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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief
R. Scott Sprouse, Circuit Court Judge
William Seals, Jr., Trial Judge
2015-CP-07-01939

Appellate Case No.: 2017-002494

JAQUWN BREWER, #347482, ... Petitioner,

vs.

STATE OF SOUTH CAROLINA, ...Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI

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PETITIONER'S QUESTION GRANTED ON CERTIORARI

I. Did the Lower Court err in not granting Post Conviction Relief on the basis that Appellate Counsel was ineffective for failure to raise the issue of Burden Shifting?

In his Brief of Petitioner after the grant of certiorari, the Petitioner now restates the issue he is briefing in the following and different expanded matter.

Did the post-conviction relief court err in not granting relief for appellate counsel's failure to raise other, more viable issues, including, but not limited to, burden shifting and failure to maintain integrity of structural due process?

RESPONDENT'S STATEMENT OF THE CASE

The Petitioner, Jaquwn Brewer, was indicted at the 2009 term of the Court of General Sessions for murder, attempted murder, and possession of a weapon during the commission of a violent crime. 2009-GS 07-1279, 2009-GS-07-1293, and 2009-GS-07-1296. ROA 4-13. The charges arise from an incident in Beaufort County at the Semper Fi Club during a Memorial Day party on May 23-24, 2009. During the incident, Donald Parker was shot in the right calf after the Petitioner was directed to take his gun outside of the ongoing event at the club. Further shots were fired inside and then outside the club. During the final shots, Henry Jones was shot in the head while he was attempting to call 911. He died shortly thereafter as a result of the single gunshot wound.

On August 22, 2011, the Petitioner went to trial before the Honorable William H. Seals, Jr. The Petitioner was represented by retained counsel, Jared S. Newman. The prosecution was handled by Assistant Solicitors Meredith A. Bannon and James J. Bannon of the Fourteenth Circuit Solicitor's Office. On August 26, 2011, the jury returned a guilty verdict on each charge. Judge Seals sentenced the Petitioner to life imprisonment on

murder, twenty (20) years concurrent on attempted murder, and five (5) years on the charge of possession of a weapon during commission of a violent crime. ROA _ (Sentencing Sheet). R. p. 6-12.

The Petitioner made a timely notice of appeal on August 26, 2011. In his appeal, the Petitioner was represented by James Brown of Beaufort, S.C. In the appeal, appellate counsel Brown raised the sole following question:

> Did the circuit court improperly admit hearsay statements, contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?

The State of South Carolina raised the following counter-question in its *Initial Brief of Respondent*:

> Did the court err in admitting the audio recording of the interrogation of the Appellant which included the Appellant being confronted with evidence gathered by the law enforcement which was not introduced for the truth of the matters asserted but for the Appellant's reaction and failure to respond to the inquiries other than to respond to his mother and the investigators that he did not do any shooting rather than reveal the location of the weapon he was photographed with at the crime scene?

Final Brief of Respondent, page v.[1] The Respondent was represented throughout the direct appeal by Deputy Attorney General Donald J. Zelenka. On December 4, 2013, the Supreme Court of South Carolina certified the case for review.[2] On April 1, 2014, oral argument was held in the matter.

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[1] During the PCR hearing, appellate counsel Brown testified that the case was unusual because below-signed counsel handled the direct appeal on the part of the State. App. 822-823. Below-signed counsel handled this matter from the receipt of the Initial Brief of Appellant. Below-signed counsel is also handling this PCR appeal only because he had handled the direct appeal and assistant attorney generals who handled the PCR action are no longer with the office.

[2] The Petitioner mistakenly asserts in the Petition and other pleadings that the direct appeal was initially reviewed pursuant to Anders v. California, 378 U.S. 738 (1967). This is

On January 28, 2015, the South Carolina Supreme Court issued its opinion. App. 718-727. The Court concluded that the admission of Brewer's interrogation was error. The Supreme Court reversed the murder conviction and remanded that limited charge for a new trial. However, the Court affirmed Brewer's convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime, for the error was harmless with respect to these charges. App. 725. State v. Brewer, 411 S.C. 401, 403, 768 S.E.2d 656, 657 (2015). Justice Pleicones dissented and asserted that he would have affirmed both convictions concluding that any error in the admission of the hearsay in the interrogation was not reversible finding the appellant had failed to establish prejudice as to the murder and ABWIK. App. 726-728. Justice Beatty entered an order concurring in part and dissenting in part and would have concluded that both convictions should have been reversed and remanded concluding there was a structural defect in that the jury was "bombarded with the unconstitutional notion that Brewer had to prove his innocence." App. 729.

The Petitioner made a Petition for Rehearing before the Supreme Court on February 11, 2015. In the petition, the Petitioner, through appellate counsel Brown, asserted that this Court's harmless error assessment involved a misapprehension of the facts arguing that the assault charge did not involve the testimony of witnesses who claimed to have seen Brewer shoot Donald Parker and that there were burden shifting claims in the matter. App. 730-733. The Respondent made a Response to the Petition for Rehearing on February 23, 2015. App. 734-749. On March 5, 2015, the Supreme Court

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incorrect. Appellate counsel Brown filed his *Initial Brief of Appellant* on the merits and it proceeded throughout as a merit case.

of South Carolina issued its order denying the rehearing petition, with Justice Pleicones dissenting. App. 751. The remittitur was issued on March 5, 2015.

PCR PROCEEDINGS

The Petitioner filed a timely *pro se* application for post-conviction relief on August 10, 2015. *Brewer v. State*, 2015-CP-07-1939. App. 755-780. The Respondent made a Return on May 13, 2016 by then Assistant Attorney General J. Rutledge Johnson. App.p. 782-786. On August 26, 2015, the circuit court appointed James Falk to represent the Petitioner. On February 13, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse. The Petitioner was present and represented by counsel Falk. The State was represented by then Assistant Attorney General Ruston Neely. App.p. 788-829. Petitioner alleged the following grounds at the PCR hearing:

I. Ineffective Assistance of Counsel
   a. Failed to object to the interview tape on 5th amendment grounds.
   b. Trial counsel was ineffective for conceding guilt without his consent.

II. Ineffective Assistance of Appellate Counsel
   a. Failed to brief the burden shifting issue which was preserved for appeal and a Fifth Amendment violation.

Testimony was received from trial counsel Jared Newman, the Petitioner, and appellate counsel James Brown. On November 5, 2017, Judge Sprouse entered his order denying the application in its entirety. App. 830-838.

THE PCR APPEAL

The Petitioner made a notice of appeal on November 29, 2017. The Petitioner, through current retained PCR appellate counsel, Tommy Thomas, made a petition for writ of certiorari on December 3, 2018. In the petition, he raised the following issues presented:

I. Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was unaware that trial counsel intended to concede that he shot the Victim Donald Parker?

II. Did the Lower court err in not granting Post Conviction Relief on the basis that trial counsel failed to argue and preserve for Appeal that the video statement was inadmissible and a violation of the confrontational clause?

III. Did the Lower Court err in not granting Post Conviction Relief on the basis that Appellate Counsel was ineffective for failure to raise the issue of Burden Shifting?

Petition for Writ of Certiorari, p. 2. The Respondent made a Return to the petition on April 3, 2019. On February 18, 2021, the South Carolina Court of Appeals issued its order denying certiorari on Questions I and II and granted on Question III related to ineffective assistance of appellate counsel. Brewer v. State of South Carolina, Order, (S.C.Ct App. February 18, 2021). This briefing follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a PCR

applicant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, 104 S.Ct. 2052. To show deficient performance, an applicant must prove "counsel's representation [fell] below an objective standard of reasonableness." Id. at 688, 104 S.Ct. 2052. To demonstrate prejudice, an applicant must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052).

Ineffective Assistance of Appellate Counsel

"A defendant is entitled to effective assistance of appellate counsel." Tisdale v. State, 357 S.C.474, 476, 594 S.E.2d 106, 167 (2004). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this [c]ourt applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). "Thus, ... we ask 1) whether appellate counsel's performance was deficient, and 2) whether [the defendant] was prejudiced by appellate counsel's deficient performance." id. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Smith v. Robbins, 528 U.S. 259, 288 (2000). "The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error." State v. Thompson, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003).

"However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as [fifteen] minutes - and when page limits on briefs are widely imposed.

Jones v. Barnes, 463 U.S. 745, 752–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "Notwithstanding Barnes, it is still possible to bring a Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

To prevail on an ineffective assistance of appellate counsel claim, "[f]irst, the burden of proof is upon petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms." Southerland, 337 S.C. at 616, 524 S.E.2d at 836. "Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. See Jones, 463 U.S. at 752–53, 103 S.Ct. 3308 (noting the importance of appellate counsel selecting the most promising issues for appellate review, especially when oral arguments are limited by time restrictions); Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) ("In a PCR proceeding, the burden is on the applicant to prove the allegations in his application."). See Gilchrist v. State, 364 S.C. 173, 179, 612 S.E.2d 702, 705 (2005) (holding appellate counsel was not ineffective for failing to argue an issue on appeal because the issue did not amount to reversible error); Bennett,

383 S.C. at 309–10, 680 S.E.2d at 276 (holding the PCR court erred in finding appellate counsel ineffective for failing to brief an issue because even if appellate counsel's performance was deficient, such performance did not prejudice the petitioner).

> **Ineffective Assistance of Appellate Counsel Claims Related to Structural Error Claims after Weaver v. Massachusetts.**
>
> The United States Supreme Court has held that:
>
> [i]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome."
>
> The question then becomes what showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of counsel claim. To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards. First, the defendant must show deficient performance—that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the defendant must show that the attorney's error "prejudiced the defense."

Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017) (citations omitted); see also Commonwealth v. Isaac, 205 A.3d 358, 365-66 (Pa. Super. 2019) (reiterating that "an error that would invalidate a conviction on direct appeal need not necessarily do so on collateral review" and noting that, consistent with Weaver, our Supreme Court has held that "the absence of harmless error for purposes of direct appeal does not equate to presumed prejudice on collateral review").

ARGUMENT

I. Relief is not warranted where probative evidence supports the conclusion the appellate counsel was not ineffective under Strickland v Washington, 466 U.S. 668 (1984) when counsel failed to present an evidentiary issue that Petitioner claims was "burden shifting" and required a new trial on assault and battery with intent to kill where 1) the alleged evidentiary errors were trial errors and not structural errors and 2) there is no reasonable probability that the result of the appeal would have been different, particularly where the Supreme Court had determined the trial error was harmless.

In his petition before this Court, Brewer asserts that the appellate counsel was deficient in the direct appeal by failing to present an argument that he asserts is a "burden-shifting" issue. Brewer has relied upon now Chief Justice Beatty's dissenting opinion in the direct appeal for support. App. P. 729. Petitioner claims that had the Petitioner's appellate counsel argued and the Court adopted the "structural error" conclusions of Justice Beatty's dissent in the direct appeal, the Supreme Court could not have done a "harmless error" analysis as it related to the assault and battery with intent to kill conviction. Collateral relief is not warranted for a number of reasons.

This matter comes before this Court in a post-conviction setting where the applicant has the burden of proof to show both deficiency and prejudice under Strickland v. Washington with necessary deference given to the findings of the PCR hearing judge. App.p. 836-837. Underlying the PCR court's rejection is the fact that this issue generated from the admission of evidence concerning hearsay comments that the Supreme Court found inadmissible as a violation of the hearsay rule and was able to perform a harmless error analysis which sustained the conviction for ABWIK. App.p. 723-725. Respondent

submits that this evidentiary claim rests on an issue that is "trial error," not "structural error" as suggested by the Petitioner.[3]

Although trial counsel made an objection related to burden shifting, appellate counsel was not deficient in failing to raise a specific argument that the admission of the evidence was unconstitutional burden-shifting where there is no support that the strength or impact of evidence can create unconstitutional burden-shifting as a matter of law *per se* or in the absence of jury instructions or with ameliorating jury instructions. Petitioner has not shown appellate counsel Brown committed an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." To the contrary, the Petitioner has not cited to any binding appellate opinion concerning trial court evidentiary errors that reasonable criminal counsel could have relied upon as supportive of structural error. Respondent has not located any such in the precedent of the U.S. Supreme Court. The Petitioner has not shown that appellate counsel acted with neglect or ignorance in failing to assert structural error and instead argued, partially with success, that the State had not shown harmless error. The types of evidentiary issues present here based upon hearsay are not and should not be considered to fall within the framework of "structural error" incapable of being assessed for harmless error and prejudice as was done in the direct appeal.

The South Carolina Supreme Court concluded in the direct appeal its earlier ability to assess harmless error in this case when it addressed the State's alternate ground. Even

[3] These are terms of art in constitutional jurisprudence as set forth more fully within. Structural error is automatically reversible and requires no additional analysis or review. As opposed to "structural" error, "trial" error is that type of error that typically occurs during the presentation of a case to the jury. Such error is amenable to qualitative assessment by a reviewing court for prejudicial impact relative to the other evidence introduced at trial. Trial error is not presumptively prejudicial and therefore not automatically reversible, and is subject to review under harmless error analysis.

if the Court had considered the evidentiary matters under the subsequent Weaver opinion as "structural error," review, this does not lead to an automatic conclusion in collateral review that relief is warranted because 6th Amendment prejudice has not been shown. Respondent submit, as supported by the harmless error conclusions in the direct appeal that the Petitioner failed to prove Sixth Amendment prejudice. The Petitioner is unable to show that there is a reasonable probability that the result of the proceeding would have been different. Simply put, the result of the direct appeal would have been the same to a reasonable probability.

HOW THE ISSUE HAS BEEN PRESENTED IN THESE PROCEEDINGS

THE DISSENT IN THE DIRECT APPEAL

The Petitioner references the following in support of his position as why appellate counsel was constitutionally deficient. In the dissent in the direct appeal, Justice Beatty stated the following:

> I concur in part and dissent in part. I agree that admission of Brewer's interrogation was error. I also agree that the murder conviction should be reversed as a result of this error. However, I depart from the majority's conclusion that admission of the interrogation was harmless as it relates to the charges of ABWIK and possession of a firearm during the commission of a violent crime.
>
> But for the solicitor's numerous instances of burden shifting, via the interrogation tape, I would agree that the error was harmless as to the latter charges. However, the jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In my view, this created a due process structural defect in the trial. Structural defects are not subject to a harmless-error analysis regardless of the evidence presented. See State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) ("[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error. These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." (internal quotations omitted) (citing Arizona v.

Fulminante, 499 U.S. 279, 306–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991))). Accordingly, I would reverse all of Brewer's convictions and remand for a new trial.

State v. Brewer, 411 S.C. 401, 412, 768 S.E.2d 656, 661–62 (2015).

HOW THE PCR COURT RULED

In the Order of Dismissal, Judge Spouse stated the following in rejected this allegation:

B. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Failed to brief burden shifting issue.

Counsel objected to the audio tape on the basis that law enforcement's statements were burden shifting. Tr. 76-77; 614. This ground was not briefed by Appellate Counsel. However, Appellate Counsel argued the admission of the audio tape was improper on other grounds. The Supreme Court reviewed the introduction of the audio tape and found the admission of the audio tape was in error. Brewer, 411 S.C. 401, 768 S.E.2d 656. Appellate Counsel was not deficient for failing to raise a different ground, as to why the interview material was inadmissible, where the Court agreed with Appellate Counsel and found in their favor. Appellate Counsel's argument was successful. There can be no stronger argument than a winning argument.

The Court ruled the admission of the objected to portions of the audio tape was in error. Applicant argues Appellate Counsel should have

> briefed the burden shifting issue in order for the Court to rule the admission of the audio tape was in error. The Court ruled the admission was in error based on the issues Appellate Counsel chose. Therefore, Applicant has failed to prove he was prejudiced where the Supreme Court found the audio tape inadmissible based on the grounds raised.
>
> Accordingly, this Court finds Applicant failed to prove Appellate Counsel's briefing decisions were deficient. Applicant also failed to prove he was prejudiced such that there was a reasonable probability the result of the appeal would have been different had Appellate Counsel had also briefed the burden shifting issue. Accordingly, this Court denies and dismisses this allegation.

App. 836-837.

EVIDENCE PRESENTED ON THE ISSUE

Evidence from the trial record.

During the trial, in objecting to the admission of the taped statement on various grounds, counsel Jared Newman made the following assertion:

> If the investigator were in court, he would not be allowed to say that. . I don't think they should be able to get those hearsay statements in under the guise of an interrogation. Those should be, if nothing else, redacted or deleted from that recording.
>
> And then infected throughout the interview is an - - for the jury to hear that you can prove yourself innocent, Get us this gun, it'll prove you innocent. You can prove yourself innocent. Help me prove you innocent. I believe the Court -- it's contrary to the Court's charge initially when you charge the jury and finally you're going to tell them, I believe, in the general charge that the defendant is under no burden to prove himself innocent at any time. It's up to the State and the State solely to amass and collect evidence and present it to show guilt. Infected throughout the entire interrogation, **that burden under <u>Sandstrom versus Montana</u> has shifted to the defendant.**
>
> The jury's going to hear that and question themselves. Well, if he was innocent, why didn't he come forward with the evidence to prove himself innocent. He does not have to do that and you can't un-ring that bell out of the jury's mind. It's wholly infected throughout that audio. Those are the four problems I have, Your Honor.

App. 76-77. (Emphases added). The trial court denied the motion to exclude the audiotape. App. 85, l. 18-22.

Evidence from the direct appeal.

In the direct appeal, appellate counsel Brown raised the following issue:

> Did the circuit court improperly admit hearsay statements, contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?

State v. Brewer, Final Brief of Appellant, p. 1. In the earlier appellate brief, the Petitioner's appellate counsel did not assert that the admission of the audio statement unconstitutionally shifted the burden of proof. Instead, he argued that the police interrogators hearsay evidence from the interview that identified Brewer as the perpetrator was inadmissible based upon hearsay and SCRE Rule 802. *State v. Brewer, Final Brief of Appellant, p. 5.* He argued, relying on some decisions of the state appellate courts, that the conviction should be reversed because the State was unable to show that the error was harmless. Appellate counsel was successful in his argument with respect to the murder conviction, but not concerning the earlier assault and battery with intent to kill charge.

However, in the Petition for Rehearing, appellate counsel Brown urged the following related to the issue currently before this Court:

> While the burden shifting issue is not the error being ruled upon, these concerns are part of the context of the case which should be considered during the prejudice analysis. In fact, Justice Beatty's dissent elevates this error to one which constitutes a structural defect in the trial. At a minimum, the fact the hearsay testimony was introduced contemporaneous with the burden shifting comments is a circumstance which must be considered in the harmless error analysis even if these comments are not properly before the court or arise to the level of a structural defect.

State v. Brewer, Petition for Rehearing. App. 731-732. Rehearing was denied by the Court. App. 751-752.

Evidence from the PCR Hearing

During the PCR hearing, trial counsel **Jared Newman** testified that he objected on Miranda and Edwards grounds. However, he also claimed he objected on what he asserted was a structural error by the admission of the tape. App.p. 797. In hindsight, Newman now claimed that the ground that he thought was the strongest was the structural trial defect. App. 800 - 801.[4]

Appellate counsel James Brown testified that he did not raise a Confrontation Clause issue, but instead exclusively raised the improper admission of the statement as a hearsay issue in the appeal. App. 813. He stated that he did not know if it would have come out differently regarding prejudice if he had raised a Confrontation Clause claim. He stated that if Confrontation Clause claim was preserved, "then it was my fault that I did not raise that issue should that have been raised, and if that would have been successful for Mr. Brewer under another analysis." App. 813.

However, as it relates to a different "burden-shifting" evidence issue currently raised in the PCR appeal related to the audiotaped recording, Brown stated it differently and was not as strong that it was reversible error:

> The burden- shifting issue is like the elephant sitting in the room, but I will tell you, and I -- and I may be wrong on this statement of law -- the burden shifting was by the witness. And actually, I say the witness. It was by the participant law enforcement detective in the case, and I didn't raise it as a burden-shifting issue because it was a statement made on a piece of evidence that was introduced in court, not by a participant, such as the prosecutor's office. Certainly, it was their evidence they put up. If I'm wrong on that, then I am wrong without a reason to have made that wrong decision. But I did not raise the burden- shifting issue because, like I said, I assume since the party didn't argue it, that it was just a participant during the recording. And those are the two other issues that I know I considered.

[4] However, it should be noted that Newman never specifically asserted that the this alleged trial error was a structural error as a matter of law as he suggested in his PCR testimony in hindsight. He only made reference to the He only cited to Sandstrom and failed to request a limiting instruction. See App.p. 76-77.

App. 813-814. Appellate counsel Brown noted that the State did not argue at trial that the burden of proof shifted in the presentation of the evidence of the statement. However, Brown acknowledged that the detectives in their interrogation clearly shifted the burden upon Brewer. However, Brown opined that he had never seen a burden shifting case based upon a piece evidence (as opposed to jury instructions). App. 814. See also App. P. 823, l. 16-22.[5] Counsel Brown further admitted that the burden shift was mentioned in the record and preserved by Newman. App. 815.[6] However, counsel Brown declared he did not know if he was right or wrong in not raising it in the appeal. App. 823, l. 21-22.

[5] In his direct appeal brief, appellate counsel did not cite to Sandstom v. Montana, an instructional burden shifting case in support of his appeal.

[6] In his Petition, Petitioner asserts that counsel Brown testified that he conceded that the burden shifting issue was an issue and should have been raised and that he did not raise it for strategic reasons and that it was an error on his part., citing App. 815, l. 14-18. Petition for Writ of Certiorari, p. 8. This is incorrect. As set out above, the reference on App. 815 concerns whether there was an Edwards v. Arizona violation in the interrogation, not the burden shifting issue.

LAW AND ANALYSIS

In its brief before this court, The Petitioner argues that the PCR court erred in failing to conclude that appellate counsel was ineffective for not raising the issue that the admission of the entire audio recording of the interrogation as it related assault and battery with intent to kill was reversible error because it constituted burden shifting to the point that the fundamentals of due process were violated. *Brief of Petitioner*, p. 8. He further relies upon Justice Beatty's conclusion in dissent that there was a structural error in the case and that the structural errors are not subject to harmless error. *Brief of Petitioner*, p. 7.[7] Petitioner takes brief issue with the PCR court's conclusion that counsel was not deficient for failing to raise a different ground, as to why the interview was inadmissible, where the Supreme Court agreed with Appellate Counsel and found in their favor. *Brief of Petitioner*, p. 8, n. 3. He particularly takes issue with the Court's comment that "there can be no stronger argument than a winning argument." *Brief of Petitioner*, p. 8, n. 3. He claims that if appellate counsel would have argued the burden shifting issue, then it would have been a structural error and the prejudice analysis would not have been appropriate, implicitly asserting that harmless error could never apply. For the following reasons, he is not entitled to relief.

A. Appellate Counsel Was Not Deficient in Failing to Assert that the Admission of the Alleged Evidence Was Improperly Burden Shifting and Required a New Trial and Unavailable for Harmless Error Analysis.

The Petitioner failed to show that appellate counsel Brown was deficient in not raising as a ground in the appeal that the admission of the improper evidence from the interrogators was burden shifting and created automatic reversible error as structural

[7] However, in Weaver v. Massachusetts, the United States Supreme Court recognized that not all structural errors are per se reversible.

error and unavailable for harmless error consideration. Appellate counsel Brown indicated in his PCR testimony that he did not raise the admission of the interrogator's questions during the interview as burden-shifting because it was not a comment by a prosecutor, but was part of the evidence. He indicated that he had never seen a burden-shifting argument based upon evidence as opposed to argument or instructions. App.p. 813-814, 823. Petitioner has not shown any case otherwise in this proceeding. Rather, appellate counsel successfully argued instead that the admission of evidence was improper as hearsay. [It should be noted that the State alternately argued in the briefs in the direct appeal that harmless error applied.] . Brown made an intentional decision not to raise his challenge as "burden-shifting" evidence relying on Sandstrom, but instead successfully sought it rejection based upon hearsay.

This was not deficient performance in the direct appeal. Petitioner has wholly failed to show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance. Contrary to the position, appellate counsel did not fail to identify a fundamental error by the trial court, instead he raised it. He also argued that the error was not harmless error, but reversible error, upon which he was partially successful.

As has been noted throughout, Petitioner's only assertion is that had appellate counsel argued the error was burden-shifting and that the burden-shifting was a structural error, the remaining charges would not have been assessed for harmless error. This remains an extraordinary assertion in light of what four justices ruled in rejecting hi claim that the evidentiary error was harmless beyond a reasonable doubt as to the remaining charges. The Petitioner implicitly contends that had appellate counsel used the term structural error – something that had not been referred to this type of claim until the

dissent raised it – the result would have been different. However, we submit that on the deficiency prong, Petitioner has failed in his burden to show the condition precedents reasonable appellate counsel would have a constitutional duty to raise that the admission of evidence that could be interpreted as shifting the burden of proof requires reversal as a structural error. The precedent of the United States Supreme Court in its delineation of trial error versus structural error is otherwise. Appellate counsel reasonably argued that the issue was a hearsay issue upon which he was successful and challenged whether harmless error was shown – successful on vacating the murder charge and unsuccessful on the remaining charges.

1. **The Admission of the interrogator's questions was not structural error**. **Appellate Counsel was not deficient in failing to argue that it was structural error were no binding precedent supports his theory**.

Brewer asserts that appellate counsel should have argued the evidentiary error was structural and mandates automatic reversal as it relates to the existing assault and battery with intent to kill and gun charge. Although trial counsel used the term structural error in the PCR proceeding (App.p. 797, l. 12), trial counsel never used the word "structural" in his arguments to the trial judge according to Respondent's review of the record. However, in its briefs before the appellate courts in the direct appeal, the State urged the appellate court to make a harmless error review and claimed the error was harmless. Appellate counsel argued that the evidence was hearsay and further that it was prejudicial and not harmless contending that identity was the only contested issue and the error was compounded by the lack of a limiting instruction. *State v. Brewer, Final Brief of Appellant,* p. 12-13.

In fact, Brewer before this Court does not even cite to Sandstrom v. Montana , supra., the only case trial counsel cited to support his argument for exclusion in the trial court for support. App.p. 77. The reason may be evident because the United States Supreme Court remanded the case to the Montana court for then to reach the decision whether the error in its case was harmless beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 527, 99 S. Ct. 2450, 2461, 61 L. Ed. 2d 39 (1979) ("The Montana court will, of course, be free to consider them on remand if it so desires."). It does not support his structural error position.

Brewer does not clearly argue how or why the purported error here falls within the "very limited class of cases" that affect the "framework within which the trial proceeds[.]" See Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quotation and citation omitted). The Supreme Court has recognized that "there is a strong presumption" that an error does not constitute a structural error. Rose v. Clark, 478 U.S. 579 (1986).[8] That "very limited class of cases" includes, for example, the failure to give a constitutionally acceptable jury instruction on the reasonable-doubt standard in a criminal case, Sullivan v. Louisiana, 508 U.S. 275, 281-282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the total deprivation of the right to counsel, the lack of an impartial trial judge, the right to self-representation at trial, the right to a jury trial and the right to a public trial. Id. at 468-69, 117 S.Ct. 1544 (citing, in relevant part, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749

[8] In Rose v. Clark , 478 U.S. 570, 579 (1986), the Court concluded an erroneous instruction that impermissibly shifted burden of proof on malice was not structural and noting "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."

(1927); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)).

As the United States Supreme Court has explained:

> [s]ome errors should not be deemed harmless beyond a reasonable doubt. [Chapman v. California, 386 U.S. 18,] 23, n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 [(1967)]. These errors came to be known as structural errors. *See* Fulminante, 499 U.S. at 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." Id., at 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. For the same reason, a structural error "def[ies] analysis by harmless error standards." Id., at 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (internal quotation marks omitted).

Weaver v. Massachusetts**,** 137 S.Ct. 1899, 1907-08, 198 L.Ed.2d 420, 431 (2017).

The error at issue here is based upon the admission of evidence, but Brewer implicitly suggests that it is equivalent to an instructional error that shifts the burden of proof. This does not make it a structural error subject to a presumption of prejudice. In fact, the United States Supreme Court has held an instructional error to be structural only once. In Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d. 182 (1993), the Court held that failure to properly instruct the jury on the "beyond a reasonable doubt" standard at all was structural error. Cf., Rose v. Clark, supra. As the Court explained in Neder, Sullivan's holding rested on the fact that an improper reasonable-doubt instruction "'vitiates all the jury's findings' and produces 'consequences that are necessarily unquantifiable and indeterminate.' " Neder v. United States, 527 U.S. 1, 11, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Sullivan, 508 U.S. at 281-82, 113 S.Ct. 2078) (internal citations omitted). In fact, instructional errors that shift the burden of proof are not structural errors that "automatically require reversal of an otherwise valid conviction."

Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Accord, United States v. Greenspan, 923 F.3d 138, 148 (3d Cir. 2019).

The Petitioner asserts that the comments in the majority opinion in Brewer suggest that a finding of structural error was appropriate because of their expressed concerns about the law enforcement interrogators evidence. *Brief of Petitioner*, p. 10.

> Beyond the hearsay error, we wish to briefly comment on the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's *ad nauseam* insistence that Brewer prove his innocence has no place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. See U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself...."); Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (noting that the Fourteenth Amendment requires that "the State prove every element of a criminal offense beyond a reasonable doubt").

State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659–60 (2015). The Supreme Court majority's strong concern did not prevent it from immediately addressing the State's alternative argument on appeal that the error was harmless error, which four of the five justices agreed to do.

By contrast, the Supreme Court has several times held significant instructional errors to be subject to a harmlessness analysis. In Neder, the Court held that failure to instruct the jury as to an element of an offense is not structural error. The Court emphasized that

> "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [his] defense against the tax charges."

527 U.S. at 9, 119 S.Ct. 1827. The Court has similarly held that unconstitutional mandatory presumptions and incorrect instruction on a single element of an offense are

errors subject to harmlessness analysis. See Carella v. California, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d. 218 (1989); Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d. 439 (1987); Clark, 478 U.S. 570, 106 S.Ct. 3101. In those cases, the Court has explained that, depending on the strength of the evidence presented at trial, the "erroneous instruction" may be "simply superfluous." Clark, 478 U.S. at 581, 106 S.Ct. 3101. Although removing an element from the jury's consideration entirely, or incorrectly permitting the element to be decided based on a mandatory presumption, are undoubtedly serious Sixth Amendment violations, the Court has nonetheless been clear that such errors are not structural.

The Supreme Court also has applied harmless error analysis even where the error was necessarily one that would have made an impression on the jury. In Fulminante, the Court held that admission of a defendant's coerced confession, in violation of the Fifth Amendment, was subject to review for harmlessness. The Court recognized that "an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant—but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless-error test entirely." Fulminante, 499 U.S. at 312, 111 S.Ct. 1246.

Similarly, in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d. 476 (1968), the Supreme Court held that a defendant's Confrontation Clause rights were violated by the admission against a nontestifying codefendant at a joint trial of a confession by the codefendant that implicated the defendant as well. Even though the jury was instructed that it could not consider the confession as evidence against the defendant, the Court explained that the jury could not be presumed to have followed those

instructions where "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." 391 U.S. at 135-36, 88 S.Ct. 1620. Nonetheless, even though the premise of the Bruton line of cases is that certain evidence put before the jury may be so powerful that the jury cannot ignore it even if instructed to do so, the Court nevertheless has held that Bruton error is subject to harmlessness analysis and may be held harmless based on other evidence admitted at trial. Harrington v. California, 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d. 284 (1969).

In sum, the Supreme Court has rejected the notion of structural error in many circumstances that have involved violations of indisputably fundamental constitutional protections afforded to criminal defendants. The Court's most recent substantial discussion of when an error is structural came in Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d. 420 (2017). In Weaver, the Court explained that it had held errors to be structural for at least three reasons. "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." Id. An example given in Weaver is a defendant's right to self-representation at trial: *pro se* representation typically makes a conviction more likely, not less, but wrongful denial of the right is a structural error because of its interference with "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Id. "Second, an error has been deemed structural if the effects of the error are simply too hard to measure." Id. The principal example given in Weaver is a defendant's right to select his own retained counsel. Id. "Third, an error has been deemed structural if the error always results in

fundamental unfairness"—for example, a denial of appointed counsel or the absence of a beyond-a-reasonable-doubt instruction. Id.

Weaver does not hold that any of those conditions is sufficient to make an error structural. Neither, as Weaver acknowledges, does every example of structural error fall neatly into only one category. See id. ("In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural."). Rather, the purpose of that categorization, in Weaver itself, was simply to establish that "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." Id. Thus, although Weaver sets out important factors to consider, it does not offer a clear rubric for evaluating whether an error is structural.

The Weaver Court recognized three bases for finding structural error: (1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; or (3) "if the error always results in fundamental unfairness." Id. at 1908. he Supreme Court has stated that "the ... doctrines [of structural error and ineffective assistance of counsel] are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." Weaver, 137 S. Ct. at 1907. A showing of structural error, however, does not always trigger a presumption of prejudice. For example, in Weaver, the Supreme Court examined a structural error related to the right to a public trial, closing the courtroom during jury selection, and whether that error triggered a presumption of prejudice. 137 S. Ct. at 1905. The petitioner argued that he need not show prejudice, as his attorney's failure to object to the courtroom closure (the structural error) rendered the

trial "fundamentally unfair." Id. at 1911. Furthermore, the Court declined to address, in the context of structural errors other than the one at issue in Weaver, "whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review," as is the case here. Id. at 1912; see also id. at 1907 (limiting the holding to "the context of trial counsel's failure to object to the closure of the courtroom during jury selection").

This approach is similar to how the Supreme Court examines various claims of ineffective assistance of counsel. For example, in United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court noted that prejudice is presumed when (1) there is complete denial of counsel, (2) counsel fails to subject the prosecution's case to meaningful adversarial testing, or (3) there is a very small likelihood that even a fully competent counsel could provide effective assistance. Id. at 659-60, 104 S.Ct. 2039; see also Bell v. Cone, 535 U.S. 685, 695-96, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (same). When, however, counsel makes an isolated error during the trial, such as failing to object to a jury instruction, the defendant must show actual prejudice to prevail on a claim of ineffective assistance of counsel. See Strickland, 466 U.S. at 695-96, 104 S.Ct. 2052 (distinguishing errors that have an "isolated, trivial" effect and do not affect factual findings from those that have a pervasive effect that therefore result in a "breakdown in the adversarial process"). Thus, not all errors involving the actions of counsel trigger a presumption of prejudice.

The admission of the interrogators comments during the interrogation is an evidentiary issue. Respondent searched and could not locate any state or federal case that suggested this admission of the interrogation was other than alleged evidentiary trial error as opposed to a structural error. See for example State v. Van Kirk, 2001 MT 184, ¶¶ 38-

40, 306 Mont. 215, 225, 32 P.3d 735, 744 (2001). Error regarding the erroneous admission of evidence, even error involving constitutional issues, is categorized as "trial error" rather than "structural error." See Rey v. State, 897 S.W.2d 333, 345 (Tex. Crim. App. 1995) (en banc). By analogy, courts have rejected claims that evidentiary violations of the Confrontational Clause are structural errors not subject to harmless error. "A violation of a defendant's confrontation rights does not, standing alone, require reversal of a judgment of conviction. Rather, a violation of the Confrontation Clause [is] subject to harmless error analysis." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

2. **The issue was a trial error not a structural error**.

Appellate counsel was reasonable in not arguing that this was a structural error where precedent did not support that assertion. The Supreme Court has recognized that most errors do not automatically render a trial unfair and thus, can be harmless. Fulminante, 499 U.S. at 306–07, 111 S.Ct. at 1262–64. Fulminante enumerated the wide variety of constitutional errors subject to harmless error analysis. They include improper admission of an involuntary confession, id. at 306–12, 111 S.Ct. at 1262 - 66; overbroad jury instructions at the sentencing stage of a capital case, Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed .2d 725 (1990); improper admission of evidence at the sentencing stage of a capital case, Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); jury instructions containing erroneous conclusive or rebuttable presumptions, Carella v. California, 491 U.S. 263, 266–67, 109 S.Ct. 2419, 2421–22, 105 L.Ed.2d 218 (1989) (per curiam); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); erroneous exclusion of a defendant's testimony regarding the circumstances of

a confession, Crane v. Kentucky, 476 U.S. 683, 691, 106 S.Ct. 2142, 2147, 90 L.Ed.2d 636 (1986); improper restriction on a defendant's right to cross-examine witnesses for bias, Van Arsdall, 475 U.S. at 673, 106 S.Ct. at 1432; denial of a defendant's right to be present at trial, Rushen v. Spain, 464 U.S. 114, 117–19 and n. 2, 104 S.Ct. 453, 454–56 and n. 2, 78 L.Ed.2d 267 (1983) (per curiam); improper comment on a defendant's silence at trial, United States v. Hasting, 461 U.S. 499, 508, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983); improper prohibition on the provision of a lesser included offense instruction in a capital case, Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982); failure to instruct the jury on the presumption of innocence, Kentucky v. Whorton, 441 U .S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (per curiam); improper admission of identification evidence, Moore v. Illinois, 434 U.S. 220, 232, 98 S.Ct. 458, 466, 54 L.Ed.2d 424 (1977); erroneous admission of an out-of-court statement of a nontestifying codefendant, Brown v. United States, 411 U.S. 223, 231–32, 93 S.Ct. 1565, 1570–71, 36 L.Ed.2d 208 (1973); improper admission of a confession made to an undercover officer, Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); admission of evidence obtained in violation of the Fourth Amendment, Chambers v. Maroney, 399 U.S. 42, 52–3, 90 S.Ct. 1975, 1981–82, 26 L.Ed.2d 419 (1970); and improper denial of counsel at a preliminary hearing, Coleman v. Alabama, 399 U.S. 1, 10–11, 90 S.Ct. 1999, 2003–04, 26 L.Ed.2d 387 (1970). Indeed, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose, 478 U.S. at 579, 106 S.Ct. at 3106–07; see also United States v. Blevins, 960 F.2d 1252, 1261–62 (4th Cir.1992). Moreover, an error in jury instructions is a trial error, not structural error, that is subject to harmless error analysis. California v. Roy, 519 U.S. 2, 5 (1996)

3. **Counsel was not deficient in argument that it was a hearsay violation rather that pursuing it as an evidentiary burden-shift relying on Sandstrom.**

Respondent submits that this argument of deficient performance based upon an alleged Sandstrom violation as raised in the trial court was reasonably rejected by appellate counsel as a ground for the appeal. Counsel opined that he had not seen a case where the admission of evidence creates a Sandstrom violation. Petitioner has not presented any precedent to suggest counsel was neglectful in his assessment. More importantly, he was successful in the Supreme Court concluding that the evidence as presented was improperly admitted. There is no precedent cited to suggest that a Sandstrom error is a structural error and counsel was not deficient in failing to do so. Appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Under Strickland, the Court should evaluate appellate counsel's conduct from appellate counsel's perspective at the time and without "'the distorting effects of hindsight.' " Strickland, 466 U.S. at 689, 104 S.Ct. 2052). An attorney's assessment of the merits of an issue depends on the law at the time. The same principles apply for claims of inadequate representation by appellate counsel on direct appeal. Appellate counsel for Petitioner could not claim error based on case law that did not exist and still does not exist that Sandstrom evidentiary error is structural error. The Petitioner presentation in hindsight must be denied. First, the Supreme Court previously addressed the Sandstrom burden

shifting concern prior to its assessment of the existence of prejudice as it related to the murder charge:

> Beyond the hearsay error, we wish to briefly comment on the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's ad nauseam insistence that Brewer prove his innocence has no place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. See U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself...."); Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (noting that the Fourteenth Amendment requires that "the State prove every element of a criminal offense beyond a reasonable doubt").

State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659–60 (2015). This was not a critique of appellate counsel's performance, but a recognition of the impact of the hearsay presentation by the State.

Despite this determination and admonishment of the State, the Supreme Court then proceeded to address prejudice related to the assault and battery charge in light of the Sandstrom issue and its conclusion that the portions of the audiotaped statement should not have been admitted upon the State's alternate argument. Appellate counsel was reasonable in urging the appellate court that the State had not meet its burden to show harmless error. This was not shown and has not been asserted to be deficient performance by Petitioner in these proceedings, only that he should have additionally argued that harmless error assessment was inappropriate because it was a (newly created) structural error issue. In accepting the Petitioner's argument on murder and not on the remaining charges, the majority of the Court concluded:

> **A careful review of the evidence convinces us the error was harmless in connection with the first shooting inside the Club,** but not harmless concerning the second shooting in the parking lot of the Club.
>
> **The evidence of Brewer's guilt is overwhelming as to the shooting of Parker inside the Club. The State introduced a photograph**

> **showing the gun in Brewer's waistband. Corroboration is found in the testimony of the many witnesses who were inside the Club. For example, Bright, the photographer, saw Brewer draw his weapon and point it at Stevenson, one of the organizers of the party. Immediately thereafter, Bright heard gunshots. Several witnesses saw Brewer shooting inside the Club, all of whom testified and were subject to cross-examination. By all accounts, there was only one shooter inside the Club—Brewer. Accordingly, we find that the error in the admission of the interrogators' statements was harmless beyond a reasonable doubt as it relates to the assault and battery with intent to kill and weapon charges**. See Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 ("Error is harmless when it 'could not reasonably have affected the result of the trial.' " (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence." (citing Blackburn, 271 S.C. at 329, 247 S.E.2d at 337)).
>
> The evidence regarding the second shooting stands in stark contrast, providing at best only a thin, circumstantial case against Brewer for Jones's murder. The shot that killed Jones came from the parking lot where Brewer and Middleton were both shooting their guns. Despite acknowledging that Middleton was shooting a handgun with a laser sight in the parking lot and that eight shell casings were recovered next to the laser sight, the lead investigator testified that he "didn't identify any other suspects" aside from Brewer. Given the presence of at least two shooters in the parking lot, and the lack of direct evidence pointing conclusively to Brewer as the one who fired the fatal shot, we hold that the admission of the challenged statements cannot be deemed harmless.

State v. Brewer, 411 S.C. 401, 409–10, 768 S.E.2d 656, 660 (2015).

The Petitioner is incorrect that the admission of the evidence from the audiotaped interview was a "structural error," not subject to harmless error analysis, rather than a trial error. The Petitioner is also incorrect in asserting that counsel was deficient in failing to argue that additional ground of trial counsel objection that the evidence was burden shifting under Sandstrom, absent established precedent tying evidence with instructional error. Appellate counsel was not deficient in failing to separately raise the due process structural error issue directly within his direct appeal. The Supreme Court concluded that

the portions of the statement were improperly admitted. Appellate counsel reasonably raised the claim that was successful.

B. Deficient performance has not been shown where the appellate court already concluded the hearsay error was harmless beyond a reasonable doubt, the Petitioner failed to show the existence of a structural error and even if it is a structural error under Weaver and Strickland does not mandate a determination of a Sixth Amendment violation, assuming *arguendo* counsel was deficient.

Brewer has failed to show that he was prejudiced by such claimed appellate counsel deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Jones, 463 U.S. at 752–53, 103 S.Ct. 3308 (noting the importance of appellate counsel selecting the most promising issues for appellate review, especially when oral arguments are limited by time restrictions. This setting is similar to Gilchrist v. State, 364 S.C. 173, 179, 612 S.E.2d 702, 705 (2005) where the Court held appellate counsel was not ineffective for failing to argue an issue on appeal because the issue did not amount to reversible error and Bennett v. State , 383 S.C. at 309–10, 680 S.E.2d at 276, where the Court reversed a holding by the PCR court finding appellate counsel ineffective for failing to brief an issue because even if appellate counsel's performance was deficient, such performance did not prejudice the petitioner. Contrary to the assertions within Petitioner's pleadings even if the alleged error was structural error, Petitioner has not shown in this collateral proceeding the defendant must show that the appellate attorney's error "prejudiced the defense." Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017) Contrary to the argument of counsel, in a Sixth Amendment appellate counsel assessment, prejudice is not presumed even if the failing was based upon a known and established structural error.

Brewer implicitly he should not have to satisfy the actual prejudice standard normally required by Strickland. He argues the admission of the alleged burden-shifting evidence, without more, is a structural error that always results in fundamental unfairness and may suggest that the Court in Weaver indicated proof of actual prejudice is not necessary in such instances.

Weaver does not stand for the proposition that Brewer may advance. The Court specifically limited its holding to "the context of trial counsel's failure to object to the closure of the courtroom during jury selection." Weaver, 137 S. Ct. at 1907. And while the Court in Weaver assumed for the purpose of its analysis that it would automatically reverse if it found that trial counsel had not objected to an error that always results in fundamental unfairness, it expressly withheld judgment on this issue. See id. At 1911 ("In light of the Court's ultimate holding ... [it] need not decide that question here."). Despite Brewer's potential contentions on reply otherwise, the Court in Weaver did not require future courts to import the structural error standard into ineffective-assistance cases. [9]

[9] Justice Alito wrote a separate opinion, concurring in the judgment. See Weaver, 137 S. Ct. at 1915 (Alito, J., concurring) (explaining that the Court has relieved defendants of the obligation to show actual prejudice "in only a very narrow set of cases in which the accused has effectively been denied counsel altogether: These include the actual or constructive denial of counsel, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest"). Justice Thomas, who joined the majority opinion, did not believe the majority opened the door for automatic reversals based on structural errors raised in the ineffective-assistance context. Id. at 1914 (Thomas, J., concurring) ("I do not read the opinion of the Court to preclude the approach set forth in Justice Alito's opinion, which correctly applies our precedents."). One circuit court has come to a similar conclusion as Justice Thomas. See Parks v. Chapman, 815 F. App'x 937, 944 (6th Cir. 2020) (unpublished) cert. denied, 2021 WL 1072353, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (Mar. 22, 2021) (rejecting the argument that Weaver ever compels a court to automatically reverse if the defendant shows a structural error as part of an ineffective-assistance claim).

Deficient performance is not shown because there is no reasonable probability that the result would have been different had he raised this additional argument. The Supreme Court concluded that harmless error existed. First, the Petitioner misreads the probative power of the dissent he relies upon. The same argument was raised in his petition for rehearing in his challenge to harmless error conclusion. In the dissent, Justice Beatty suggested that the alleged burden shifting comments, presented through the interrogation comments, was a structural error for the first time, citing State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) and referring to Arizona v. Fulminante. See App. 658-661.

Nevertheless, the dissent misapplied the concept of "structural error" with prejudicial error. The error at trial was a defined trial error, not structural error, even if it was a constitutional error. Analysis of the error under Chapman harmless error standard was the appropriate standard, even if it was determined to be Sandstrom error was done in Sandstrom. The jury was properly charged on the burden of proof on the basis of the record before this Court. App.p. 658-662. The prosecution similarly acknowledged the burden of proof. App.p. 614-617. Even if there is constitutional error, non-structural errors may be harmless. See Hedgpeth v. Pulido, 129 S.Ct. 530, 532 (2008) (per curiam) (citing Chapman v. California, 386 U.S. 18 (1967)). In the context of jury instructions, an error is not structural so long as the error does not "vitiat[e] all the jury's findings." An erroneous burden-shifting instruction is also not structural. Rose v. Clark, 478 U.S. 570 (1986)). In Chapman, a case before the Supreme Court on direct review, the Court held that "before a [non-structural] constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The United State Supreme Court addressed a similar misimpression in Glebe v. Frost, 135 S.Ct. 429 (2014). In Glebe, the Court summarily reversed the Ninth Circuit concerning a restriction in a defense summation which the circuit court had contended a shifting the burden of proof. In a criminal trial, whether at the state or federal level, "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." Sullivan v. Louisiana, 508 U.S. 275, 277–78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); In re Winship, 397 U.S. 358, 363–64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law

Sullivan provides that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the *instructional error* consists of a misdescription of the burden of proof, which vitiates all the jury's findings." 508 U.S. at 281, 113 S.Ct. 2078. The Court in Sullivan also engages in a useful discussion of structural versus harmless errors. Id. at 278–82, 113 S.Ct. 2078. The Court cites to Arizona v. Fulminante, 499 U.S. 279, 308–10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), which discusses the distinction between potentially harmless "trial errors," and never-harmless "structural errors." "Trial errors" are problems which occur during a case's presentation to the trier of fact and may be assessed in the context of other evidence. They may be harmless and are harmless if the error can be examined against the other trial evidence and a determination made that the error was not serious enough that it would have caused the jury to have a

reasonable doubt of the defendant's guilt. *See id.* at 310, 111 S.Ct. 1246. In contrast, "structural errors" are "violations ... in the constitution of the trial mechanism," and are "defect[s] affecting the framework within which the trial proceeds" which inhibit the trial's " 'function as a vehicle for determination of guilt or innocence.' " Id. at 309–10, 111 S.Ct. 1246 (quoting Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). They are never harmless.

As the Supreme Court has stated: "[W]e have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.' " Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). " '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' " 527 U.S., at 8, 119 S.Ct. 1827 (quoting Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder, supra, at 9, 119 S.Ct. 1827 (emphasis deleted). This evidentiary issue does not rise to that level.

Here, the issue was not the reasonable doubt instruction by the Court, but the admission of evidence. Against that framework, it was not structural error, but alleged trial error that could be assessed against the entire record. Assuming admission was error, the Court properly found it to be harmless as related to the assault charge. The Petitioner failed to satisfy his burden of showing Sixth Amendment prejudice.

There was support for a harmless error assessment as found by the Supreme Court. The challenged comments on appeal concerned whether witnesses had seen the Appellant either with a gun or shooting. There was non-hearsay evidence in the record from the eyewitnesses that show the information was cumulative.

The Respondent submit that Sixth Amendment prejudice has not been shown because the alleged deficiency did not create a reasonable probability the result would be different. The alleged error did not undermine confidence in the outcome. Each of the concerns were addressed by the other evidence related to the assault and the instructions by the court.

As to the "comment" when the investigator was reading from a statement from a female about seeing the gun pointed at her boyfriend (Exhibit 2, 5:25), Sheena Gardner, Deon Stevenson's boyfriend testified about seeing the defendant with a gun and having her boyfriend Deon confront him and asked him to remove the gun from the area and points it at him and begins shooting. App.p. 474-479. She also testified about seeing him shooting inside and outside. App.p. 493-498.

In addition, Deon Stevenson declared similarly that he learned about Brewer having a weapon and confronted him with the gun being placed to his head and then seeing the Petitioner shooting. App.p. 457-459.

Others testified about seeing Petitioner with a gun. These included Gary Bright who photographed Petitioner with the gun and saw him put the gun to Stevenson head immediately prior to gunfire. App.p. 171-172, 175-176, 186-187. Houston Chaneyfield saw Petitioner with the gun and reported it to Stevenson immediately prior to the shooting. App.p. 208-210. John Doctor saw the Petitioner with the gun in his possession. App.p. 448-449. Charles Cox saw the gun with a shorter fellow aiming it at people. App.p. 533-

535. However, Donald Parker was unable to identify his shooter, only the fact that he saw the gun fire. App.p. 311, 313, 330.

Simply put, there was no reliance by the prosecution upon the investigator interrogation comments to prove that witnesses had seen Petitioner shooting that night. Instead, the witnesses themselves testified - although some were confronted with their prior statements - and were subjected to cross-examination. Any error in the admission was harmless. A new trial is not warranted.

Appellate counsel's handling of the issues on appeal did not undermine confidence in the decision under the Strickland standard. The PCR Court properly denied relief. This court should do the same.

CONCLUSION

For the foregoing reasons, Respondent submits the judgment of the lower court affirmed.

Respectfully submitted,

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