

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO KERSHAW COUNTY
G. Thomas Cooper, Jr., Trial Judge
Clifton Newman, Post-Conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No. 2019-000317

DERRICK MCDONALD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Respondent's Counterstatement of Issues on Certiorari

I. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to file a motion to sever his trial from his co-defendants based on its determination after a thorough review of the record that there was overwhelming evidence of Petitioner's guilt independent from the statement of his co-defendant, thereby negating his argument that he suffered unconstitutional prejudice necessitating relief as a result of his joint trial.

II. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's alleged misapplication of the correct standard of review for the admissibility of his statement where the trial court employed the correct standard for determining the admissibility of Petitioner's statement.

III. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to present a defense, and specifically, for failing to introduce evidence regarding the voluntariness of Petitioner's statement, where counsel made a sound, strategic decision not to introduce such evidence, Petitioner agreed with this decision following a thorough colloquy with the trial court, and there is overwhelming evidence establishing Petitioner's guilt.

IV. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's use of "search for the truth" language in its opening and closing charge to the jury where such language was widely accepted and utilized by the bench at the time of Petitioner's 2008 trial and the trial court's instructions as a whole properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Petitioner.

V. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's decision to allow the jury to review a transcript of three witnesses rather than reply the audio testimony upon the request from the jury to re-hear these three witnesses' testimony during its deliberations where the trial court did not abuse its discretion in providing the transcripts and there was overwhelming evidence establishing Petitioner's guilt.

STATEMENT OF THE CASE

Procedural History

On December 12, 2006, the victim, Joshua Zoch, was murdered in his home. On the same day, Kershaw County Sheriff's Deputies obtained an arrest warrant for Petitioner Derrick McDonald for Zoch's murder. Petitioner was indicted for murder (2007-GS-28-0015) and first-degree burglary (2007-GS-28-0016). Petitioner was represented by J. Marcus Whitlark, Esquire, and Nathan J. Sheldon, Esquire. On May 6, 2008, Petitioner appeared before the Honorable G. Thomas Cooper, Jr., and proceeded to a joint jury trial with co-defendants Christopher Whitehead and Robert Cannon. On May 13, 2008, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to thirty-five years' imprisonment for each conviction, with the sentences to be served concurrently.

Petitioner appealed and was represented by Chief Appellate Defender Robert M. Dudek. On appeal, one of the issues raised by Petitioner was whether the trial court erred in admitting the statement of his non-testifying co-defendant Robert Cannon without adequately redacting portions of Cannon's statement implicating Petitioner because it denied him of his right to confront and cross-examine Cannon. State v. McDonald, 400 S.C. 272, 273, 734 S.E.2d 167, 167 (Ct. App. 2012), *aff'd as modified*, 412 S.C. 133, 771 S.E.2d 840 (2015). The Court of Appeals affirmed Petitioner's convictions, finding "that the neutral phrase 'another person' inserted into Cannon's statement avoided any Bruton violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence." Id. at 279, 734 S.E.2d at 170. Petitioner filed a petition for rehearing, which the Court of Appeals denied.

Petitioner then filed a petition for writ of certiorari, which this Court granted. Following briefing and oral argument, this Court affirmed Petitioner's convictions, finding the admission of co-defendant Cannon's statement using the phrase "another person" to refer to co-defendant and two other male individuals violated Petitioner's rights under the Confrontation Clause, but the error was harmless beyond a reasonable doubt. State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). In reaching this decision, this Court found:

[W]e find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move to Aiken." **We find this evidence of guilt, independent of Cannon's confession, compelling.**

Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon's confession. McDonald's confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and gloves from Wal-Mart, arriving at Victim's home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim's home. The properly admitted evidence at trial aligns with the

details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal-Mart, part of a purple latex glove was found at the crime scene. Victim's girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Id. at 142–43, 771 S.E.2d at 844–45 (emphasis added). This Court concluded, “Given the **extensive evidence of guilt**, we conclude that the Bruton violation was harmless beyond a reasonable doubt. “ Id. at 143, 771 S.E.2d at 845 (emphasis added).

On May 8, 2015, Petitioner filed a timely PCR application, and later, an amended application. An evidentiary hearing was held December 12, 2017, before the Honorable Clifton Newman. Petitioner and counsel Whitlark testified. Following the hearing, the PCR court took the matter under advisement and requested proposed orders. On April 2, 2018, the court adopted Petitioner’s order granting PCR on all grounds raised. This order was filed on April 5, 2018, and received by Respondent on April 6, 2018. On April 16, 2018, Respondent served its Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCP. Petitioner served his return to the motion on May 8, 2018. Thereafter, all parties convened for a hearing on Respondent’s motion. After hearing argument from both parties, the court instructed counsels to file post-hearing memorandums addressing any additional arguments. The PCR court issued an order granting Respondent’s motion to reconsider and denying relief on all grounds, filed February 20, 2019.

Statement of Facts as Presented at Trial

On December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. The evidence at trial established the burglary and murder occurred at approximately 11:30 that night.

Zachary Waltemath, then an employee at the local Sonic along with Whitehead, testified at approximately 7:00 or 8:00 that night, Whitehead called him and asked him to call the victim “and see what he’s doing because he wanted to go over there and fight him or something.” Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call

him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. Waltemath had "hung out" with Whitehead on several occasions. He was sure it was Whitehead who called him that night. (App. p. 563, line 12 - p. 565, line 21; p. 569, line 3 - p. 572, line 10).

Allen Brown, a manager at the local Sonic, testified all three co-defendants had worked at Sonic. Petitioner, Whitehead (who was still employed at the time), and Cannon, were together that evening. At approximately 10:00 p.m., Whitehead, Petitioner, and Cannon were in the kitchen area. Cannon was wearing a ski mask, and was told to take it off. Brown instructed all three to leave. (App. p. 504, line 12 - p. 504, line 14). Christopher Rust, also an employee at Sonic who was working that same evening, confirmed all three left at the same time. (App. p. 546, lines 1-22). Rust also recalled Whitehead drove a car with "noticeable" muffler noise. (App. p. 556, line 20 - p. 557, line 5).

At approximately 11:30 p.m., the victim's neighbor Cosmo Baccamo testified he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and loud male voices, a door slam, and a car with a loud muffler take off. (App. p. 522, line 25 - p. 524, line 15).

Later that same night, at approximately 1:30, Petitioner went to Rust's home. He was upset and asked to stay the night at Rust's house. He claimed he had an argument with his mother. Rust allowed him to stay, then took him to his mother's home the next morning on his way to school. (App. p. 548, line 7 - p. 550, line 8).

Patricia Heathcoe, part owner of the Sonic, testified on Wednesday, December 13, 2006, the day after the murder, Whitehead came to work at Sonic with a scratch under one eye, a noticeable limp, and complaining that his ankle hurt. He did not have the injuries the previous day when he had worked an early shift. Whitehead told Heathcoe he had "slipped and fell."

(App. p. 628, line 19 - p. 630, line 23). On Thursday, Whitehead demanded a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Whitehead go home that day, but "he got real adamant. Whitehead didn't want to leave, you know, until the Workman's Comp form was filled out on him." He wanted to report his injuries as occurring on the 12th. Heathcoe noted Whitehead never went to a doctor. (App. p. 631, line 15 - p. 633, line 17). On Friday, Whitehead walked out of work, leaving the crew short-handed. Heathcoe called Whitehead on his cell phone and he became belligerent:

... the first thing he said to me was, F Sonic. I said, "Chris, what is wrong with you?" And he started just ranting. I said, "you walked out and left Cecile by herself." I said, "Why would you do that?" And he was just ranting. You know, I don't need that f'g job. I've got problems. I'm about to move to Aiken. And I was just trying to talk to him. I mean, he was just - - I never heard him sound like that ever. ...

(App. p. 634, line 1 - p. 636, line 14).

"Cecile," as referenced in the above conversation, was Cecile Trapp. Trapp testified she worked Tuesday morning with Whitehead and all was well. She went back to Sonic Tuesday night, to eat and check her schedule, and confirmed, like Rust, that Whitehead and Cannon came by the store that night and that Cannon was wearing a ski mask. Whitehead was not limping either that day, or when she saw him later that night. On Wednesday, however, Whitehead came into work "complaining that his ankle was hurting, and he had a scratch on his face." He told Trapp "that he had got into like a play fight with his cousin and that he hurt his ankle and his cousin accidentally scratched him on his face." He was also limping. Further, Whitehead advised Trapp he intended to "pretend that he fell on grease and hurt his ankle so that Ms. Pat could pay for the hospital bills." (App. p. 661, line 13 - p. 664, line 25; p. 669, lines 20-24). On Friday, Whitehead was with Trapp to open the Sonic, when his mother drove up. After speaking with his

mother, Whitehead “kind of freaked out and was just like, ‘I have to go’.” He would not tell Trapp what was happening, but simply left immediately. (App. p. 666, line 19 - p. 668, line 1).

Victim’s longtime live-in girlfriend, Melissa Davy, was absent from the victim’s home at the time of the burglary and murder, the two having had a disagreement over victim’s drug use. Victim had hosted a party at their home on Friday, December 8, 2006, that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim’s drug use, specifically his smoking crack cocaine (though marijuana may also have “possibly” been used at the party, as well), and after his request that they leave the house. (App. p. 748, line 13 - p. 750, line 17; 778, line 16 - p. 781, line 12; p. 795, line 15 - p. 796, line 2). Davy would later spend time with the victim on Monday, December 11, 2006. (App. p. 752, line 1 - p. 753, line 19). She last spoke to him when he called her at approximately 6:00 or 7:00 that night. (App. p. 569, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim’s home with Zach and Molly. The lights were off and victim’s car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim’s grandmother, Helen Zoch, who had purchased the home for victim to rent, (App. p. 1456, lines 14-24), and stayed on the phone with the grandmother as she entered the home. She saw victim’s lifeless body and called 911. (App. p. 757, line 9 - p. 760, line 23).

Helen Zoch testified she had spent time with victim the day before the burglary and murder and hoped to help him with his drug problem. In fact, victim had planned to enter Morris Village but wanted to talk to Ms. Davy first. The next day, Ms. Zoch called at 7:30 in the morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home,

noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the home. (App. p. 1457, line 6 - p. 1459, line 24; p. 1463, line 11 - p. 1465, line 11). She testified she was aware that her grandson had worked with the police, making drug buys for them. (App. p. 1469, lines 9-24). (See also App. p. 804, lines 19-25).

Investigating officers found the victim's home a "complete mess" with the victim's body "in the middle of it." (App. p. 877, lines 13-17). The back door had been kicked in. (App. p. 860, lines 13-25). The investigation began to focus on Whitehead, Petitioner and Cannon. Whitehead informed the investigating officers he "didn't know a damned thing about" the victim's murder. (App. p. 902, line 18 - p. 903, line 5). Both Petitioner and Cannon similarly denied any direct knowledge or involvement in their initial statements to police. (App. p. 906, lines 21-25; p. 917, lines 14-25). However, Cannon later gave a detailed confession to officers, implicating Whitehead and Petitioner, which was, of course, redacted for presentation at trial to avoid Bruton issues. The statement included not only the grisly facts of the vicious beating – such as the attack on the victim while he slept, dragging him off his couch, using the victim's bat to strike the victim on his head – but also that victim was selected because he was thought to be a "snitch" and for his drugs. Cannon's details included that one person took frozen chicken from the kitchen and place it on the victim's head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at the victim's home at approximately 11:30. (App. p. 933, line 25 - p. 937, line 15; Supp. App. 179-183, 188-192). Cannon later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair

clippers, and cellphones, (App. p. 1207, line 16 - p. 1208, line 17), and gave an additional statement in which he admitted kicking the victim, (App. p. 1211, lines 3-16).

Petitioner also confessed to the crime in detail. Like Cannon's statement, his statement was also redacted before introduction. (Supp. App. 193-96). The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called "Zach" to see if someone was home; that all of them kicked in a sturdy back door; that one person "picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch"; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him in the back of the head using the victim's bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (App. p. 958, line 15 - p. 960, line 21). Petitioner confessed as follows:

... I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(App. p. 960, lines 2-9). Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Petitioner volunteered to officers, "This is the way we came that night." (App. p. 1139, line 4 - p. 1140, line 3).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (App. p. 1406, line 10 - p.

1407, line 8). This caught Jenkins' attention as he had known the victim. (App. p. 1407, lines 9-20). A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (App. p. 1442, lines 15-20). Forensic pathologist Joel Sexton, M.D., testified that at the autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (App. p. 1276, line 15 - p. 1281, line 8; p. 1283, line 19 - p. 1284, line 16; p. 1285, line 21 - p. 1290, line 4). From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (App. p. 1308, line 17 - p. 1310, line 14). He also confirmed that testing showed prior use of cocaine and marijuana. (App. p. 1312, lines 11-17).

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006, at 10:43 (App. p. 1243, line 7 - p. 1246, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (App. p. 775, line 4 - p. 776, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (A. p. 1282, line 17 - p. 1468, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim's head, the broken glass bowl, and the overturned lamp and Christmas tree. (App. p. 896, line 3 - p. 897, line 19; p. 1291,

line 1-7). In sum, the physical evidence supported the detailed confessions of both Cannon and Petitioner and the details overheard in Whitehead's detention center conversations.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner argues the PCR court erred in denying him relief as to five allegations raised to the PCR court. Petitioner asserts the PCR court erred in reversing its original grant of PCR following Respondent's motion to reconsider, alter, or amend. Petitioner complains the court's "dramatic reversal" of the prior grant of relief on all grounds to his ultimate determination that Petitioner did not meet his burden of proof was based on this Court's finding of overwhelming evidence of guilt during his direct appeal. (PWC 8). However, this is not reflective of the PCR court's order granting Respondent's motion to reconsider and denying PCR, which addressed and made specific findings for each issue, with many issues being denied on independent or alternative grounds than this Court's holding in Petitioner's direct appeal that any error from the

violation of his confrontation rights was harmless beyond a reasonable doubt. The PCR court properly considered the record in its entirety, listened to the testimony, evidence, and arguments presented at the hearings, and ultimately concluded its prior grant of relief was unwarranted.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. The standards do not establish mechanical rules; the

ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s

prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case . . . ,” and “we must consider the totality of the evidence before the jury.”)). “In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696 (stating “a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”). However, while the strength of the State case is one significant factor the PCR court must consider when determining whether an applicant can establish prejudice, it is generally not a categorical bar that precludes a finding of prejudice. Smalls, 422 S.C. at 188, 810 S.E.2d at 843. However, this Court has reiterated that there are rare cases where overwhelming evidence of an applicant’s guilt precludes a finding of prejudice; in those cases, “the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so

strong that the Strickland standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’” cannot possibly be met.” Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

Moreover, while a finding of harmless error during a direct appeal review does not entirely foreclose an applicant’s ability to establish the requisite prejudice for relief on the same or a related issues, it would be a an exceedingly rare case in which an applicant could do so. “Harmless error review looks to the basis on which the jury actually rested its verdict.” Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). “From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must ‘find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’” Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991)); See Arnold v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt “embodies a standard requiring reversal ‘if there is a reasonable possibility that the evidence complained of might have contributed to the conviction’ ” (quoting Yates, 500 U.S. at 403)); see also Clark v. Goose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of statements obtained in violation of Massiah was harmless error beyond a reasonable doubt, LePage suffered no prejudice from his counsel’s failure to object to the statements).

In the present case, Petitioner failed to meet this high burden of proof required of him as to any of his allegations, and the PCR court properly denied relief.

- I. **The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to file a motion to sever his trial from his co-defendants based on its determination after a thorough review of the record that there was overwhelming evidence of Petitioner’s guilt independent from the**

statement of his co-defendant, thereby negating his argument he suffered unconstitutional prejudice necessitating relief as a result of his joint trial.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failing to move to sever his trial from his co-defendants, which he argues resulted in a violation of his constitutional rights by the admission of his non-testifying co-defendant's statement incriminating him. Petitioner asserts this statement would not have been introduced against him if he were tried separately and accordingly, he is able to establish the requisite prejudice entitling him to PCR. This issue is strikingly similar to the dispositive issue on Petitioner's direct appeal—that his constitutional rights were violated by the introduction of his co-defendant's confession during a joint trial that implicated him. McDonald, 412 S.C. at 142, 771 S.E.2d at 844 (“Moreover, we reject the State's invitation to find no Confrontation Clause violation based on the trial court's limiting instruction. The presence of a limiting instruction is not curative here, as it was not in Bruton, for ‘there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.’ Bruton, 391 U.S. at 135, 88 S.Ct. 1620 (citations omitted). We hold that the court of appeals erred in finding that the admission of Cannon's redacted confession did not violate McDonald's Confrontation Clause rights.”). When evaluating the impact of this constitutional violation on Petitioner's trial, this Court concluded this error was harmless beyond a reasonable doubt. McDonald, 412 S.C. at 142, 771 S.E.2d at 844 (Internal citations omitted) (“The mere finding of a violation of [the Confrontation Clause] in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the

improper use of the admission was harmless error. In this case, we find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.").

The PCR court was similarly presented with an allegation that Petitioner's constitutional rights were violated by the introduction of Cannon's statement through the allegation counsel was ineffective for failing to move to sever his trial. The PCR court properly rejected this argument based on its thorough review of the record and its determination that the result of Petitioner's trial would not have been different had his counsel so moved for a severance based on the overwhelming evidence of Petitioner's guilt separate and apart from Cannon's statement. This finding is supported by the record and is not premised upon an error of law.

Additionally, Petitioner's repeated assertions the PCR court should have ignored or disregarding his confession when determining prejudice simply because he was challenging the validity and handling of his confession is misguided, as the PCR court properly rejected his various assertions that counsel performed deficiently in his handling of his confession. Petitioner's apparent argument that a vital piece of evidence, such as a confession, cannot be used to determine whether prejudice exists if that evidence is also challenged on collateral review is illogical and would make it impossible to courts to conduct the necessary prejudice analysis based on numerous allegations. This Court should deny certiorari as to this issue.

II. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's alleged misapplication of the correct standard of review for the admissibility of his statement where the trial court employed the correct standard for determining the admissibility of Petitioner's statement.

Petitioner argues the PCR court erred in denying him relief because his trial counsel was constitutionally ineffective for failing to object to the trial court's use of an improper standard during the Jackson v. Denno hearing to determine the admissibility of his confession. The record

clearly establishes the trial court employed the correct standard when determining Petitioner's statement was admissible, and accordingly, trial counsel was not ineffective for failing to object.

Like his co-defendant Cannon, Petitioner also gave a detailed confession implicating himself in the horrific beating death of Joshua Zoch. Like Cannon's statement, Petitioner's statement was also redacted before introduction. (Supp. App. 193-96). Petitioner's statement referenced going to the local Wal-Mart and buying a ski mask and a box of purple gloves; one of them called "Zach" to see if someone was home; all of them kicked in a sturdy back door; one person "picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch"; another person dragged victim off the couch; he repeatedly hit victim with his fists then hit him in the back of the head using the victim's bat; they were searching for drugs and money; another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (App. pp. 958-960). In particular, as to the beating, Petitioner confessed as follows (again, as reflected in the redacted statement read at trial):

I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(App. p. 960). Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Petitioner volunteered to officers, "This is the way we came that night." (App. pp. 1139-1140).

Prior to the admission of Petitioner's statement, the trial court conducted a Jackson v. Denno hearing to determine the admissibility of Petitioner's statement to law enforcement. During the Denno hearing, the trial court heard testimony from three law enforcement investigators, Petitioner, Petitioner's mother, and Petitioner's brother. The trial court was also presented with Petitioner's signed waiver of rights. After hearing all testimony and evidence presented and listening to argument from counsel, the court noted it had considered everything presented by the State, including the State's evidence of waiver, as well as everything presented by the defense, and found Petitioner was fully advise of his rights and knowingly and voluntarily waived those rights to give a statement to law enforcement. See App. pp. 437-444. Specifically, the trial court made the following findings at the conclusion of the Denno hearing:

So based on that analysis of this case, I have carefully considered all the evidence that's been offered by the State and the defendants and am convinced by a preponderance of the evidence—and that's my standard, and I so find that before the alleged statements were obtained from the defendants—and this applies to both defendants—the defendants were fully advised of their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and that the defendants were advised of the Constitutional safeguards required by Miranda vs. United States (sic) as follows :

The defendants were advised prior to any interrogation that they had the right to remain silent. The defendants were advised prior to any interrogation that if they waived their right to remain silent and made a statement such statement could and would be used against them in a court of law, that the defendants were advised prior to any interrogation that they had the right to employ or select an attorney of their own choice, that if they did not have the money, resources or funds to employ an attorney that the court would appoint and provide an attorney for them; and, if so, if they so desired, without cost or expense to them, and that they had the right to have their attorney present with them at all times during all interviews and interrogations, that the defendants were advised prior to any interrogation that they had the right to consult with their attorneys before interrogation, that they were advised prior to any interrogation they had a right to interrupt and terminate the interrogation at any time.

They had further the right to stop answering questions at any time during the interrogation, that they were advised prior to any interrogation that even if during the interrogation they desired an attorney, the interrogation would cease until an attorney was provided for them and they were given the opportunity to consult

with their attorney prior to further interrogation, that the defendants knowingly and intelligently waived their rights under the Fifth and Sixth Amendments to the Constitution of the United States and the Constitutional safeguards required by *Miranda vs. Arizona*, and that the alleged statements given by the defendants were freely and voluntarily given, without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without threat of injury, and without compulsion or inducement of any kind; and that such alleged statements were the voluntary product of the free and unconstrained will of the defendants.

This Court finds all of the foregoing conclusions by a preponderance of the evidence; and I, therefore, find the statements are admissible into evidence. All right, counsel. Are you ready for the jury? (Trial Tr. p. 257-259).

Based on a review of the record, and specifically upon the conclusions of the trial court listed above, the trial court employed the correct standard for determining the admissibility of Petitioner's statement. See *State v. Trapp*, 420 S.C. 217, 243, 801 S.E.2d 742, 756 (Ct. App. 2017) (internal citations and quotations omitted) ("When conflicting evidence exists as to whether a defendant's statement is voluntary, the circuit court must determine this factual issue in the first instance by the preponderance of the evidence. In its review, the circuit court "must examine the totality of the circumstances surrounding the statement" and decide whether the State has carried its burden in proving the statement was knowingly, intelligibly, and voluntarily given. This voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*."). Therefore, as the trial court employed the proper standard, trial counsel cannot be deemed deficient for failing to object when no objection was warranted. The PCR court properly denied relief. Certiorari should be denied.

III. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to present a defense, and specifically, for failing to introduce evidence regarding the voluntariness of Petitioner's statement, where counsel made a sound, strategic decision not to introduce such evidence, Petitioner agreed with this decision following a thorough colloquy with the trial court, and there is overwhelming evidence establishing Petitioner's guilt.

Petitioner argues the PCR court erred in denying him relief because counsel was

ineffective for failing to present a defense, and specifically, for failing to introduce evidence regarding the voluntariness of his statement. The PCR court rejected this claim, finding counsel made a strategic decision not to present any evidence and that Petitioner could not establish any prejudice based on overwhelming evidence establishing his guilt. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

The trial court conducted a thorough colloquy with Petitioner advising him of his right to testify, right to remain silent, and right to present a defense. (App. 1477-79). Following this colloquy, Petitioner told the court he wished to discuss these rights with his attorney during the lunch break. (App. 1479). After this consultation with counsel, Petitioner made a knowing, intelligent, and voluntary decision not to testify or present any evidence in his own defense. (App. p. 1500-01). Moreover, at the evidentiary hearing, counsel testified at the time of trial, without the distorting effect of hindsight following his client's conviction, he made a strategic decision not to present evidence because he believed the State would be unable to meet its burden of proof and he wanted to preserve the right to final closing arguments.

The PCR court properly rejected Petitioner's argument based on its thorough review of the record and his determination that the result of Petitioner's trial would not have been different had his counsel presented evidence, including Petitioner's testimony, based on a reasonable trial strategy, Petitioner's knowing, voluntary, and intelligent decision not to testify or present evidence following a thorough colloquy with the trial court, and the overwhelming evidence of Petitioner's guilt separate and apart from his statement. This finding is supported by the record and is not premised upon an error of law. Certiorari should be denied.

IV. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's use of "search for the truth" language in its opening and closing charge to the jury where such language was widely accepted and utilized by the bench at the time of

Petitioner's 2008 trial and the trial court's instructions as a whole properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Petitioner.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failing to object to the trial court's use of truth seeking language in its opening and closing charge to the jury. The PCR court properly rejected this argument because the trial court's language was widely accepted and utilized by the bench at the time of Petitioner's 2008 trial and the trial court's instructions as a whole properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Petitioner. Certiorari should be denied.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, this Court again considered the use of "truth seeking" language by the trial court in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). The Beaty Court concluded:

[A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id. The Beaty opinion signified the first time this Court issued a general and blanket admonishment to the bench and bar that such “truth-seeking” language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court.

In both Aleksey and Beaty, this Court determined that while the trial court’s use of “truth seeking” language was improper, the error was not significant enough to overturn the convictions. The same holds true here. Initially, it is important to note that at the time of Petitioner’s trial in 2008, the trial court’s opening and closing charges included truth-seeking remarks that were widely-used by the bench and were similar to the approved charges as prepared by the judicial department and given to the bench for reference. To find that trial counsel was constitutionally deficient for failing to object to something that was standard practice at the time of Petitioner’s trial and which the our appellate courts had not expressly advised the bench and bar not to use goes against the principles of Strickland and its progeny that counsel’s actions be evaluated based on a standard of reasonableness at the time of an applicant’s trial. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (“This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.”); see also Thornes v. State, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993)(“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

Here, when these “truth seeking” comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State’s burden of proof and did not impermissibly shift the burden to Petitioner and Petitioner cannot establish any prejudice. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) (“In reviewing jury

charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict." (internal citations omitted)).

The PCR court properly rejected this argument because the trial court's language was widely accepted and utilized by the bench at the time of Petitioner's 2008 trial and the trial court's instructions as a whole properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Petitioner. This finding is supported by the record and is not premised upon an error of law. Certiorari should be denied.

V. The PCR court properly found Petitioner failed to establish counsel was ineffective for failing to object to the trial court's decision to allow the jury to review a transcript of three witnesses rather than reply the audio testimony upon the request from the jury to re-hear these three witnesses' testimony during its deliberations where the trial court did not abuse its discretion in providing the transcripts and there was overwhelming evidence establishing Petitioner's guilt.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failing to object to the transcripts from three witnesses being given to the jury in lieu of replaying their testimonies in court as this unduly emphasized the testimony and removed the "credibility element of live testimony." (PWC p. 32). The PCR court properly rejected this argument because the trial court did not abuse its broad discretion in providing the jury with these transcripts and this had no impact on the jury's verdict in light of the overwhelming evidence establishing Petitioner's guilt.

Whether the trial court can permit the jury to rehear witness testimony is a settled question in South Carolina, and, here, the trial court did not abuse its broad discretion in

providing full transcripts of both direct and cross examination of these witnesses once the jury made it clear it could not properly deliberate without rehearing this testimony. See App. 1656; State v. Carlson, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (“The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after the beginning of deliberations.” (internal citations omitted)). Moreover, as discussed with previous allegations, the PCR court properly concluded Petitioner could not establish prejudice stemming from this allegation based on overwhelming evidence establishing his guilt.

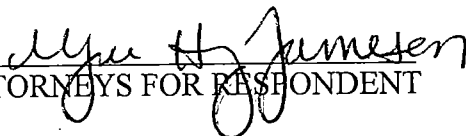
CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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March 19, 2020

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAR 19 2020

S.C. SUPREME COURT

CERTIORARI TO KERSHAW COUNTY
G. Thomas Cooper, Jr., Trial Judge
Clifton Newman, Post-Conviction Relief Judge

Appellate Case No. 2019-000317

DERRICK MCDONALD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

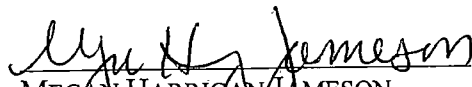
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by electronically mailing and depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender Jessica M. Saxon
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 19th day of March, 2020.


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