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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380
S.C. Ct. App. Filed October 12, 2022
Withdrawn, Substituted and Refiled November 16, 2022

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 4, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone?

2. Whether the decision by the Court of Appeals to summarily deny the petition for writ of certiorari as to all nine (9) allegations of ineffective assistance of counsel constitutes an abuse of discretion that distinguishes the present case from Ellison v. State, 382 S.C. 189, 676 S.E.2d 671 (2009), and allows review by this Court when Petitioner alleged that the cumulative effect of the nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial?

STATEMENT OF THE CASE

In July of 2009, the Richland County Grand Jury indicted Petitioner, Adonis Williams, for kidnapping, armed robbery and burglary first degree, indictments #2009-GS-40-2697, 2698, 2701. (App. pp. 722-727). On February 8, 2010, Petitioner proceeded to jury trial for the above listed charges and the additional charges of resisting arrest and assault on an officer while resisting arrest before the Honorable Clifton Newman. Byron E. Gipson represented Petitioner at the first trial. The jury found Petitioner not guilty of assault on a police officer while resisting arrest but guilty of resisting arrest. The jury could not reach a verdict on the other charges and Judge Newman declared a mistrial. Judge Newman sentenced Petitioner to one year for resisting arrest. It appears from the indictment that the burglary indictment was amended in March of 2010.

On September 6, 2011, Petitioner again proceeded to jury trial. The Honorable James R. Barber presided over the re-trial. Mark E. Schnee represented Petitioner at the re-trial. Kathryn "Luck" Campbell, Dolly Garfield and Meghan Walker prosecuted the case. The jury returned verdicts of guilty this time. Judge Barber sentenced Petitioner to twenty-five (25) years for kidnapping, twenty-five (25) years concurrent for armed robbery and twenty-five (25) years concurrent for burglary first. Petitioner filed a timely notice of intent to appeal. The South Carolina Court of Appeals, however, dismissed the appeal for failing to timely order the transcript as required by Rule 207, SCACR. The Remittitur issued on January 24, 2013.

On April 19, 2013, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 731-737). On October 18, 2013, the State filed a return. (App. pp. 767-772). On July 1, 2015, Petitioner, through counsel, filed an amended application for post-conviction relief. (App. pp. 738-763). On January 21, 2016, Petitioner filed, through counsel, a second amended

application for post-conviction relief. (App. pp. 764-766). On February 1, 2016, an evidentiary hearing was held before the Honorable J. Derham Cole. Kristy G. Goldberg represented Petitioner at the PCR hearing. J. Clayton Mitchell, III represented the State. In a 48- page written order Judge Cole granted a belated appeal pursuant to White v. State but denied relief on the other allegations and dismissed the application. A timely notice of intent to appeal was served on September 19, 2018.

The petition for writ of certiorari and separately filed brief pursuant to White v. State were filed on March 11, 2019. The State filed a return to the petition for writ of certiorari on July 16, 2019, but not a brief of respondent pursuant to White v. State. On July 31, 2019, the South Carolina Supreme Court, pursuant to Rule 243(1), SCACR, transferred the case to the South Carolina Court of Appeals. Based on the discovery of a factual error, on December 6, 2019, Petitioner moved to withdraw the White v. State brief filed on March 11, 2019, and substitute with a corrected brief pursuant to White v. State. The State had not yet filed a brief of respondent pursuant to White v. State. On January 8, 2020, the Court of Appeals granted the motion to file an amended brief pursuant to White v. State. The brief of respondent pursuant to White v. State was filed on January 26, 2022. The reply brief pursuant to White v. State was filed on February 22, 2022.

On October 12, 2022, the Court of Appels granted the petition for writ of certiorari as to the belated appeal issue and affirmed the convictions. The Court of Appeals denied the petition for writ of certiorari as to the nine (9) allegations of ineffective assistance of counsel. Adonis Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed October 12, 2022). A timely petition for rehearing was filed on October 27, 2022. On November 16, 2022, the Court of Appeals withdrew the former opinion and substituted with a refiled opinion. Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed

November 16, 2022). A second petition for rehearing was filed on November 28, 2022, and denied on January 4, 2023. This petition for writ of certiorari follows.

STANDARDS OF REVIEW

Belated Direct Appeal pursuant to White v. State

"Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court] review[s] the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

Ineffective Assistance of Counsel

The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The appellate courts review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, (2018).

"In Haggins, we noted a decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed 'a special reason' justifying the exercise of our discretion under Rule 226." Ellison v. State, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009).

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify what the State is required to prove in order to establish that property is abandoned for Fourth Amendment analysis. Additionally, this Court should grant the petition for writ of certiorari to clarify cumulative error analysis in PCR cases.

ARGUMENTS

1. **The Court of Appeals erred in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone.**

The consent to search the Petitioner's girlfriend's home, by the girlfriend, did not extend to a search of the content of Petitioner's cell phone. Petitioner did not abandon his cell phone by leaving it at his girlfriend's house, where he sometimes stayed. The trial judge erred in allowing an investigator to testify as to the content of text messages found on the cell phone stating, "The police is looking for you. They came back one of a kind." (App. p. 497, lines 7-8). The investigator then testified about another text message stating, "'Are you gonna let me get that weed, my N-I-G-G-A?' There's a question mark. And, 'I'm about to go into hiding.' Then, 'Black power.'" (App. p. 497, lines 19-22). Photographs of the text messages were also admitted in evidence as State's Exhibits #66, #67. (App. p. 496, line 8). The error requires reversal.

On March 22, 2009, Linda Wofford called 911 from the Citgo gas station to report a home invasion and kidnapping. (App. p. 283, line 3 – p. 284, lines 1-21). Petitioner was identified as a suspect and law enforcement obtained arrest warrants for Petitioner. (App. p. 435-436). On March 26, 2009, officers with the fugitive division went to the home of Dawn Shea on True Street to try and locate Petitioner. When asked about the relationship between Shea and Petitioner, Sergeant Robinson with the Richland County Sheriff's Department testified "This was a rekindled girlfriend situation. They had recently rekindled their affair shortly before this happened." (App. p. 489, lines 22-23). Officers located Petitioner at his girlfriend's house but he ran away and was not arrested until the next day. (App. p. 449, line 10 – p. 450 – 453).

Officers returned to the True Street address. (App.pp. 489-490). Sergeant Matt Ellis with the Richland County Sheriff's Department testified that they obtained consent to search the residence from Dawn Shea. (App. p. 438, line 1 – p. 439, lines 1-14). Pursuant to the consent to search Sergeant Ellis testified that he found a phone. (App. p. 439, lines 4-21). The phone was admitted in evidence, over objection, as State's Exhibit #65. (App. p. 439, line 22 – p. 440, lines 1-2). Sergeant Robinson testified that he took possession of the phone found at Ms. Shea's home and downloaded records from the phone. (App. p. 492, lines 8 – p. 493, lines 1-19). Sergeant Robinson testified that the phone belonged to Petitioner. (App. p. 491, lines 20-23). Sergeant Robinson testified that after he confirmed that the phone belonged to Petitioner, he went through the phone and looked at text messages. (App. p. 493, lines 25 – p. 494, lines 1-3).

Prior to trial Petitioner moved to suppress text messages obtained from the cell phone. (App. pp. 84-91). During the pre-trial hearing the prosecutor told the judge, "Your Honor, we believe there was a search warrant done on a Dawn Shea's house who is a person the defendant sometimes would stay with I guess is the best way to put it. The defendant wasn't there at the time they took the phone. They then did look at the phone - - " (App. p. 85, lines 23 – p. 86, lines 1-3). During the pre-trial suppression hearing the prosecutor told the judge that Petitioner would sometimes stay with Dawn Shea. (App. p. 85, lines 23-25).

Counsel for Petitioner argued that the search warrant did not cover the **contents** of the phone. (App. p. 86, line 16 – p. 87, lines 1-2). Both the prosecutor and the defense lawyer were mistaken about the existence of a search warrant for Dawn Shea's True Street home. As the officers testified, the search was done by consent from Shea.

As to abandonment, the prosecutor argued:

> At that point, Your Honor, I believe it's abandoned property. I don't know what standing he would even have to object to the search warrant. Furthermore, the search warrant did specify certain things they were searching for. In addition to that, in the end there is a catch-all saying: Any evidence that may be relevant to this investigation. The police then got it. Once the evidence is in their hands pursuant to State versus Sanders, I believe that they can do with it what they want as long as they have obtained it legally.

(App. p. 87, lines 4-14)

Petitioner argued that the phone was not abandoned property and if it was abandoned the State could not prove who sent the text messages in question. (App. p. 88, lines 3-14). When asked about the purpose of introducing the text messages the prosecutor indicated the messages were evidence of flight. (App. p. 88, lines 15-25). The trial judge asked the prosecutor, "Don't y'all already have flight?" (App. p. 88, line 18). The prosecutor answered, "No, sir. We never have enough." (App. p. 88, line 19). The judge responded, "Well, sometimes you have too much, and that's generally what gets solicitors in trouble because they have too much and they don't need everything that they put in." (App. p. 88, lines 20-23). The trial judge denied the motion to suppress stating:

> Well, you know, obviously any time there's a – a defendant's involved in a case, he has a right to make whatever objections or motions he wants to make with respect to any of the evidence or anything else where he thinks his rights are being violated, but, you know, this is not his residence. If he leaves something at somebody else's place and in the course of a lawful search by the police, the police come up with this, I believe it constitutes abandoned property and he doesn't -- and once they take it, they have the right to do with it as they deem appropriate. So I will deny your motion.

(App. p. 89, lines 9-19). After the judge ruled pretrial that the text messages were admissible because the phone had been abandoned, trial counsel challenged the admission of the text messages as hearsay and a violation of the confrontation clause. (App. p. 90, lines 1-12). Trial counsel also objected pursuant to Rule 403, SCRE, specifically referencing the "Black power" language in the text message. (App. p. 90, lines 13-17).

The trial judge erred in finding the phone was abandoned. Leaving something at somebody else's house is not sufficient for a finding of abandonment. Without a sufficient finding of abandonment, the police do not have the right to do with seized property as they deem appropriate, especially as it relates to the contents of a cell phone. See Riley v. California, 573 U.S.373, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).

At trial, counsel for Petitioner again objected to the admission of the text messages. (App. p. 491, lines 6-16). The prosecutor told the judge, "We are only introducing those just to show evidence of flight." (App. p. 495, lines 8-9). Trial counsel additionally objected to the admission of the text messages based on hearsay and Rule 403. (App. p. 495, lines 12-18). The trial judge overruled the objections stating:

> All right. I'm going to admit it on the basis that it's not being offered for the truth of the matter of the matter asserted but being offered for the purpose of putting - - that this defendant may have known that the police were looking for him and - - whether that's true or not true, but that he may have had information that the police were looking for him either through t a text message to this phone or a message from this phone.
>
> Now, you can certainly question them - - I think it would go to the weight of the evidence, and you can cross-examine them about whether they have any information that he had the phone when there were – messages were either made or received but that will - - that's the purpose of - - I mean, the basis of admission. All right. Bring the jury in.

(App. p. 495, line 19 – p. 496, lines 1-7). The text messages, however, went beyond the purpose of showing evidence of flight. The text messages including the use of the words "my N-I-G-G-A" and "Black power" are not relevant to flight, not cumulative to other evidence introduced at trial and prejudicial to Petitioner by inserting an arbitrary racial factor into the trial. The error in admitting the text messages was not harmless. Connecting the "I'm about to go into hiding" message with the "my N-I-G-G-A" and "Black power" is far more prejudicial than the other evidence of flight introduced by the State at trial. The trial judge erred in

finding that the phone was abandoned and admitting the text messages obtained without a warrant.

In State v. Brown, 423 S.C. 519, 815 S.E.2d 761, cert. denied, 139 S. Ct. 486, 202 L. Ed. 2d 377 (2018), the South Carolina Supreme Court found that a cell phone found at a burglary scene was abandoned for Fourth Amendment analysis. Recognizing the unique nature of information contained in a cell phone and citing Riley v. California, 573 U.S. ——, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014), the South Carolina Supreme Court wrote:

> In Riley, the Supreme Court described in extensive detail the manner in which "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." 573 U.S. at ——, 134 S.Ct. at 2489, 189 L.Ed. 2d at 446. Among the many observations the Court made to explain these differences, the Court stated, "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate," 573 U.S. at ——, 134 S.Ct. at 2490, 189 L.Ed. 2d at 447, "Data on a cell phone can also reveal where a person has been[,] ... and can reconstruct someone's specific movements down to the minute, ... within a particular building," 573 U.S. at ——, 134 S.Ct. at 2490, 189 L.Ed. 2d at 448, and "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," 573 U.S. at ——, 134 S.Ct. at 2491, 189 L.Ed. 2d at 448. The Court concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' " 573 U.S. at ——, 134 S.Ct. at 2494-95, 189 L.Ed. 2d at 452 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751 (1886)).

State v. Brown, 423 S.C. at 523–24, 815 S.E.2d at 763–64.

While Riley involved a search incident to arrest, the consent to search in the present case did not cover the contents of the cell phone. Petitioner maintained a reasonable expectation of privacy in the phone that he left at a home where he occasionally stayed. The phone was not abandoned.

In State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995), the South Carolina Supreme Court wrote:

> Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). In determining whether the defendant abandoned the evidence for Fourth Amendment purposes, [t]he distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue. In the law of property, the question ... is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein. Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure. City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370–71 (1975) (citations omitted).

Petitioner did not discard his cell phone. Instead, the cell phone was in a home where Petitioner sometimes stayed and maintained a reasonable expectation of privacy. Because of the unique nature of information contained in a cell phone, the general consent to search the home given by Ms. Shea was not sufficient to cover the contents of the cell phone. The information from the cell phone was obtained in violation of Petitioner's Fourth Amendment rights pursuant to the State and Federal Constitutions. The South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution. See S.C. Const. art. 1§10; State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). The error is not harmless.

In State v. Moore, 429 S.C. 465, 839 S.E.2d 882 (2020), the trial judge denied a motion to suppress evidence seized from the warrantless examination of a flip phone's SIM card, finding the phone had been abandoned. The phone was found in the car of a man who had been shot. The Court in Moore, wrote, "Yet we acknowledge a close question is presented on

the issue of abandonment. We elect to resolve this appeal on other grounds." State v. Moore, 429 S.C. 465, 473, 839 S.E.2d 882, 886 (2020) (n. #4 omitted). The cell phone in the present case was not found at the crime scene. Instead, the cell phone was found in a home where Petitioner sometimes stayed with his girlfriend. The search in the present case was not limited to a SIM card of a flip phone. Instead, highly prejudicial text messages from the cell phone were published to the jury. The cell phone in the present case was not abandoned.

The dissent in Moore discussed abandonment writing:

> In my view, the State failed to establish the abandonment exception to the Fourth Amendment warrant requirement. See State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (recognizing the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement).
>
> When determining whether a defendant abandoned property for Fourth Amendment purposes, "the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment." Id. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370–71 (1975)). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). In the context of abandonment, intent is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

429 S.C. at 488–89, 839 S.E.2d at 894.

The State failed to establish the abandonment exception to the Fourth Amendment in the present case. While it may have been a close call in Moore, it is not a close call in the present case. Petitioner did not discard his phone under circumstances indicating no future expectation of privacy by leaving the phone at his girlfriend's house where he sometimes stayed.

In affirming the trial judge's refusal to suppress the contents of the cell phone the Court of Appeals wrote:

> We hold Petitioner "relinquished his reasonable expectation of privacy" by leaving his phone in a place where he did not live and making no efforts to recover his phone. See State v. Brown, 423 S.C. 519, 522, 815 S.E.2d 761, 763 (2018) ("Under a standard abandonment analysis, 'the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.' " (quoting State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995))).

Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed November 16, 2022). The Court of Appeals erred.

The State failed to prove that Petitioner abandoned his cell phone by leaving it at his girlfriend's house. Petitioner stayed at his girlfriend's house and the police located Petitioner at his girlfriend's house. Petitioner left the phone at his girlfriend's house when he fled from police. Petitioner did not relinquish an expectation of privacy in the contents of his phone by fleeing from the police. Leaving a cell phone at a friend's house is not abandoning the phone. Leaving his cell phone at his girlfriend's house, where he sometimes stayed is not abandoning the phone. Petitioner was arrested the next day and did not have an opportunity to recover the phone.

In State v. Valles, 2019 ND 108, 925 N.W.2d 404, the North Dakota Supreme Court found that a phone that was found in a parking lot and turned over to the police was not abandoned. The North Dakota Supreme Court found that the warrantless search of the phone's photos, video, Facebook Messenger application, text messages and call log was constitutionally unreasonable. Distinguishing lost property from abandoned property the court wrote:

> Most courts that have faced the issue have allowed warrantless searches of abandoned phones. The typical scenario is where a phone is left at a crime scene under circumstances inconsistent with a lost or misplaced phone that may yet be retrieved by its owner. State v. Brown, 414 S.C. 14, 776 S.E.2d 917, 924 (S.C. Ct. App. 2015) (reasoning that initial privacy interest in a locked container may be abandoned if the container is left at a crime scene, indicating "a superior desire to avoid being arrested for a crime"); State v. Samalia, 186 Wash.2d 262, 375 P.3d 1082, 1084 (2016) (en banc) (phone found in abandoned stolen vehicle); Martinez v. State, No. 08-14-00130-CR, 2016 WL 4447660, at *1-4 (Tex. App. Aug. 24, 2016) (phone left at murder scene); Edwards v. State, 497

> S.W.3d 147, 154, 161 (Tex. App. 2016) (phone left on stolen vehicle at scene of armed robbery); State v. Brown, 414 S.C. 14, 776 S.E.2d 917, 923-24 (S.C. Ct. App. 2015) (phone left at scene of burglary); State v. Dailey, 2010-Ohio-4816, at ¶¶ 3, 13, 16, 2010 WL 3836204 (phone left in pocket of jacket that was abandoned while fleeing from store employees attempting to apprehend defendant for theft); People v. Daggs, 133 Cal.App.4th 361, 34 Cal.Rptr.3d 649, 650-51 (2005) (phone dropped during robbery of drug store). If truly abandoned, a phone is ownerless and thus the former owner lacks a continuing possessory interest to assert a Fourth Amendment claim. But a phone that is lost, dropped, or misplaced is not ownerless, and the owner retains the protection of the Fourth Amendment.

State v. Valles, 925 N.W.2d at 408.

In the present case Petitioner's expectation of privacy in the contents of his phone left at his girlfriend's house, where he sometimes stayed, is even greater than if he had lost his phone and it was handed over to the police as in Valles. In Valles the court noted that the phone was locked. In the present case the officer testified that he downloaded records from the phone but there is no mention in the record that it was locked. As Petitioner left the phone at a place where he sometimes stayed, the fact that the phone may not have been locked should not dimmish the expectation of privacy. The fact that Petitioner did not attempt to recover his phone between the time he fled from the police until the time he was arrested the next day does not establish abandonment. As the North Dakota Supreme Court noted in Valles, "One day passing without the owner having reported a phone missing is insufficient to establish abandonment." 925 N.W.2d at 409. As in Valles, the State in the present case failed to prove that Petitioner abandoned his phone.

One scholar suggests that Riley mandates that police obtain a warrant before searching even an abandoned cell phone. Abigail Hoverman, Note, *Riley and Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 546 (2017). This Court does not have to reach that conclusion in the present case because, as discussed above, under a

traditional abandonment analysis, the State failed to prove that Petitioner abandoned his phone by leaving it at his girlfriend's house.

The error in admitting the text messages was not harmless. The investigator was allowed to testify as to the content of text messages found on the cell phone stating, "The police is looking for you. They came back one of a kind." (App. p. 497, lines 7-8). The investigator then testified about another text message stating, "'Are you gonna let me get that weed, my N-I-G-G-A?' There's a question mark. And, 'I'm about to go into hiding.' Then, 'Black power.'" (App. p. 497, lines 19-22). Photographs of the text messages were also admitted in evidence as State's Exhibits #66, #67. (App. p. 496, line 8). As the trial judge cautioned, "Well, sometimes you have too much, and that's generally what gets solicitors in trouble because they have too much and they don't need everything that they put in." (App. p. 88, lines 20-23). The text messages were too much. The portions of the text messages that included a racial slur, a reference to Black power, and a reference to weed were not cumulative to the other evidence of flight presented by the State. The evidence presented by the State was not overwhelming. The error in admitting the text messages requires reversal.

In State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> In State v. Creech, 314 S.C. 76, 441 S.E.2d 635 (Ct.App.1993), this court reiterated the Supreme Court of the United States' holding in Chapman v. California[4] that error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *Id.* at 86, 441 S.E.2d at 640 (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

Considering the entire record on appeal, the constitutional error in admitting the illegally obtained text messages was not harmless. At trial Petitioner admitted that he heard there were

warrants for him and testified that, "I mean, basically I didn't want to get arrested." (App. p. 599, line 10). Petitioner's testimony at trial and the evidence of flight leading up to Petitioner's arrest were far less prejudicial than the improperly admitted text message, "I'm about to go into hiding." The text messages including the use of the words "my N-I-G-G-A" and "Black power" are not cumulative to other evidence introduced at trial. The admission of the text messages that included racially charged words was prejudicial.

Additionally, the State's evidence linking Petitioner to the burglary and armed robbery was not overwhelming. This was the second trial after the first jury was unable to reach a verdict. A mixture of DNA evidence was found on a cigarette butt that was found on the grassy area near a driveway on Patricia Drive where the witness testified the suspect got out of her truck. (App. pp. 305-307). The DNA expert testified that neither the witness, nor Petitioner could be eliminated as contributors to the mixture of DNA found on the cigarette butt. (App. p. 386, lines 3-19). Petitioner's DNA was not found inside the truck or the house that was burglarized. The fingerprint evidence was found on the outside of the house on a telephone box where the wires had been cut. (App. p. 173, lines 14-23). Petitioner's fingerprints were not found inside the house or the truck. Although the witness described the suspect as having a chickenpox scar near his left eye, (App. p. 195, line 24 – p. 196, line 1), and Petitioner admitted having a mark on his temple, (App. p. 652, lines 13-18), the witness did not identify Petitioner. The State's evidence was not overwhelming. The error was not harmless.

2. **The decision by the Court of Appeals to summarily deny the petition for writ of certiorari as to all nine (9) allegations of ineffective assistance of counsel constitutes an abuse of discretion that distinguishes the present case from Ellison v. State, 382 S.C. 189, 676 S.E.2d 671 (2009), and allows review by this Court when Petitioner alleged that the cumulative effect of the nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial.**

The second amended application for post-conviction relief contains nine allegations of ineffective assistance of trial counsel. (App. pp. 764-765). The transcript of the PCR evidentiary hearing is 129 pages long. The order of dismissal is 48 pages long. In the order of dismissal the PCR judge wrote:

> Applicant alleges that the cumulative effect of Counsel's alleged errors constitutes ineffective assistance of counsel. "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettles question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); see also Lorenzen, 376 S.C. at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial error, must be reviewed individually, rather than collectively" and therefore does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis would be inappropriate and therefore finds that his allegation must be denied and dismissed with prejudice.

(App. p. 1185). The PCR judge erred.

Petitioner raised nine allegations of ineffective assistance of counsel in the petition for writ of certiorari, addressed in the opinion as Petitioner's Questions Two through Ten. In one count Petitioner alleged, "Due to the cumulative effect of counsel's error the Applicant suffered prejudice such that, but for the combination of these errors, the result of the proceeding would have been different." (App. p. 765.). The Court of Appeals denied all nine PCR issues raised in the petition for writ of certiorari simply writing, "We deny certiorari on Petitioner's Questions Two through Ten." Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed November 16, 2022). The Court of Appeals erred. The failure to address the nine PCR issues and the cumulative

effect of those nine allegations of ineffective assistance of counsel constitutes an abuse of discretion.

In Ellison v. State, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009), this Court wrote:

> In Haggins, we noted a decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed "a special reason" justifying the exercise of our discretion under Rule 226. We noted further that an informal letter denial cannot meet any of the five criteria we consider when determining whether to grant certiorari to review a decision of the Court of Appeals pursuant to Rule 226. While the language in our opinion in Haggins could be construed to preclude review of the Court of Appeals' order in the case at hand, we realize that the specific holding in Haggins applies only to letter denials. Accordingly, we take this opportunity to extend our decisions in Haggins and Missouri to cases in which the Court of Appeals has issued an order denying a writ of certiorari in a PCR matter and in cases in which the Court of Appeals initially issues an order granting a writ of certiorari in such matters but later issues an opinion dismissing the writ as improvidently granted without further discussion of the case. Our decision is based on the same reasoning set forth in Haggins.

The present case is distinguished from Ellison, Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008), and Missouri v. State, 378 S.C. 594, 663 S.E.2d 480 (2008), because the present case alleges as a ninth allegation that the cumulative effect of the eight separate instances of deficient performance on the part of trial counsel establishes prejudice requiring a new trial. The allegation that the cumulative effect of the eight separate instances of deficient performance establishes prejudice requiring a new trial should be deemed a special reason justifying the exercise of this Court's discretion under Rule 226, when the Court of Appeals failed to address any of the PCR issues.

As noted in Green v. State, id., South Carolina Appellate Courts have recognized cumulative error analysis of trial errors on direct appeal. See Also *Rebutting the "Strong Presumption of Reliability" for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina*, 65 S.C. L. Rev. 685 (2014) (Benjamin Dudek). In State v.

Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801(1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court reversed the death sentences imposed upon Peterson and his co-defendant, Stubbs, and remanded the cases for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court . . ." This Court found that, "Some, if not all, of these arguments have some merit. The combination of numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial." Peterson, 287 S.C. at 246, 335 S.E.2d at 801.

In State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), the South Carolina Court of Appeals found that numerous unsolicited comments by the trial judge and the limitation of cross-examination unduly prejudiced the defendant. In Freeman the court wrote:

> Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. See Myers v. Moffett, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); see also Ryan v. United Parcel Service, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do). We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

319 S.C. at 123–24, 459 S.E.2d at 875.

In State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), the South Carolina Supreme Court wrote:

> In our opinion, the facts of this case do not support a finding cumulative errors warranted reversal. While the admission of the search warrant was prejudicial error, the error of refusing to admit the prior shoplifting conviction for

> impeachment purposes was not prejudicial and the inadvertent mention of the polygraph examination was not error. Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial. See Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Here, respondent has failed to show he suffered prejudice warranting a new trial based on cumulative trial error. Compare with State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (although Court held cumulation of errors warranted reversal, each error caused prejudice against appellant); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding the cumulative effect of the trial conduct, not trial errors, warranted reversal).

This Court in Johnson recognized a cumulative error analysis in the direct appeal but found no prejudice. This Court should apply a cumulative error analysis in this post-conviction relief action and find prejudice pursuant to Strickland. In contrast to Johnson, the facts of the present case support a finding that cumulative errors warrant reversal. In the present case trial counsel failed to properly cross-examine the victim about prior statements she made which support that Petitioner was not the assailant, failed to move to redact prejudicial portions of text messages, failed to immediately object to the recall of the DNA expert, leaving the impression with the jury that two individual could be excluded from critical DNA evidence, failed to object to a witness testifying about the date Petitioner was released from prison, failed to object when the prosecutor asked questions about facts not in evidence, failed to object to questioning about Petitioner's "Head Bussa" tattoo, failed to object to the prosecutor referencing September 11th in her closing argument and consented to allowing the judge to answer a question from the jury with neither party present. Without conceding that the individual errors result in prejudice alone, the cumulative effect of all eight errors creates prejudice requiring a new trial.

A majority of state courts have recognized some form of cumulative error analysis in reviewing ineffective assistance of counsel claims. Id. 65 S.C. L. Rev. 685 fn. #52. In

Cirincione v. State, 119 Md. App. 471, 506, 705 A.2d 96, 112–13 (1998), the Maryland Court of Special Appeals wrote:

> Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance. Apparently, this cumulative effect may be applied to either prong of the Strickland test. That is, numerous non-deficient errors may cumulatively amount to a deficiency, Bowers v. State, 320 Md. 416, 436, 578 A.2d 734, 744 (1990), or numerous non-prejudicial deficiencies may cumulatively cause prejudice. Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir.1995).

The Court of Appeals should have determined if the numerous errors cumulatively amounted to deficiency and if the numerous errors cumulatively resulted in prejudice.

While establishing Strickland prejudice from the cumulative effect of several instances of deficient performance by trial counsel in the context of habeas relief pursuant to 28 U.S.C § 2254 is not yet "clearly established federal law as determined by the Supreme Court of the United States," a majority of federal courts of appeals (the First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits) have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. See Ruth A. Moyer, To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors, 61 Drake L. Rev. 447, 451 (2013).

In Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (fn #9 omitted), the Fourth Circuit Court of Appeals wrote, "To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue." The position taken by the Fourth Circuit in Fisher in regard to cumulative error, however, is no longer the majority taken

by the other federal circuit courts of appeal. While the Eighth and the Sixth Circuit Courts of Appeals have specifically rejected a cumulative error analysis to establish prejudice in a § 2254 action[1] (Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006); Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir.2002) and the Eleventh Circuit has not yet answered the question of whether cumulative errors by trial counsel will establish Strickland for § 2254 review (Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011), as noted above, a majority of federal courts of appeals have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. More recently in Oken v. Corcoran, 220 F.3d 259, 271 (4th Cir. 2000), the Fourth Circuit Court of Appeals wrote, "Finally, even were we to find one or more of these purported instances of objectively unreasonable performance by counsel to be such, either individually or cumulatively, we still could not say that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694, 104 S.Ct. 2052."

This Court should follow the majority of other state courts as well as the majority of federal circuit courts of appeal and apply cumulative error analysis in reviewing post-conviction relief cases. The cumulative effect of trial counsel's nine separate instances of deficient performance results in prejudice requiring a new trial.

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[1] The reasoning for the Eighth and Sixth Circuits rejecting the cumulative error analysis in § 2254 review appears to be based on the fact that such analysis is not yet clearly established federal law as determined by the Supreme Court of the United States.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2023.