCR court correctly found Counsel was not ineffective for stipulating Petitioner’s competency to stand trial where Petitioner failed to prove a reasonable probability the result of trial would have been different since was a DMH report finding Petitioner competent; the stipulation did not preclude Petitioner from raising a mental health defense; the trial court was unlikely to find Petitioner GBMI or NGRI based on evidence presented that Petitioner knew right from wrong at the time of the crime; and Counsel articulated reasonable strategy to preserve Petitioner’s right to testify at trial?

STATEMENT OF THE CASE

In November 2014, the Calhoun County Grand Jury indicted Charles Winston, Jr., (“Petitioner”) for attempted murder (2014-GS-09-00260). On May 9-12, 2016, Petitioner proceeded to a bench trial before the Honorable Maite Murphy. Assistant Solicitor Theodore Lupton prosecuted the case. Martin R. Banks, Esq., (“Counsel”) represented Petitioner. The court found Petitioner guilty and sentenced him to thirty (30) years.

On May 16, 2016, a notice of appeal was filed on Petitioner’s behalf. On appeal, Petitioner was represented by Appellate Defender Kathrine Hudgins, who raised the following issue:

At this bench trial, did the trial judge err in refusing to find Appellant guilty but mentally ill when the State only evaluated Appellant for competency to stand trial and the only evidence in regard to criminal responsibility came from the forensic psychiatrist, called by the defense, who testified that Appellant suffered from delusional disorder which impaired his ability to conform?

On May 9, 2018, following briefing and without oral argument, the Court of Appeals affirmed Petitioner’s conviction and sentence, determining the trial court did not abuse its discretion in refusing to find Petitioner guilty but mentally ill (“GBMI”). *State v. Winston*, Op. No. 2018-UP-198 (S.C. Ct. App. date May 9, 2018). The remitter was sent on November 15, 2018.

On April 17, 2019, Petitioner filed an application for post-conviction relief (“PCR”). On August 24, 2020, the State (“Respondent”) filed its Return. On February 6, 2024, an evidentiary hearing was convened before the Honorable Paul M. Burch. Petitioner was represented by Arthur K. Aiken, Esq. Assistant Attorney General Bryan T. Hall represented Respondent. On April 8, 2024, Judge Burch denied Petitioner PCR relief, finding he failed to prove Counsel was ineffective. This Petition follows.

STATEMENT OF THE FACTS

Courtney Glover (“Victim”) was Petitioner’s neighbor and had known him since she was Fourteen (14) years old. (App. 10). Victim testified as follows. On September 30, 2014, Petitioner invited Victim over, saying he needed someone to talk to. (App. 12-13). When Victim arrived and asked Petitioner what was wrong, he responded, “I have a lot...on my mind.” (App. 13). When Victim prepared to leave, Victim asked Petitioner to walk her to her car. (App. 13).

At some point, Petitioner retrieved a knife. As Victim walked outside of the home, Petitioner turned the carport (garage) light off and jumped on Victim. (App. 14). Petitioner cut Victim’s neck. (App. 15). Victim tried to flee from Petitioner, but he pinned her down. (App. 15). In attempting to cut Victim’s throat, Petitioner cut Victim’s face. (App. 15). Victim elbowed Petitioner, broke free, and ran to her car which was located in the driveway. (App. 15). Victim got into her car and attempted to start it by pushing the start button. (App. 16).

Petitioner chased Victim and prevented her from closing the car door and turned her car off each time she started the car. (App. 16). Petitioner yelled at Victim, “[y]ou’re not going anywhere.” (App. 15). Eventually, Victim was able to start her car and attempted to drive away as Petitioner refused to let go of her car door. (App. 16). Victim pulled into her front yard and began to honk the horn to alert family members of the situation. (App. 16). Petitioner cursed, tried to stab Victim one last time, then fled when Victim’s mother ran out of the home. (App. 17). Victim was rushed to the hospital in an ambulance. (App. 17). Victim lost a lot of blood but survived the attack. (App. 17).

Victim testified that moments before the attack, while at Petitioner’s home, Petitioner’s conduct did not lead her to believe that he was not rational or did not understand. (App. 13-14). Victim testified that she had known Petitioner for years and did not have reason to believe that

Petitioner did not know right from wrong. (App. 18-19). Victim testified that based on her conversations with Petitioner, it was “obvious that he knew” right from wrong. (App. 19).

Captain Pat Regalis, of Calhoun County Sheriff’s Office, testified that he responded to the scent and noticed a spot next to the steps of the home. (App. 24). Regalis testified that the spot looked like blood, was recently washed, and had a bucket next to the area. (App. 25). In a recorded interview with police, after being advised of his *Miranda* rights twice, Petitioner admitted to intending to kill Victim. (App. 27). Petitioner also admitted that he cleaned up the blood at the crime scene, hid where he could see police responding to the scene, and waited until the police left before leaving. (App. 28). Petitioner admitted that he understood [on the night of the crime] that he could not talk to police because he would go to jail. (App. 28). Regalis testified that Petitioner said “voices” made him do it. (App. 30). Regalis testified that based on Petitioner’s answers, he believed Petitioner knew right from wrong. (App. 29).

In January 2016, Petitioner was evaluated by the Department of Mental Health (“DMH”) and was found competent to stand trial. (App. 4:10-16). At trial, Counsel stipulated that Petitioner was competent to stand trial and stipulated to the facts contained in the indictment. (App. 4; 9). Counsel argued at trial, however, that due to his mental health, Petitioner could not conform his actions to the requirements of the law at the time of the crime. Counsel presented testimony from Dr. Amanda Salas, who opined that Petitioner suffers from “delusional disorder” and was suffering delusional disorder and hallucinations at the time of the crime. (App. 45; 37-100). Dr. Salas also testified that Petitioner could tell the difference between right and wrong at the time of the crime, but his delusions change his perception of right and wrong and impair his ability to conform his behavior to the law. (App. 61-64).

Commenting on Petitioner’s competency to stand trial, the trial court stated the following:

The defendant's stipulation as to the competency of the defendant discredits his own expert witness. His own expert witness indicated that she felt he was not competent to stand trial; but clearly, he is competent to stand trial. He was appropriate in his discussions with the court. He is obviously very intelligent and able to communicate effectively. And certainly, his interactions and his behavior and his demeanor have been evidence here [in] the courtroom.

(App. 119:23-120:4).

The trial court found Petitioner guilty, refusing to find him guilty but mentally ill ("GBMI") or not guilty by reason of insanity ("NGRI"). (App. 123). The trial court articulated its ruling as follows:

Dr. Sala actually testified that he knew legal right from wrong. And mental illness has not been established. The defendant's conduct contradicts this on every stage of this trial. He is clearly intelligent, articulate, and I think, quite frankly, he knew that his only defense to mitigate or escape his responsibility for these heinous acts are to allege that he was hearing voices in order to escape liability for his actions. Therefore, the Court finds the defendant guilty of attempted murder.

(App. 122:19-123:3).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

Petitioner is a forty-five (45) year old man who successfully completed one (1) year of college. (App. 178:12-15). The record establishes that Petitioner was both competent to stand trial and able to distinguish right from wrong at the time of the crime. After being advised of his *Miranda*¹ rights *twice*, Petitioner confessed to police that he cut Victim's throat and face in an attempt to kill her and knew right from wrong. (App. 27-29). Petitioner also confessed that he attempted to cover-up the crime and knew that he would go to jail. (App. 28). At trial, Victim testified that she had known Petitioner for years and did not have a reason to believe he did not understand right from wrong. (App. 18-19). Victim also testified that on the night of the attack, Petitioner's conduct did not make her believe that he was not rational or did not understand right from wrong. (App. 13-14).

Around the time of trial, Petitioner was evaluated by DMH and found to be competent. Dr. Salas, the defense's expert, opined that Petitioner suffered from "delusional disorder" but could "certainly" distinguish right from wrong at the time of the crime. (App. 61:18-23). The trial court found Petitioner to be "clearly...competent..." and "very intelligent." (App. 119:23-120:4). The trial court rejected verdicts for guilty but mentally ill ("GBMI") and not guilty for reason of insanity ("NGRI") and instead, found Petitioner guilty of attempted murder. The trial court determined that Petitioner's mental health story is likely a *post-hoc* rationalization that Petitioner created to escape criminal liability for cutting Victim in an attempt to kill her. (App. 122-23).

The evidence of Petitioner's guilt is overwhelming: the surviving Victim's testimony and Petitioner's confession to both the crime and his mental state. Counsel articulated a valid and reasonable strategy in presenting a mental health defense to negate the attempted murder charge.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

The problem in Petitioner's case is not Counsel's performance but the overwhelming evidence of Petitioner's guilt and significant evidence presented that Petitioner knew right and wrong at the time of the crime.

The PCR correctly found that Counsel's performance was reasonable under prevailing professional norms and not deficient. Further, the PCR court correctly found that Petitioner failed to prove he was prejudiced by any of the complained actions of Counsel. Respondent asks this Court to deny this petition.

I. A remand is unwarranted under *Fishburne* because the PCR court specifically and adequately addressed all the issues raised in Petitioner's PCR.

This Court should not remand this case under *Fishburne* because the PCR court specifically and adequately address the issues of (1) whether Counsel subjected the "prosecution's case to a meaningful adversarial testifying" and (2) whether Petitioner was prejudiced. The PCR Court correctly found that Counsel was not ineffective, and Petitioner failed to prove prejudice. The PCR court is required to make specific findings of fact and conclusions of law relating to each issue raised by a PCR applicant. S.C. Code Ann. § 17-27-80 (2014). A remand is only required where the PCR court's order fails to set forth appropriate findings of fact and conclusions of law on all PCR grounds raised. *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019). A general denial of all claims without specific findings does not constitute a sufficient ruling on any issues. *Id.*

A. The PCR court already decided that Counsel put the "prosecution's case to a meaningful adversarial testing" by determining that Counsel was not ineffective under the Sixth Amendment.

The PCR court addressed the issue of whether Counsel put the prosecution's case to a meaningful adversarial testing by finding that Counsel was not ineffective on any of the specific grounds raised by Petitioner. The phrase "adversarial testing" comes from *Strickland v. Washington*, the foundational case for reviewing allegations of ineffective assistance of counsel

under the Sixth Amendment. *Strickland*, 466 U.S. at 690 (stating that “counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case”). In evaluating “any claim of ineffectiveness [,]” the court must determine whether the applicant proved “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. If the court finds that counsel’s conduct failed to put the prosecution’s case to an adversarial test, then the court may determine that counsel was “ineffective” under the Sixth Amendment. *See id.* To prove ineffectiveness, the burden is on the PCR applicant to prove (1) counsel’s performance was deficient, and (2) the applicant was prejudiced by counsel’s errors. *Strickland*, 466 U.S. at 687-88.

The issue of whether counsel put the prosecution’s case to a meaningful adversarial test is not its own separate issue to be ruled on but is simply the *standard* under *Strickland* for evaluating whether counsel’s representation was constitutionally ineffective. For each issue raised, the PCR court determines whether counsel’s performance was deficient under prevailing professional norms, and whether the defendant was prejudiced. *Id.* at 668 (“The benchmark for judging *any claim of ineffectiveness* is whether counsel’s conduct undermined the proper functioning of the adversarial process....”) (emphasis added).

Petitioner alleges the PCR court failed to address whether Counsel put the prosecution’s case to a meaningful adversarial test. However, the PCR court addressed this issue by determining that Counsel was not ineffective on each issue Petitioner raised in his PCR. In its Order, the PCR court provided specific findings of fact, legal analysis, and conclusions for each of the issues raised. By determining that Petitioner failed to prove Counsel was ineffective on each issue raised, the PCR court determined that Counsel put the prosecution’s case to a meaningful adversarial test.

Thus, the PCR court specifically, sufficiently, and adequately addressed this issue in its Order, and a remand is unwarranted.

B. It is unnecessary for the court to consider a presumption of prejudice under *Cronic* where the PCR court has already ruled that Petitioner failed to prove prejudice on the allegations raised.

A remand is unwarranted to address the issue of whether prejudice should be presumed under *Cronic* since the PCR court specifically addressed each issue raised and determined Petitioner failed to prove prejudice. A lawyer is presumed to be effective under the Sixth Amendment, but there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified and prejudice is presumed. *United States v. Cronic*, 466 U.S. 648 (1984). For a presumption of prejudice under *Cronic*, the burden is on the defendant to demonstrate (1) a constitutional violation and (2) that the circumstances of the case are of such a magnitude that it is unlikely that *any* lawyer, *not even a fully competent one*, could have provided effective assistance under the circumstances. *Id.* at 659-60 (emphasis added).

In *Cronic*, the Supreme Court identified five (5) *relevant* but *non-dispositive* criteria for whether the circumstances of a case rise to the level of justifying a presumption of prejudice: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. *Id.* at 652, 663 (emphasis added). The *Cronic* Court determined that the surrounding circumstances in *Cronic*'s case were *not* of such magnitude that made it unlikely that the defendant could have received effective counsel despite the lawyer being young and inexperienced in criminal matters; only having twenty-five (25) days to prepare for a complex trial; and some witnesses for trial were not easily accessible. *Id.* at 666 (emphasis added).

It is unnecessary for this case to be remanded to the PCR court to make further findings regarding whether there should be a presumption of prejudice under *Cronic* where the PCR court has already determined that Counsel was not ineffective and Petitioner failed to prove prejudice. For a *Cronic* presumption of prejudice, Petitioner must show a constitutional violation. The specific constitutional violation that Petitioner alleges is ineffective assistance of counsel under the Sixth Amendment, however, the PCR court has already ruled on that issue. Since Petitioner failed to prove a constitutional violation from Counsel's conduct, he has failed to show that he is entitled to a presumption of prejudice under *Cronic*.

However, applying *Cronic* further, Petitioner failed to prove he is entitled to a presumption of prejudice because he failed to show that the circumstances of his case are of such a magnitude that no competent lawyer in Counsel's position could have provided effective assistance. Unlike the defendant in *Cronic*, Petitioner was represented by an experienced attorney who had been practicing criminal defense for over twenty-five (25) years. (App. 184:12-15). Unlike the defendant in *Cronic*, Petitioner's case and defense was not complex: the sole issue for trial was whether Petitioner lacked the mental capacity to conform his conduct to the requirements of the law at the time of the crime. Unlike the defendant in *Cronic*, Counsel had sufficient time to prepare for trial and present witnesses in Petitioner's defense.

Petitioner also cites *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006). However, Petitioner's case is distinguishable. In *Nance*, the Court applied *Cronic* and found prejudice was presumed from the circumstances of the case in a death penalty case. *Id.* The defendant's lead counsel was suffering from several health issues at the time of appointment and was taking prescription medications, the side effects of which impaired his memory, sleep, and sedation. *Id.* at 553, 626 S.E.2d at 881. The defendant's co-counsel had only been practicing law for eighteen

(18) months and only investigated one witness. *Id.* Trial counsel did not receive the defendant's medical records, which were to be used by a psychologist to testify, until hours before trial. *Id.* Lead counsel presented a lack luster presentation to the jury in which he stated that he did not ask to represent his client and did not ask for the case. *Id.* at 554, 626 S.E.2d at 881. The lead lawyer called three (3) witnesses, one of which testified to prior bad acts of the client while incarcerated. *Id.* Trial counsel also failed to qualify an expert witness who was to offer an opinion regarding the defendant's mental health. *Id.*

Unlike the defendant in *Nance*, Petitioner was represented by experience counsel who was prepared, reasonably investigated his mental health, and presented expert testimony to support his defense. Unlike the defendant in *Nance*, Petitioner was not facing the death penalty and was not tried before a jury. Petitioner failed to prove that the circumstances of his case and the alleged errors of Counsel even remotely rise to a comparable level as those in *Nance* to justify a presumption of prejudice.

Petitioner argues that prejudice should be presumed from Counsel's stipulation to the facts contained in the indictment. However, Petitioner failed to prove he was prejudiced by the stipulation where there was overwhelming evidence of Petitioner's guilt from the surviving Victim's testimony and Petitioner's own confession. *See Smalls v. State*, 422 S.C. 174, 190-91, 810 S.E.2d 836, 944-45 (2018) (holding that in rare cases, the court may find that overwhelming evidence precludes a finding of prejudice, requiring the "overwhelming evidence" to include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical or corroborating evidence so strong that *Strickland's* standard of a reasonable probability of a different outcome cannot be met).

It was undisputed that on September 30, 2014, Petitioner intended to kill Victim by cutting her throat and face as stated in the indictment. (App. 235). Petitioner confessed to those facts. Counsel testified that there was no issue regarding who committed the crime or what acts were committed. (App. 192). Thus, Petitioner failed to prove there's a reasonable probability that the result of trial would have been different but for Counsel's stipulation to the facts in the indictment.

Petitioner argues that prejudice should be presumed from the fact that Counsel did not move to suppress Petitioner's confession under *Jackson v. Denno*.² However, Counsel testified that he did not have any concerns about the voluntariness of the statement Petitioner gave to law enforcement. (App. 200:11-13). Further, Petitioner failed to prove prejudice by failing to show a reasonable probability that a *Jackson v. Denno* hearing would have been successful where there was sufficient evidence in the record to show that Petitioner's statement was given voluntarily.

Cpt. Regalis testified that in a recorded interview with police, Petitioner gave a confession after being advised of his *Miranda* rights *twice*. (App. 27) (emphasis added). It is unlikely that a motion to suppress the statement would have been successful based on Cpt. Regalis' testimony. The trial court's likely denial of the motion would have been affirmed on appeal since there was evidence to support denying the motion. *See Millidge v. State*, 422 S.C. 366, 380, 811 S.E.2d 769, 804 (2018) (holding the proper inquiry for determining prejudice from failing to preserve an issue is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's ruling").

Petitioner also argued that Counsel's stipulation to his competency undermined his expert witness and trial strategy. However, as supported by analysis below, Petitioner failed to prove a reasonable probability that the result of trial would have been different where the stipulation did

² *Jackson v. Denno*, 378 U.S. 368 (1964).

not preclude Counsel's mental health trial strategy and there was substantial evidence presented that Petitioner was competent at the time of trial and able to distinguish right from wrong at the time of the crime. Thus, Petitioner is not entitled to a presumption of prejudice where he failed to prove prejudice. Accordingly, the PCR court specifically, sufficiently, and adequately addressed all the issues raised. A remand is unwarranted.

II. The PCR court correctly found Petitioner knowingly and voluntarily waived his right to a jury trial where the record establishes that after being advised of his right, and after the trial court denied his motion for a venue change, Petitioner made the decision to waive his right to a jury trial due to his concerns about the jury pool in Calhoun County.

The PCR court correctly found Petitioner knowingly and voluntarily waived his right to a jury trial. The Sixth Amendment guarantees a criminal defendant the right to a public trial with a jury. U.S. Const. amend VI. A defendant has the "ultimate authority" to determine whether to waive his right to a jury trial, and the defendant's waiver of the right to a jury trial must be knowing, voluntary, and intelligent. *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871 (2012). A defendant's knowing and voluntary waiver of a statutory or constitutional right *must be established by a complete record* and *may* be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Id.* at 641, 732 S.E.2d at 873 (emphasis added). To determine whether the waiver was made knowingly and voluntarily, the court examines the particular facts and circumstances of the case including the background, experience, and conduct of the accused. *Id.* at 641, 732 S.E.2d at 874.

In *Moore*, the Supreme Court determined a defendant did not knowingly and voluntarily waive his right to a jury trial where the record was *devoid of any evidence* regarding counsel's discussions with the defendant. *Id.* at 641, 732 S.E.2d at 874-75 (emphasis added). The defendant's lawyer could not testify at the PCR hearing that he definitely explained to the defendant the

difference between a jury trial and a bench trial. *Id.* The defendant testified he did not know ahead of time that he was going to have a bench trial, and the defendant was illiterate. *Id.* The Court reasoned the complete record did not support a finding that the defendant's waiver was voluntary. *Id.*

Petitioner's case is distinguishable from *Moore*. Here, there is sufficient evidence to support the PCR court's finding that Petitioner waived his right to a jury trial. Under *Moore*, a colloquy is not required where a complete record establishes that Petitioner waived his right. Unlike the lawyer in *Moore*, Counsel *credibly* testified that he advised Petitioner of his right to a jury trial, and Petitioner voluntarily decided to waive the right. (App. 188:9-11; 189:5-9; 226). Unlike the defendant in *Moore*, Petitioner is intelligent, educated, competent, and was represented by an experienced criminal defense attorney who advised him of his right to a jury trial. Counsel *credibly* testified that Petitioner was concerned about the jury pool in Calhoun County and wanted Counsel to move for a change of venue. (App. 188). Counsel testified that when the motion for a venue change was denied, Petitioner decided to waive his right to a jury trial because he was afraid that he would not get a fair trial with a jury. (App. 188-89). Counsel testified that Petitioner agreed to go forward with a bench trial because he was worried about the Calhoun County jury and believed a judge would be more neutral than a jury. (App. 189-90).

Counsel testified that he had been practicing law for twenty-five (25) years, and this was the *one and only* bench trial he *ever* did. (App. 190:23-25) (emphasis added). It is inconceivable and very unlikely that an experienced criminal defense attorney would proceed to his first and only bench trial *ever* without his client's knowing and voluntary waiver. Petitioner made the decision to waive his right to a jury trial. Regarding Petitioner's absence at the pre-trial motion for change of venue, the PCR court correctly found that Petitioner failed to prove he was prejudiced where

Petitioner was not tried in his absence, and the facts from the pre-trial hearing and waiver were put on the record in Petitioner's presence. (App. 6-8; 225).

Counsel further testified that based on Counsel's discussions with the trial judge in chambers, he believed a bench trial would be more favorable for Petitioner in sentencing. Counsel testified that he discussed with the trial judge a possible sentence for Petitioner and thought he had the judge's approval that she would consider a sentence consistent with the solicitor's previous plea offers. (App. 190-91). Counsel testified that the trial judge did not believe it was necessary to put Petitioner's waiver on the record, which Counsel believed lent credence to his chambers meeting with the judge regarding sentencing. (App. 191).

The PCR court found Counsel's testimony credible regarding Petitioner's waiver and found that there was sufficient evidence in the record to establish that Petitioner knowingly and voluntarily waived his right to a jury trial (App. 227; 6:16-7:7:9; 7:22-8:1). Thus, the PCR court correctly found that Petitioner waived his right to a jury trial.

III. The PCR court correctly found Counsel was not ineffective for stipulating Petitioner's competency to stand trial where Petitioner failed to prove a reasonable probability the result of trial would have been different since there was a DMH report finding Petitioner competent; the stipulation did not preclude Petitioner from raising a mental health defense; the trial court was unlikely to find Petitioner GBMI or NGRI based on evidence presented that Petitioner knew right from wrong at the time of the crime; and Counsel articulated a reasonable strategy to preserve Petitioner's right to testify at trial.

The PCR court correctly found Counsel was not ineffective for stipulating Petitioner's competency. The burden is on the PCR applicant to prove prejudice from counsel's alleged errors by proving "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.

"Competency to stand trial" is a determination of a defendant's present rational understanding and ability to consult with his attorney *at the time of trial*. Competency to stand trial

is a separate analysis from whether a defendant had the ability to determine right from wrong *at the time of a crime*. Compare *McLaughlin v. State*, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003) (stating the test for competency to stand trial is “whether the defendant has sufficient *present* ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him.”) (emphasis added) (citation omitted) *with State v. Curry*, 410 S.C. 46, 52-53, 762 S.E.2d 721, 724-25 (Ct. App. 2014) (“A defendant is guilty but mentally ill if, *at the time of the commission of the act* constituting the offense, he had the capacity to distinguish right from wrong or recognize his acts as being wrong....” (emphasis added) (citing S.C. Code Ann. § 17-24-20(A) (2014))).

Guilty but mentally ill (“GBMI”) is further distinguished from a not guilty by reason of insanity (“NGRI”) verdict. *Id.* “[GBMI] verdict clarifies the distinction between a defendant who is not guilty by reason of insanity from one who is mentally ill yet not criminal insane and, therefore, is criminally liable.” *Id.* (citing *State v. Hornsby*, 326 S.C. 121, 130, S.E.2d 869, 874 (1997)). In a bench trial, the judge is presumed to know the difference between each issue presented and conduct the appropriate analyses.³

Petitioner argues that Counsel’s stipulation undermined the defense expert’s testimony from Dr. Salas. However, the Counsel’s stipulation merely undermined Dr. Salas’s report that Petitioner was not competent to stand trial; it did not preclude Counsel’s argument that Petitioner did not know the difference between legal right and wrong at the time of the crime. Dr. Salas acknowledged that there is a difference between competency to stand trial and criminal responsibility at the time of the crime. (App. 66:2-20). On cross-examination, the solicitor

³ *Cf. State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (stating in a bench trial, a judge is presumed to disregard prejudicial or inadmissible evidence because a judge, unlike a juror, is uniquely suited by training, experience and judicial discipline.).

questioned Dr. Salas about her May 30, 2015, report in which she opined Petitioner was not competent to stand trial. (App. 77:10-78:2). The solicitor followed up his questioning by asking Dr. Salas if she was aware that Petitioner stipulated to being competent. (App. 77:25-78:1).

The trial court found Counsel's stipulation to Petitioner's competency undermined Dr. Salas' report that Petitioner was not competent to stand trial. On the issue of Petitioner's competency, the court stated the following:

The defendant's stipulation as to the competency of the defendant discredits his own expert witness. His own expert witness indicated that she felt he was not competent to stand trial; but clearly, he is competent to stand trial. He was appropriate in his discussions with the court. He is obviously very intelligent and able to communicate effectively. And certainly, his interactions and his behavior and his demeanor have been evidence here [in] the courtroom.

(App. 119:23-120:4).

Petitioner failed to prove prejudice by failing to prove there's a reasonable probability that the trial court would have found him not competent to stand trial but for Counsel's stipulation where there was a DMH evaluation report finding him competent, and the trial court found Petitioner competent based on the judge's own observations of Petitioner's demeanor and communication during trial. Further, Counsel's stipulation to Petitioner's competency neither precluded Counsel from presenting a mental health defense to seek a GBMI or NGRI verdict nor undermined his trial strategy.

Petitioner failed to prove there's a reasonable probability that but for Counsel's stipulation to competency, the trial court would have found him GBMI or NGRI based on the evidence presented. There was significant evidence presented that Petitioner was able to distinguish right from wrong at the time of the crime. Petitioner confessed to police that he understood right from wrong. (App. 28). Petitioner also confessed to police that after stabbing Victim, he attempted to

clean up Victim's blood and hid from police until they left the scene because he knew his actions were legally wrong. (App. 27-29). Victim also testified that she had known Petitioner for years and did not have a reason to believe he did not understand right from wrong or was not rational [at the time of the crime]. (App. 18-19; 13-14). Further, Dr. Salas, the defense's own expert witness, testified that Petitioner "certainly could tell the difference between legal right and wrong" at the time of the crime. (App. 61:18-23).

Since there was evidence that Petitioner could distinguish right from wrong at the time of the crime, Petitioner was not criminally "insane" and a NGRI verdict was unavailable. After hearing the evidence and testimony presented, the trial court rejected a GMBI verdict and found Petitioner guilty, stating the following:

Dr. Sala actually testified that he knew legal right from wrong. And mental illness has not been established. The defendant's conduct contradicts this on every stage of this trial. He is clearly intelligent, articulate, and I think, quite frankly, he knew that his only defense to mitigate or escape his responsibility for these heinous acts are to allege that he was hearing voices in order to escape liability for his actions. Therefore, the Court finds the defendant guilty of attempted murder.

(App. 122:19-123:3).

Thus, Petitioner failed to prove a reasonable probability the result of trial would have been different but for Counsel's stipulation to competency.

Addressing Deficiency. This Court need not address whether Counsel was deficient for making the stipulation since Petitioner failed to prove prejudice. *Strickland*, 466 U.S. at 670 ("A court need not first determine whether counsel's performance was deficient before examining the prejudice... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). However, addressing deficiency, Petitioner failed to

prove Counsel was deficient where Counsel articulated a valid and reasonable strategy for the stipulation: to preserve Petitioner’s right to testify at trial.

Strickland requires that courts be *highly deferential* to counsel’s reasonable judgment in deciding how to best represent a defendant. *Strickland*, 466 U.S. at 688-89 (“[j]udicial scrutiny of counsel’s performance must be highly deferential”) (emphasis added). “Generally, trial counsel will not be deemed ineffective when he or she has expressed a valid reason for using a particular strategy.” *Washington v. State*, 440 S.C. 550, 573, 891 S.E.2d 668, 681 (Ct. App. 2023) (citing *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008)).

Petitioner argues Counsel was ineffective for stipulating to Petitioner’s competency. However, Counsel *credibly* testified that he stipulated Petitioner’s competency, pursuant to a DMH report, so Petitioner could testify at trial [if he chose to do so]. (App. 189). It was both a valid and reasonable strategy for Counsel to preserve Petitioner’s right to testify at trial in a trial where his mental state was the sole issue for trial. For Petitioner to be allowed to testify in his defense, it must have been established that he was competent. *See State v. China*, 312 S.C. 335, 339, 440 S.E.2d 382, 384 (Ct. App. 1993) (stating it is the “duty of the trial judge to determine competency of a witness to testify” and “there must be some evidence of the [capacity or] lack of capacity of the offered witness”).

Even if this Court finds Counsel’s decision was less than ideal, this Court still may not grant relief where Counsel’s overall performance in representing Petitioner was reasonable. Under the Sixth Amendment, a criminal defendant is entitled to *competent* representation, not *perfect* representation. *See Harrington v. Richter*, 562 U.S. 86, 90 (2011) (“[W]hile it is possible an isolated error can constitute ineffective assistance if it is sufficiently egregious, it is difficult to establish ineffective assistance where counsel’s overall performance reflects active and capable

advocacy.”); *see also* *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach *that no competent lawyer would have chosen.*”) (emphasis added and citation, internal quotations, and brackets omitted). Given the overwhelming evidence of Petitioner’s guilt, Counsel fought an uphill battle and attempted to give Petitioner the best chance of a defense against the attempted murder charge. *Strickland* requires this Court to defer to the reasonable strategic decisions of Counsel. The PCR court correctly denied relief.

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CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests that this Court affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



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