STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge

2011-CP-32-2798

Ronald J. Sheppard, #320057,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE ON APPEAL

PROBATIVE EVIDENCE EXISTS TO SUPPORT THE LOWER COURT'S RULING THAT THE PETITIONER WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST A CURATIVE INSTRUCTION REGARDING IMPROPER JUROR CONTACT.

STATEMENT OF THE CASE

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of State Grand Jury Clerk of Court. The Applicant was initially indicted by the State Grand Jury on November 16, 2005, followed by a superseding indictment filed on February 21, 2006 for: Count 1 - Securities Fraud (violation of S.C. Code §35-1-1210 and §35-1-1590); Count 2 - Crime Against a Federally Chartered or Insured Financial Institution violation of S.C. Code §34-3-110); Counts 3 & 4 – Forgery; Counts 5 & 6 - Making a False Statement or Misrepresentation; Counts 7 & 8 - Obtaining Signature or Property by False Pretenses (violation of S.C. Code §16-13-240); Count 9 - Breach of Trust; Count 10 – Perjury; and Count 11 - Conspiracy. (2005-GS-40-20).

James M. Griffin, Esquire represented the Applicant. On January 16, 2007, the Applicant proceeded to trial on counts one, seven, and eleven after the Court granted the Applicant's Motion to Dismiss on the other eight charges. Applicant was found guilty on all three of the remaining counts. The Honorable James W. Johnson, Jr., consecutively sentenced the Applicant to confinement for a period of ten (10) years on count one – Securities Fraud; five years on count seven – Obtaining Property Under False Pretenses; and five years on count eleven – Conspiracy.

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected. Applicant was represented on appeal by O. Grady Query, Esquire and Michael W. Sautter, Esquire.

The Applicant raised the following issues on appeal:

1. Whether Applicant received a fair trial before an impartial jury when there was improper contact between a spectator and a juror which was not cured by the trial court;

2. Whether the State Grand Jury had subject matter jurisdiction over counts seven and eleven of the indictment and if not, should those sentences and convictions be vacated;

3. Whether South Carolina Code §14-7-1820 violates Applicant's constitutional rights against the passage of *ex post facto* laws; and

4. Whether the trial court abused its discretion by imposing a sentence on Applicant which was substantially disproportionate to the sentences of other co-conspirators?

The South Carolina Supreme Court affirmed Applicant's conviction and sentence. With respect to issue two the court held that Applicant was actually challenging the sufficiency of the indictment; that there was no question that the Circuit Court had subject matter jurisdiction over the crimes charged; that because Applicant failed to timely challenge the three counts in the indictment and instead went to trial on the charges, he could not now, having lost at trial, come back to challenge the sufficiency of the indictment; and that the State Grand Jury had jurisdiction over the charges of obtaining property by false pretenses and conspiracy, even though those specific crimes may not be enumerated elsewhere in section 14-7-1630, because they were committed in the same course of conduct as securities violations.

With respect to issues one, three and four, the Court held that Applicant failed to preserve the issues for review. State v. Sheppard, Op. No. 26927 (S.C. Sup. Ct. filed Feb. 7, 2011). The Remittitur was issued on February 23, 2011.

In the present action, the Return and Partial Motion to Dismiss was filed by the Respondent on or about March 30, 2012 and a Motion for a More Definitive Answer made by Respondent on or about September 17, 2012. A hearing was held regarding these motions at the Lexington County Courthouse on October 15, 2012. The Applicant was represented by O. Grady Query, Esquire and Michael W. Sautter, Esquire[1]. The Respondent was represented by Assistant Attorneys General Ashley A. McMahan and Karen C. Ratigan. The Respondent's motions were granted on October 19, 2012.

An evidentiary hearing into the matter was convened on November 15, 2012, at the Lexington County Courthouse in Lexington, SC. The Applicant was present at the hearing and was represented by O. Grady Query, Esquire and Michael W. Sautter, Esquire. Assistant Attorney General Ashley A. McMahan of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying were James M. Griffin, Esquire and Sheila Hoffman. On June 17, 2013, the Court denied and dismissed the application with prejudice. The Applicant filed a motion pursuant to Rule 59(e), SCRCP on July 3, 2013. The Court found that the Order of Dismissal contained the required findings of fact and conclusions of law, and denied the Applicant's motion on April 14, 2014. A timely Notice of Appeal was filed on the Applicant's behalf. The Petition for a Writ of Certiorari was served on September 25, 2014. This Return follows.

[1] At the hearing the Applicant waived any claim to ineffective assistance of appellate counsel since he is represented in his PCR by the same attorneys that represented him on appeal.

Facts of the Case[2]

The PCR court found that Applicant was not prejudiced because overwhelming evidence of guilt existed. (App. p. 2410). In 1963, Dwight Holder formed Carolina Investors, Inc. (CII) to finance the sale of cemetery plots. CII expanded its operations into other types of lending, including subprime mortgage lending. In 1991, Emergent Group, Inc. (Emergent) purchased CII.

In 1995, Emergent formed Emergent Mortgage Company to take over the subprime lending business from CII. Emergent Mortgage was formed using a loan of $15 million from CII, thus beginning the inter-company loans. Upon the formation of Emergent Mortgage, CII ceased its lending operations, but continued to sell debt instruments to investors. The money CII continued to raise from investors was no longer used to fund its own operations, but immediately transferred to fund the operations of Emergent and Emergent Mortgage. (App. 167-168; 761-762).

In 1998, Emergent began losing money, and eventually sold all of its subsidiaries and assets except Emergent Mortgage and CII. (App.744-745). Emergent became a publicly traded company and changed its name to HomeGold Financial, Inc., with Emergent Mortgage becoming HomeGold, Incorporated (collectively referred to as HomeGold). HomeGold began buying back from investors the previously sold bonds for less than their face value. At the same time, however, the company continued selling debt instruments through CII at full face value. Throughout this time, HomeGold's indebtedness to CII continued to grow.

[2] These are the facts that were presented in the Final Brief of Respondent filed with the Court of Appeals on March 18, 2009.

In addition to a general turndown in the subprime lending business during 1998, HomeGold lost its primary producer of mortgages. (App.166). In 1999, HomeGold began looking for a merger partner with sufficient assets to stabilize the company as well as an experienced production operation. After performing due diligence on two companies that proved poor merger candidates, HomeGold looked to merge with HomeSense Financial Mortgage Corporation, a company owned and operated by Appellant, Ronald J. Sheppard.

At the time the merger closed in May 2000, Appellant represented that HomeSense had approximately $2-3 million in net worth. Additionally, HomeSense financial records reflected about $30 million in loans on the books. (App.862). Prior to completing the merger, Appellant and HomeGold entered into a Mutual Indemnity Agreement, which indemnified both Appellant and HomeGold from losses incurred as a result of a breach of certain guaranties associated with the merger. (App.174-178). The Mutual Indemnity Agreement required the total equity of HomeSense at the closing of the merger to equal at least $2,373,233.00, determined using generally accepted accounting principles. In the event the net worth was less than the required amount, Appellant would have to immediately pay the deficiency in cash to HomeGold. (App.1592-1596; State's Exhibit 57).

Pursuant to the terms of the merger, Appellant received a $5.7 million non-recourse loan from HomeGold, which consisted of $4 million in cash and HomeGold's assumption of $1.7 million in Appellant's personal debt. Additionally, Appellant was issued over 6 million shares of HomeGold common stock and $10 million worth of

preferred stock, which would pay a dividend.[3] (App.1588-1589). The interest payments on the loan were structured to be equal to or less than the dividend or bonus checks received by Appellant so he never made any payments out of pocket. (App.1596;). In addition, the loan was a non-recourse loan; meaning Appellant would never be personally liable for the amount owed, and the only security provided on the loan was the shares of stock he received during the merger.

On January 30, 2001, Appellant and HomeGold, specifically Jack Sterling, entered into an agreement canceling the Mutual Indemnity Agreement. The terms of the agreement were not presented to HomeGold shareholders even though it claimed cancellation of the Mutual Indemnity Agreement was in the best interest of HomeGold shareholders. (App. 174-75; 1612-1613; State's Exhibit 197).

Rhonda Johnson, who was in the accounting department of HomeGold, was tasked with merging the two companies' financial records. During her examination of HomeSense' books, she was unable to locate $7 million of the loans claimed by Appellant. HomeGold was forced to record the missing loans as goodwill because they could not be accounted for otherwise. (App.862-65).

The first week after the merger, HomeGold received numerous unpaid, past due invoices from HomeSense totaling over $1 million. (App.767). Kevin Mast, who was CFO of Emergent and then HomeGold, explained the bills had "not been expensed by [HomeSense], it had been saved up to pay by [HomeGold] after the merger." (App.767). Additionally, Mast located instances where HomeSense was using the same loans as

[3] It was later determined that HomeGold could not pay a dividend, so the amount Appellant would have received was converted to a quarterly bonus he received instead of a dividend check.

collateral to borrow from two different warehouse lines of credit. (App.767). He brought these accounting irregularities to the attention of Jack Sterling and Appellant. (App.805). When he asked Appellant about the discrepancies, Appellant was "really dismissive" and referred him to the accounting department. The accounting staff responded, "they just did what Ronnie told them to do." (App.767).

Gary Rank, an auditor with the accounting firm of Elliot Davis, reviewed HomeSense financial documents and discovered several accounting irregularities. The irregularities stemmed from recording income before it was actually earned by the company. The adjustments resulted in HomeSense showing a negative net worth rather than the positive net worth Appellant asserted. (App.353-357).

While the inter-company debt began prior to Appellant's taking the reigns of HomeGold, the main growth of that debt occurred while he was CEO. In 1999, before Appellant joined HomeGold, the inter-company debt owed to CII was approximately $67 million. By the end of 2000, the debt had grown to $100 million. At the end of 2001, HomeGold owed CII over $144 million, and finally, by the end of 2002, Appellant had overseen the increase of the inter-company debt to more than $243 million. (App.195).[4] This increase in debt took place while HomeGold continued to incur large losses and was, at times, spending two dollars to earn every dollar of revenue. (App.189).

[4] HomeGold's mortgage subsidiary did business in several states, each state requiring a license to operate. In order to obtain these licenses, HomeGold would have to show the mortgage subsidiary had a positive net worth at the time of filing. To accomplish this, the subsidiary's debt to CII was transferred to the parent company. This misleading accounting practice allowed HomeGold's mortgage subsidiary to continue originating mortgage loans. (T.622-625; 896-897).

After becoming CEO, Appellant and others, including Sterling, restructured the company and terminated several members of the management team. Keith Giddens (Chief Operating Officer), Laird Minor (EVP of structured finance), and Kim Bullard (Head of Portfolio Management and Servicing Operations) were all terminated. [5] (App.769). Other key employees resigned under pressure or because they refused to perform various actions demanded by Appellant.[6] Appellant filled the positions with former HomeSense employees.

To further demonstrate his control of the company, Appellant moved HomeGold's headquarters to Lexington County.[7] (App.1615-1617). Over time, all major divisions of HomeGold were moved to Lexington County. (App.1616). Finally, he moved check-writing authority to Lexington from Greenville, which prevented the account control that had previously been in place. (App.817).[8]

While CEO of HomeGold, Appellant instituted some "aggressive" accounting practices in order to make the books of HomeGold and CII look better to investors and regulatory agencies. At Appellant's direction the amount paid for sales and loan leads, or a customer list, was amortized over twenty-four months instead of being expensed in the month it was purchased. This book entry spread out the recognition of expenses, which made income appear greater than it should have been. (App.632-634). Rank

[5] Keith Giddens resigned after Appellant "made it clear that he did not want Keith Giddens to play any role in the company going forward." (App. 788).

[6] Kevin Mast was given a severance package and resigned because he refused to perform inappropriate acts at the direction of Appellant. (App. 789-790). Susanne Caughman, HomeGold's Controller, wasterminated for refusing to sign a document claiming that HomeGold's financial records were kept in accordance with Generally Accepted Accounting Principles. (App. 737-738).

[7] Appellant moved HomeGold headquarters to Lexington County because he no longer wanted to travel from his home in Lexington County to Greenville, South Carolina. (App. 1633).

indicated the auditors disagreed with that treatment of the expense, and it was changed to reflect a shorter amortization period prior to the issuance of the next audited financial statements. (App.384-387).

Early in Appellant's tenure, he requested the accountants with HomeGold increase the amount of the deferred tax-loss asset the company carried on the books. The tax-loss was a deferred asset because it would be used to offset any future taxes incurred if the company became profitable. While it was proper for HomeGold to recognize a realistic amount that could be utilized in the future, Appellant and Sterling wanted to report the full amount of the tax-loss asset available on the books in order to turn the company's net worth from negative to positive. (App.391-394; 888-889). After several meetings with auditors and HomeGold accounting staff, in which both Appellant and Sterling were present, the deferred tax-loss asset was increased, but not as substantially as originally sought. (App.493; 854-856; 871-875).

The accountants were also asked to transfer assets from the books of HomeGold to CII as "payment" on the inter-company debt. The assets were transferred only on the books, however, and actual ownership never actually transferred to CII. (App.629-631). Appellant and other officers also pressured the accounting department to record income prior to it actually being earned. Every loan processed by HomeGold earned some income from fees and other items that was recorded on the closing of the loan. However, HomeGold also earned money when the loan was sold to another company. This income was supposed to be recorded upon the sale of the loan, but HomeGold

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[8] Kevin Mast testified the move was made after he raised his concerns to Jack Sterling and others. Mast testified Sterling's response was "that Ronnie was the CEO and what Ronnie wanted we should provide to him." (App. 838)

recorded it upon the loan's closing, thus speeding up recognition of income. (App.612; 962-964).

At a meeting on October 4, 2001, Rank and other members of Elliot Davis met with HomeGold personnel, including Appellant and Sterling, to discuss the auditors' concerns over HomeGold's ability to remain a going concern and the financial and accounting choices implemented by Appellant. (App.615-616; 974-975; State Exhibit 74). The auditors from Elliot Davis asked Appellant: "What are you going to do if you can't pay back Carolina Investors?" Appellant answered he "will file Chapter 13 . . . I will cut and run." (App.671). The auditors also asked HomeGold to obtain an independent valuation of the mortgage business to determine if its value was sufficient to cover the debt owed to CII, or whether the debt would need to be impaired. (App.389-391; 414).

HomeGold obtained a valuation of the mortgage division from CBIZ based on projections submitted by Appellant and others in management at HomeGold. (App.962-968). The CBIZ valuation showed a value for the mortgage division of about $170 million. However, after examining the valuation, the auditors at Elliot Davis rejected it as improperly conducted. (App.967-68; 990).

HomeGold then obtained a second valuation from Deloitte and Touche (D&T). (App.968-969). The D&T valuation showed the mortgage division's value between $130 and $140 million. (App.972). The auditors accepted the D&T valuation, and as a result, impaired the debt owed to CII by $6-7 million because it was not likely HomeGold could repay the full debt, even if it sold the mortgage division. (App.971-972). Both valuations included statements that they were not meant for publication

and were to be used solely for financial reporting purposes and calculation of the loan impairment. (App.971).

At a meeting on March 14, 2002, the auditors informed HomeGold officers and directors, including Appellant and Sterling, that they would place a paragraph in HomeGold's audited financial statements indicating their belief HomeGold would not be able to sustain operations as a going concern for another twelve months. (App.396-398; 405; 445-446; 966). Rank indicated the auditors "could no longer rely on [HomeGold official's] ability to project the future." (App.383-384). The individuals at the meeting also discussed the impairment of the inter-company debt based on the valuations. (App.398-400). The reporting of the going concern language in the 2001 financial statement also triggered the write off of HomeGold's goodwill and the deferred tax asset discussed above. (App.389).

After learning the auditors planned to include a statement regarding going concern, HomeGold drafted a response. Shane Smith testified he gathered information for the response, and Appellant told him and others that they were not to discuss the "going concern" language, especially with individuals from CII. (App.621). Additionally, Appellant and Sterling each wrote letters to auditors at Elliot Davis, seeking to change their mind regarding placing the "going concern" language in HomeGold's 10k and CII's prospectus. (App.402-406; State's Exhibit 76).

HomeGold's year-end 2001 10k filing as well as CII's 2002 prospectus included an opinion from the auditors regarding their belief that HomeGold would be unable to continue for the next twelve months as a going concern. (App.405; State Exhibit 26 p.6; Exhibit 26 p.52-53; Exhibit 26 p.67-68; State's Exhibit 50 pp. F-2; F-11). The

auditors made the decision to include the "going concern" language in compliance with Generally Accepted Accounting Principles. (App.507-508).

In April 2002, the CII prospectus was submitted to the South Carolina Securities Commission. The prospectus included notes from management regarding the "going concern" opinion. Additionally, the prospectus referenced the valuations received from CBIZ and D&T, in contravention of the express statement in the valuations that they were only for internal purposes. (State's Exhibit 50; State's Exhibit 61). Additionally, Appellant, Sterling, Larry Owens, and Earle Morris signed a letter to the Securities Division of the Attorney General's Office indicating their belief the "going concern" opinion was the result of Elliot Davis being overly conservative as a result of the Enron and Arthur Andersen collapse. (State's Exhibit 62).

After informing other officers at HomeGold of his plan to "cut and run," Appellant "invested" $200,000 in CII in order to make it seem to investors that the officers of HomeGold all had confidence in the ability of HomeGold to repay CII. (T.623-625). The amount invested, however, was immediately returned to Appellant in a loan or check from HomeGold that was secured with the debt instruments as collateral. (T.624-625).

During the time HomeGold was failing as a business and the debt to CII was growing to the point it would never be repaid, Appellant continued to live and spend lavishly at the expense of HomeGold and CII. HomeGold furnished Appellant with a motor home valued at "a little over a million dollars." When HomeGold and HomeSense merged, the company took on the payments of the motor home, which was used by Appellant. While with HomeGold, Appellant went through several motor

homes and several upgrades, including at least one after auditors expressed concerns about HomeGold's and CII's ability to continue operations. (App.643-646; State's Exhibit 84). Additionally, Appellant traveled throughout the United States in a chartered jet with catered food instead of flying on commercial aircraft. (App.647-648; 928-930; State Exhibit 85). Finally, Appellant maintained a personal trainer who was paid by checks from HomeGold. (App.648-649; State's Exhibit 86).

Kevin Martin, a former CFO of HomeGold, explained Appellant's attitude:

> On one specific occasion I made a specific comment about either the chartered air flights or the million dollar RV and my question was, Ronnie, look, when we get to the end of this thing and we can't pay the investors back they are going to say, they are going to look at these chartered flights and this RV and they are going to say, you know, what were you doing, did you not care about these investors. And Ronnie's reaction, whether it was out of frustration . . . or not, his reaction was screw the investors, they are getting what they deserve. (App.960; R. 1136).

Appellant also took advantage of his position with HomeGold to make a profit for himself. HomeGold had property on Leaphart Road on its books. On June 6, 2001, Appellant obtained a contract to sell the property for $438,000. However, at that time the land was still an asset owned by HomeGold. Appellant obtained a letter from a real estate agent indicating a value of $380,000 for the property. On June 22, 2001, HomeGold sold the property to Appellant for the amount listed in the valuation. (App.897-905; State's Exhibits 122-126). Thereafter, Appellant sold the property based on the contract he obtained prior to owning the property. After closing on the sale, Appellant received a check for $61,567.04 for his profit on the sale of the property. (App.920; State's Exhibit 127).

Appellant sought to ensure that he got all the money he could out of HomeGold before he left or it collapsed. In April 2002, he submitted a check for mileage that was incurred from January until April 2000, even though Appellant was not with HomeGold during that time because it was prior to the merger with HomeSense. (App.652-653; State's Exhibit 66). Appellant was also reimbursed $9,291.61 for office furniture and $17,380 for wallpaper in early 2002. (App. 653-655; State's Exhibits 67&68). These reimbursements were made despite the fact Appellant knew HomeGold could not continue in business and would not be able to repay the debt owed to CII.

In mid-2002, Appellant and other HomeGold officials informed the board of CII they were attempting to sell the mortgage division in order to repay the debt to CII. Appellant informed the board of CII he was negotiating with IMPAC Bank in California, and he would be able to sell the mortgage division for $185 million. (App.1203). After several months passed, Appellant notified the board of CII that the IMPAC deal failed to materialize. (App.1204).

HomeGold officials began working on alternatives to keep the company operating. The main considerations included a receivership for CII, struggling along with reduced production to see if things would turn around, or sell to another company. (App.1674-1675). The HomeGold officials even went so far as to hire an attorney regarding the receivership plan. (App.1678-1679).

Appellant presented his alternative to the board of CII which required Appellant to resign his positions with HomeGold, form a new company called EMMCO, and purchase the mortgage division using the new company. (App.1204-1205; 1713). Appellant maintained he would be able to produce profits at EMMCO using his

personal guarantee to obtain new warehouse lines of credit to increase mortgage production beyond that capable at HomeGold. (App.1677-1678). Appellant never discussed the possibility of a receivership for CII or any other alternative besides EMMCO purchasing HomeGold's mortgage division. (App.1680-1681).

Appellant agreed to pay one-half of EMMCO's profits to HomeGold on a quarterly basis in order to pay off the debt to CII.[9] (App.1677-1681). In exchange, he was paid approximately $5million in cash to fund the new business, and EMMCO received in-kind services, property, and other items valued between $3-4 million. (App.1689-1693). Despite repeated attempts, HomeGold never collected on debts accrued by EMMCO. When HomeGold formally demanded payment, Appellant responded by submitting an invoice to HomeGold for $34,400,000.00, purportedly for HomeGold's use of warehouse lines Appellant personally guaranteed. (App.1731-1733; State's Exhibit 204).

In February of 2003, HomeGold officials informed the board of CII that HomeGold was no longer using CII's money, and HomeGold should become profitable in the second quarter. (App.1209-1210). On March 20, 2003, members of the board of CII held a conference call with individuals from HomeGold including Jack Sterling, Karen Miller, and Forrest Ferrell. During the call, HomeGold officials indicated they expected significant cash inflows over the next few weeks, including a $1.2-1.6 million payment from EMMCO. (App.1211-1212). The very next day on March 21, 2003, however, the same individuals from CII were on another conference call to tell them

9 It is significant that payment was only required if EMMCO made a profit, something that had not happened at HomeGold.

HomeGold filed bankruptcy, and CII needed to hire an attorney to explore a conservatorship or receivership. (App.1212-1214; 1731). Both HomeGold and CII ceased operations on that date and never reopened for business.

STANDARD OF REVIEW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

PROBATIVE EVIDENCE EXISTS TO SUPPORT THE LOWER COURT'S RULING THAT THE PETITIONER WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST A CURATIVE INSTRUCTION REGARDING IMPROPER JUROR CONTACT.

To be successful on a claim of ineffective assistance of counsel, the Applicant must first prove that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant 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 of trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland). The PCR court found that Applicant was not prejudiced because overwhelming evidence of guilt existed. (App. p. 2410).

Respondent submits that the lower court correctly determined that Petitioner did not meet his burden of showing that he was prejudiced by counsel's decision to not take action to determine and cure the improper jury contact and by trial council's decision to not preserve issues surrounding the improper jury contact for appeal.

Due to the overwhelming evidence against Petitioner, the outcome of his trial would not have been different even if Petitioner's trial counsel had addressed the

improper jury contact and preserved the issue for appeal. Therefore, evidence of probative value exists to support the PCR court's findings.

A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Solomon v. State 313 S.C. 526, 443 S.E.2d 540 (1994), *citing* Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). The reviewing court is to give great deference to a judge's findings since the appellate court lacks the opportunity to directly observe the witnesses. Id. Accordingly, because evidence of probative value exists to support the PCR court's findings, this Court should deny this Petition for Writ of Certiorari.

Petitioner attempts to raise - via an additional argument - that the PCR court erred in holding that Petitioner was not deprived of his Constitutional rights and thus was not entitled to a new trial. This issue was never raised before the PCR court. Rather, it was raised for the first time in a 59(e) motion.

It is abundantly clear that a party cannot raise an issue for the first time in a post-trial motion. *See* South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding "it is improper to argue new matter in a motion for reconsideration"). *See also* Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Further, "[c]onstitutional arguments are no

exception to the rule, and if not raised to the trial court are deemed waived on appeal." State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) *citing* State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

In addition, this is a direct appeal issue and it is not properly before this Court. This Court has long held that post-conviction relief is not a substitute for an appeal. *See* Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *See* S.C. Code Ann. § 17-27-20(b) (2006); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (emphasis added).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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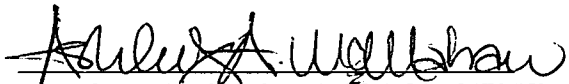
By: 
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