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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO JASPER COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, PCR Judge

Appellate Case No. 2019–001176

PHILLIP MONROE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General
S.C. Bar No. 103665

Post Office Box 11549
Columbia, SC 29211
(803) 734–3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Whether the PCR court erred where it found counsel provided effective representation in petitioner's trial for trafficking cocaine where counsel admitted in his closing argument that petitioner was guilty of conspiring to manufacture and possess cocaine, since counsel's comments conceded guilt to trafficking and failed to "subject the prosecution's case to meaningful adversarial testing," and since the comments rendered petitioner's trial structurally deficient?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

Petitioner's contention that Counsel's comments during closing argument rendered his trial structurally deficient under *McCoy* and constitute constructive denial of counsel under *Cronic* such that prejudice is presumed is not preserved for appellate review. Nonetheless, the PCR court correctly found Counsel's strategic decision during his closing argument to concede partial guilt was reasonable in light of Petitioner's confessions.

STATEMENT OF THE CASE

Philip Monroe (Petitioner) was arrested on April 11, 2012, for drugs recovered by law enforcement during a lawful traffic stop. In September 2012, the Jasper County Grand Jury indicted Petitioner for possession with intent to distribute a schedule IV controlled substance—first offense (PWID) and trafficking in cocaine, ten to twenty-eight grams—third or subsequent offense. (App. 340–45). Robert Hughes, Esquire (Counsel) represented Petitioner. Assistant Solicitors Carra Henderson and Erin Vaux prosecuted the case. On February 11, 2013, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, III.

A. Pre-Trial

On Counsel's motion, the trial court convened a pre-trial *Jackson v. Denno*[1] hearing to assess the voluntariness of Petitioner's April 30, 2012, statement to law enforcement. At that time, Master Sergeant Brian Baird was conducting an interview of Petitioner as part of an investigation into an unrelated matter in Beaufort County. Master Sergeant Baird stated that Petitioner began talking about the Jasper County case during the interview. Petitioner told Master Sergeant Baird at that time that the drugs recovered by law enforcement belonged to him, and that his co-defendant was not involved. Master Sergeant Baird testified that

B. Summary of Evidence Adduced at Trial

On April 10, 2012, Officer Richard Long and Sergeant (then-Corporal) Kevin Scott Smith of the Ridgeland Police Department initiated a traffic stop upon observing a tan Honda make a right-hand turn into the wrong lane of traffic. (App. 77, 92). Both the driver and passenger appeared to be in an "excited" state as they pulled over, and began opening their respective doors before coming to a complete stop. (App. 77, 92). The officers quickly ran toward the Honda to prevent

[1] *Jackson v. Denno*, 378 U.S. 368 (1964).

the men from fleeing, with Officer Long approaching the driver's side and Sergeant Smith approaching the passenger's. (App. 77, 92).

The passenger, later identified as Courtney Baniel (Baniel), quickly exited the vehicle, threw his hands up, and began backing away. (App. 93, 98). As he made contact with Baniel, Sergeant Smith immediately noticed "a purple Crown Royal bag that was bulging lying on the ground." (App. 93). The driver, later identified as Petitioner, and Baniel were both detained while the officers inspected the contents of the Crown Royal bag. (App. 78–80; 92–93). The bag contained several types of narcotics, pills, and a white, powder substance that later tested positive for cocaine. (App. 80, 94). The pills were determined to be clonazepam. (App. 80, 94, 159, 161). Petitioner and Baniel were arrested and taken into custody. (App. 81, 94).

Baniel testified that once they saw blue lights behind them, Petitioner threw the Crown Royal bag into Baniel's lap, stating, "Take these charges from me." (App. 108–09). When Baniel refused to take responsibility for the drugs, Petitioner responded, "Boy, don't play with me, I'll kill Sally and your kids." (App. 108). Sally was Baniel's girlfriend and mother of his two children. (App. 102–03). Baniel explained that when he got out of the car with his hands up, the Crown Royal bag fell off his lap and onto the ground. (App. 108–10). Baniel testified he never touched the bag, and did not know what it contained until law enforcement emptied its contents onto the hood of the car. (App. 110). Baniel remained silent the evening of the arrest when asked who the drugs belonged to. (App. 111). A few days later, however, Baniel told law enforcement that the drugs did in fact belong to Petitioner and explained that he did not originally reveal this information due to Petitioner's earlier threat. (App. 110–11).

Petitioner was read and waived his *Miranda* rights prior to each of four interviews with law enforcement. On April 10th, the night of the arrest, Officer Long questioned Petitioner about

who the drugs belonged to. (App. 81). Petitioner stated the drugs did not belong to him. (App. 81). Lieutenant Daniel Litchfield, an investigator with the Ridgeland Police Department, interviewed Petitioner on April 12th and April 16th. (App. 126–27). During the April 12th interview, Petitioner maintained the drugs belonged to Courtney Baniel and were not his. (App. 128, 150). Petitioner subsequently contacted investigators and asked for another interview which was conducted on April 16th. (App. 127). Petitioner stated he and Baniel had purchased the drugs together, and that they belonged to both of them. (App. 129).

Lieutenant Litchfield also was present for Petitioner's final interview on April 30th, which was conducted by Master Sergeant Brian Baird.[2] (App. 134–35). At that interview, Petitioner stated the drugs all belonged to him, that he threw them in Baniel's lap during the traffic stop, and that Baniel was not involved**.** (App. 135; 144–45; 151).

C. Verdict & Subsequent Proceedings

On February 13, 2013, the jury convicted Petitioner as indicted for trafficking in cocaine and to the lesser-included offense of possession of a schedule IV controlled substance.[3] (App. 223). Judge Buckner sentenced Petitioner to concurrent terms of twenty-seven years' imprisonment for trafficking and six months' imprisonment for possession. (App. 344–45). Petitioner appealed.

Appellate Defender Lara M. Cuady represented Petitioner on appeal. The following issue was briefed to the Court of Appeals:

> Whether the court erred in denying Petitioner's motion for a mistrial where a law enforcement officer testified about a polygraph examination performed on Petitioner immediately prior to Petitioner giving a confession in this case since it was improper and unduly

[2] Counsel challenged the admissibility of this statement in a pre-trial *Jackson v. Denno* hearing. (Supp. App. 1).

[3] The trial court directed a verdict in favor of Petitioner as to the possession with intent to distribute charge but submitted the lesser-included offense of possession of a schedule IV controlled substance to the jury. (App. 181).

prejudicial?

(App. 243). Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion on January 28, 2015. (App. 274). The case was remitted back to the circuit court on March 10, 2015. (App. 276).

Petitioner timely commenced the underlying PCR action on August 11, 2015. (App. 278). The State submitted its return requesting an evidentiary hearing on June 7, 2016. (App. 286). An evidentiary hearing convened on October 13, 2017, before the Honorable Thomas A. Russo. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Ruston Neely represented the State. On May 3, 2019, the PCR court denied relief and dismissed the action with prejudice. (App. 333). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. Petitioner's contention that Counsel's comments during his closing argument rendered his trial structurally deficient under *McCoy* and constitute constructive denial of counsel under *Cronic* such that prejudice is presumed is not preserved for appellate review. Nonetheless, the PCR court correctly found Counsel's strategic decision during his closing argument to concede partial guilt was reasonable in light of Petitioner's confessions.

In an attempt to sidestep *Strickland*'s prejudice requirement, Petitioner contends Counsel's remarks allegedly conceding guilt during his closing argument constitute both a failure to subject the State's case to meaningful adversarial testing under *United States v. Cronic*, 466 U.S. 648 (1984), and a violation of Petitioner's right of autonomy under *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018). The Court should deny certiorari on both of these issues because neither were raised or ruled upon by the PCR court. However, even if preserved, neither *Cronic* nor *McCoy* apply to Petitioner's case, and the PCR court properly applied the *Strickland* standard in finding Counsel's remarks during closing argument were not a complete concession, but rather were a strategic attempt to minimize Petitioner's involvement in light of the evidence presented. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

A. Petitioner's claim he is entitled to a presumption of prejudice under *McCoy* and *Cronic* is not properly before this Court.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003); *cf. Sevens & Wilkinson of S.C., Inc. v. Cty. Of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review."). It is axiomatic that an issue cannot be raised for the first time on appeal. *Herron v. Century BMW*,

395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). As this Court has repeatedly noted, when an "issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." *Plyler v. State*, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (citing *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)). Thus, "[a]n issue that was not preserved for review should not be addressed by [appellate courts]." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694.

As an initial matter, Petitioner's claims regarding Counsel's closing argument were made in the context of the allegation Petitioner actually raised below—of ineffective assistance of counsel. Specifically, Petitioner's amended PCR application alleges ineffective assistance of counsel based on:

> Trial counsel did not consult with Applicant before counsel adopted a strategy to advise the jury during closing argument that the guilty of trafficking, but he is guilty of conspiracy to manufacture crack cocaine.

(App. 293). Applying *Strickland*, the PCR court concluded Counsel's performance was neither deficient nor was Petitioner prejudiced by his closing argument. (App. 337). Because Petitioner never raised the allegation Counsel's performance was such that prejudice should be presumed, the PCR court properly did not make any findings of fact as to Counsel's closing argument in the context of *McCoy* or *Cronic*.

Petitioner now contends the PCR court erred in denying relief because Counsel's ineffectiveness was "of such a magnitude that petitioner's trial was structurally deficient and prejudice is presumed." (Pet. 6). Specifically, Petitioner argues Counsel's alleged concessions during his closing argument constitute a structural error under *McCoy* such that he need not prove prejudice. Petitioner's attempt to re-frame this issue as one of client autonomy rather than ineffective assistance is a new invention on appeal which should not be entertained by this Court.

Petitioner further claims prejudice should be presumed under *Cronic* because Counsel's

performance constitutes the constructive denial of counsel. Specifically, Petitioner contends Counsel's remarks during his closing argument constitute a failure to subject the prosecution's case to meaningful adversarial testing. (Pet. 9). Petitioner never presented the argument he was constructively denied counsel under *Cronic* to the PCR court. Rather, Petitioner alleged he was denied *effective* assistance of counsel under *Strickland*, which the PCR court applied in its denial of relief. Like the *McCoy* issue, Petitioner's attempt to raise this issue as one of constructive denial of counsel on appeal should not be considered by this Court.

B. Even if preserved, neither *McCoy* nor *Cronic* apply to Petitioner's case such that he is alleviated from showing prejudice under *Strickland.*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court has recognized various categories of claims within the right to the assistance of counsel, including (1) ineffective assistance of counsel under *Strickland*, (2) complete deprivation of the assistance of counsel under *Cronic*, and (3) violation of a defendant's autonomy to decide the objectives of his defense under *McCoy*. A key difference among these categories is whether a showing of prejudice is an essential component of the claim.

Petitioner conflates a defendant's right of autonomy, the violation of which is structural error under *McCoy*, with the constructive denial of counsel under *Cronic.* While both *McCoy* and *Cronic* are similar in that a defendant need not show prejudice, the accused's right to be master of the defense is a right separate and distinct from the right to effective assistance of counsel. Nonetheless, neither *McCoy* nor *Cronic* apply to Petitioner's case such that a presumption of prejudice is warranted.

Petitioner's reliance on the United States Supreme Court's decision in *McCoy* is misplaced. As an initial matter, *McCoy* addressed structural errors warranting reversal on direct appeal, and has not been held to apply retroactively in post-conviction or habeas petitions. *See Tyler v Cain*, 533 U.S. 656, 666 (2001) (rejecting the contention that the recognition of a structural error requires a finding of retroactivity). Nor has *McCoy* been held to apply to noncapital cases. *See McCoy*, 138 S. Ct. at 1514 ("[I]t is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment.") (J. Alito, dissenting). Finally, the Supreme Court in *McCoy* explicitly held that its rule was not applicable to claims of ineffective assistance of counsel. *McCoy*, 138 S. Ct. at 1510–11 ("[B]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance of counsel jurisprudence.").

In *McCoy*, a criminal defendant charged with murdering three individuals pleaded not guilty and "insistently maintained he was out of State at the time of the killings." *Id.* at 1506. Defense counsel conceded the defendant's guilt during the guilt phase of a capital trial even though the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. On appeal, the defendant argued his Sixth Amendment rights were violated when his lawyer admitted his guilt at trial. *Id.* Ultimately, the Supreme Court held that under the Sixth Amendment, "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. amend. VI) (emphasis in original).

Distinguishing between trial counsel's ability to direct trial strategies and decisions that are basic trial rights of the defendant, the Court explained

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.

McCoy, 138 S. Ct. at 1508 (citations omitted). The Court further explained that McCoy's claim was not subject to ineffective-assistance analysis, because

> [t]he *client's autonomy*, not *counsel's competence*, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless-error review.

Id. at 1504 (citations omitted).

In expressly stating its decision did not overrule *Florida v. Nixon*, 543 U.S. 175 (2004), the Court in *McCoy* clearly limited its ruling to instances where a defendant expressly objects to his counsel's concessions. *McCoy*, 138 S. Ct. at 1509–10. In *Nixon*, the Court rejected the defendant's argument that counsel's concession, made without the defendant's express consent, constituted a failure to subject the prosecution's case to meaningful adversarial testing under *Cronic*. *Nixon*, 543 U.S. at 179. The Court emphasized that *Cronic*'s presumption of prejudice is "reserved for

situations in which counsel has entirely failed to function as the client's advocate." *Id*. at 177 (citing *Cronic*, 466 U.S. at 659). Thus, while a defendant "has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," trial counsel's strategy to concede guilt does not automatically render counsel's performance deficient. *Nixon*, 543 U.S. at 186–87. Instead, counsel's effectiveness is determined under the standard established in Strickland. *Id*. at 192.

Petitioner asserts *McCoy* entitles him to a new trial because he expressed his opposition to his attorney's assertion of guilt by pleading not guilty and proceeding to trial. However, *McCoy* specifically recognized that absent an *express statement* by the defendant, "an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." *McCoy*, 138 S. Ct. at 1509. Unlike Petitioner, McCoy opposed his attorney's assertion of guilt "at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id*. It is only *after* trial, as in *Nixon*, that Petitioner has mounted a specific attack on his attorney's concession. Thus, the *Strickland* standard applies.

II. The PCR court correctly concluded Counsel was not constitutionally ineffective during his closing argument where Counsel made a strategic decision to concede partial guilt in light of Petitioner's confessions while focusing on Baniel's involvement in an effort to minimize Petitioner's role.

To establish ineffective assistance of counsel under *Strickland*, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown

in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Id*. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

As noted by Petitioner, effective assistance of counsel is particularly important during closing argument;

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Herring v. New York, 422 U.S. 853, 862 (1975).

Thus, "deference to counsel's tactical decisions in his closing presentation is particularly

important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003). Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact, . . . but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Id.* (citations omitted).

Petitioner characterizes counsel's closing argument as a complete concession of guilt. Distinguished from such complete concessions, however, are tactical admissions of less than full guilt. "Some remarks of complete concession may constitute ineffective assistance of counsel, but tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt." *Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990).

At the PCR hearing, Counsel explained that the biggest challenge in Petitioner's case were his April 16th and April 30th statements to law enforcement. The State introduced the recording of Petitioner's April 16th statement, where he told law enforcement he was planning to cook the cocaine into crack. (App. 316). Because the April 30th statement was not recorded, the State presented testimony from investigators as to Petitioner's confession that the drugs belonged to him and that Baniel was not involved. Counsel attempted to prevent the statements from being introduced at trial through a *Jackson v. Denno* hearing, but was unsuccessful.

A defense attorney does not and cannot reasonably decide on a reasonable theory of a defense in a vacuum. Rather, in order for counsel to reasonably decide on how to properly defend a client, he or she must take the prosecution's evidence into account. The PCR court correctly noted that the strong weight of evidence against Petitioner required a creative strategy by Counsel once his pre-trial attempts to suppress the statements were unsuccessful. Counsel's statements during closing that Petitioner was guilty of conspiracy to manufacture crack do not constitute

deficient performance based on the specific factual scenario presented in Petitioner's case.

Thus, Counsel made a strategic decision to admit to the matters of which Petitioner admitted in his statement—that he was planning on cooking the crack—in order to maintain credibility with the jury. Although conspiracy to manufacture is included within the trafficking statute, Counsel challenged the possession element of the trafficking statute by convincing the jury that the drugs belonged to Baniel. *See Yarborough v. Gentry*, 540 U.S. 1, 9 (2003) (per curiam) ("By candidly acknowledging the strength of the prosecutor's case, an attorney can build credibility with the jury and possibly persuade the jury to focus on other factors important to the defendant.").

Counsel admitted at the PCR hearing that he was not convinced the jury could have made the distinction between trafficking and conspiring to manufacture. (App. 320–21). However, Counsel explained that he could not deny Petitioner's involvement entirely since he was on videotape saying he was there to cook the coke, cook the crack, that he was an expert at crack cooking. (App. 321). At the PCR hearing, Petitioner denied ever telling law enforcement the cocaine belonged to him, but admitted saying he was going to "cook" the crack-cocaine in his video statement. (App. 316–17). Thus, Counsel attempted to minimize Petitioner's role by focusing the jury's attention on Baniel. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (explaining that "where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

Moreover, when viewing Counsel's opening and closing statements as a whole, the PCR court properly concluded Counsel employed a reasonable trial strategy under the circumstances. Specifically, it is clear in the context of Counsel's closing argument that Counsel's trial strategy was to poke holes in Baniel's statement on the theory that the cocaine belonged to Baniel, who

only contacted Petitioner to cook the crack-cocaine. (App. 193–94; 197). Counsel's characterization of the case as a "he-said/he-said type case" in his opening argument was not inconsistent with this theory. Regarding the owner of the drugs, it was Baniel's word against Petitioner's, and the fact that the drugs were found on Baniel's side of the vehicle supported Counsel's decision to challenge the possession element. Counsel also brought up in closing his concern that Petitioner's April 30th confession was not recorded. (App. 196).

Therefore, Petitioner cannot overcome *Strickland*'s strong presumption that counsel reasonably decided to defend the charges, based upon the information available to him, by conceding that Petitioner had agreed to cook the cocaine into crack, but asserting the State could not prove the possession element beyond a reasonable doubt. *See Nixon*, 543 U.S. at 191–93 (finding that counsel's concession of guilt in opening and closing argument in guilt phase of a capital was a reasonable trial strategy under *Strickland*); *Young v. Catoe*, 205 F.3d 750, 759-62 (4th Cir. 2000) (counsel's admission of the petitioner's guilt in a capital murder case did not constitute deficient performance where decision was based upon focusing on penalty phase and there was overwhelming evidence of guilt, where "counsel felt that the best way to save [Young's] life was if he gave the jury the appearance that he was willing for the truth to come out concerning the murder and was remorseful for his role in it"); *United States v. Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (counsel not ineffective for admitting defendant's guilt of individual drug offenses where evidence was overwhelming and concession's purpose was to persuade the jury that defendant was innocent of operating a continuing criminal enterprise). *See also Clozza v. Murray*, 913 F.2d 1092, 1099-1100 (4th Cir. 1990) (finding that, while some remarks of complete concession may constitute ineffective assistance of counsel, tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming

evidence of the defendant's guilt).

To establish prejudice under Strickland, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). "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*, 422 S.C. at 188, 810 S.E.2d at 843 (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)). Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687 (emphasis added).

"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.

Here, the PCR court concluded that any alleged deficiency by Counsel did not prejudice Petitioner in light of the overwhelming evidence against him. Petitioner confessed in his initial statement to law enforcement that he was planning on cooking the crack cocaine. He then admitted in his April 30th statement that the drugs belonged to him, and that Baniel wasn't involved. If counsel had denied these statements, there is no reasonable possibility the jury would have rendered a different verdict.[4] Put simply, Petitioner's "own statements admitted all of the facts required for a conviction, and those statements were unaffected by the performance of his lawyer." *Young*, 205 F.3d at 762.

[4] *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), the United States Supreme Court highlighted the unique nature of a confession:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Fulminante, 499 U.S. at 296 (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting); *See also United States v. Ince*, 21 F.3d 576, 583 (4th Cir.1994) (recognizing that a confession can have "a devastating and pervasive effect" on the outcome of a trial).

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

BY: s/LillianMeadows
Lillian L. Meadows
S.C. Bar No. 103665
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734–3737

July 27, 2020

ATTORNEYS FOR RESPONDENT