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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County

The Honorable Kristi F. Curtis, Post-Conviction Relief Judge
The Honorable James R. Barber, III, Trial Judge

Appellate Case No. 2019-001677

Michael Orlando Brown, #295408,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

ISSUES PRESENTED ON CERTIORARI

PETITIONER'S ISSUES PRESENTED

I. Did the post-conviction relief (PCR) judge err by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's alleged statements to law enforcement in which Petitioner allegedly offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements pursuant to Rule 403, SCRCE, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal?

II. Did the post-conviction relief (PCR) judge err by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's statements to law enforcement in which Petitioner allegedly admitted the state's DNA evidence would convict him and offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements arguing the statements were made after Petitioner invoked his Fifth Amendment right against self-incrimination and right to counsel, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

I. The PCR court correctly found Counsel was not constitutionally ineffective for failing preserve her objection to the admission of Petitioner's statements to law enforcement in which Petitioner inquired about pleading guilty to a lesser offense because the statements were properly admitted, and therefore, Petitioner cannot meet his burden as to prejudice.

II. The PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve her objection to the admission of Petitioner's statements to law enforcement on Fifth Amendment grounds because Petitioner cannot meet his burden of proving prejudice where the first alleged invocation was not made in response to an interrogation and where the second alleged invocation was ambiguous.

STATEMENT OF THE CASE

Michael Orlando Brown (Petitioner) is incarcerated with the South Carolina Department of Corrections. Petitioner was indicted by the April 2014 term of the Richland County Grand Jury for attempted armed robbery (2014-GS-40-02050). Anastasia L. Walker (Counsel), and Alicia Dyar Goode, Esquires, represented Petitioner. Meghan L. Walker, Kathryn L. Campbell, and Sandra V. Moser, Esquires, prosecuted the case on behalf of the State. On August 4-5, 2014, Petitioner proceeded to trial before the Honorable James R. Barber, III, and a jury. The jury found Petitioner guilty as indicted. Judge Barber sentenced Petitioner to life in prison without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code of Laws.[1]

Petitioner filed a timely notice of appeal, which was perfected by Laura Baer, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. After briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016). The case was remitted to the circuit court on August 1, 2016.

Petitioner then timely filed a post-conviction relief application on August 3, 2016. Respondent filed a Return on June 30, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter convened on February 19, 2019, at the Richland County Courthouse the Honorable Kristi F. Curtis. Petitioner was present at the hearing and represented by Leah B. Moody, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Petitioner testified on his own behalf and presented testimony from Judy and Cecilia Castro as purported alibi witnesses. Counsel and Meghan Walker, the assistant solicitor

[1] Petitioner had a previous conviction for attempted armed robbery in Lexington County in 2003 (2002-GS-32-04128).

who prosecuted the case, testified on behalf of Respondent. After reviewing the evidence and testimony from the hearing along with the trial and direct appeal records, the PCR court issued an order, filed September 4, 2019, denying relief and dismissing the application.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief, and, through counsel, filed a petition for writ of certiorari on April 1, 2020.

STATEMENT OF THE FACTS

On the night of January 3, 2013, a small group of employees was cleaning up the Chuck E. Cheese restaurant in Columbia prior to closing when an armed gunman entered the restaurant wearing a bandana over his face and a wig. App. pp. 123-24, 172-73, 187-88. The man grabbed an employee, put a gun to the employee's back, and demanded money before fleeing on foot. App. pp. 174, 190-91, 197, 203. Portions of the attempted armed robbery were captured on the restaurant's surveillance video. App. pp. 124, 165-66. Police responded to the scene and a K9 officer tracked the man's trail away from the building. App. pp. 126-27, 155. The dog led officers to a neighboring property where they recovered a red bandana and a wig matching the description of those used in the attempted armed robbery. App. pp. 127, 156-59. These items were tested for DNA, and the bandana was eventually connected to Petitioner, leading to his arrest. App. pp. 207-08.

Richland County Sheriff's Department Investigator Robert Martin interviewed Petitioner in his office on March 14, 2013, after Petitioner's arrest. App. pp. 212-14. Martin advised Petitioner of his Miranda[2] rights both orally and in writing, which Petitioner voluntarily waived. App. pp. 213-17. Martin asked why Petitioner's DNA would be found at the scene of the crime, and Petitioner could not give a valid reason. App. p. 222, 224. In fact, Petitioner told Martin the only time he had been to that Chuck E. Cheese restaurant was for a family member's birthday party in 2011. App. p. 222. Martin testified he asked whether Petitioner would be willing to give a DNA sample but Petitioner said no, "because it would convict him." App. p. 220. Petitioner never denied the validity of the DNA evidence and additionally stated to Martin he was not going to challenge the DNA because he knew it would be enough to convict him. App. pp. 218-220.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

During this same interview, Petitioner asked Martin about the possibly of being charged with a lesser offense because attempted armed robbery "was severe." App. pp. 219-20. Petitioner also offered to plead guilty to a lesser charge. App. pp. 218-19. Martin explained he could not make deals and any negotiations would be between Petitioner's attorney and the Solicitor's Office. App. p. 219. Petitioner then indicated he did not want to talk about the case anymore, and Martin ended the interview and allowed Petitioner to make a phone call. App. pp. 64, 66, 220. At some point – Martin could not recall if it was during the interview or at the end – Martin requested Petitioner's DNA, and Petitioner declined until he could speak with an attorney.[3] App. p. 66.

Counsel challenged the admissibility of Petitioner's statements in a pretrial Jackson v. Denno[4] hearing. App. pp. 53-55. The trial judge ruled he would not allow any testimony regarding Petitioner's refusal of Martin's request to give a DNA sample, but he allowed testimony about the portion of the statement where Petitioner said, "I know the DNA will convict me." App. pp. 73- Additionally, the trial judge ruled Petitioner's statement indicating he would plead guilty to a lesser charge was admissible. App. pp. 95-99.

[3] Martin testified to Petitioner's request for an attorney and refusal to give a DNA sample in the pre-trial hearing, but not before the jury. App. pp. 73-76.
[4] 378 U.S. 368 (1964).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (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. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's

performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

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 petitioner 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. at 688.

ARGUMENT

I. The PCR court correctly found Counsel was not constitutionally ineffective for failing preserve her objection to the admission of Petitioner's statements to law enforcement in which Petitioner inquired about pleading guilty to a lesser offense because the statements were properly admitted, and therefore, Petitioner cannot meet his burden as to prejudice.

Petitioner contends Counsel was ineffective for failing preserve her objection to the admission of Petitioner's statements to law enforcement in which Petitioner inquired about pleading guilty to a lesser offense. Counsel raised the issue in a pretrial hearing, but, after the trial judge ruled the statement was admissible, Counsel then failed to contemporaneously object when the testimony was presented to the jury. App. pp. 78-79, 95-99, 219-20. The Court of Appeals therefore found the issue was not preserved for appellate review. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016). Accordingly, the PCR court found Counsel was deficient for failing to preserve the issue. App. p. 696. However, the PCR court ultimately denied relief, finding Petitioner had failed to prove he was prejudiced by the admission of the challenged testimony because the statements were properly admitted, and therefore, there was no reasonable probability Petitioner would have prevailed on appeal. App. pp. 696-98. Because the PCR court correctly determined Petitioner was not prejudiced by Counsel's deficiency and denied relief, this Court should likewise deny certiorari.

A. Petitioner's argument is not preserved because it was not raised to the PCR court.

As an initial matter, Petitioner's argument on this issue is itself not preserved for appellate review. At the PCR hearing, Petitioner testified he never made a statement to law enforcement at all, and *that* was the objection he wanted Counsel to make and preserve for appeal, not the Fifth Amendment or Rule 410 issue. App. pp. 533-35, 606-07. However, the Order of Dismissal states:

> The testimony presented at trial showed [Petitioner] was Mirandized orally and in writing prior to being asked if he would give a DNA sample. This Court finds [Petitioner's] response that he would not submit to DNA testing because he knew the DNA evidence would convict him clearly evinces consciousness of guilt, which is the same rationale relied upon by the trail (sic) court, and the statement was properly admitted at trial. Additoinally, this Court finds Applicant's statement offering to plead guilty to a lesser charge was properly admitted for the same reason. . . .

App. p. 697. Essentially, the PCR court found Petitioner *did* make the two statements, and the statements were properly admitted because they were voluntary and relevant to the issue of Petitioner's consciousness of guilt. Petitioner never asked the PCR court to rule on whether Counsel was deficient in failing to preserve the Rule 410 or Fifth Amendment objections, either at the evidentiary hearing or by way of a post-hearing motion. Thus, Petitioner has waived his right to assert ineffective assistance of counsel on the ground Counsel failed to preserve the Rule 410 or Fifth Amendment issue. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005) ("When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.").

B. Even if the argument is preserved, Petitioner cannot prove prejudice because he was not reasonably likely to prevail on direct appeal.

In any event, Petitioner was not reasonably likely to prevail on appeal as to the Rule 410 issue, so the PCR court correctly found he did not meet his burden of proving prejudice. At trial, Investigator Robert Martin testified about his interview of Petitioner after Petitioner's arrest. Martin testified he read the advisement of rights form containing the standard Miranda[5] warnings to Petitioner aloud, determined Petitioner understood the warnings, and both he and Petitioner

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

signed the acknowledgment form indicating Petitioner wished to waive his right to remain silent. App. pp. 212-17. Martin testified Petitioner stated he had not been to that Chuck E. Cheese or even in the general area since 2011. App. p. 222. Martin explained he asked Petitioner if he had ever worn a wig, which Petitioner denied, and when Martin asked why Petitioner's DNA would be at the crime scene, Petitioner could not offer any explanation. App. p. 222. According to Martin, in the course of this discussion about Petitioner's DNA, Petitioner never denied involvement in the robbery and instead said, "[h]e wasn't going to challenge the DNA. . . . He wanted to be charged with something lesser if he could. He knew the DNA would convict him. . . . [H]e wanted a less severe charge, and he wanted to discuss a plea." App. pp. 218-19. Martin then explained to Petitioner "it would be between [Petitioner's] attorneys and the Solicitor's Office to make any kind of plea agreement," but Martin was not "at liberty to make those kind of offers." App. p. 219. Martin further testified Petitioner said "he wanted to plead guilty" spontaneously after being confronted with the evidence against him. App. p. 219. Martin emphasized Petitioner "wasn't making any denials that he was involved in this. . . . He wanted to see if he could negotiate some kind of plea or get a plea negotiated on his behalf." App. pp. 219-20.

At trial, the State argued, and the trial court agreed, Rule 410(4), SCRE, only applies to keep out a statement made to a prosecuting attorney during plea negotiations, and since Petitioner's statement was made to law enforcement during an interrogation, Rule 410 was inapplicable in this situation.[6] Counsel objected to the admission of Petitioner's statement that the DNA would convict him as well as his statement that he wanted to plead guilty during the pretrial Jackson v. Denno,

[6] Statements "made in the course of plea discussions with *an attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" are inadmissible. Rule 410(4), SCRE (emphasis added).

378 U.S. 368 (1964), hearing. Counsel based her objection on Rule 410(4), SCRE.[7] However, Counsel did not renew her objection when the testimony was presented in front of the jury, rendering the issue unpreserved for direct appellate review. App. pp. 78, 99, 218-20.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475-76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim." (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a... claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam))).

The PCR court found Petitioner was not reasonably likely to prevail on direct appeal because Petitioner's statement "offering" to plead guilty to a lesser charge was properly admitted because it was an acknowledgment of guilt and was not made in the course of a plea negotiation. App. pp. 696-98. The PCR court therefore correctly found Petitioner suffered no prejudice due to

[7] Although Counsel did not specifically cite the rule, she characterized the statement as "an offer to plead guilty," which she argued "shouldn't be admissible" because it was an "attempt[] to enter into some sort of negotiation." App. pp. 78, 99. Counsel also argued against admission based on the "prejudicial and probative value" of the statement which she argued was not "a confession." App. p. 78.

Counsel's missed objection. App. p. 696.

Petitioner now relies primarily on the holding of United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978), to argue Rule 410(4), SCRE,[8] requires the exclusion of Petitioner's statement to Martin that he wanted to plead guilty to a lesser charge. The discussion and interpretation of Rule 410 in Robertson, though, is based on the pre-1979 version of the rule, which was substantially broader than its current form. Critically to Petitioner's case, the rule was amended to narrow the scope of statements deemed inadmissible specifically because of decisions like Robertson which were being used to keep out more evidence than was originally intended by Congress. See, e.g., United States v. Marks, 209 F.3d 577, 582 (6th Cir. 2000) ("Defendants rely on United States v. Brooks and United States v. Herman for the proposition that statements made to law enforcement officers pursuant to a plea agreement then in effect are statements 'made in the course of plea discussions.' Their reliance is misplaced. Congress amended Rule 11(e)(6) in 1979; it did so in part to abrogate decisions such as Brooks and Herman, because they manifested what Congress thought was a too-broad view of the plea negotiation process.").

As the Notes to the Federal Rules of Criminal Procedure[9] explain, "This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases... must be resolved by that body of law dealing with police interrogations." Fed. R. Crim. P. 11 advisory committee's note on 1979 Amendments to

[8] South Carolina's Rule 410(4), "is identical to the federal rule." Rule 410, SCRE.

[9] The Notes to Federal Rule of Evidence 410 explicitly direct the reader to the amendments to Federal Rule of Criminal Procedure 11(e)(6) for an explanation of the changes to Rule 410. See Fed. R. Evid. 410 advisory committee's note on 1979 Amendments ("A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence: see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.").

subdivision (e)(6). In fact, as the Notes go on to point out, "these statements are sometimes admitted in court against the defendant." Id. Cleary, then, the current version of both the federal and South Carolina Rule 410, enacted after Robertson was decided, specifically contemplate that statements regarding plea negotiations made to *law enforcement* are generally admissible, assuming the traditional voluntariness factors are met. As Robertson itself acknowledged, "[S]urely not every discussion between an accused and agents for the government is a plea negotiation." 582 F.2d at 1365. "[T]he cooperation of an arrested person often is prompted by a desire for leniency for himself or others. Statements or confessions made in such circumstances, if they are voluntary and made with full awareness of the person's rights, are reliable, probative and constitutionally admissible evidence." Id. at 1368.

In Petitioner's case, the trial court properly admitted the statement because it correctly determined it was made voluntarily and not excluded by the plain language of Rule 410, SCRE. The statement was made to a police officer, not the solicitor, nor was it made during a plea negotiation. Although Petitioner indicated his seeming willingness to engage in a plea negotiation, in the context of the entire conversation, Petitioner's statement was not made *during* any such negotiations; it was made during an interview about his involvement in the crime and immediately after Petitioner was informed of DNA evidence linking him to the scene. Additionally, the testimony at trial showed the statement was made unprompted by law enforcement, after Miranda warnings had been given to Petitioner. In this context, the trial court correctly found this "offer" to plead guilty was actually an admission of consciousness of guilt. See State v. Compton, 366 S.C. 671 (Ct. App. 2005) (finding statements defendant made to police were not barred by Rule 410, SCRE, in prosecution for murder where discussions between defendant, solicitor, and investigators were not in furtherance of defendant making a plea on the murder charge).

Accordingly, the PCR court correctly found Petitioner was not prejudiced by Counsel's omission because he was not reasonably likely to have succeeded on appeal. Thus, the PCR court correctly determined Petitioner received effective assistance of counsel and denied relief. This Court should likewise deny certiorari.

II. The PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve her objection to the admission of Petitioner's statements to law enforcement on Fifth Amendment grounds because Petitioner cannot meet his burden of proving prejudice where the first alleged invocation was not made in response to an interrogation and where the second alleged invocation was ambiguous.

Petitioner additionally contends Counsel was ineffective for failing preserve her objection to the admission of Petitioner's statements to law enforcement in inquiring about pleading guilty to a lesser offense and acknowledging DNA would convict him on the basis that the statements were made after Petitioner allegedly invoked his Fifth Amendment right against self-incrimination and requested counsel. [10] Counsel again briefly argued the issue pretrial, but, after the trial judge ruled the statements were admissible, Counsel failed to contemporaneously object when the testimony was presented to the jury. App. pp. 70-76, 218-19. The Court of Appeals therefore found the issue was not preserved for appellate review. State v. Brown, Op. No. 2016-UP-349

[10] Notably, Counsel never objected to the admission of this statement regarding the DNA sample on *Fifth* Amendment grounds. App. p. 71. Rather, she objected on *Sixth* Amendment grounds, which, even if preserved at trial, would not have been a meritorious issue for direct appeal as the Sixth Amendment right to counsel does not attach until indictment. See State v. Register, 323 S.C. 471, 4776 (1996) ("Sixth Amendment right does not attach simply because the defendant has been arrested or because the investigation has focused on him. . . . Further, the Sixth Amendment right attaches only 'post-indictment,' at least in the questioning/statement setting." (internal citations omitted)). In this case, the alleged invocation occurred when Martin questioned Petitioner on the day of Petitioner's arrest, well before Petitioner was indicted or made his first appearance before a judge. Petitioner's allegation at PCR was only that she failed to preserve her objection(s), not that she made an incorrect objection. App. p. 685. Regardless, Petitioner has also waived his argument Counsel was deficient for failing to make or preserve a Fifth Amendment argument as to this statement for the same reasons discussed in Section I(A), *supra*.

(S.C. Ct. App. filed July 6, 2016). Accordingly, the PCR court found Counsel was deficient for failing to preserve her objections to the statements about the DNA sample. App. p. 696. However, the PCR court ultimately denied relief, finding Petitioner had failed to prove he was prejudiced by the admission of the challenged testimony because the statements were properly admitted, and there was no reasonable probability Petitioner would have prevailed on appeal. App. p. 696-98. Because the PCR court correctly determined Petitioner was not prejudiced by Counsel's deficiency and denied relief, this Court should likewise deny certiorari.

As discussed above, an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel, but the applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability in order to be entitled to relief. McHam, 404 S.C. at 475-76, 746 S.E.2d at 47 (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In this case, the PCR court found Petitioner was not reasonably likely to prevail on direct appeal because Petitioner's statements that he was not challenging the DNA and he knew the DNA would convict him were properly admitted as voluntary statements relevant to Petitioner's consciousness of guilt. App. p. 697. The PCR court therefore correctly found Petitioner suffered no prejudice due to Counsel's missed objection. App. pp. 696-98.

Even if the issue of Counsel's ineffectiveness for failing to preserve the Fifth Amendment argument is itself preserved, Petitioner cannot meet his burden of proving he was prejudiced by Counsel's deficiency. Petitioner argues he invoked his Fifth Amendment right to counsel such that Martin's questioning of him should have stopped when he declined to give a DNA sample without first speaking with an attorney. PWC pp. 19, 21. However, Petitioner's response was specifically

limited to the context of giving a DNA sample, not the entire interview. Martin testified, and Petitioner has never disputed, he advised Petitioner of his Miranda rights, which Petitioner voluntarily waived. Therefore, because the alleged invocation was equivocal in that it was limited to the specific circumstance of giving a DNA sample, Martin was not required to cease questioning Petitioner entirely. See State v. Jett, 814 S.E.2d 635 (Ct. App. 3018) (quoting Davis v. United States, 512 U.S. 452, 458 (1994)) ("'[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.'"). Because this statement by Petitioner was not an unequivocal invocation of Petitioner's Fifth Amendment right to counsel in the context of answering questions and giving a statement, the PCR court correctly found no prejudice from Counsel's lack of objection to these statements, and this Court should deny certiorari.

Additionally, Petitioner contends he also, at some point, told Martin he "did not want to talk about his case anymore," which Petitioner claims is another assertion of his Fifth Amendment right against self-incrimination and right to counsel which should have immediately ended the interview. PWC p. 24. However, this phrase is plainly not a request for an attorney and is insufficient to require the immediate cessation of the interview on that basis. "To invoke a Fifth Amendment right to counsel, one must give 'some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.'" State v. Binney, 362 S.C. 353, 359 (2005) (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)). Furthermore, the request must be unambiguous. United States v. Eligwe, 456 Fed. Appx. 196, 198 (4th Cir. 2011); see also Davis, 512 U.S. at 462 (finding the statement, "Maybe I should talk to a lawyer" was not a request for counsel which required the investigator to

stop questioning); Jett, 814 S.E.2d at 420-21 (relying on Davis to find defendant's question, "Where my lawyer at?" was not an unambiguous and unequivocal request for counsel requiring the cessation of questioning). Here, Petitioner merely said he did not want to talk anymore. He did not even mention an attorney at this point in the interview. This statement, therefore, was not enough to assert his Fifth Amendment right to counsel and require Martin to end the interview.

This statement is also not enough to require Martin to end the interview on the basis Petitioner invoked his right to remain silent or his right against self-incrimination, because even if Martin's request for the DNA sample occurred after a successful invocation of Petitioner's right to remain silent, the request for DNA was not an interrogation. A DNA sample is not testimonial evidence, and therefore, a request to give such evidence does not constitute an interrogation or the "functional equivalent" which would trigger Miranda protections. The Fifth Amendment "protects a person only against being incriminated by his own compelled testimonial communications." Doe v. United States, 487 U.S. 201, 207 (1988). The Supreme Court "has held that certain acts, though incriminating, are not within the privilege," including giving a blood sample, standing in a lineup, or providing a voice or handwriting exemplar. Id. at 210. Cf. Everett v. Sec'y, Fla. Dept. of Corr., 779 F.3d 1212, 1245 (11th Cir. 2015) ("[W]e conclude that the Florida Supreme Court did not unreasonably apply clearly established Supreme Court precedent in determining that a request for consent to collect DNA samples from a defendant in custody who has invoked the right to counsel was not an interrogation, did not procure any testimonial communication, and did not run afoul of Miranda and its progeny."). Merely asking Petitioner whether he would give a DNA sample was not an interrogation, nor was the yes-or-no question on its own "reasonably likely to

elicit an incriminating response."[11] Counsel therefore would not have been successful in suppressing the statement[12] on the basis that Petitioner invoked his Fifth Amendment right to remain silent, because he was not constitutionally entitled to do so that context.

Moreover, Martin testified, however, he did stop questioning Petitioner at that point and allowed Petitioner to make a phone call. Martin then asked Petitioner some follow up questions solely about what Petitioner said in the phone call (i.e. that he was being set up), which Petitioner answered and then "went back into trying to negotiate a plea." App. p. 227. The spontaneous statements Petitioner made during the phone call were not induced by Martin, and Martin simply asked some clarifying questions because Petitioner had not mentioned a set up during the previous portion of their interview. "[S]tatements volunteered by a suspect during the course of routine arrest procedures [are] not the products of interrogation... and... custodial statements made on the suspect's own initiative are not subject to the safeguards of Miranda. Butzin v. Wood, 886 F.2d 1016, 1018 (8th Cir. 1989) (internal citations omitted). Likewise, "[a]n officer's attempt to seek clarification of an ambiguous statement is not generally construed as interrogation for Miranda

[11] Petitioner chose to elaborate on his "no" answer and give an incriminating response of his own volition.

[12] Importantly, even if Counsel had succeeded in suppressing *the statement*, "The DNA will convict me," she would not have been able to suppress *the DNA evidence itself*. Law enforcement was alerted to Petitioner as a suspect because the DNA sample obtained from the bandana found at the crime scene was entered into a database, which generated a match to Petitioner. Therefore, even before any interrogation of Petitioner, the State had a sufficient basis to compel Petitioner to give a DNA sample. See Schmerber v. California, 384 U.S. 757, 761 (1966) ("We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.").

purposes if the question does not 'enhance the defendant's guilt or raise the offense to a higher degree....'" Id. (internal citation omitted).

When Petitioner turned the topic back to a plea agreement, Martin reiterated he was not authorized to make any kind of agreement and ended the interview again. App. p. 227. This testimony clearly indicates, at the very least, Petitioner made statements about wanting to plead guilty *before* the phone call and the alleged invocation of his right to remain silent. Although Martin's testimony about the timing of the statement "DNA will convict me" is not as clear, the trial judge determined the statement was made prior to any assertion of the right to remain silent, and, in any event, as discussed above, the request for the DNA was not interrogation, so Petitioner's alleged invocation of his right to remain silent was inapplicable to his answer to that particular question. Because the trial court's finding the statements were admissible was not "clearly erroneous," Petitioner cannot prove prejudice from Counsel's lack of objection because he was not reasonably likely to succeed on direct appeal on this issue. State v. Banda, 371 S.C. 245, 251 (2006) ("In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. . . . The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases.").

Accordingly, because neither of these declarations by Petitioner were sufficient to invoke his Fifth Amendment right against self-incrimination or his right to counsel such that the statements should have been excluded at trial, Petitioner is not reasonably like to have succeeded on direct appeal, even had Counsel made and preserved a Fifth Amendment argument. The PCR court, therefore, correctly concluded Petitioner failed to meet his burden of proving he was

prejudiced by Counsel's deficiency in failing to preserve the Fifth Amendment issue for appellate review and denied relief. This Court should likewise deny certiorari as to this issue.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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