THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief
R. Scott Sprouse, Circuit Court Judge
William Seals, Jr., Trial Judge
2015-CP-07-01939

Appellate Case No.: 2017-002494

JAQUWN BREWER, #347482, ... Petitioner,

vs.

STATE OF SOUTH CAROLINA, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI

I. Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was unaware that trial counsel intended to concede that he shot the Victim Donald Parker?

II. Did the Lower court err in not granting Post Conviction Relief on the basis that trial counsel failed to argue and preserve for Appeal that the video statement was inadmissible and a violation of the confrontational clause?

III. Did the Lower Court err in not granting Post Conviction Relief on the basis that Appellate Counsel was ineffective for failure to raise the issue of Burden Shifting?

RESPONDENT'S STATEMENT OF THE CASE

The Petitioner, Jaquwn Brewer, was indicted at the 2009 term of the Court of General Sessions for murder, attempted murder, and possession of a weapon during the commission of a violent crime. 2009-GS 07-1279, 2009-GS-07-1293, and 2009-GS-07-1296. ROA 4-13 . The charges arise from an incident in Beaufort County at the Semper Fi Club during a Memorial Day party on May 23-24, 2009. During the incident, Donald Parker was shot in the right calf after the Petitioner was directed to take his gun outside of the ongoing event at the club. Further shots were fired inside and then outside the club. During the final shots, Henry Jones was shot in the head while he was attempting to call 911. He died shortly thereafter as a result of the single gunshot wound.

On August 22, 2011, the Petitioner went to trial before the Honorable William H. Seals, Jr. The Petitioner was represented by retained counsel, Jared S. Newman. The prosecution was handled by Assistant Solicitors Meredith A. Bannon and James J. Bannon of the Fourteenth Circuit Solicitor's Office. On August 26, 2011, the jury returned a guilty

verdict on each charge. Judge Seals sentenced the Petitioner to life imprisonment on murder, twenty (20) years concurrent on attempted murder, and five (5) years on the charge of possession of a weapon during commission of a violent crime. ROA _ (Sentencing Sheet). R. p. 6-12.

The Petitioner made a timely notice of appeal on August 26, 2011. In his appeal, the Petitioner was represented by James Brown of Beaufort, S.C. In the appeal, appellate counsel Brown raised the following questions:

> Did the circuit court improperly admit hearsay statements, contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?

The State of South Carolina raised the following counter-question in its *Initial Brief of Respondent*:

> Did the court err in admitting the audio recording of the interrogation of the Appellant which included the Appellant being confronted with evidence gathered by the law enforcement which was not introduced for the truth of the matters asserted but for the Appellant's reaction and failure to respond to the inquiries other than to respond to his mother and the investigators that he did not do any shooting rather than reveal the location of the weapon he was photographed with at the crime scene?

Final Brief of Respondent, page v.[1] The Respondent was represented throughout by Deputy Attorney General Donald J. Zelenka. On December 4, 2013, the Supreme Court of South Carolina certified the case for review.[2] On April 1, 2014, oral argument was held in the matter.

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[1] During the PCR hearing, appellate counsel Brown testified that the case was unusual because below-signed counsel handled the appeal on the part of the State. App. 822-823. Below-signed counsel handled this matter from the receipt of the Initial Brief of Appellant. Below-signed counsel is handling this appeal because he had handled the direct appeal and counsel who handled the PCR action are no longer with the office.

[2] The Petitioner mistakenly asserts in the Petition and other pleadings similarly assert that the appeal was initially reviewed pursuant to Anders v. California, 378 U.S. 738

On January 28, 2015, the South Carolina Supreme Court issued its opinion. App. 718-727. The Court concluded that the admission of Brewer's interrogation was error. This Court reversed the murder conviction and remanded that charge for a new trial. However, this Court affirmed Brewer's convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime, for the error was harmless with respect to these charges. App. 725. State v. Brewer, 411 S.C. 401, 403, 768 S.E.2d 656, 657 (2015). Justice Pleicones dissented and asserted that he would have affirmed both convictions. App. 726- 728. Justice Beatty entered an order concurring in part and dissenting in part and would have concluded that both convictions should have been reversed and remanded. App. 729.

The Petitioner made a Petition for Rehearing before the Supreme Court on February 11, 2015. In the petition, the Petitioner, through appellate counsel Brown asserted that this Court's harmless error assessment involved a misapprehension of the facts asserting that the assault charge did not involve the testimony of witnesses who claimed to have seen Brewer shoot Donald Parker and that there were burden shifting claims in the matter. App. 730-733. The Respondent, through undersigned counsel, made a Response to the Petition for Rehearing on February 23, 2015. App. 734-749. On March 5, 2015, the Supreme Court of South Carolina issued its order denying the petition, with Justice Pleicones dissenting. App. 751. The remittitur was issued on March 5, 2015.

PCR PROCEEDINGS

(1967). This is incorrect. Appellate counsel Brown filed his Initial Brief of Appellant on the merits and it proceeded throughout as a merit case.

The Petitioner filed a pro se application for post-conviction relief on August 10, 2015. *Brewer v. State*, 2015-CP-07-1939. App. 755-780. The Respondent made a Return on May 13, 2016 by then Assistant Attorney General J. Rutledge Johnson. App.p. 782-786. On August 26, 2015, the circuit court appointed James Falk to represent the Petitioner. On February 13, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse. The Petitioner was present and represented by6 counsel James Falk. The State was represented by then Assistant Attorney General Ruston Neely. App.p. 788-829. Petitioner alleged the following grounds at the PCR hearing:

I. Ineffective Assistance of Counsel
   a. Failed to object to the interview tape on 5th amendment grounds.
   b. Trial counsel was ineffective for conceding guilt without his consent.
II. Ineffective Assistance of Appellate Counsel
   a. Failed to brief the burden shifting issue which was preserved for appeal and a Fifth Amendment violation. .

Testimony was received from trial counsel Jared Newman, the Petitioner, and appellate counsel James Brown. On November 5, 2017, Judge Sprouse entered his order denying the application in its entirety. App. 830-838.

The Petitioner made a notice of appeal on November 29, 2017.

The Petitioner, through retained PCR appellate counsel made a petition for writ of certiorari on December 3, 2018. This Return follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119,

386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENTS

I. Certiorari is not where probative evidence supports the conclusion the appellate counsel was not ineffective under Strickland v Washington, 466 U.S. 668 (1984) when he failed to present an issue that he claims was burden shifting.

In his petition before this Court, Brewer asserts that the appellate counsel in the direct appeal an argument that he asserts is a "burden-shifting" issue. He relies upon Justice Beatty's dissent in the direct appeal as support for his position. Petitioner now claims that had the Petitioner argued and the Court adopted Justice Beatty's dissent, a harmless error analysis would not have been done as it related to the assault and battery with intent to kill conviction. Respondent submits that certiorari should be denied for a number of reasons.

The Petitioner references the following in support of his position. In the dissent in the direct appeal, Justice Beatty stated the following:

> I concur in part and dissent in part. I agree that admission of Brewer's interrogation was error. I also agree that the murder conviction should be reversed as a result of this error. However, I depart from the majority's conclusion that admission of the interrogation was harmless as it relates to the charges of ABWIK and possession of a firearm during the commission of a violent crime.

But for the solicitor's numerous instances of burden shifting, via the interrogation tape, I would agree that the error was harmless as to the latter charges. However, the jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In my view, this created a due process structural defect in the trial. Structural defects are not subject to a harmless-error analysis regardless of the evidence presented. See State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) ("[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error. These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." (internal quotations omitted) (citing Arizona v. Fulminante, 499 U.S. 279, 306–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991))). Accordingly, I would reverse all of Brewer's convictions and remand for a new trial.

State v. Brewer, 411 S.C. 401, 412, 768 S.E.2d 656, 661–62 (2015).

HOW THE PCR COURT RULED

In the Order of Dismissal, Judge Spouse stated the following in rejected this allegation:

B. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Failed to brief burden shifting issue.

Counsel objected to the audio tape on the basis that law enforcement's statements were burden shifting. Tr. 76-77; 614. This ground was not briefed by Appellate Counsel. However, Appellate Counsel argued the admission of the audio tape was improper on other grounds. The Supreme Court reviewed the introduction of the audio tape and found the admission of the audio tape was in error. Brewer, 411 S.C. 401, 768 S.E.2d 656. Appellate Counsel was not deficient for failing to raise a different ground, as to why the interview material was inadmissible, where the Court agreed with Appellate Counsel and found in their favor. Appellate Counsel's argument was successful. There can be no stronger argument than a winning argument.

The Court ruled the admission of the objected to portions of the audio tape was in error. Applicant argues Appellate Counsel should have briefed the burden shifting issue in order for the Court to rule the admission of the audio tape was in error. The Court ruled the admission was in error based on the issues Appellate Counsel chose. Therefore, Applicant has failed to prove he was prejudiced where the Supreme Court found the audio tape inadmissible based on the grounds raised.

Accordingly, this Court finds Applicant failed to prove Appellate Counsel's briefing decisions were deficient. Applicant also failed to prove he was prejudiced such that there was a reasonable probability the result of the appeal would have been different had Appellate Counsel had also briefed the burden shifting issue. Accordingly, this Court denies and dismisses this allegation.

App. 836-837.

During the trial, in objecting to the admission of the taped statement on various grounds, counsel Jared Newman made the following assertion:

If the investigator were in court, he would not be allowed to say that. . I don't think they should be able to get those hearsay statements in under the guise of an interrogation. Those should be, if nothing else, redacted or deleted from that recording.
And then infected throughout the interview is an - for the jury to hear that you can prove yourself innocent, Get us this gun, it'll prove you innocent. You can prove yourself innocent. Help me prove you innocent. I believe the Court -- it's contrary to the Court's charge initially when you charge the jury and finally you're going to tell them, I believe, in the general charge that the defendant is under no burden to prove himself innocent at any time. It's up to the State and the State solely to amass and collect evidence and present it to show guilt. Infected throughout the entire interrogation, that burden under Sandstrom versus Montana has shifted to the defendant.

The jury's going to hear that and question themselves. Well, if he was innocent, why didn't he come forward with the evidence to prove

himself innocent. He does not have to do that and you can't un-ring that bell out of the jury's mind. It's wholly infected throughout that audio. Those are the four problems I have, Your Honor.

App. 76-77. The trial court denied the motion to exclude. App. 85, l. 18-22.

In the appeal, counsel Brown raised the following issue:

> Did the circuit court improperly admit hearsay statements, contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?

Final Brief of Appellant. In the brief, the Petitioner's counsel did not assert that the admission of the statement unconstitutionally shifted the burden of proof. However, in the Petition for Rehearing, counsel Brown stated the following as it related to the pertinent matter currently before this Court:

> While the burden shifting issue is not the error being ruled upon, these concerns are part of the context of the case which should be considered during the prejudice analysis. In fact, Justice Beatty's dissent elevates this error to one which constitutes a structural defect in the trial. At a minimum, the fact the hearsay testimony was introduced contemporaneous with the burden shifting comments is a circumstance which must be considered in the harmless error analysis even if these comments are not properly before the court or arise to the level of a structural defect.

State v. Brewer, Petition for Rehearing. App. 731-732. Rehearing was denied by the Court.

During the PCR hearing, counsel Newman testified that he objected on Miranda and Edwards grounds, but also objected on what he asserted was a structural error. App.p. 797. Newman claimed that the ground that he thought was the strongest was the structural trial defect. App. 800 - 801.

Appellate counsel Brown testified that he did not raise a Confrontation Clause issue, instead raising the improper admission of the statement as a hearsay issue in the appeal. App. 813. He stated that he thought the hearsay issue was exclusively argued ,

but not the Confrontation Clause issue. He stated that he did not know if it would have come out differently regarding prejudice. He stated that if it was preserved, "then it was my fault that I did not raise that issue should that have been raised, and if that would have been successful for Mr. Brewer under another analysis." App. 813. Brown stated:

> The burden- shifting issue is like the elephant sitting in the room, but I will tell you, and I -- and I may be wrong on this statement of law -- the burden shifting was by the witness. And actually, I say the witness. It was by the participant law enforcement detective in the case, and I didn't raise it as a burden-shifting issue because it was a statement made on a piece of evidence that was introduced in court, not by a participant, such as the prosecutor's office. Certainly, it was their evidence they put up. If I'm wrong on that, then I am wrong without a reason to have made that wrong decision. But I did not raise the burden- shifting issue because, like I said, I assume since the party didn't argue it, that it was just a participant during the recording. And those are the two other issues that I know I considered.

App. 813-814. Appellate counsel Brown noted that the State did not argue that the burden of proof shifted. However, Brown acknowledged that the detectives in their interrogation clearly shifted the burden upon Brewer. However, Brown opined that he had never seen a burden shifting case based upon a piece evidence. App. 814. See also App. P. 823, l. 16-22. Counsel Brown further admitted that the burden shift was mentioned in the record and preserved by Newman. App. 815. [3] However, counsel declared he did not know if he was right or wrong in not raising it. App. 823, l. 21-22.

ANALYSIS

[3] In his Petition, Petitioner asserts that counsel Brown testified that he conceded that the burden shifting issue was an issue and should have been raised and that he did not raise it for strategic reasons and that it was an error on his part., citing App. 815, l. 14-18. Petition for Writ of Certiorari, p. 8. This is incorrect. The reference on App. 815 concerns whether there was an Edwards v. Arizona violation in the interrogation, not the burden shifting issue.

The Petitioner argues that the PCR court erred in its analysis because of Justice Beatty's conclusion that there was a structural error in the case and that the structural errors are not subject to harmless error. Petition, p. 11. Petitioner takes issue with the PCR court's conclusion that counsel was not deficient for failing to raise a different ground, as to why the interview was inadmissible, where the Supreme Court agreed with Appellate Counsel and found in their favor. He particularly takes issue with the Court's comment that "there can be no stronger argument than a winning argument." Petition, p. 11. He claims that if appellate counsel would have argued the burden shifting issue, then it would have been a structural error and the prejudice analysis would not have been appropriate.

Respondent submits that this argument is without merit. First, the Supreme Court noted the Sandstrom concern prior to its assessment of the existence of prejudice:

> Beyond the hearsay error, we wish to briefly comment on the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's ad nauseam insistence that Brewer prove his innocence has no place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. See U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself...."); Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (noting that the Fourteenth Amendment requires **660 that "the State prove every element of a criminal offense beyond a reasonable doubt").

State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659–60 (2015)

The Supreme Court assessment addressed prejudice in light of the Sandstrom issue and its conclusion that the portions of the statement should not have been admitted.

> A careful review of the evidence convinces us the error was harmless in connection with the first shooting inside the Club, but not harmless concerning the second shooting in the parking lot of the Club.

> The evidence of Brewer's guilt is overwhelming as to the shooting of Parker inside the Club. The State introduced a photograph showing the gun in Brewer's waistband. Corroboration is found in the testimony of the many witnesses who were inside the Club. For example, Bright, the photographer, saw Brewer draw his weapon and point it at Stevenson, one of the organizers of the party. Immediately thereafter, Bright heard gunshots. Several witnesses saw Brewer shooting inside the Club, all of whom testified and were subject to cross-examination. By all accounts, there was only one shooter inside the Club—Brewer. Accordingly, we find that the error in the admission of the interrogators' statements was harmless beyond a reasonable doubt as it relates to the assault and battery with intent to kill and weapon charges. See Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 ("Error is harmless when it 'could not reasonably have affected the result of the trial.' " (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence." (citing Blackburn, 271 S.C. at 329, 247 S.E.2d at 337)).
>
> The evidence regarding the second shooting stands in stark contrast, providing at best only a thin, circumstantial case against Brewer for Jones's murder. The shot that killed Jones came from the parking lot where Brewer and Middleton were both shooting their guns. Despite acknowledging that Middleton was shooting a handgun with a laser sight in the parking lot and that eight shell casings were recovered next to *410 the laser sight,5 the lead investigator testified that he "didn't identify any other suspects" aside from Brewer. Given the presence of at least two shooters in the parking lot, and the lack of direct evidence pointing conclusively to Brewer as the one who fired the fatal shot, we hold that the admission of the challenged statements cannot be deemed harmless.

State v. Brewer, 411 S.C. 401, 409–10, 768 S.E.2d 656, 660 (2015).

The Petitioner is incorrect that the admission of the evidence was a structural error that is not subject to harmless error analysis. Appellate counsel was not deficient in failing to separately raise the issue. As noted, the Supreme Court concluded that the portions of the statement were improperly admitted. He reasonable raised the claim that was successful.

Further deficient performance is not shown because there is no reasonable probability that the result would have been different had he raised this additional argument. The Supreme Court concluded that harmless error existed. First, the

Petitioner misreads the probative power of the dissent he relies upon. The argument was raised in his petition for rehearing in his challenge to harmless error. In the dissent, Justice Beatty suggested that the alleged burden shifting comments, presented through the interrogation comments, was a structural error, *citing State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013). As noted, this issue was not before the Court, and if it is/was, the entire jury instructions must be considered and called up before this Court under SCACR Rule 212(A). See App. 658-661.

Nevertheless, the Justice Beatty confused matters of "structural error" with prejudicial error. The jury was properly charged on the burden of proof on the basis of the record before this Court. ROA 181. The prosecution similarly acknowledged the burden of proof. ROA 353.

The United State Supreme Court addressed a similar misimpression in Glebe v. Frost, 135 S.Ct. 429 (2014). In Glebe, the Court summarily reversed the Ninth Circuit concerning a restriction in a defense summation which the circuit court had contended a shifting the burden of proof. In a criminal trial, whether at the state or federal level, "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." Sullivan v. Louisiana, 508 U.S. 275, 277–78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); In re Winship, 397 U.S. 358, 363–64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law

Sullivan provides that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the *instructional error* consists of a misdescription of the burden of proof, which vitiates all the jury's findings." 508 U.S. at 281, 113 S.Ct. 2078. The Court in *Sullivan* also engages in a useful discussion of structural versus harmless errors. Id. at 278–82, 113 S.Ct. 2078. The Court cites to Arizona v. Fulminante, 499 U.S. 279, 308–10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), which discusses the distinction between potentially harmless "trial errors," and never-harmless "structural errors." "Trial errors" are problems which occur during a case's presentation to the trier of fact and may be assessed in the context of other evidence. They may be harmless and are harmless if the error can be examined against the other trial evidence and a determination made that the error was not serious enough that it would have caused the jury to have a reasonable doubt of the defendant's guilt. *See id.* at 310, 111 S.Ct. 1246. In contrast, "structural errors" are "violations ... in the constitution of the trial mechanism," and are "defect[s] affecting the framework within which the trial proceeds" which inhibit the trial's " 'function as a vehicle for determination of guilt or innocence.' " Id. at 309–10, 111 S.Ct. 1246 (*quoting Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). They are never harmless.

As the Supreme Court has stated: "[W]e have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, " 'most constitutional errors can be harmless.' " Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). " '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' " 527

U.S., at 8, 119 S.Ct. 1827 (quoting Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder, supra, at 9, 119 S.Ct. 1827 (emphasis deleted).[4] This evidentiary issue does not rise to that level.

Here, the issue was not the reasonable doubt instruction by the Court, but the admission of evidence. Against that framework, it was not structural error, but alleged trial error that could be assessed against the entire record. Assuming admission was error, the Court properly found it to be harmless as related to the assault charge. The Petitioner failed to satisfy his burden of showing Sixth Amendment prejudice. Certiorari on this issue must be denied.

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[4] *See* Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), in turn *citing* Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)).

II. Certiorari must be denied where trial counsel was not ineffective in asserting that the Petitioner fired his weapon which injured victim Donald Parker. Further, the matter is barred because it was not addressed in the Order and no Rule 59 motion was made.

The Petitioner asserts that counsel improperly conceded that Petitioner fired a weapon that struck assault victim Donald Parker without an on the record waiver. Petition, p. 12. A review of the PCR Court's Order of Dismissal reveals this issue was not addressed in the PCR Order. App. 830-838. The record further shows that no Rule 59 motion was made on this issue. Respondent respectfully asserts that the failure to make a Rule 59 motion on a matter that was not addressed in the Order of Dismissal bars its consideration on certiorari. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding, "a Rule 59(e) motion must be filed if issues are not adequately addressed" in the PCR order); cf, Reese v. State, 425 S.C. 108, 109, 820 S.E.2d 376, 377 (2018) (erroneous denial of Rule 59 motion).

A review of the trial record shows the portion of defense counsel's remarks that Petitioner currently challenges:

> Now, if you talk about circumstantial evidence as to the charge of assault and battery of a high and aggravated nature, it sure looks like it; y'all talk about that, That's where you should be able to piece together evidence. Not assault with intent to kill, shooting him in the leg, but assault and battery of a high an aggravated nature. That's what Jaquwn Brewer's guilty of, if you so find, not to murder. They have not proven that.

App. 653, l. 15-24.

> But I ask if you will follow that oath, there's no way that the State has proven this murder case beyond a reasonable doubt. If you follow that oath, I do not believe that you will find Mr. Brewer guilty of an assault with an intent to kill, but a reckless assault, a high and aggravated assault.

App. 657, l. 3-9.

During the PCR hearing, counsel Newman testified that based upon the evidence presented he wanted to argue that he did not think that the state had shown an intent to kill by the shooting inside the club. App. 804. He stated it was his thought that the jury was going to find him guilty based upon the evidence . "What I wanted to argue that it wasn't an assault with intent to kill; it was the lesser of assault high and aggravated." App. 804, l. 19-21. He opined that he thought this was the only way to maintain credibility with the jury. He confirmed that he did say that shooting Proctor in the leg, that's an assault and battery of a high and aggravated nature. App. 804. Counsel Newman confirmed that the defense went to trial and discussed the general strategy and what the case would be. App. 805. Counsel Newman did not recall whether he discussed putting the gun in his hand in the closing statement. He stated that he did not think he specifically discussed with Brewer that he was going to concede that element. In hindsight, he opined that "if I didn't, I probably should have." App. 80524- 806, l. 5.

Counsel confirmed that there were photographs introduced at trial of Brewer with a gun in his hand. App. 806. Also there was evidence that the photographer testified that the shooting began shortly after the photo was taken. App. 807.

The Petitioner testified at the PCR hearing that his counsel did not discuss the argument with him and claimed he would not have wanted him to make that argument. App. 811.

Assuming this procedurally barred issue can be addressed, Respondent submits that deficient performance was not shown. First, counsel could not recall whether he advised Petitioner or not about his obvious closing argument. The United States Supreme Court has held that a counsel's failure to remember does not overcome

Strickland's strong presumption of reasonable performance. Burt v. Titlow, 571 U.S. at 12, 22-23 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that **the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'**"). See also Romine v. Head, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); Fretwell v. Norris, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance).

Further, closing arguments are a matter of strategy. In Florida v. Nixon, the United States Supreme Court concluded that a concession of guilt without a client's consent is not automatically a Sixth Amendment violation. In Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), a collateral appeal, the United States Supreme Court explained that defense counsel's decision not to test the prosecution's case is not always presumed ineffective assistance of counsel.. The circumstances in this case are similar to those in Nixon. The criminal defendant in Nixon was charged with the kidnapping and gruesome murder of a stranger he approached for help in mall parking lot. Id. at 179–80, 125 S.Ct. 551. At trial, defense counsel conceded the defendant's guilt and did not present a guilt phase defense, knowing the prosecution would submit overwhelming evidence of

guilt of a very violent and shocking crime. Id. at 180–81, 125 S.Ct. 551. Instead, defense counsel focused on presenting mitigating evidence during the penalty phase to establish the defendant's mental infirmities in a bid to save the defendant from the death penalty. The defendant was convicted of murder and, despite defense counsel's efforts, received the death penalty. Id. at 184, 125 S.Ct. 551. On collateral review, the defendant argued his counsel was ineffective for conceding guilt without his express consent. The Supreme Court recognized that prejudice is presumed when counsel does not subject the prosecution's case to a "meaningful adversarial testing," defense counsel may validly choose to focus on the sentencing phase of a capital case and not contest guilt. Accord State v. Nance, 393 S.C. 289, 296, 712 S.E.2d 446, 450 (2011). Nixon also suggests that the fact that a client has not approved of a strategy does not necessarily trigger the application of U.S. v. Cronic, 466 U.S. 648 (1984) : "When counsel informs the defendant of the strategy counsel believe[d] to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding defendant's explicit consent." Nixon, 543 U.S. at 192.

Subsequent to the Petitioner's trial, the U.S. Supreme Court decided McCoy v. Louisiana, 138 S.Ct. 1800 (2018). In McCoy, the defendant-appellant moved for a new trial, arguing that his constitutional rights were violated when the trial court allowed prior defense counsel to concede during the guilt phase of a capital trial, over defendant's "intransigent and unambiguous objection," that defendant committed the three murders of which he was convicted. 138 S. Ct. at 1503, 1506-07. Trial counsel's strategy was to argue that McCoy's mental state prevented him from forming the specific intent necessary for a first-degree murder conviction. Id. The Supreme Court held that "a defendant has the right

to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id. at 1505. The Supreme Court reasoned that while "[t]rial management is the lawyer's province," including decisions as to "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," a criminal defendant is entitled to "[a]utonomy to decide that the objective of the defense is to assert innocence." Id at 1508. The Court explained that the decision to maintain one's innocence is not a "strategic choice[ ] about how best to achieve a client's objectives; [it is a] choice[s] about what the client's objectives in fact are." Id. The Court concluded that "[b]ecause a client's autonomy, not counsel's competence, is in issue," neither the Strickland standard, nor United States v. Cronic, 466 U.S. 648 (1984), apply. Id. at 1510-11. Instead, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." Id. at 1511. Here, unlike McCoy, there was no disagreement with the strategy expressed to the trial court. [5]

Because McCoy was decided after completion of Petitioner's trial and post-conviction proceeding, the decision does not provide the clearly established law applicable

[5] Nevertheless, Petitioner may the Court to apply McCoy's analysis of a defendant's constitutional right to control the objectives of his or her own defense to cases, such as this one, where the defendant has not expressly raised an objection. Respondent submits such an extension is not supported by the controlling authority. In fact, the court in McCoy explicitly distinguished Florida v. Nixon, supra, 543 U.S. at p. 186, 125 S.Ct. 551, in which defense counsel several times explained to the defendant a proposed concession strategy, but the defendant was unresponsive. The Nixon court held that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." (McCoy, supra, 138 S.Ct. at p. 1505, quoting Nixon, supra, 543 U.S. at p. 192, 125 S.Ct. 551.)

to Petitioner's ineffective assistance claim. Moreover, McCoy is factually distinguishable because Applicant was not charged with capital offenses and his trial counsel did not expressly admit Applicant's guilt to the charge of assault and battery with intent to kill that he was convicted, but instead argued for an acquittal of that charge.

In particular, in the matter of Larry Gene Bell's case, the Fourth Circuit addressed a similar issue and rejected it. See Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) (a decision to concede guilt on a lesser charge is a sound and reasonable tactic when there is overwhelming evidence of the defendant's guilt). Several federal appellate courts have held that a criminal defendant's counsel is not constitutionally ineffective in conceding a lesser-included offense when there is overwhelming evidence of the defendant's guilt. See Lingar v. Bowersox, 176 F.3d 453, 459 (8th Cir. 1999) (recognizing that a decision to concede guilt on a lesser charge can be "a reasonable tactical retreat rather than a complete surrender."); Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (conceding guilt of lesser included offense is "a sound tactic when the evidence is indeed overwhelming...and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury"); See also Castillo v. Stephens, 640 F. App'x 283, 292 (5th Cir. Feb. 8, 2016) (unpublished) (trial counsel was not ineffective in suggesting, in closing statement, that the jury might convict on a lesser included offense of murder if they found that petitioner killed the victim, given the evidence against petitioner and the capital murder charge); Farrington v. Senkowski, 214 F.3d 237, 244 (2d Cir. 2000) (explaining that counsel's concession of defendant's guilt on a lesser charge to induce the jury to acquit on more serious charges was an acceptable tactical decision and not ineffective assistance under Strickland).

Respondent submits that defense counsel's concession that the prosecution may have proven a lesser offense of assault and battery of a high and aggravated nature was a reasonable strategy based on the evidence of Petitioner's guilt. The concession was not the functional equivalent of a guilty plea, since he was still arguing for acquittal of the greater offense, as well as the murder charge. See Nixon, 543 U.S. at 188; Boykin, 238 U.S. at 242-243 and n. 4. Further, Applicant has failed to demonstrate a reasonable probability that he would have been acquitted of assault and battery with intent to kill . As such, he has failed to satisfy the prejudice prong of the Strickland inquiry. Mar. 25, 2019)

Respondent submits that certiorari should be denied on the second ground.

III. **Certiorari is not warranted where the PCR Court reasonable concluded under Strickland that prejudice was not proven by counsel failure to object to the same evidence in the statement under a Confrontation Clause objection when this Court has already determined that the admission of the same evidence was harmless.**

In his final ground for relief, he contends that the trial counsel was ineffective in failing to argue that the statement was inadmissible under the Confrontation Clause and was therefore a violation of the Sixth Amendment. The PCR Court denied relief on this claim finding that Sixth Amendment prejudice was not proven. App. 834-836. The record supports this conclusion.

A review of the record reveals that Defense counsel did not expressly present argument against the admission of the taped statement as a violation of the Confrontation Clause. App. 797-802. Here, Counsel properly objected to the introduction of Applicant's statement in a Jackson v. Denno hearing on four separate grounds: 1. The continuation of the interview after Applicant requested the interview stop. 2. The mother

of Applicant was brought into the interview room to reopen the interview. 3. The hearsay testimony used by the interviewing officers. 4. Law enforcement's insistence Applicant prove his innocence was burden shifting. Tr. 72-77. None of these specifically raised the Confrontation Clause issue specifically, although the hearsay arguments were similar and ultimately successful.

Appellate counsel Brown stated that there was no Confrontation Clause issue raised at trial and therefore he could not have raised one in the appeal. App. 813, 820-821, 823-824. Appellate counsel Brown claimed that he would have raised it had it been preserved. Brown claimed that this would have arisen based upon the questioning during the interrogation that people were saying that he did the crime and Brown claims were not subject to examination. App. 825.

> The PCR Court rejected the claim finding the Supreme Court granted relief based upon the similar portions of the hearsay statement, as cogently pointed out in footnote 6 in Justice Pleicones dissent in which he would affirmed relief. The PCR Court concluded:: However, the Court upheld the ABWIK and weapon convictions because the State's evidence against Applicant, for those charges, was overwhelming. This Court agrees and also finds the evidence against Applicant was overwhelming regarding the ABWIK and possession of a weapon during commission of a violent crime. **Therefore, Applicant cannot prove prejudice where the evidence against him is overwhelming**. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.
>
> Accordingly, this Court finds Applicant failed to prove Counsel's actions prejudiced Applicant such that there was a reasonable probability the result of the appeal would have been different had Counsel objected on constitutional grounds. Accordingly, this Court denies and dismisses this allegation.

App. 835-836.

Respondent submits that the Supreme Court rejected similar evidence in granting relief under the hearsay issue. The alleged failure of trial counsel to challenge the same ultimately excluded evidence under the Confrontation Clause that the Court found inappropriately admitted as hearsay does not change the assessment under its earlier harmless error review. The PCR Court reasonably found that Sixth Amendment prejudice was not proven since there is no reasonable probability that the result of the proceeding would have been different. This Court had already rejected the same improper evidence exclusion under the more difficult harmless error test based upon the same evidence. Under Strickland, his claim under prejudice must similarly fail.

CONCLUSION

For the foregoing reasons, Respondent submits the certiorari should be denied and judgment of the lower court affirmed.

Respectfully submitted,

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April 3, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
The Honorable R. Scott Sprouse, Circuit Court Judge
The Honorable William H. Seals, Jr, Trial Judge

Appellate Case No. 2017-002494

JAQUWN BREWER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Donald J. Zelenka, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Tommy A. Thomas, Esquire, P.O. Box 88, Irmo, South Carolina 29063.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of April, 2019.

DONALD J. ZELENKA
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ALAN WILSON
ATTORNEY GENERAL

April 3, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Jaquwn Brewer v. State of South Carolina
Appellate Case No: 2017-002494

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition for Writ of Certiorari* along with proof of service in the above-referenced case.

Sincerely,

Donald J. Zelenka
Deputy Attorney General
S.C. Bar No. 5758

DJZ/ab
Enclosures

cc: Tommy A. Thomas
Victim Advocacy Division