STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Lexington County
The Honorable R. Knox McMahon, Trial Judge
The Honorable Brooks P. Goldsmith, PCR Judge

Appellate Case No. 2019-001436

QUINCY A. MCCANTS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Whether the PCR court erred in denying relief, where trial counsel failed to utilize a report produced by SLED showing that none of the three fingerprints lifted from a bag of chips at the gas station matched fingerprints in AFIS, where Petitioner had previously been arrested and fingerprinted?

III. Whether the PCR court erred in denying relief, where trial counsel failed to object to prejudicial and improper remarks by the solicitor in closing which commented on his choice not to testify, where the solicitor told the jury they could consider that Petitioner did not say?

IV. Whether the PCR court erred in denying relief, where trial counsel offered no strategic testimony from Petition in a Jackson v. Denno hearing, where counsel offered no strategic reasons justifying the decision not to put Petitioner on the stand pre-trial in order to support the argument that his statements were involuntary, and where Petitioner had a ninth-grade education?

V. Whether the PCR court erred by failing to comply with the deadline established by this Court, where a PCR hearing has neither scheduled nor heard within the sixty-day timeframe required by this Court's order.

Respondent's Counterstatement of Issues

I. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not calling as witnesses at trial Petitioner's mother and girlfriend because the attorneys made the reasonable and strategic choice to call Petitioner's aunt as a witness instead and because Petitioner has not presented any evidence that there is a reasonable likelihood that the outcome of his trial would have been different had his mother and girlfriend testified.

II. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not introducing evidence that SLED was unable to match the fingerprints lifted from a potato chip bag at the scene of the crime to Petitioner's prints on file with the State because Petitioner's attorneys did not feel

that the fact was exculpatory and wanted to prevent the jury from discovering that Petitioner had a prior criminal record and because police still were able to match the prints from the bag to those taken from Petitioner when he was arrested.

III. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not objecting when the solicitor informed the jury during closing argument that the jury could consider what Petitioner did not say because the statement was not a comment upon Petitioner's decision not to testify at trial and because the trial court instructed the jury that it could not take into account the fact that Petitioner did not testify.

IV. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not calling him as a witness during the hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), because Petitioner's attorneys wanted to limit the solicitor's chances to question Petitioner and cross-examined the State's witness instead, and because Petitioner failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had he testified during the hearing.

V. The PCR court did not err by not conducting Petitioner's remanded post-conviction relief hearings within sixty days of this Court's remand order because Petitioner consented to continuing the matter.

STATEMENT OF THE CASE

Quincy A. McCants ("Petitioner") is presently incarcerated in the South Carolina Department of Corrections. During its December of 2005 term, the Lexington County Grand Jury indicted Petitioner for armed robbery. Petitioner was represented by Jonathan M. Harvey, Esquire, and Stanley L. Myers, Esquire. Then-Deputy Solicitor Samuel R. Hubbard, III, of the Eleventh Circuit Solicitor's Office prosecuted Petitioner. On October 16, 2006, through October 17, 2006, Petitioner proceeded to a jury trial with the Honorable R. Knox McMahon presiding. At the conclusion of trial, the jury found Petitioner guilty as indicted, and Judge McMahon sentenced him to imprisonment for twenty-two years.

Petitioner filed a timely notice of appeal. Deputy Chief Appellate Defender Wanda H. Carter of the South Carolina Commission on Indigent Defense represented Petitioner on appeal.

Carter filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing Judge McMahon erred in denying Harvey's motion to suppress the State's fingerprint evidence because the prints were not preserved for the defense's review. Petitioner filed a pro se Anders brief, arguing Judge McMahon erred in allowing the cashier at the convenience store Petitioner robbed to make an in-court identification of Petitioner because the witness' identification was the result of a prior unreliable and tainted identification. The South Carolina Court of Appeals granted Carter's motion to be relieved and dismissed the appeal. State v. McCants, Op. No. 2009-UP-194 (S.C. Ct. App. filed May 6, 2009) (per curiam). The remittitur was issued on May 22, 2009.

Petitioner filed an application for post-conviction relief on September 18, 2009, and an amended application on November 5, 2012. The State ("Respondent") filed its return on February 25, 2010. An evidentiary was convened on April 13, 2013, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. In an order issued on November 24, 2014, Judge Dickson denied Petitioner's application and dismissed it with prejudice. Blanchette moved to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Judge Dickson denied that motion in an order issued on September 7, 2015.

Blanchette filed a timely notice of appeal. Appellate Defender Taylor Davis Gilliam of the South Carolina Commission on Indigent Defense represented Petitioner on appeal. In an order issued on December 1, 2016, this Court ordered the parties to attempt to reconstruct the record from Petitioner's evidentiary hearing before Judge Dickson due to the fact that the assigned court reporter was unable to produce a transcript. After reconstruction was attempted, Judge Dickson issued an order finding the attempt had not been successful. By an order issued on February 1,

2019, this Court granted the parties' joint motion to vacate Judge Dickson's order of dismissal and remand the matter for a new evidentiary hearing.

Pursuant to that order, the parties appeared before the Honorable Brooks P. Goldsmith ("PCR court") at the Lexington County Courthouse for an evidentiary hearing on June 26, 2019. Petitioner was present and was represented by Don A. Thompson, Esquire, with the undersigned representing Respondent. At the conclusion of that hearing, the PCR court issued an order denying Petitioner's application and dismissing it with prejudice. Petitioner's appeal follows.

STATEMENT OF FACTS

Chandra Wight was working as a cashier at a Li'l Cricket convenience store located on Sunset Boulevard in Lexington County on November 7, 2004, and had been working the job for only one week. App. 164, 166-67. She was the only employee working at the store that day. App. 167. At some time after 8:00 p.m., a man entered the store and bought a bag of potato chips. App. 167-68. Wright was behind the counter and the man walked from the store's entrance on her left to the chip rack at the front of the store to her right, passing by her in front of her from a short distance away. App. 168-69. The man was wearing tan pants, a tan shirt, and a blue, fishing or bucket hat with a yellow design on it. App. 169-70.

A few minutes later, the man returned to the store when no one else was inside but Wright. App. 170. Wright was still in the same position behind the counter. App. 170. The man, while standing in front of Wright, asked to exchange the bag of chips he purchased for another, saying he had purchased the "wrong" chips. App. 170-71. Wright allowed him to exchange the bag of chips if he replaced them with a bag of the same type off the same chip rack from which he took the first bag. App. 170. Wright watched the man go back to the chip rack on her right, exchange

the bag of chips, leaving the first bag of chips on the fourth shelf of the rack. App. 171, 177-78. She was able to identify the specific bag of chips that the man put back on the shelf because she watched him put it back and noted that the bag was laying on its side when the man put it back. App. 178. The man went to the very back of the store to get a juice from the drink cooler. App. 171. The man came back to the counter to pay for the juice, placed the new bag of chips and the juice on the counter, and pulled a gun on Wright when she opened the cash register to accept his payment. App. 171-72. The gun was "a little black gun." App. 173. The man was standing directly in front of Wight and demanded that she give him the money from the register. App. 172. Wight estimated she gave the man approximately $100 from the register, but she was unable to say exactly how much money he made off with. App. 173, 197. The man even made her pick up and give to him some money that fell behind the counter during the robbery. App. 186. When the man exited the store, Wright locked the door, which was standard procedure. App. 173. The man did not take the second bag of chips with him when he exited, but left it sitting on the counter where he had been standing. App. 177. Wright saw the man drop some of the money and stop to pick it up before continuing to his car, which was a tan Oldsmobile Cutlass with a landau top that as "half brown." App. 174, 187. Wright saw the man's car, watched him leave the parking lot, and called the police. App. 174. She did not have the opportunity to take down the car's license plate number or notice the number of people in the car. App. 200.

Wright gave a statement to the police who arrived to investigate and pointed out the two bags of potato chips the man had left behind in the store. App. 188-90. Wright gave a statement to police that the man was a black male, 5'11 in height, weighed between 150 and 160 pounds, was wearing tan pants, and had rough hands. App. 193-94. At trial, Wright identified Petitioner as the

man who had robbed the store, over Petitioner's objection. App. 191. Wright testified she had no doubt Petitioner was the man who robbed her. App. 191-92, 195. When questioned on cross-examination, Wright testified she did not recall seeing a gold tooth in the robber's mouth. App. 195-96. She explained that she had not been focused on the man's mouth, but instead had been focused on his face and the gun he had pointed at her. App. 196, 203, 205.

Detective James Hickman, who was a crime scene investigator with the Lexington County Sheriff's Department, was sent to convenience store of the night of the robbery. App. 221. He was not able to lift any latent fingerprints of value from the counter in front of the cash register and from the door, which he did not believe unusual due to the high-traffic at that spot. App. 225. Detective Hickman was able to lift a latent fingerprint off of the potato chip bag the robber left on the counter in the store, which was a bag of Lay's sour cream an onion chips (State's Exhibit 9). App. 226, 235, 309. Detective Hickman was also able to lift latent prints from the bag the robber placed back on the chip rack; those chips were Lay's salt and vinegar (State's Exhibits 7 and 8). App. 227, 235, 309. Wilbur Johnson, a fingerprint examiner with the Lexington County Sheriff's Department, was qualified as an expert in latent fingerprint analysis at trial without objection. App. 295, 299. Johnson analyzed the prints lifted from the chip bags and compared them to Petitioner's fingerprints. App. 318-19. He determined the prints lifted from the bag of salt and vinegar chips, which were placed back on the chip rack at the store by the robber, were the fingerprints of Petitioner. App. 319. He determined the print lifted from the bag of sour cream and onion chips was not "of value." App. 319.

Then-Detective Brett Sims of the major crimes unit of the Lexington County Sheriff's Department was the lead detective in the robbery. App. 259-60. Using license plate information,

Sims was able to identify the owner of the car: Gloria Hall, Petitioner's mother. App. 261-62. After making contact with Hall, Sims first met with Petitioner on January 5, 2005. App. 263. After giving Miranda warnings to Petitioner, Petitioner gave only a verbal statement to Sims and refused to give a written statement. App. 263-68. In that first statement, Petitioner denied robbing the store. App. 269. Petitioner supplied Sims with fingerprints, which Sims sent off to be processed. App. 169-70. Sims' testimony about what Petitioner told him during their two meetings was admitted into evidence at trial over Petitioner's objections to the voluntariness of the statements. App. 263.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the 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, 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, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR 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).

ARGUMENT

I. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not calling as witnesses at trial Petitioner's mother and girlfriend because the attorneys made the reasonable and strategic choice to call Petitioner's aunt as a witness instead and because Petitioner has not presented any evidence that there is a reasonable likelihood that the outcome of his trial would have been different had his mother and girlfriend testified.

Petitioner argues his attorneys were constitutionally ineffective for not calling Petitioner's mother and girlfriend as witnesses at trial because the two could have strengthened the attorneys' reasonable doubt theory, the attorneys did not have a strategic reason not to call the two, and Petitioner was prejudiced by the lack of testimony from the two. Petitioner's argument fails because Petitioner's attorneys made a reasonable, strategic choice to call Petitioner's aunt as a witness instead of Petitioner's mother and girlfriend and because Petitioner has failed to offer any evidence that anything the two had to say would have created a reasonable likelihood that the jury would have found Petitioner not guilty had the two testified.

The PCR court correctly found that Petitioner failed to prove that his the decision of his attorneys to call Petitioner's aunt as a witness at trial instead of Petitioner's mother and girlfriend was deficient. Myers testified at the PCR hearing that Petitioner was not able to identify anyone who could provide testimony that he was with him or her while the robbery was taking place at the convenience store. App. 813. Harvey based his trial preparation upon the information that Petitioner had given him and crafted what he thought would be Petitioner's strongest defense. App. 848. In the end, the attorneys decided to call Petitioner's aunt as a witness to testify that the robber shown on the store's security camera was not Petitioner instead of calling the mother and girlfriend as witnesses because the two had defective memories, would have been more susceptible to impeachment for bias, and would not have presented to the jury as well as Petitioner's aunt, a social worker who had prior experience testifying as a witness in court and a "professional aura." App. 814-15, 837-38. The PCR court's finding that Harvey and Myers made a reasonable and strategic decision when they called Petitioner's aunt as a witness instead of Petitioner's mother or girlfriend was thoroughly supported by the evidence before it.

The PCR court correctly found that Petitioner failed to provide any evidence that he suffered prejudice from his attorneys' decision not to call Petitioner's mother and girlfriend as witnesses. An applicant for post-conviction relief is required to produce the testimony of a witness at a PCR hearing in order to establish prejudice from that witness's failure to testify at the applicant's trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (S.C. Ct. App. 2012) (finding that Smith failed to prove that trial counsel's failure to call character witnesses at trial resulted in prejudice because Smith did not present any testimony from the witnesses at the PCR hearing); see Bailey v. Bazzle, 628 F. Supp.2d 651, 671-72 (D. S.C. 2008) (finding the petitioner for a writ of habeas corpus failed to prove that there was a reasonable probability that the result of the proceedings would have been different but for counsel's alleged errors because the petition did not have any of the witnesses he claimed could have aided his case testified at the post-conviction relief hearing); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Neither Petitioner's mother nor his girlfriend testified at the PCR hearing. App. 776.[1] Although it would not have helped prove his case, Petitioner was unable even to speculate as to what the two would have testified to had they been

[1] Petitioner stresses that Petitioner's mother was unable to testify at the PCR hearing because a stroke took her ability to speak. This, of course, does not relieve Petitioner of his burden to produce her testimony in order to prove prejudice, which he could have done through an alternative means, such as through an affidavit of the mother or her written responses to questions.

called at trial. See Smith, at 502, 745 S.E.2d at 383 (instructing that the mere speculation of an applicant for post-conviction relief as to what a witness would have said at trial is not sufficient to satisfy the applicant's burden of proving prejudice) (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)).

II. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not introducing evidence that SLED was unable to match the fingerprints lifted from a potato chip bag at the scene of the crime to Petitioner's prints on file with the State because Petitioner's attorneys did not feel that the fact was exculpatory and wanted to prevent the jury from discovering that Petitioner had a prior criminal record and because police still were able to match the prints from the bag to those taken from Petitioner when he was arrested.

Petitioner argues the PCR court erred in finding Petitioner failed to prove his attorneys were constitutionally ineffective for not introducing into evidence a SLED report showing the fingerprints lifted from a bag of chips left behind by the robber at the convenience store matched Petitioner's prints.

The PCR court correctly found that Petitioner's attorneys had a reasonable and strategic reason not to introduce SLED'S fingerprint report into evidence at trial and their pre-trial investigation into the fingerprint issue gave them an adequate basis upon which to form their trial strategy. Whenever a defense attorney articulates a valid reason for his use of a particular strategy at trial, his decision will not be found to have been ineffective. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Courts must be wary of second-guessing counsel's trial tactics . . . ." Id. Harvey understood the South Carolina Automated Fingerprint Identification System ("AFIS") report to mean that SLED's comparison of the prints lifted from the chip bags at the scene of the robbery and Petitioner's prints stored in AFIS had been "inconclusive" and that additional fingerprint samples were needed for a

more definite comparison. App. 867. The report was not "a dispositive resolution" of the person to whom the prints belonged. App. 856.[2] Harvey knew that Petitioner had been arrested and fingerprinted by law enforcement officers on previous occasions, but his experience led him to believe that booking information for criminal defendants is not always transmitted actually or accurately to AFIS. App. 867-68. After Harvey consulted with his private fingerprint expert, a retired SLED agent, about the matter, Harvey decided not "double check" with SLED out of a fear that the forensic examiners there would determine that the prints did match after all. App. 836, 868. Harvey did not want to introduce the SLED fingerprint report into evidence at trial because he felt it would have been counterproductive to call as a witness a SLED agent to testify about the report because the agency's agents "are very articulate, very well trained," and would have been able to give a good explanation to the jury that the report was inconclusive rather than exculpatory. App. 868-69. As the PCR court found, all of this showed that Petitioner's attorneys reasonably concluded that SLED'S fingerprint report was not exculpatory evidence and that relying upon it could open the door to the possibility that SLED would conduct further analysis that could result in a harmful conclusion for Petitioner and that the admission of the report of corresponding testimony from a SLED agent at a trial would not be helpful for the defense. App. 914. In addition, Petitioner's attorneys wanted to avoid opening the door to evidence about Petitioner's criminal record, which would explain the presence of Petitioner's fingerprints in AFIS. App. 914.

Petitioner has failed to prove that there is a reasonable probability that the outcome of trial would have been different had his attorneys introduced into evidence SLED's comparison between

[2] Petitioner appears to accept that the fingerprint report was not exculpatory, merely inconclusive, as is shown by the reference in his petition to the report's being "an inconclusive report performed by a well-trained agent . . . ." Petitioner for Writ of Certiorari of Petitioner at 9.

the prints lifted from the chip bags and Petitioner's prints stored in AFIS. The fingerprint examiner for the Lexington County Sheriff's Department, an expert in latent fingerprint analysis, determined that the prints lifted from the bag of salt and vinegar chips placed back on the chip rack at the store by the robber were Petitioner's. App. 295, 299, 318-19, 910-12. Even if Petitioner's attorneys had introduced the testimony of a SLED agent and the agency's inconclusive fingerprint report, the jury would still have heard all of the other evidence of Petitioner's guilt, which included a positive fingerprint identification, one whose result was confirmed by the defense's own fingerprint expert. App. 856-57.

III. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not objecting when the deputy solicitor informed the jury during closing argument that the jury could consider what Petitioner did not say because the statement was not a comment upon Petitioner's decision not to testify at trial and because the trial court instructed the jury that it could not take into account the fact that Petitioner did not testify.

Petitioner argues the PCR court erred by finding Petitioner failed to prove Petitioner's attorneys were constitutionally ineffective for not objecting when the deputy solicitor told the jury during his closing argument that it could consider what Petitioner did not say because the statement was a comment by the State upon Petitioner's decision not to testify in his own defense at trial. Petitioner's argument fails because remark was not a comment on Petitioner's right to remain silent, but was argument based upon the lack of credibility of Petitioner's two statements to law enforcement officers, which were admitted into evidence. Furthermore, even if the remark was improper, the trial court instructed the jury that it could not take into account the fact that Petitioner did not testify at trial.

The PCR court correctly found the deputy solicitor's comments during closing argument were not comments upon Petitioner's right not to testify against himself, but a comment upon the

evidence admitted at trial and the meaning of that evidence in the context of the State's evidence of Petitioner's guilt. App. 931. "[T]he solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." McFadden v. State, 342 S.C. 637, 640-41, 539 S.E.2d 391, 393 (2000) (citations omitted). In McFadden, the solicitor stated in closing argument that it had only one chance to present its case "because there is no defense presented. And the only reason I mentioned it is because no defense has been presented because this defendant based no [sic] the evidence is guilty." Id. at 640, 539 S.E.2d at 393. In McFadden, this Court found the comments were more than an explanation to the jury of the process of closing arguments, instead serving as an indirect comment upon McFadden's right to remain silent. Id. (citing Doyle v. Ohio, 426 U.S. 610 (1976)). In State v. Meggett, 398 S.C. 516, 524-25, 728 S.E.2d 492, 496-97 (S.C. Ct. App. 2012), the South Carolina Court of Appeals found the solicitor's statement that there was no evidence that the victim had been a prostitute was a comment upon the evidence admitted at trial, or the lack thereof, and not a comment on Meggett's right to remain silent. Specifically, the solicitor argued in closing in response to the defense's attacks on the victim, stating:

> [T]here is one singular tactic that is employed by the defense, and I don't fault defense counsel for . . . doing it, but recognize it, and that is attack the victim. Attack the victim, call into question—and it's fine that defense counsel stands up here and goes I don't mean to say anything. He—that's precisely what he means. Her history of medication, the fact that she's poor, the fact that she lives in a house that doesn't really look like a middle class home. Calls her unstable, calls her a liar, in opening statement he implied, although there's no evidence of this, that somehow she's a prostitute . . . .

Id. at 524, 728 S.E.2d at 496. In that case, Meggett alleged at trial that he and the victim were involved in a sex-for-pay arrangement, which drew the statement from the solicitor in response; the solicitor did not argue Meggett did not provide any evidence or any defense and did not suggest

to the jury that it should draw an adverse inference against Meggett due to his failure to testify at trial or present evidence. Id.

Petitioner did not testify in his own defense at trial because he had a prior criminal record, his attorneys were wary his testimony in this trial could also harm him in another case pending against Petitioner simultaneously, and they did not believe Petitioner would have been an effective defense witness; Petitioner affirmed to the trial court that he was making the decision not to take the stand of his own free will based upon his attorneys' advice. App. 360-66, 778-80, 794-97. 829-30, 837-38, 847-48. During his closing argument, the deputy solicitor showed that the evidence pointed to Petitioner as the robber, despite Petitioner's arguments to the contrary. As part of that broad strategy, the deputy solicitor argued that Petitioner's two statements to law enforcement were contradictory. The solicitor summarized Petitioner's first statement to Detective Sims by saying, "[Petitioner] knew what he was doing when he said: I didn't do it. I didn't do it." App. 412. The deputy solicitor argued the jury could be firmly convinced of Petitioner's guilt as follows:

> [Petitioner], when he was questioned on January 5th and said he didn't do it, and although on January the 7th when he was questioned and couldn't remember committing an armed robbery . . . .
>
> Why couldn't [Petitioner] remember? What was different there from the 5th to the 7th? I know you can figure that out. How believable though is it for a man to not remember putting a gun in someone's face? How do you forget that?
>
> It's one thing to say: I made hundreds of cases. I've got hundreds of files. Let me see, dates, things like that. I can't remember. It's another thing if you go out and rob somebody, you plan it, you stick a gun in somebody's face, how do you forget that? Is that believable?
>
> Firmly convinced: Fingerprints, the I.D. by Ms. Wright, and [Petitioner's] own statements. You can consider what he didn't say. He didn't say anything about the potato chip bag, like: I've been in that store a million times. He didn't say anything like that.

> You can consider all of that. I want to leave you with this. Although the truth, as I said in the beginning of this trial, may be foggy in the mind of [Petitioner], I know it's not in yours.

App. 417-18.

The deputy solicitor's closing argument is easily distinguishable from McFadden, in which the solicitor told the jury that the State was prevented from making the final closing argument because it was limited due to the defendant's failure to testify or present a defense. McFadden, at 640, 539 S.E.2d at 393. The deputy solicitor's comments in this case were more like those made in Meggett, in which the solicitor's argument that there was no evidence that the victim was a prostitute was in reference to evidence or the lack of evidence of the victim's being a prostitute admitted at trial and was not a reference to Meggett's not putting up a defense at trial and did not encourage the jury to draw an inference against Meggett because of that fact. Meggett, at 524-25, 728 S.E.2d at 496-97. The deputy solicitor's argument in Petitioner's trial concerned the lack of credibility and inconsistency of two pieces of evidence admitted at trial: Petitioner's two statements to police. One of the questions asked by Petitioner's counsel at the PCR hearing showed that he recognized that the State's argument at trial was that the conflicting nature of Petitioner's two verbal statements to law enforcement was evidence of Petitioner's guilt. App. 811-12. Myers rightly understood the deputy solicitor's comments to be referring to the "inconsistency" in Petitioner's two statements, and not as a comment upon Petitioner's right not to testify at trial; Myers would have objected to such a comment if one had been made. App. 825-26. Myers did not think it necessary that he or Harvey to object to the deputy solicitor's comments "in this situation." App. 820.

Even if the deputy solicitor's remark was improper, Petitioner has failed to show that he suffered prejudice. If a Doyle violation has occurred, the prejudice analysis for the PCR court

"runs parallel to the harmless error analysis applied in a direct appeal." McFadden, at 641, 539 S.E.2d at 393. This Court has held that, in conducting that prejudice analysis, the PCR court should consider: (1) whether the reference to the defendant's right to remain silence was made once or was repeatedly made or alluded to, (2) whether the solicitor tied the defendant's silence directly to the defendant's exculpatory story, (3) whether the defendant's exculpatory story was totally implausible, and (4) whether the evidence of the defendant's guilt was overwhelming. Id. In this case, the deputy solicitor's remark came only in two short sentences during his closing argument, Petitioner's story that he did not remember whether or not he had robbed the convenience store was totally implausible, and the State was able to prove Petitioner's identity as the robber through matching fingerprints and an eyewitness identification. Immediately following the deputy solicitor's closing argument in this case, the trial court instructed the jury as follows:

> I instruct you and emphasize that the fact [Petitioner] did not testify is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilt or innocence of [Petitioner]. It must not be considered by you in any manner whatsoever.
>
> A defendant has the constitutional right to remain silent and the assertion of this right must not be considered by you in your deliberations. I repeat, under your oath you are to draw no conclusion whatsoever from the fact that [Petitioner] in this case did not testify.
>
> The fact that [Petitioner] did not testify should not even be discussed in the jury room. The burden of proof, as I have stated to you, is on the State. [Petitioner] is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

App. 425-26. With all of this together, any error from the deputy solicitor's remarks would have been rendered harmless.

IV. The PCR court correctly found that Petitioner failed to prove that his attorneys were constitutionally ineffective for not calling him as a witness during the hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), because Petitioner's attorneys wanted to limit the solicitor's chances to question Petitioner and cross-examined the

State's witness instead, and because Petitioner failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had he testified during the hearing.

Petitioner argues the PCR court erred in denying the application for post-conviction relief because Petitioner's attorneys were constitutionally ineffective for not calling Petitioner as a witness during the pre-trial hearing held pursuant to Jackson v. Denno, 378 U.S. 368 (1964). Petitioner's argument fails because his attorneys did not want to expose him to questioning from the deputy solicitor and avoided that problem by questioning the State's witness instead, and because Petitioner has not shown that it is likely that he would have been acquitted had he testified during the hearing.

The PCR court correctly found that Petitioner failed to prove his attorneys were constitutionally ineffective in their handling of the Jackson v. Denno hearing because the attorney had a reasonable and strategic reason not to call Petitioner as a witness during the hearing. App. 908. Jackson v. Denno entitles a defendant:

> [T]o a reliable determination as to the voluntariness of his statement by a tribunal other than the jury charged with deciding his guilt or innocence. Once the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made. In South Carolina, the judge makes this initial determination of voluntariness required by Jackson v. Denno.

State v. Parker, 381 S.C. 68, 84-85, 671 S.E.2d 619, 627 (S.C. Ct. App. 2008) (quotations and citations omitted). When a trial court makes a determination as to whether a defendant's confession was given voluntarily, it should consider the totality of the circumstances surrounding the giving of the confession, such as: the defendant's age, the defendant's lack of education or low intelligence, the lack of advice to the defendant regarding his constitutional rights, the length of law enforcement's detention of the defendant, whether the questioning of the defendant was

repetitive and prolonged, and whether physical punishment was used during the questioning. Id. at 85, 671 S.E.2d at 627 (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

Petitioner testified at the PCR hearing that he did not recall whether or not he gave a statement to police because "[i]t's so much went on in this case and [he had] been dealing with this case for a long time." App. 765. Petitioner did say he remembered his second meeting with Detective Sims because it stood out to him; he recalled Sims writing up a summary of Petitioner's statement that included the detail that Petitioner told Sims he did not remember committing the robbery because he had been doing cocaine, which made Petitioner forget some details. App.766-67, 889. At the PCR hearing, Petitioner denied he had made that comment to Sims, and testified Sims had added that into his written summary of Petitioner's statement without any basis. App. 766-67. Petitioner's attorneys discussed with Petitioner the possibility that he may have had to testify during the pre-trial hearing, but Harvey ultimately decided not to call Petitioner as a witness at the time because he thought Petitioner's testimony would have been harmful to the defense rather than helpful. App. 907. Harvey believed Petitioner would not have "held up" as a witness while being cross-examined by the deputy solicitor and wanted to avoid giving the deputy solicitor multiple opportunities to question Petitioner. App. 907. Myers agreed that it was better for Petitioner not to testify because it would give the State multiple opportunities to question him. App. 806. Instead, Harvey cross-examined Detective Brett Sims during the pre-trial hearing about the voluntariness of Petitioner's statements, as Sims had been one of the law enforcement officers to whom Petitioner had given his statements. App. 907.

Moreover, Petitioner's argument fails because his contention that he did not tell Detective Sims that he did not remember the robbery does not involve a question of whether Petitioner's

statement was voluntary, but instead raises a question of Detective Sims' credibility. Petitioner's testimony on this issue at the PCR hearing concerned whether Detective Sims falsely included in his report a statement that Petitioner did not make and falsely repeated the lie during trial. Rather than indicating that Detective Sims somehow coerced Petitioner into making a statement, Petitioner is calling the detective a liar. The purpose of a Jackson v. Denno hearing is not to determine witness credibility, a determination that is properly left to the jury anyway, but to determine whether the defendant's statement was voluntary. Petitioner's argument that he should have testified at the hearing does not follow from the testimony he presented at the PCR hearing.

The PCR court found that Petitioner failed to prove that there is a reasonable probability that the outcome of trial would have been different had Petitioner testified during the Jackson v. Denno hearing. App. 909. The PCR court found that Petitioner's testimony was not credible and that Petitioner's attorneys were able to satisfy the purpose of a Jackson v. Denno hearing by questioning the State's witness, and so it was not necessary that Petitioner testify at the hearing not would it have been beneficial to the defense. App. 908. In a case where an eyewitness—the cashier at the convenience store that was robbed-identified Petitioner as the robber, Petitioner signed the waiver of Miranda rights before talking to law enforcement officers, and Petitioner's fingerprints were found on a bag of chips picked up by the robber at the scene of the crime, it would not have mattered if Petitioner had testified in front of the trial court that Detective Sims included a false detail in his written summary of Petitioner's verbal statement.

V. The PCR court did not err by not conducting Petitioner's remanded post-conviction relief hearings within sixty days of this Court's remand order because Petitioner consented to continuing the matter.

Petitioner argues the PCR court erred because it did not hear Petitioner's evidentiary hearing within sixty days of this Court's order remanding the matter for a new evidentiary hearing

and argues the doctrine of laches requires Petitioner to receive a new trial.

Petitioner's arguments fail because Petitioner consented to continuing the remanded hearing once it was scheduled. For a party to preserve an issue for appellate review, he must make a contemporaneous objection for the trial court to rule upon. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996)). The party's objection should be addressed to the trial court with sufficient specificity that the party brings the court's attention to the "exact error." Id. (citing State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001)). If the party fails to object properly, he is barred procedurally from raising the issue on appeal. Id. at 58-59, 609 S.E.2d at 523 (citing State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996)). Neither can the party argue one ground before the trial court and then an alternate ground on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). After Judge Dickson found the record from Petitioner's PCR hearing could not be reconstructed, this Court granted Petitioner's motion to vacate Judge Dickson's order denying post-conviction relief. App. 731. Respondent consented to Petitioner's motion to vacate. App. 731. In an order issued on February 1, 2019, this Court then vacated Judge Dickson's order and remanded the matter to the circuit court with the instruction that it was to be heard "by any available judge within sixty days" of the order. App. 731. Respondent sent a letter, dated February 5, 2019, asking the Lexington County Clerk of Court to appoint an attorney to represent Petitioner at the remand hearing. Supp. App. 4. In an order issued on February 7, 2019, the Honorable Allison Renee Lee issued an order appointing Don A. Thompson, Esquire, to represent Petitioner. Supp. App. 3. The remanded PCR hearing was scheduled to take place on April 3, 2019, but was continued when one of the criminal defense attorneys who represented Petitioner at trial was scheduled to appear in a week-long trial

in the Court of General Sessions during that same week. Supp. App. 5. The witness's testimony was material to the case. Supp. App. 5. The witness's General Sessions trial took precedence over the PCR hearing. Rule 601, SCACR (establishing the order of priority of an attorney's obligations when called to different tribunals simultaneously). Respondent moved for a continuance without any objection from Petitioner. Supp. App. 5. Judge Lee granted the continuance, finding there was good cause to continue it until the next regularly scheduled PCR term of court in the Eleventh Judicial Circuit. Supp. App. 5.

CONCLUSION

For all of the foregoing reasons, the PCR court's decision denying relief was correct, and this Court should likewise deny the petition for a writ of certiorari.

Respectfully submitted,

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