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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 Court of Common Pleas

The Honorable Brian M. Gibbons, Post-Conviction Relief Judge
The Honorable R. Knox McMahon, Plea Judge

Appellate Case No. 2020-000755

Venable Deon Mitchell,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made, when plea counsel failed to adequately object to or challenge the process the State used to setup a lineup for identification of Petitioner. It is Petitioner's position that defense counsel's decision not to object and/or challenge the State's lineup prejudiced his case. Furthermore, that the evidence the police used to arrest Petitioner was insufficient and therefore his arrest was unconstitutional.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made, when plea counsel failed to adequately communicate with and advise Petitioner of the State's evidence against him. Trial counsel failed to provide Applicant with a full copy of the Rule 5 materials received from the Richland County Solicitor's Office until after Petitioner pled guilty on March 20, 2017. The Applicant was not properly advised concerning the prosecution's evidence against the Petitioner or potential defenses he waived by pleading guilty.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made, when plea counsel pressured Petitioner's mother to convince Petitioner to plead guilty out of fear of potentially losing her son for thirty years.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Whether certiorari must be denied where there is ample evidence of probative value in the record to support the post-conviction relief court's findings that Petitioner failed to establish that counsel was constitutionally ineffective and that his plea was not knowingly, voluntarily, and intelligently entered.

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. In April 2016, the Richland County Grand Jury indicted Petitioner for attempted murder (2016-GS-40-01860) and discharging a firearm into a dwelling (2016-GS-40-01862). The charges resulted from an incident that occurred on July 29, 2015, in which Petitioner fired a shotgun multiple times through the bedroom window of the victim, which resulted in the victim losing his vision and his nose. Assistant Public Defender J. Rhodes Bailey (Counsel) represented Petitioner. Assistant Solicitor Meghan Walker prosecuted the case. On March 20, 2017, Petitioner appeared in the Richland County Court of General Sessions before the Honorable R. Knox McMahon, where he pleaded guilty as indicted to all charges pursuant to Alford v. North Carolina, 400 U.S. 25 (1970). Pursuant to the negotiations between Petitioner and the State, Judge McMahon sentenced Petitioner to imprisonment for ten years for attempted murder. Petitioner did not appeal his conviction or sentence.

On August 17, 2017, Petitioner filed a timely application for post-conviction relief (PCR), with an amendment field by his PCR counsel on October 20, 2019. Respondent filed a return on May 11, 2018. An evidentiary hearing into the matter convened October 28, 2019, at the Richland County Courthouse before the Honorable Brian M. Gibbons. Jason G. Soper, Esquire, represented Petitioner. In an order of dismissal filed April 8, 2020, Judge Gibbons denied relief on all grounds. Petitioner then filed a timely notice of appeal of the denial of relief.[1]

[1] Petitioner filed a petition for writ of certiorari and appendix on November 12, 2020. However, one exhibit from the evidentiary hearing, marked Applicant's Exhibit 8, was inadvertently left out. The parties have discussed this matter, and, in order to comply with Rule 243, SCACR, Petitioner's counsel indicated he will to file a Supplemental Appendix shortly. However, because the missing document is not directly relevant to the State's arguments, the State has chosen to file this return prior to the filing of the Supplemental Appendix.

STATEMENT OF THE FACTS

On the night of July 29, 2015, the victim, Emanual Udensi, was shot in the face by a shotgun blast through his bedroom window. App. p. 6. The victim was watching tv in his room when he heard a knock on the window. App. pp. 7, 95-96. When he looked outside, he saw a man raise a shotgun and fire multiple times. App. pp. 7, 95-96. The victim suffered serious injuries to his face and spent several weeks in the hospital. App. pp. 7, 95-96. Eventually, although he could not speak, he recovered enough to participate in an interview with investigators. App. pp. 7, 96. He immediately identified Petitioner as the man who shot him by writing Petitioner's name on a piece of paper. App. pp. 7, 50, 96.

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).

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. 474 U.S. 52 (1985); cf. Padilla, 559 U.S. at 373 (recognizing the

guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry

of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

Certiorari must be denied because there is ample evidence of probative value in the record to support the post-conviction relief court's findings that Petitioner failed to establish that counsel was constitutionally ineffective and that his plea was not knowingly, voluntarily, and intelligently entered.

Notably, all of the issues Petitioner raises relate to the PCR court's factual findings; in this case, Petitioner is not arguing the PCR incorrectly interpreted or applied some aspect of the law. Rather, Petitioner simply disagrees with the PCR court's findings regarding deficiency and prejudice. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented at the PCR hearing, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective. Sellner, 416 S.C. at 611, 787 S.E.2d at 527 ("In addressing the adequacy of a PCR applicant's guilty plea, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing."). These findings are supported by ample probative evidence in the record and not premised on an error of law, and thus, they are entitled to "great deference" on appeal. Id. at 610, 787 S.E.2d at 527 ("This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.").

Petitioner alleges Counsel was constitutionally ineffective for failing to communicate and advise Petitioner of the State's evidence against him, pressuring Petitioner's mother to convince

Petitioner to plead guilty, and failing to challenge the identification of Petitioner as the perpetrator, all of which lead Petitioner to enter his guilty plea unknowingly and involuntarily. At the evidentiary hearing, Petitioner identified three main issues he claims Counsel did not appropriately disclose or advise him about, and which he only discovered after he received a full copy of his discovery from Counsel after the entry of his guilty plea: (1) video from street cameras in the area of the shooting; (2) the victim's text messages; and (3) problems with the identification of Petitioner as the perpetrator. Additionally, Petitioner argues his guilty plea was not voluntarily entered because Counsel inappropriately "forced" Petitioner's mother to pressure Petitioner into accepting the plea.

Both Petitioner and his mother testified at the evidentiary hearing, and Petitioner introduced numerous exhibits to support his contentions regarding Counsel's failure to advise Petitioner of the full evidence in the case and prepare appropriate challenges that evidence. App. p. 63. However, the PCR court expressly stated it found this testimony not to be credible, and it reviewed all of the evidence in conjunction with the record from the guilty plea in denying Petitioner's request for relief. App. pp. 167-68. As discussed above, these credibility findings are entitled to great deference on appeal. Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) ("[W]e defer to the PCR court's credibility findings as to witnesses who testified before the PCR court. . . ."); Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Because Petitioner failed to meet his burden of proof as to either deficiency or prejudice on any of these issues, the PCR court correctly denied relief, and this Court should deny certiorari.

A. There is ample probative evidence in the record to support the PCR court's finding Counsel conducted a thorough investigation and properly reviewed the evidence and possible defenses with Petitioner prior to Petitioner's decision to enter a guilty.

First, Petitioner claims the discovery revealed there were videos captured by street cameras in the area of the shooting, which Counsel had previously told Petitioner did not exist. App. pp. 144. However, the PCR court found Counsel credibly testified the email Petitioner points to as proof of this claim did not contain video attachments, but simply a log that Counsel needed to interpret still photos. App. pp. 104-05, 156, 160. Counsel testified there was one video of a dark SUV in the area, but the State never alleged that vehicle was involved in this incident, and it did not appear to be related to the shooting or in any way exculpatory for Petitioner. App. pp. 106-07, 156. Moreover, Petitioner did not produce any videos or present the testimony of any witness to confirm other videos in fact exist as Petitioner claims. App. pp. 63, 160-61. For this reason alone, the PCR court properly denied relief on this claim because without such evidence Petitioner cannot prove prejudice. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

Petitioner also alleges he was unaware of the existence of the victim's cell phone records, including a text message which Petitioner claims is "evidence that the person who sent [the message] to the victim potentially had knowledge of someone who had a motive to shoot the victim." App. pp. 144. However, Petitioner did not present testimony from the sender of the message or offer anything other than his speculation as to what the message might mean. App.

pp. 63, 161. Additionally, as Counsel pointed out, the text message in question was sent a month prior to the shooting. App. p. 115. Counsel testified he investigated the text messages and tried to find names to match to phone numbers, but he felt this text was too remote in time and subject matter to be relevant, and he did not consider it for a possible defense. App. pp. 114-15, 119-20.

The PCR court also found Counsel credibly testified he engaged a private investigator to look into Petitioner's alleged alibi or potential third-party perpetrator, but neither defense could never be proven. App. pp. 93-94, 162-63. The PCR court specifically found Counsel was in no way deficient in conducting an investigation, and Petitioner did not present any evidence to support his claim that these texts messages or other alleged defenses (like an alibi) were viable but did not come to fruition because of Counsel's inadequate performance. App. pp. 63, 162. See Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)) (holding an applicant's mere speculation as to what further investigation might have revealed is insufficient to support a finding of ineffective assistance)). Accordingly, the PCR properly found Petitioner failed to meet his burden as to deficiency or prejudice regarding Counsel's investigation into the State's evidence, possible defenses, and in giving his opinion and explanation of the merits of the case to Petitioner. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996) (where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective).

Thirdly, according to Petitioner's interpretation of events, the record shows the victim's mother identified him by picking his photograph out of a group of pictures, and Petitioner argues Counsel should have challenged the identification because the incident report says the victim's parents did not see anything before or after the shooting because they were in bed asleep. App.

pp. 145. However, Petitioner acknowledged the victim himself wrote Petitioner's name down when giving his statement to investigators, but Petitioner characterized the victim's statement as "illegible," and stated he did not understand how it could be used for an arrest warrant. App. pp. 77-78.

Counsel, on the other hand, explained that although law enforcement used an unusual procedure for identifying the alleged shooter in this case because the victim was unable to see or speak due to his injuries, the victim himself ultimately named Petitioner as the perpetrator. App. pp. 95-96, 103-04, 132-33. According to Counsel, the victim wrote Petitioner's name as the assailant, and then the victim's mother identified Petitioner's photograph as the person she knew by that name. App. pp. 95-96, 104. Counsel testified he watched the videotape of the interview and identification procedure multiple times and reviewed the victim's written statement with Petitioner's name on it, and in his opinion, the name is clearly that of Petitioner.[2] App. pp. 96, 102-04, 135. Counsel also stated he and Petitioner reviewed the piece of paper together and discussed it. App. pp. 103-04.

Further, Counsel explained he felt the identification issue was subject to challenge and stated he would have done that at trial. App. pp. 97, 134-35. The PCR court found Counsel's testimony he prepared a defense based on challenging the victim's memory of the events, including whether the victim's mother had influenced the identification, to be credible. App. pp. 96-99, 163. Thus, the record reflects Petitioner was clearly aware of this potential defense, but, as discussed more fully below, instead of proceeding to trial, he freely and voluntarily chose to enter a guilty plea instead. App. pp. 101-02. In fact, at the beginning of the plea hearing, Counsel explicitly told the plea court Petitioner was entering the plea in order to avail himself of the State's ten-year offer,

[2] The PCR court also reviewed the statement and agreed with Counsel's assessment. App. p. 165.

despite the fact Petitioner believed he had a defense. App. p. 6. The PCR court found Counsel's testimony and analysis of this issue credible, while also finding Petitioner's testimony not credible, and accordingly denied relief. App. pp. 162-63, 167.

In this case, Petitioner insists witnesses and evidence which would exonerate him exist, but he has presented no such evidence or witnesses. Moreover, much of the evidence he *did* present at the evidentiary hearing simply does not support what Petitioner's interpretation of what it means or shows. The PCR court viewed all of this evidence, observed the witnesses and weighed their credibility, and found Petitioner's version of events was not credible. App. pp. 157-59. All of these findings are amply supported by the record and entitled to deference on appeal. See Foye v. State, 335 S.C. 586, 589, 518 S.E. 265, 267 (1999) ("Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses."). Because the PCR court properly denied relief on these issues, this Court should deny certiorari.

B. There is ample probative evidence in the record to support the PCR court's finding Petitioner knowingly, intelligently, voluntarily entered a guilty plea in order to avail himself of the State's plea offer of ten years and avoid a potential thirty year sentence if convicted at trial.

Finally, Petitioner argues Counsel inappropriately pressured Petitioner's mother to coerce Petitioner into accepting the State's plea offer. However, the PCR court reviewed both the plea hearing transcript and weighed the credibility of the witnesses at the evidentiary hearing, including that of both Petitioner and Petitioner's mother, and determined Petitioner's contention he entered his plea involuntarily was refuted by the combined record. App. pp. 157, 167-68; see Foye, 335 S.C. at 589, 518 S.E.2d at 267 (noting appellate courts give "great deference to a [PCR court's] findings" because the PCR court has "the opportunity to directly observe the [PCR] witnesses").

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, an applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985).

Both Petitioner and Counsel agreed Petitioner's mother indeed traveled from Charleston to speak to Petitioner about whether to accept the State's plea offer. App. pp. 68, 109-10, 124. Although Petitioner and his mother testified Petitioner accept the plea offer because they felt Counsel "was not on [Petitioner's] side" and not prepared for trial, Counsel testified he spoke to Petitioner's mother about the offer and told her he thought they had a good case, but the victim was very sympathetic and he was concerned Petitioner's anger was going to come across to the jury. App. pp. 81-82, 87-88, 98-100, 109. Counsel stated he explained the outcome would come down to whether a jury believed Petitioner or the victim more. App. p. 123. According to Counsel,

Petitioner's mother then told *him* that Petitioner was going to accept the offer, and *she* wanted to talk to Petitioner about it. App. pp. 109-100, 123-24 (emphasis added). Counsel testified he arranged a meeting at the jail with between himself, Petitioner, and Petitioner's mother. App. p. 110. Counsel testified after she spoke with Petitioner one-on-one, Petitioner indicated he wished to accept the plea offer. App. p. 110. Counsel stated he thought Petitioner was smart to do so, which he conveyed to Petitioner and Petitioner's mother, but he did not pressure Petitioner to agree, nor did he force Petitioner's mother to speak to Petitioner about it. App. pp. 110-11. Counsel stated once Petitioner decided to enter a plea, he never indicated to Counsel he felt pressured and never changed his mind. App. p. 112. Counsel testified he spoke with Petitioner again after the meeting with Petitioner's, and Petitioner still wished to enter the plea. App. pp. 112-13.

The plea transcript confirms Counsel's version of events. The plea court also explained the negotiated ten-year sentence Petitioner would receive, and Petitioner indicated his understanding and informed the court he wished to plead guilty. App. pp. 9-11. The plea court additionally explained to Petitioner his right to a jury trial, to call witnesses, and to put on a defense; Petitioner informed the plea court he understood these rights and wished to waive, *specifically because of the potential maximum sentence he would face at trial*. App. pp. 9-12 (emphasis added). Counsel told the plea court Petitioner was pleading guilty because the State's identification of him as the shooter was strong, and Petitioner did not want to risk a trial *even though he may have had a defense*. App. pp. 5-6 (emphasis added). The record reflects Petitioner informed the plea court he had discussed the charges with his attorney and understood those discussions, he understood the State's evidence against him, and he did not need any more time to speak to Counsel, and he was satisfied with Counsel's advice. App. pp. 13-14. Petitioner affirmed he was pleading guilty freely

and voluntarily and no one had threatened him or made him any promises to get him to do so. App. p. 13-14.

As repeatedly stated in the record at the time of the plea, Petitioner's decision was predicated on the significant reduction in sentence by accepting the plea versus if he should lose at trial. App. pp. 5-6, 11-12, 18. The PCR court found Petitioner chose, freely and voluntarily, after consultation with Counsel and his mother, not to risk a conviction at trial when the State extended a plea offer with a negotiated sentence of ten years. App. pp. 168. The PCR court also found, based on the combined record of the plea transcript and Counsel's credible testimony at the evidentiary hearing, Counsel's was not deficient, nor was Petitioner prejudiced by Counsel's representation. App. p. 168. Because these findings are supported by probative evidence and not based on an error of law, they are entitled to great deference on appeal, and this Court should affirm them and 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 finding Counsel was not constitutionally ineffective. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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