

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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Withdrawn, Substituted and Refiled November 16, 2022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

APPENDIX

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S.C. SUPREME COURT

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ISSUES PRESENTED

1. Did the PCR judge correctly find that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to cross-examine the witness about prior testimony that indicated that the assailant was someone other than Petitioner?
3. Did the PCR judge err in finding that trial counsel properly objected to the admission of text messages obtained from a cell phone when trial counsel failed to move to redact irrelevant and prejudicial portions of the text message?
4. Did the PRC judge err in refusing to find trial counsel ineffective for not immediately objecting when the State recalled the DNA expert?
5. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the testimony of an employee of the South Carolina Department of Corrections who testified as to the date that Petitioner was released from prison?
6. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting when the prosecutor, through cross-examination, asserted a fact not in evidence?
7. Did the PCR judge err in refusing to find trial counsel ineffective for not immediately objecting when the prosecutor asked Petitioner about the tattoo on his arm?
8. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when in closing argument the prosecutor referenced the terrorist attacks of September 11th?
9. Did the PCR judge err in refusing to find trial counsel ineffective in consenting to allow the judge to enter the jury room, without either party presence, to answer a question from the jury?
10. Did the PCR judge err in refusing to find that the cumulative effect of eight separate instances of ineffective assistance of counsel established prejudice requiring a new trial?

STATEMENT

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). 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. 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 resisiting 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 Garfied 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]. On October 18, 2013, the State filed a return. On July 1, 2015, Petitioner, through counsel, filed an amended application for post-conviction relief. On January 21, 2016, Petitioner filed, through counsel, a second amended application for post-conviction relief. 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. This petition for writ of certiorari and separately filed brief pursuant to White v. State follow.

STANDARD OF REVIEW

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).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366.

ARGUMENTS

1. The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In the order of dismissal the PCR judge wrote, “This Court affirmatively finds that Applicant did not knowingly and voluntarily waive his right to a direct appeal. This Court further concludes Applicant is entitled to a belated review of his convictions.” (App. p. 1108). Prior to the start of the PCR hearing the State consented to the belated direct appeal. (App. p. 777, lines 1-10; See App. pp. 920-964). The State advised the PCR judge that there was a problem ordering the trial transcript. (App. p. 777, lines 5-7). The record reflects that trial counsel was retained for the trial only. (App. p. 926). It appears from a letter dated February 29, 2012, that the Division of Appellate Defense did not receive an affidavit of indigency required to represent Petitioner on direct appeal. (App. p. 934). The appeal was dismissed for trial counsel’s failure to order the trial transcript. (App. p. 937). The PCR order of dismissal additionally notes that the State consented to the belated appeal. (App. p. 1184). The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to cross-examine the witness about prior testimony that indicated that the assailant was someone other than Petitioner.

Petitioner’s first trial ended with a hung jury. Trial counsel for the re-trial, who was different from counsel in the first trial, had a copy of the transcript of the first trial. (App. p. 862, lines 1-7). During the PCR hearing Petitioner introduced in evidence Applicant’s exhibit #7 which was the transcript of the witness’s testimony from the first trial. (App. pp. 1061-1137).

During the first trial the witness, Linda Wofford, testified that the assailant told her, “I’m having to feed the chickens and pigs and this. I have a little girl. I need to have alimony, I think it was, or child support.” (App. p. 1080, lines 16-19). She also testified that the assailant had a bit of a dialect. (App. p. 1080, line 25). Counsel for the re-trial failed to cross-examine the witness about these statements made during the first trial. (App. pp. 186-200).

In the second amended application for post-conviction relief Petitioner alleged, “Ineffective assistance of counsel – Trial counsel failed to effectively cross examine the victim with her prior testimony.” (App. p. 765; 11d.). During the PCR hearing PCR counsel asked trial counsel, “Do you remember in the first transcript the victim talking about her assailant mentioning chickens and pigs and alimony and child support and a dialect? Do you remember reading that in the transcript?” (App. p. 862, lines 20-23). Trial counsel testified, “I do remember reading those things.” (App. p. 862, line 24). PCR counsel asked trial counsel, “Why didn’t you bring up any of this, these statements in your cross-examination of the victim?” (App. p. 863, lines 11-12). Trial counsel answered, “I don’t believe she testified to it the same way in the second trial. And other than I didn’t – I’m not sure if I had a particular reason other than I – I thought it might show that she just has very few details about her assailant. Showing such inconsistencies may have been more useful. I don’t know.” (App. p. 863, lines 13-18). Trial counsel admitted that to his knowledge Petitioner did not have any chickens or pigs, was not under an order to pay alimony or child support and did not have a dialect. (App. p. 863, lines 19 – p. 864, lines 1-16). Trial counsel admitted that identification was a big issue in the case and the statements by the witness could show that the assailant was someone other than Petitioner. (App. p. 864, lines 13-20).

Petitioner testified at the PCR hearing that he has always lived in South Carolina, at the time of trial he did not own any pigs or chickens and has never been under a court order for alimony or child support. (App. p. 802, lines 1-20). Petitioner testified at his re-trial. If counsel had questioned the witness about her previous testimony, Petitioner could have testified, as he did at the PCR hearing, that he has always lived in South Carolina, at the time of trial he did not own any pigs or chickens and has never been under a court order for alimony or child support. This testimony supports the argument that Petitioner was not the assailant. Trial counsel was ineffective in failing to question the witness about her prior testimony.

In the order of dismissal the PCR judge wrote:

Here, Counsel testified he did not delve into such prior descriptions of the robber the victim had given because he thought not highlighting those inconsistencies might show to the jury the victim had very few details about the robber. He further testified during his cross-examination of the victim he attempted to bring out details about the robber's eyes, as Applicant had some unique features with respect to his eyes which the victim never discussed. Because Counsel wanted to highlight the victim, in fact, knew very little identifying information about the robber, this Court finds Counsel employed a valid trial strategy in not questioning the victim about prior statements, which gave more details about the robber. Accordingly, this Court finds Counsel was not deficient. This allegation must be denied and dismissed with prejudice.

(App. p. 1181). The PCR judge erred.

Trial counsel's answer that, "I don't believe she testified to it the same way in the second trial. And other than I didn't – I'm not sure if I had a particular reason other than I – I thought it might show that she just has very few details about her assailant. Showing such inconsistencies may have been more useful. I don't know." (App. p. 863, lines 13-18), demonstrates that his failure to cross-examine the witness was not part of some trial strategy. As the South Carolina Supreme Court noted with regard to the failure to object to hearsay, "The presumption of adequate representation based on a valid trial strategy disappears when trial counsel

acknowledged there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony.” Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010).

The failure to cross-exam the witness about characteristics that indicated that the assailant was someone other than Petitioner because Petitioner does not have a dialect, at the time of trial did not own chickens and pigs and has never been ordered to pay alimony or child support is certainly not part of a **valid** trial strategy. An attorney’s performance is not immunized from 6th Amendment challenge by simply labeling the actions as “trial strategy.” Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). Trial counsel was ineffective in failing to cross-examine the witness about the prior statements about the assailant that did not match Petitioner. There is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. This is particularly true in light of the fact that the first trial in which the witness made the statements about the assailant ended in a hung jury.

3. The PCR judge erred in finding that trial counsel properly objected to text messages obtained from a cell phone when trial counsel failed to move to redact irrelevant and prejudicial portions of the text message.

Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). The cell phone was found pursuant to the execution of a search warrant of the home of Dawn Shea, where Petitioner would sometimes stay. (App. p. 85, line 13 – p. 86, lines 1-12). The police did not have a search warrant for the contents of the phone. (App. p. 87, lines 1-2). The State argued that Petitioner did not have standing to challenge the search of a house belonging to a third party, that no warrant was needed as the phone was abandoned and that the search warrant for the house covered the contents of the phone. (App. p. 87, lines 15-21). 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 denied the motion to suppress finding that the phone was abandoned. That ruling is challenged in the accompanying belated appeal. Apart from the direct appeal issue, trial counsel failed to move to limit the text messages to those involving flight.

At trial an investigator testified before the jury as to the content of the text messages found on the 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).

In the second amended application for post-conviction relief Petitioner alleged, “Ineffective assistance of trial counsel – Trial counsel failed to properly object to the admissibility of evidence obtained from the cellphone on the grounds of an unconstitutional search and seizure under the 4th amendment and overly prejudicial content with no probative value (Trial transcript pages 493-499).” (App. p. 765, 11b.). During the PCR hearing PCR counsel noted that trial counsel objected to the text messages pursuant to Rule 403 but trial counsel failed to elaborate why the text messages were objectionable pursuant to Rule 403. (App. p. 857, lines 7-11). When asked about the basis for the objection pursuant to Rule 403, trial counsel answered, “Well there is some offensive language. They’re talking about drug sales, and it’s also saying something just – they’re really not anything relevant. They’re – they are prejudicial in – in the way that they’re describing certain things such as – well, they’ll speak for themselves.” (App. p. 857, lines 12-17).

PCR counsel then asked trial counsel, “Mr. Schnee, did you ever ask that those text messages be entered in a redacted version so that any prejudicial or irrelevant information be

removed?” (App. p. 858, lines 1-3). Trial counsel answered, “I’m not sure I did. Probably should have.” (App. p. 858, line 4). PCR counsel asked, “Okay. Any particular reason why not?” (App. p. 858, line 5) Trial counsel answered, “No. There’s no good reason not to have asked that.” (App. p. 858, line 6). Trial counsel then testified that he may not have seen the text messages before trial but admitted that he saw them before they were entered in evidence when he could have asked for redaction of the text messages. (App. p. 858, line 8 – p. 859, lines 1-5). At the close of the PCR hearing PCR counsel argued, “I think the biggest P.C.R. issue involving the text messages is they should have been redacted. They clearly should have been redacted.” (App. p. 896, lines 18-20).

In the order of dismissal the PCR judge wrote, “Based on the foregoing , this Court finds Counsel thoroughly objected to both the cellphone and the text messages being introduced on a number of grounds, and, therefore, Counsel was not deficient. Similarly, this Court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency.” (App. p. 1175). The PCR judge erred.

While trial counsel objected to the admission of the text messages, once the trial judge overruled the objection, trial counsel failed to move to limit the text messages to those that involved flight and failed to move to redact the prejudicial irrelevant portions. Trial counsel admitted that he should have moved to redact and that there was no good reason not to move to redact. Trial counsel was ineffective for failing to move to redact the text messages. There is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.

- 4. The PRC judge erred in refusing to find trial counsel ineffective for not immediately objecting when the State recalled the DNA expert.**

At trial Dr. Gray Amick with the Richland County Sheriff's Department was qualified, without objection by the defense, as an expert in DNA comparison. (App. p. 372, lines 11-13). Dr. Amick testified that neither the witness, Linda Wofford, nor Petitioner could be eliminated as contributors to the mixture of DNA found on a cigarette butt that was found on the grassy area near a driveway on Patricia Drive where the witness testified the assailant got out of her truck. (App. p. 386, lines 3-19). Two other individuals, Blankenbecklor and Tucker were eliminated from contributing to the mixture. (Ap. P. 387, lines 7-10).

According to witness, Linda Woofford, after the assailant got out of her truck, she drove to a Citgo station, parked the truck and went inside to call the police. (App. p. 168, line 22 – p. 169, lines 1-21). When the police arrived at the Citgo station the witness got in the police car and showed them where she had driven the assailant. (App. p. 169, line 22 – p. 170, 171, lines 1-9). While the witness was with the police and her truck was parked at the Citgo station, the truck was vandalized. (App. p. 180, lines 2-24). In opening statement the prosecutor told the jury:

Now, I imagine that you will also hear two other names over the course of this week. That's Charles Blankenbecklor and Isaac Tucker because when Ms. Walker [Wofford] left her captor on Patricia Drive, she drove to a Cirgo station where she called 9-1-1 and waited for authorities to arrive. While she was there, her car was vandalized in a completely separate incident from what happened to her earlier that morning. Charles Blankenbecklor was responsible for that vandalism. He has entered a guilty plea and taken responsibility for his actions that day.

(App. p. 145, lines 13-22).

Dr. Amick testified that he had known DNA samples from the witness, Linda Wofford, the Petitioner, as well as Charles Blankenbecklor and Isaac Tucker. (App. p. 381, lines 7-17). Dr. Amick testified that he tested several DNA swabs, in addition to the cigarette butt. He tested a swab from the interior passenger door of the Toyota truck. (App. p. 381, lines 22-24). All four known samples were eliminated as contributing to this sample. (App. p. 383, lines 13-16). He

tested a swab from the exterior passenger door of the Toyota truck and that DNA profile was too weak to interpret. (App. p. 383, lines 17-25). He tested, item #4, a swab from the passenger door latch on the window, and that DNA profile was also too weak to interpret. (App. p. 384, lines 7-12). He tested item #5, swab from the center console on the passenger side, and got no DNA. (App. p. 384, lines 13-15). He tested a swab from a cigarette disposal container but that DNA profile was too weak to interpret. (App. p. 384, lines 16-20). He tested items #7 and #8, swabs from the exterior storm door handle from the house and the exterior point of the entry doorknob, and both DNA profiles were too weak to interpret. (App. p. 384, lines 21-25). Finally, he tested a swab from the bedroom door handle and that DNA profile matched Linda Wofford. (App. p. 385, lines 2-22). After the defense cross-examined Dr. Amick, the prosecution conducted re-direct. (App. pp. 408 – 413). The State then call its next witness.

Later, the State recalled Dr. Amick and trial counsel did not immediately object. (App. p. 555, line 24 – p. 556, lines 1-5). The prosecutor asked, “Doctor, I’ll be brief. I just want to clarify some things. In cross-examination yesterday we referred to State’s Exhibit Number 72. He referred to swabs three, four, six, seven and eight in this case and you’ve testified earlier they were too weak to interpret?” (App. p. 556, lines 7-11). The doctor agreed. The prosecutor then asked, “But then he went through and asked you specific things about definite alleles in those cases?” (App. p. 556, lines 13-14). The doctor agreed. The prosecutor asked, “At my request did you go back and look at – even though they’re too weak to reliably interpret, were they enough for you to be able to compare them to Blankenbecklor and Tucker?” (App. p. 556, lines 16-18). Trial counsel finally objected. (App. p. 556, lines 19-20). The judge properly sustained the objection and did not allow the State to recall the witness.

In the second amended application for post-conviction relief Petitioner alleged that trial counsel was ineffective for the delayed objection to the re-called testimony of Dr. Gray Amick. (App. p. 764; 11a. iv). During the PCR hearing PCR counsel asked trial counsel, “Why didn’t you object when Dr. Amick was first recalled to the stand?” (App. p. 840, lines 23-24). Trial counsel answered, “Honestly, I had no idea what they were trying to do. I – and that’s actually – I – I admit I should have immediately asked for a mistrial, and I should have asked actually to admonish the solicitors and hold them in contempt for prosecutorial misconduct. Based on that question she even admits that she had the state investigate things during a nightly recess of trial and did not provide me with any documentation. That’s a clear violation of Brady and Rule 5.” (App. p. 840, line 25 – p. 841, lines 1-8).

At the close of the PCR hearing PCR counsel argued:

Mr. Schnee testified that there was D.N.A. on the cigarette. Mr. Williams admitted being in possession of that cigarette at some point in time. So they weren’t challenging that. He testified that his whole issue that he was challenging regarding the D.N.A. had to do with this other third-party D.N.A., may have been involved

And in this section on these pages the State recalls this witness, which they did not have authority to do. Mr. Schnee doesn’t know what he’s going to testify to yet doesn’t object or ask for a hearing outside the presence of the jury to see what it is.

He just let the State start asking these questions. And then the jury becomes aware that there’s been some new test done regarding this third individual who Mr. Schnee is trying to put all of the blame on.

The jury never hears the answer to the question. The only logical reference is that its favorable to the state because the state called the witness.

We find that was ineffective. I believe that was ineffective because – for many reasons but specifically because it was prejudicial and it allowed the jury to speculate on what the results would be. That completely went to Mr. Schnee’s defense, which was putting this identification, putting this blame, on a third party. So we believe that was improper and ineffective.

(App. p. 891, line 22 – p. 892, lines 1-22).

In the order of dismissal the PCR judge wrote:

Applicant further contends Counsel was ineffective for failing to immediately object when the State re-called Dr. Gray Amick as a witness. Rule 611(d) provides: “A witness may be re-examined as to the same matters to which he testified only in the discretion of the court . . . After the examination of the witness has been concluded by all parties to the action, that witness may be recalled only in the discretion of the court.” Rule 611(d), SCRE. Here, the State re-called Dr. Amick during the presentation of its case. When re-called the State questioned Dr. Amick regarding specific DNA swabs, which Counsel had questioned him about during cross-examination. Trial Tr. 558. After Dr. Amick was asked whether he could compare these DNA swabs to two other individuals, after a late request to test the DNA by the State, Counsel immediately objected. Trial Tr. 558. The trial court sent the jury out of the courtroom, and Counsel indicated he objected to this line of testimony under both *Brady* and Rule 5, as well as Rule 611(d). Trial Tr. 558. Although Counsel’s initial objection was under *Brady* and Rule 5, Counsel indicated at the evidentiary hearing he was unsure exactly what information the State was attempting to elicit when it recalled Dr. Amick, which explained his delayed objection under Rule

611(d). Based on the foregoing, this Court finds Counsel’s actions were reasonable under the circumstances, and Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Following Counsel’s objection to the State recalling Dr. Amick, the trial court sustained his objection, and Dr. Amick was unable to testify any further. Moreover, Dr. Amick was only able to testify as to matters Counsel raised during cross-examination, specifically that certain DNA swabs were too weak to interpret and that Counsel asked about specific alleles in those samples. Trial Tr. 558. Indeed, Dr. Amick was unable to testify any further due to Counsel’s immediate objection following the State’s question as to whether or not Dr. Amick had compared those DNA swabs to any other individuals. Trial Tr. 558. As Dr. Amick merely reiterated points Counsel raised during his initial cross-examination of Dr. Amick, it is unlikely the result of the proceeding would have been different. Therefore, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. Accordingly, this allegation must be denied and dismissed.

The PCR judge erred. First, the State did not ask the doctor whether he could compare these DNA swabs to two other individuals. Instead, the State asked, “At my request did you go back and look at – even though they’re too weak to reliably interpret, were they enough for you to be able to compare them to Blankenbecklor and Tucker?” (App. p. 556, lines 16-18). The jury heard this before trial counsel finally objected and the jury was excused. (App. p. 556, lines 19-24). Second, because Rule 611(d), SCRE, only allows a party to recall a witness in the discretion of the court and because trial counsel did not know what the witness was going to testify upon being recalled, trial counsel should have objected immediately. These are reasons trial counsel should have objected prior to the testimony not justification for the failure to immediately object. Importantly, the only DNA evidence matching Petitioner was found on cigarette butt found on the ground. Petitioner admitted that the witness gave him one of her cigarettes. (App. p. 593, lines 5-13). His DNA was not found in the victim’s car or at her house. Trial counsel was deficient. Petitioner was prejudiced by the deficient performance. As noted by PCR counsel, the only logical inference for the jury to draw was that the re-test eliminated Blankenbecklor and Tucker as contributing to the DNA samples taken from the victim’s home and truck.

5. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the testimony of an employee of the South Carolina Department of Corrections who testified as to the date that Petitioner was released from prison.

In a pre-trial motion trial counsel moved to suppress statements made by the witness that the assailant advised her that he had recently been released from prison. (App. p. 42, line 15 – p. 43, 44, line 1). The prosecutor argued that the statement was an identifying factor in the case because she intended to introduce evidence at trial that Petitioner had been released from prison ten months earlier. (App. p. 42, line 22 – p. 43, lines 1-5). Trial counsel argued that it was not

an identifying factor because hundreds of people are released from prison every month. (App. p. 43, lines 9-12). Additionally, trial counsel argued, “It’s clearly highly prejudicial with very little probative value.” (App. p. 43, lines 23-24). The trial judge ruled, “All right. Well, I’m going to admit it on the same basis as last time.” (App. p. 43, line 25 – p. 44, line 1). According to the prosecutor, during the first trial the judge ruled, “. . . that it would be an identifying factor.” (App. p. 42, lines 22-23). It is unclear if the ruling went to both the evidence that Petitioner had recently been released from prison as well as the statement attributed to the assailant that he had recently been released from prison.

At trial and over objection, the prosecutor, improperly leading her witness, asked, “Did he tell you something about being down and out because he had just gotten out of prison ten months before that?” (App. p. 168, lines 1-12). The witness answered, “Yes.” (App. p. 168, line 13). The last witness called by the State was Michael Stobbe with the South Carolina Department of Corrections [SCDC]. The prosecutor, without objection, asked Mr. Stobbe if Petitioner was ever an inmate at the department of corrections. (App. p. 567, lines 24-25). Mr. Stobbe answered, “Yes.” (App. p. 568, line 1). The prosecutor, again without objection, asked about his release date. (App. p. 568, line 2). Mr. Stobbe answered, “He had three.” (App. p. 568, line 3). He then clarified that Petitioner’s last release date from the department of corrections was July 1, 2008. The incident took place almost nine months later on March 22, 2009.

In the second amended application for post-conviction relief Petitioner alleged that counsel was ineffective, “Trial transcript pages 569 – Failed to renew pre-trial objection regarding evidence that Adonis Williams [Petitioner] had been out of prison 10 months – and

failed to object regarding relevance as the actual evidence showed that Adonis Williams had actually been out of prison for 8 months;" (App. p. 764; 11a. v.).

During the PCR hearing PCR counsel asked trial counsel, "On this page, 569, that is when the state called a S.C.D.C. employee to testify as to Mr. – when Mr. Williams had been released from prison, correct?" (App. p. 843, lines 14-16). Trial counsel agreed. PCR counsel then asked, "Why didn't you object when this witness was called?" (App. p. 843, line 18). Trial counsel answered, "I had already objected during the trial to the testimony during the actual witnesses. At this point listing another objection here that was going to be overruled, I felt the issue was already preserved at that point. And I also didn't want to raise anything to the jury that I – thought I was trying to hide it at that point since they already heard it." (App. p. 843, lines 21-25). Trial counsel was incorrect. The objection earlier to the witness testifying that the assailant told her he had been released from prison ten months ago did not preserve the objection to Mr. Stobbe testifying that Petitioner had been released from prison almost nine months before the incident. Prior to Mr. Stobbe's testimony, the jury had not heard that Petitioner had been released from prison almost nine months prior to the incident.

In the order of dismissal the PCR judge wrote:

Here, Counsel testified he did not want to highlight the fact Applicant had, in fact, been in prison shortly prior to the time in which these crimes were committed. He elaborated at this point in the trial, the jury had already heard testimony the robber indicated he had been released from prison shortly before committing these crimes. This Court finds Counsel, therefore, employed a valid strategic decision in choosing not to object and, therefore, finds counsel was not deficient in this regard.

This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. The victim testified the robber indicated he had been out of prison for ten months before he committed these crimes, whereas Mr. Stobbe indicated Applicant had been released July 1, 2008 – approximately eight-and-a-half to nine months prior to the incident date. *Compare* Trial Tr. 170 and Trial Tr. 570. Because the jury was, indeed, presented with this inconsistency,

there is no indication the result would have been different [sic.] had Counsel objected to this line of testimony. Accordingly, this allegation must be denied and dismissed.

(App. p. 1169). The PCR judge erred.

Trial counsel's erroneous belief that the objection to the witness's testimony regarding the statement made by the assailant that he had been released from prison ten months prior preserved the objection to Mr. Stobbe's testimony negates the valid trial strategy finding by the PCR judge, especially in light of the fact that, contrary to trial counsel's testimony, the jury had not yet heard that Petitioner was released from prison nine months prior to the incident. The prejudice does not result from the one-month inconsistency but rather from the fact that the testimony from Mr. Stobbe was inadmissible as an improper detail, the release date, about a prior conviction that should have been objected to. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). Although the State admitted in evidence, without objection, two indictments for burglary second degree and told the jury that Petitioner was convicted of these two burglaries in 2000 and 2004, prior to Mr. Stobbe's testimony, the jury did not know that Petitioner had been released from prison in July of 2008, nine months prior to the incident.

6. The PCR judge erred in refusing to find trial counsel ineffective for not objecting when the prosecutor, through cross-examination, asserted a fact not in evidence.

At trial Petitioner testified that at the time of the incident he sold drugs in the Leesburg Road area. (App. pp. 585-588). He testified that he would not keep drugs on his person but instead would store them in bags that looked like litter or in the little gray meter boxes on the sides of houses. (App. p. 586, line 17 – p. 587, 588, lines 1-4). Petitioner admitted that he stored drugs in the meter box at the victim's house, although he did not know it was her house at the time. (App. p. 588, lines 5-10). Linda Wofford testified that after the robbery she discovered

that the box on the outside of her house that held the telephone equipment was hanging off the wall and the wires were cut. (App. p. 173, line 1 – p. 174, lines 1-13). Investigator Harold Bouknight with the Richland County Sheriff's Department was qualified, without objection, as an expert in latent print comparison. (App. p. 318, line 22 – p. 319, lines 1-7). Investigator Bouknight testified that Petitioner's print was found on Linda Wofford's telephone box on the outside of her house. (App. p. 325, lines 11-12).

During the cross-examination of Petitioner the following took place:

Q. Your testimony here today on this occasion was that you put drugs in that box approximately a week or two prior to that?

A. Approximately.

Q. And were you aware that in the eight days prior to the 22nd it rained five out of six of those eight days?

A. No, ma'am.

Q. That it rained on the 14th?

A. No. ma'am.

Q. The 15th?

A. No. ma'am.

Q. The 16th?

A. No. ma'am.

Q. The 17th and 19th?

A. No. ma'am.

(App. p. 651, line 19 – p. 652, lines 1-8). Trial counsel failed to object to this line of questioning.

In the second amended application for post-conviction relief Petitioner alleged, "Trial transcript pages 653-654 – Missed objection when Solicitor essentially offered testimony

regarding the weather when there was no evidence offered on this topic;" (App. p. 764, 11a. vii). When asked why he did not object to this line of questioning trial counsel answered, "Frankly, I didn't care." (App. p. 847, line 22). PCR counsel later asked trial counsel, "All right. Do you understand what the solicitor was trying to get at when discussing the weather?" (App. p. 848 lines 13-14). Trial counsel answered, "If she's trying to claim that the fingerprints are being washed off, there's no testimony that they were – they would have been washed off or wouldn't have been washed off or where the telephone box – or if it was exposed to weather. There was nothing about that. The telephone box was quite dirty, so no matter how much it rained it still was dirty. So clearly that wouldn't have washed any fingerprints off." (App. p. 848, lines 15-22). When asked if he argued that point in closing trial counsel answered, "I don't know if I did or I didn't. I don't remember." (App. p. 848, lines 23-24). The record reflects that trial counsel did not argue that the dirty box reveals that rain would not have washed finger prints away but instead challenged the failure to test the telephone box for DNA. (App. p. 677, lines 13-24).

At the close of the PCR hearing PCR counsel argued, "I think it's clear that the solicitor here testified by asking Mr. Williams if he was aware that in the eight days before the 22nd that it rained five out of eight days. I think that's improper. The solicitor can't testify. That information should have been admitted into evidence by the state through the state climatologist office or something. Mr. Schnee should have objected to that information." (Tr. p. 894, line 20 – p. 895, lines 1-2).

In the order of dismissal the PCR judge wrote:

Here, Counsel testified the fact that it may have rained approximately three days prior to this robbery had no relevance to the trial, and he did not feel it was worthy of an objection at the time. He further elaborated he was unsure what information the State was attempting to elicit by this line of questioning, and the information sought was certainly not elicited. Based on Counsel's strategic

decision not to object to this line of testimony, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. Furthermore, because the State was unable to elicit any damaging information to Applicant from this line of testimony, Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. This allegation must be denied and dismissed with prejudice.

(App. p. 1170). The PCR judge erred. The failure to recognize the damaging nature of the cross-examination about rain, when there was no evidence offered by the State that it had in fact rained in the days prior to the robbery is not a valid trial strategy. It is well settled that a prosecutor's closing argument must stay within the evidence in the record and the reasonable inferences to be drawn from that evidence. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). As there was no evidence about rain prior to the incident, the prosecutor could not have argued this in closing argument and should not have been allowed to question Petitioner in that regard.

Petitioner was prejudiced by the improper cross-examination because it implied that Petitioner's finger print could not have been placed on the telephone box earlier when Petitioner stored his drugs, as testified by Petitioner. The jury was then left to believe that the finger print must have been left on the day of the burglary. Trial counsel was deficient for not objecting to the questioning about whether it rained the days before the burglary, a fact not in evidence. The questioning was damaging because the timing of when the fingerprints were placed on the box was critical to Petitioner's defense.

7. The PCR judge erred in refusing to find trial counsel ineffective for not immediately objecting when the prosecutor asked Petitioner about the tattoo on his arm.

During cross examination the following exchange took place between the prosecutor and Petitioner:

Q: What's tattooed on your arm?

A: I mean, this got nothing to do with this, I mean, what's tattooed on my armor what my nickname is.

Q: What's tattooed on your arm?

A: May I speak to my lawyer right quick?

Q: No. You have to answer my question.

A: It says head bussa.

Q: Head bus? How do you spell that?

A: H-E-A-D B-U-S-S-A.

Q: Head bussa? Are you familiar with the urban dictionary?

(App. p. 652, lines 2-11). Trial counsel objected, finally, to the urban dictionary reference.

(App. p. 650, lines 12-13). The trial judge sent the jury out and asked the prosecutor, "What is this all about? The tattoo and the . . . Why are we going into this?" (App. p. 650, lines 18-19).

The prosecutor answered, "Your Honor, I think under some of the cases as far as what it implicates as far as his tendency . . . I'll move on, Your Honor. I won't mention the tattoo anymore." (App. p. 650, lines 20-23). Trial counsel did not move to strike the testimony or move for a mistrial.

At trial the witness described the suspect as, "A masked man with a bandana. It was dark blue with white on it. He had a toboggan type hat that had a lot of play in the top; it was rather large. He had black pants on. He had a beige coat on. No gloves. The coat had a green diamond, I guess a logo of some type, on the back of the jacket." (App. p. 152, line 22 – p. 153, lines 1-2). The witness testified about observing a chicken pox scar near the subject's left eye, but did not testify about observing a tattoo on the subject's arm. (App. p. 159, lines 4-21).

In the second amended application for post-conviction relief Petitioner alleged, "Trial transcript page 652, lines 1-25 – Missed objection to Solicitor's question as calling for overly prejudicial and irrelevant testimony with no probative value – trial counsel should have

requested that testimony be stricken from the record and moved for a mistrial.” (App. p. 764). When asked about the relevance of the tattoo questioning during the PCR hearing, trial counsel testified, “Well, the – the case involves my client allegedly sitting in a car with this woman for several minutes as they were driving multiple places. Any kind of details about physical appearance would have been relevant. And in this particular case the victim was – had very few details of anything.” (App. p. 846, lines 5-10). While the failure to observe the tattoo may have been relevant if the suspect’s arms were bare, in this case the witness described the suspect as wearing a jacket. The questioning was not relevant because the witness would not have been able to observe a tattoo on the arm. The tattoo itself, “Head Bussa,” is highly prejudicial. Trial counsel was ineffective for failing to immediately object before Petitioner reluctantly answered the prosecutor’s question.

In the order of dismissal the PCR judge wrote:

Applicant further alleges Counsel was ineffective for failing to object when the State questioned Applicant about his tattoo. *See* Trial Tr. 652. Specifically, Applicant contends Counsel should have objected to this line of testimony in that it was overly prejudicial and had no probative value. Furthermore, Applicant contends Counsel should have moved to strike this line of testimony and should have moved for a mistrial.

(App. p. 1092). The PCR judge additionally wrote:

Counsel testified when the State began eliciting testimony about Applicant’s tattoo, he was unsure exactly for what purpose the State intended to introduce this testimony, as the victim had not testified to the robber having any tattoos. He did, however, testify he immediately objected when the State attempted to elicit the meaning of this tattoo based on “Urban Dictionary.” Because counsel did, in fact, object when the purpose of this line of questioning became apparent, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice. The victim never testified that the robber had any tattoos. In fact, the victim’s description of the robber revealed very little details about the robber, except for a pock mark of the left side of his face. Counsel also testified the

absence of tattoos, rather, were relevant. Based on the foregoing, Applicant has failed to establish any prejudice, and this allegation must be denied and dismissed.

(App. pp. 1092-1093). The PCR judge erred.

Trial counsel was ineffective for not immediately objecting when the prosecutor began questioning Petitioner about his tattoo. The questioning was irrelevant and the tattoo reading, “Head Bussa,” is highly prejudicial. The Urban Dictionary is not necessary to know that “Head Bussa” is slang for head buster or someone who busts heads or fights. The tattoo indicates a violent tendency. As the prosecutor stated, “Your Honor, I think under some of the cases as far as what it implicates as far as his tendency . . .” The tattoo in this case constitutes the type of propensity evidence prohibited by Rule 404(b), SCRE. As Petitioner was charged with violent crimes, trial counsel’s failure to object was prejudicial.

In State v. Day, 341 S.C. 410, 422, 535 S.E.2d 431, 437–38 (2000), the South Carolina Supreme Court wrote, “Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant. See generally Stevenson v. Texas, 963 S.W.2d 801 (Tex.App.1998) (holding defendant's “bitch killa” tattoo was admissible evidence of gang membership). In the instant case, the State did not use Day's tattoo or nickname for any purpose other than to attack his character.” As in Day the prosecutor in the present case did not use the tattoo for any purpose other than to attack Petitioner’s character. Trial counsel was ineffective in failing to object to the questioning about the tattoo.

8. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object when in closing argument the prosecutor referenced the terrorist attacks of September 11th.**

In closing argument the prosecutor told the jury, “In the wake of the anniversary of one of the largest crimes committed on U.S. soil, we should be thanking law enforcement for what they do to protect us. Heroes do not always wear capes. They wear badges, too. Please keep that in mind in your deliberations.” (App. p. 690, lines 18-22). Trial counsel did not object. In the second amended application for post-conviction relief Petitioner alleged ineffective assistance of counsel, “Trial transcript page 692, lines 3-22 – Failed to object when the Solicitor made an improperly prejudicial appeal to the jury.” (App. p.765; 11a. xi.).

During the PCR hearing PCR counsel noted the above portion of the State’s closing argument and then asked trial counsel, “Mr. Schnee, this trial took place in September of the year 2011, correct?” (App. p. 852, lines 15-16). Trial counsel answered, “Yes.” The following then took place between PCR counsel and trial counsel:

Q. Why didn’t you object?

A. Don’t have a good reason for that.

Q. Does it appear that that was done to invoke passion in the jury?

A. Oh. Obviously.

Q. And to add credibility to law enforcement witnesses based on that unrelated incident, correct?

A. Yes.

Q. Should you have objected to that?

A. I should have.

(App. p. 852, line 20 – p. 853, lines 1-4).

At the close of the PCR hearing PCR counsel argued:

Eleven I do think just is worthy of another statement. For the solicitor in her closing argument to reference September 11th, the trial is September 11th – and state that because of the we should be thanking law enforcement for what they do to protect us, hearers [sic.] don’t always wear capes, they wear badges too, please

keep that in mind during your deliberations, I think that's highly prejudicial, highly inflammatory. It was used simply to bolster the credibility of law enforcement and guilt the jurors into siding with them.

There's case law that says that the state should not make comments so in – effect the trial with its fairness to make the result of the conviction a denial of due process. They shouldn't make – they should carefully tailor their closings to not appeal to the personal bias of the juror nor calculate it to arise passion or prejudice to ask questions - the state. I just think that's a clearly prejudicial statement and should have been objected to.

(App. p. 895, line 9 – p. 896, lines 1-2).

In the order of dismissal the PCR judge wrote:

Applicant contends Counsel was ineffective for failing to object when the solicitor made the following comments, "In the wake of the anniversary of one of the largest crimes committed on U.S. soil, we should be thanking law enforcement for what they do to protect us. Heroes do not always wear capes. They wear badges, too. Please keep that in mind in your deliberations." Trial Tr. p. 692. Counsel's strategy at trial was to attack the credibility of law enforcement and question the manner in which they investigated this case. As a result, the solicitor was fully permitted to comment on the credibility of law enforcement. *See State v. Ellenberg*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant."); *see also State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (finding solicitor's closing argument comments were a ninvited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense). Based on the foregoing, this Court finds Applicant has failed to establish Counsel was deficient.

Even assuming Counsel should have objected to these comments, Applicant has failed to establish any resulting prejudice from this alleged deficiency. At multiple points throughout its final charge to the jury, the trial court instructed the jury to only consider the evidence and testimony presented throughout the trial. In particular, the trial court instructed the jury: "You are to decide this case according to the testimony that you've heard from the lips of sworn witnesses along with other evidence introduced." Trial Tr. 706. The jury was clearly instructed not to take into account any statements made by the Sate or by Counsel during their arguments, therefore, it is unlikely the result of the proceeding would have been different had counsel objected. Accordingly, this allegation must be denied and dismissed with prejudice.

(App. pp. 1173-1174). The PCR judge erred. While the prosecutor could properly comment on the credibility of law enforcement, referencing the terrorist attack of September 11th was improper. Trial counsel admitted he should have objected.

In Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), the South Carolina Supreme Court granted a new trial based on the fact that trial counsel failed to object when the prosecutor misstated the law in closing argument. In Simmons this Court discussed when improper comments made by a solicitor required a new trial writing:

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Johnson v. State, *supra*; 3 *Wharton's Criminal Procedure* § 353 (13th ed. 1991) (question is whether comment was sufficiently prejudicial or harmless). On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Johnson v. State, *supra* (a solicitor's improper comments may be cured by the judge's instructions to the jury); State v. Copeland, *supra*; United States v. Wilson, 135 F.3d 291 (4th Cir.1998). The Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Johnson v. State, *supra*; State v. Copeland, *supra*. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

331 S.C. at 338, 503 S.E.2d at 166–67.

In Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), this Court granted a new sentencing hearing based on the fact that trial counsel failed to object when the prosecutor characterized Vasquez, a Muslim, as a domestic terrorist and correlated his acts with the terrorist attacks of September 11th. This Court wrote:

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, “[s]olicitors are bound to rules of fairness in their closing arguments,” as we have explained:

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

388 S.C. at 458, 698 S.E.2d at 566.

The reference to September 11th in closing argument was calculated to appeal to arouse the passions and prejudices of the jury. Trial counsel was ineffective in failing to object to the improper closing argument. Petitioner was prejudiced by the deficient performance, as in Simmons and Vasquez.

9. The PCR judge erred in refusing to find trial counsel ineffective in consenting to allow the judge to enter the jury room, without either party present, to answer a question from the jury.

During deliberations the jury sent a note to the judge asking for a copy of the jury instructions. The judge stated, “I received a note from the jury asking if they could get a copy of the instructions I gave them during the charge. I reviewed the note with the attorneys. It was decided that I would go into the jury room and advise the jury that I could not give them a copy of the jury instructions but if they wanted me to -- hear the charge or any portion of the charge again, I would be happy to do so. So we’ll wait to see what the jury wants to do about it, if anything. Thank you. It’s with the consent of all counsel that I advised the jury in the manner that I did.” (App. p. 708, line 23 – p. 709, lines 1-7).

In the second amended application for post-conviction relief Petitioner alleged trial counsel was ineffective, “Trial transcript page 710-711 – Failed to object when the Judge talked to the jurors in the jury room without either party present.” (App. p. 765; 11a. xii.). PCR counsel asked trial counsel, “Did you consent to allow the judge to go back into the jury chambers and talk with them?” (App. p. 853, lines 18-19). Trial counsel answered, “Yes.” (App. p. 853, line 20). When asked why he consented, trial counsel answered:

They had a very simple question, and the answer was going to take less than ten seconds for the judge to answer. In order to accomplish that if the jury was brought in my client would have to be brought back up. I’d obviously want all of his family brought in, you know, back inside the courtroom. It would have caused a substantial delay, at which point the jury is being told you’re not allowed to deliberate. I would rather they get a very fast answer and then come back with, no, we want to hear instructions, or, no, we don’t as opposed to sit there and decide that it wasn’t an important question and then not make up their minds appropriately.

(App. p. 853, line 22 – p. 854, lines 1-11). PCR counsel then asked, “You didn’t think Mr. Williams should be present to hear what the judge told the jury?” (App. p. 854, lines 12-13). Trial counsel answered, “No one was present for what the judge told the jury, and I – I certainly don’t believe the judge said anything inappropriate.” (App. p. 854, lines 14-16).

In the order of dismissal the PCR judge wrote:

Finally, Applicant contends Counsel was ineffective for failing to object when the trial court talked to the jurors in the jury room without either party present. This Court finds Applicant has failed to establish Counsel was ineffective. Counsel testified he consented to allowing the trial court to answer the jury’s very brief question, and neither party was present in the jury room when the trial court spoke with the jury. Furthermore, he testified had he objected, this would have caused a significant delay. Accordingly, this Court finds Counsel’s actions were reasonable under the circumstances. Moreover, there is no indication the trial court did anything improper in speaking with the jury privately, so Applicant has failed to establish any prejudice. This allegation must be denied and dismissed with prejudice.

(App. p. 1174). The PCR judge erred.

In State v. Elmore, 279 S.C. 417, 421–22, 308 S.E.2d 781, 784–85 (1983), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the South Carolina Supreme Court wrote:

Appellant's final contention of error as to the guilt phase of the trial concerns the trial judge's entering the jury room, accompanied by counsel from both the state and defense, to answer a question of the jury. Although we find no actual prejudice in this instance, we hold this conduct to be reversible error regardless of the presence of counsel. We caution the bench that this procedure is highly improper and also runs counter to the requirement that in a death case the defendant be present at all stages of trial. State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973); State v. James, 116 S.C. 243, 107 S.E. 907 (1921).

Petitioner had a right to be present at all stages of the trial. United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Petitioner had a right to hear the judge's response. Trial counsel was ineffective in consenting to allow the judge to enter the jury room without either party present to answer the jury's question.

10. The PCR judge erred in refusing to find that the cumulative effect of nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial.

In the second amended application for post-conviction relief Petitioner alleges, "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, 11h.). 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 recognized 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. The cumulative effect of the eight separate instances of deficient performance on the part of trial counsel establishes prejudice requiring a new trial.

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).

Petitioner does not need to rely on a cumulative error analysis to demonstrate deficient performance as discussed by the Maryland Court of Special Appeals in Cirincione. Petitioner demonstrated and the South Carolina Court of Appeals found three separate instances of deficient performance on the part of trial counsel. As argued in issue one, Petitioner was prejudiced by each of those instances of deficient performance. As an alternative theory, however, if this Court finds that prejudice did not result from the three instances of deficient performance individually, this Court should find that the cumulative effect of the deficient performances 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 action¹ (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

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.

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 three separate instances of deficient performance results in prejudice requiring a new trial.

CONCLUSION

Based on the following arguments, this Court should grant the petition for writ of certiorari in order to allow further briefing on each of the presented issues.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland CountyHonorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

PETITIONER

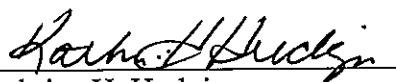
V.

STATE OF SOUTH CAROLINA,

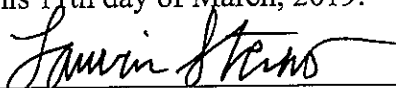
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, and Lindsey McCallister, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Adonis K. Williams, #274626, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 11th day of March, 2019.


Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 11th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

RECEIVED
MAR 11 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-001688

ADONIS WILLIAMS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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¹ 263 S.C. 110, 208 S.E.2d 35 (1974)

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IX.	The PCR judge properly found trial counsel was not ineffective in consenting to allow the trial judge to speak with jurors, in the jury room, without either party present, because the question was not improper and there is no evidence Petitioner was prejudiced by the trial judge’s actions.	35
X.	The PCR judge properly dismissed Petitioner’s claims regarding cumulative error because it is a doctrine not recognized in South Carolina. Further, any alleged errors were harmless given the substantial evidence of Petitioner’s guilt.	36
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ISSUES PRESENTED

- I. The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State.
- II. The PCR judge properly found trial counsel was not ineffective in failing to cross-examine the witness about prior testimony which occurred during Petitioner's first trial because such decision was valid trial strategy.
- III. The PCR judge properly found trial counsel was not deficient, nor was Petitioner prejudiced, by trial counsel's objections to the admission of text messages from his cell phone because trial counsel made numerous objections to the admission of the text messages, on a number of different grounds, but those objections were all overruled. Further, Petitioner abandoned his cell phone at his girlfriend's residence and forfeited his right to object to the contents of the phone.
- IV. The PCR judge properly found trial counsel was not ineffective in immediately objecting to the State recalling the DNA expert to testify because trial counsel objected as soon as he discerned the purpose of the expert's additional testimony and Petitioner was not prejudiced by the limited statements.
- V. The PCR judge properly found trial counsel did not err in failing to renew his pretrial objection to the testimony of an SCDC employee regarding Petitioner's release date from prison because trial counsel purposely avoided drawing attention to this fact because prior testimony indicated the robber had been released from prison shortly before the events of the case.
- VI. The PCR judge properly found trial counsel was not ineffective in failing to object to the State's reference to weather on cross-examination because the State did not elicit any damaging information at trial and trial counsel did not object due to trial strategy.
- VII. The PCR judge properly refused to find trial counsel ineffective for "not immediately objecting when the prosecutor asked Petitioner about the tattoo on his arm" because trial counsel objected immediately after the State questioned Petitioner about the meaning of his tattoos and there was no evidence the robber possessed tattoos.
- VIII. The PCR judge properly found trial counsel was not ineffective in failing to object to the State's comments in its closing regarding law enforcement because said comments were an invited response based on counsel's repeated critiques of law enforcement.
- IX. The PCR judge properly found trial counsel was not ineffective in consenting to allow the trial judge to speak with jurors, in the jury

room, without either party present, because the question was not improper and there is no evidence Petitioner was prejudiced by the trial judge's actions.

- X. The PCR judge properly dismissed Petitioner's claims regarding cumulative error because it is a doctrine not recognized in South Carolina. Further, any alleged errors were harmless given the substantial evidence of Petitioner's guilt.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its July 2009 term, the Richland County Grand Jury indicted Petitioner for kidnapping (2009-GS-40-2697), armed robbery (2009-GS-40-2698), and first-degree burglary (2009-GS-40-2701). Mark E. Schnee, Esquire, represented Petitioner on these charges. On September 6–9, 2011, Petitioner proceeded to a jury trial before the Honorable James R. Barber, III.² Following deliberations, the jury convicted Petitioner as indicted. Judge Barber sentenced him to a term of imprisonment of twenty-five years for kidnapping, twenty-five years for armed robbery, and twenty-five years for first-degree burglary. The sentences were to run concurrently.

Petitioner filed a timely notice of appeal. By written Order dated March 30, 2012, the South Carolina Court of Appeals dismissed Petitioner's appeal for failing to timely order the transcript as required by Rule 207, SCACR. The Remittitur was issued on January 24, 2013.

In his application for post-conviction relief, Petitioner alleged he was held, unlawfully, in custody for the following reasons:

1. "No DNA in house or truck;"
 - a. "They had DNA but its [sic] wasn't mine. They couldn't find a match."
2. "No video of me at bank on camera;"
 - a. "Video from teller at bank."
3. "Video at Citgo gas station shows a white male doing what police n

² Initially, on February 8–11, 2010, Petitioner proceeded to a jury trial before the Honorable Clifton Newman, where he was represented by Byron E. Gipson, Esquire. That trial proceeded on the charges of first-degree burglary, armed robbery, and kidnapping, as well as additional charges of resisting arrest (2009-GS-40-2740) and assault on an officer while resisting arrest (2009-GS-40-2741). Following the presentation of all evidence, the jury convicted Petitioner of resisting arrest and acquitted Petitioner of assault on an officer while resisting arrest. Judge Newman sentenced Petitioner to a term of imprisonment of one year for resisting arrest. The jury could not reach a verdict on the charges of first-degree burglary, armed robbery, and kidnapping, so Judge Newman declared a mistrial with respect to those charges.

[sic] victim accused me of. She accused me in impact statement, police in impact statement, police in preliminary hearing.”

a. “Video from gas station (Citgo).”

In his amended application for post-conviction relief, Petitioner raised the following grounds:

1. “Ineffective assistance of counsel – Trial counsel failed to properly object and/or request a mistrial to preserve the record for appellate review on several occasions, including specifically:”
 - a. “Trial transcript page 163, line 5–16 – Statement was sufficiently prejudicial that counsel should have requested a mistrial;”
 - b. “Trial transcript page 170, lines 1–16 – Missed objection to leading and failed to appropriately renew pre-trial objection contemporaneously;”
 - c. “Trial transcript page 389, lines 16–25 – Missed objection to bolstering and hearsay;”
 - d. “Trial transcript pages 558–559 – Delayed objection to recalled testimony of Dr. Gray Amick;”
 - e. “Trial Transcript pages 569 – Failed to renew pre-trial objection regarding evidence that [Petitioner] had been out of prison 10 months – and failed to object regarding relevance as the actual evidence showed that [Petitioner] had been out of prison 8 months;”
 - f. “Trial transcript page 652, lines 1–25 – Missed objection to Solicitor’s question as calling for overly prejudicial and irrelevant testimony with no probative value – trial counsel should have requested that testimony be stricken from the record and requested a mistrial;”
 - g. “Trial transcript pages 653–654 – Missed objection when Solicitor essentially offered testimony regarding the weather when there was no evidence offered on this topic;”
 - h. “Trial transcript page 669, line 4 – Failed to object when the Solicitor misstated the facts in evidence;”
 - i. “Trial transcript page 692, lines 18–22 – Failed to object when the Solicitor made an improperly prejudicial appeal to the jury.”
2. “Ineffective assistance of trial counsel – Trial counsel failed to properly object to the admissibility of evidence obtained from the cell phone on the grounds of an unconstitutional search and seizure under the 4th amendment and overly prejudicial content with no probative value (Trial transcript pages 493–499)[;]”
3. “Ineffective assistance of counsel – Trial counsel failed to investigate and present possible evidence and witnesses[;]”
4. “Ineffective assistance of counsel – Trial counsel failed to effectively cross examine the victim with her prior testimony[;]”

5. "Ineffective assistance of counsel – Trial counsel failed to effectively argue the facts during closing argument[;]"
6. "Ineffective assistance of counsel – Trial counsel failed to effectively argue the importance of DNA evidence during closing argument[;]"
7. "Ineffective assistance of counsel – Trial counsel failed to request an alibi charge be included in the jury charges[;]" and
8. "Ineffective assistance of trial counsel pursuant to White v. State – failure to properly initiate client's direct [a]ppeal."

In his second amended application Petitioner raised the following grounds:

1. "Ineffective assistance of counsel – Trial counsel failed to properly object and/or request a mistrial to preserve the record for appellate review on several occasions, including specifically:"
 - a. "Trial transcript page 163, line 5–16 – Statement was sufficiently prejudicial that counsel should have requested a mistrial;"
 - b. "Trial transcript page 170, lines 1–16 – Missed objection to leading and failed to appropriately renew pre-trial objection contemporaneously;"
 - c. "Trial transcript page 389, lines 16–25 – Missed objection to bolstering and hearsay;"
 - d. "Trial transcript pages 558–559 – Delayed objection to re-called testimony of Dr. Gray Amick;"
 - e. "Trial Transcript pages 569 – Failed to renew pre-trial objection regarding evidence that [Petitioner] had been out of prison 10 months – and failed to object regarding relevance as the actual evidence showed that [Petitioner] had been out of prison 8 months;"
 - f. "Trial transcript page 652, lines 1–25 – Missed objection to Solicitor's question as calling for overly prejudicial and irrelevant testimony with no probative value – trial counsel should have requested that testimony be stricken from the record and requested a mistrial;"
 - g. "Trial transcript pages 653–654 – Missed objection when Solicitor essentially offered testimony regarding the weather when there was no evidence offered on this topic;"
 - h. "Trial transcript page 668, line 17–24; Trial transcript page 670, line 10–11 and 15–16; Trial transcript page 672 Line 4–12 – Failed to object when the Solicitor improperly vouched for the victim and witness;"
 - i. "Trial transcript page 669, line 4 – Failed to object when the Solicitor misstated the facts in evidence;"
 - j. "Trial transcript page 667, lines 7–12 – Failed to object when the Solicitor asked the jury to convict [Petitioner] on an improper basis;"

- k. "Trial transcript page 692, lines 3–22 – Failed to object when the Solicitor made an improperly prejudicial appeal to the jury;"
- l. "Trial transcript page 710–711 – Failed to object when the Judge talked to the jurors in the jury room, without either party present."
2. "Ineffective assistance of trial counsel – Trial counsel failed to properly object to the admissibility of evidence obtained from the cell phone on the grounds of an unconstitutional search and seizure under the 4th amendment and overly prejudicial content with no probative value (Trial transcript pages 493–499)[;]"
3. "Ineffective assistance of counsel – Trial counsel failed to investigate and present possible evidence and witnesses[;]"
4. "Ineffective assistance of counsel – Trial counsel failed to effectively cross examine the victim with her prior testimony[;]"
5. "Ineffective assistance of counsel – Trial counsel failed to effectively argue the facts to the jury during closing argument[;]"
6. "Ineffective assistance of counsel – Trial counsel failed to effectively argue the importance of DNA evidence during closing argument[;]"
7. "Ineffective assistance of counsel – Trial counsel failed to request the following law to be included in the Judge's charge to the jury:"
 - a. "an alibi charge[;]"
 - b. "a mere presence charge;"
 - c. "A charge regarding lack of criminal intent."
8. "Due to the cumulative effect of counsel's errors [Petitioner] suffered prejudice such that, but for the combination of these errors, the result of the proceeding would have been different[;]" and
9. "Ineffective assistance of trial counsel pursuant to White v. State – failure to properly initiate client's direct [a]ppeal."

On February 1, 2016, an evidentiary hearing was held before the Honorable J. Derham Cole. Kristy G. Goldberg represented Petitioner; J. Clayton Mitchell, III represented the State. At the hearing, Petitioner proceeded forward on the claims of ineffective assistance of counsel raised in his second amended application for post-conviction relief.

In a written order filed on September 10, 2018, 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, followed by

a Petition for Writ of Certiorari and Appendix on March 11, 2019. This Return on behalf of the State now follows.

Trial

During the early morning hours of March 22, 2009, at approximately seven o'clock, Linda Wofford ("Victim") was asleep in her home when she heard a loud banging noise. App.p. 152. When she woke up from the noise, she saw a masked man, wearing a dark blue and white bandana, black pants, a beige coat with a green diamond on the back of it, and a toboggan-type hat. App.pp. 152–53, 190. He was not wearing gloves, and he held a revolver. App.pp. 152, 153. The man had entered the victim's bedroom from the hallway and was standing between the hallway door and the victim's bed. App.p. 153. The man then stated to the victim: "I'm coming down. I'm coming down bad. I need some money. I need you to take me to a teller." App.p. 153. The victim then got out of her bed and began to get dressed. App.p. 153. Meanwhile the man stayed in her bedroom in a location from which he could see both the victim and the side door, through which he broke into the victim's home. App.pp. 153–54.

As she walked through her home, she noticed her furniture had been knocked all over the room. App.pp. 154–55. The victim attempted to use her front door to exit her home, but the man insisted she use the side door. App.pp. 154–56. The man then instructed the victim to drive him to the A.T.M. App.p. 156–57. The victim got into the driver's side of her Toyota Tacoma pickup truck, which was parked in her driveway right next to her house, and the man got into the passenger's side. App.p. 157–58. The man gave instructions to the victim, dictating the manner in which she should leave her neighborhood. App.p. 158. While driving, the victim was able to observe the left side of the man's face, where he had a chicken pox scar around his eye. App.p. 159. She also observed dark blood veins in the man's eyes. App.pp. 160, 189.

As the victim drove away from her home, she proceeded down Caroline Street, turned right onto Leesburg Road, and then took a left towards the V.A. hospital. App.p. 158. While on the way to the A.T.M., the victim lit a Virginia Slim Menthol cigarette, as did the man. App.pp. 165, 197. The man also told her he was “down and out because he had just gotten out of prison” ten months before. App.p. 168. The victim then drove to her usual A.T.M., which was located on Garners Ferry Road across the street from the V.A. hospital. App.pp. 158, 160.

When she arrived at the A.T.M., she pulled into a handicap parking space in the parking lot. App.p. 160. The man instructed the victim to get the money from the A.T.M. while he stayed in the truck. App.p. 161. The victim retrieved \$200 from the A.T.M, but the man told her to get more, so she tried again. App.p. 162. On her second attempt to get more money from the A.T.M., the victim was only able to retrieve an additional \$100. App.p. 162. The man stayed in the car each time she went to the A.T.M. App.p. 183. The man still appeared to be upset, so the victim took out her billfold and began giving him anything she had in that. App.p. 163.

The victim then got back in the car, and the man instructed her to drive back the way they had come to the A.T.M. App.pp. 163–64. At that point, the man had a key and the cigarette butt from earlier in his hand. App.p. 166. The man then instructed her to stop at a home with a red door on Patricia Drive, where he indicated his car was located and further instructed her to stay in her truck. App.pp. 167, 193, 202. After the man exited her vehicle, with the cigarette butt, the victim immediately started her vehicle and drove to a Citgo gas station approximately two blocks away in order to call 911. App.p. 167. While in the Citgo station, the victim left her car parked on the left side of the building. App.pp. 169, 198, 210. She then informed the employees at the Citgo what had happened and called 911. App.p. 169. She waited there until law enforcement arrived. App.p. 169.

When law enforcement arrived, at approximately 8:30 in the morning, she filled out a robbery questionnaire and gave a statement, giving a description of the man. App.pp. 170, 187, 208, 263, 284–85. In her description, she indicated the man’s height and build, as well as her observations of the man’s left side of his face. App.p. 172. Specifically, the victim described the man as a black male, who was taller than she was (approximately five feet, ten inches), slender, about 170 pounds, with short black hair, dark spots in his eyes, and a chicken pox scar³. App.pp. 182, 188–89, 195–96, 201, 267, 271, 277, 510–11. She further described the man was wearing a mask, a dark blue and white bandana with a design, black hat, dark pants, beige windbreaker, and no gloves. App.pp. 182, 188, 190–91, 196, 271–72. She indicated she did not know if the man had facial hair because he was wearing a bandana the entire time. App.pp. 188, 270. She also showed him the route she was forced to take, indicating the A.T.M. location and the location the man exited her truck. App.pp. 170–71, 260. When she returned to the Citgo station to retrieve her truck, she noticed the windows had been broken. App.pp. 180, 198, 210–11, 264. Initially, law enforcement believed the vandalism of the truck was connected to the victim’s kidnapping, but another individual, Charles Alexander Blankenbecklor, who was with a man named Isaac Tucker a/k/a Boochee, was ultimately charged and convicted for that vandalism. App.pp. 478–82, 505–07, 508–09, 516–18, 534–36, 560, 562. Indeed, Blankenbecklor did not match the description of the assailant given by the victim and had no connection to Petitioner. App.p. 506–08.

Upon initial observation of the truck, law enforcement observed glass on both the inside and the outside of the vehicle, as well as personal belongings of the victim. App.p. 212. Further, law enforcement had information the man did not leave anything in the victim’s truck. App.p.

³ Petitioner testified he does, indeed, have a mark on his temple, which he described as a “spot” or a “scratch.” App.p. 652.

212. Investigator Kristin Polis then processed the truck for fingerprints, focusing on the passenger side. App.p. 214. In particular, she processed the passenger side door handle, the center console, the dash area around the glove box, and the exterior of the passenger door. App.p. 219. She was unable to retrieve any usable fingerprints, which is not uncommon. App.pp. 219–20, 222, 250, 255, 341. Investigator Polis also processed a cigarette disposal container, which was left in the truck and was believed to be used to break the windows, for both fingerprints and DNA. App.pp. 220, 222. That did not produce any usable fingerprints. App.p. 220. After processing the truck for fingerprints, Investigator Polis then processed the vehicle for DNA, swabbing the interior and exterior passenger door handle, the side of the center console, the passenger door latch, and the passenger door window and lock controls. App.pp. 220–21, 250.

Law enforcement released the truck to the victim, and she and law enforcement proceeded to the victim's home. App.pp. 172, 222. Upon entering the home, it was apparent damage had been done to the side door, and there was an area with some dirt around the door, and furniture had been pushed forward. App.pp. 223, 226, 239–41, 265–66, 286. Investigator Polis also walked through the home with the victim in order to determine the relevant areas to be processed. App.pp. 223, 239. The wires to the telephone line had been cut as well, and the area around the box which housed those wires had been freshly disturbed. App.pp. 173–74, 224, 228, 250. Fingerprints and some ridge detail were found on the box that housed the telephone wires, but Investigator Polis was unable to lift them. App.pp. 229–30, 253. Consequently, the box was taken into evidence. App.pp. 230, 245.

Deputy Benjamin Lasher returned to the drop-off location on Patricia Drive and assisted in setting up a perimeter for a canine track. App.p. 261. When the canine unit arrived, he

indicated to those officers the direction in which the victim indicated the man had gone. App.p. 262. Those officers then began a canine track, which was unsuccessful. App.pp. 262, 287.

The following day, law enforcement again went to the victim's home to speak with her and to go back through her home and her truck. App.pp. 300, 302, 468–69, 519. After speaking with the victim, they determined a cigarette butt could be pertinent to the investigation. App.pp. 302–03, 470–71, 525. As a result, he proceeded to the drop-off location on Patricia Drive. App.pp. 303, 313, 472–73. Upon searching the area, they discovered a Virginia Slims cigarette butt, which was collected into evidence. App.p. 305–07, 473–75.

Subsequently, on March 25, 2009, Investigator Harold Bouknight made a comparison of the latent fingerprints found on the telephone box and Petitioner's fingerprints. App.pp. 319–23. Investigator Bouknight determined Petitioner's fingerprint was a match to that left on the telephone box⁴. App.pp. 324–25, 328, 485. Sergeant Stan Richards also did an independent comparison, which yielded the same results—the fingerprint on the telephone box was a match to Petitioner. App.pp. 343–44. In addition to the box with the telephone wires, Investigator Polis also processed the side door, the storm door attached to the side door, and the bedroom doorknob for fingerprints and for DNA. App.pp. 232–34, 242–43. No usable fingerprints were discovered. App.pp. 233, 244.

⁴ Petitioner testified he was storing drugs in the telephone box outside of the victim's house at the time, about one to two weeks prior to this incident, but he did not know her and did not know this house belonged to her. App.pp. 588, 608, 651. He explained he stored them there because, sometime before this incident, he was walking down Tama Road (where the victim's house is located) at night, and the police were driving down the road, shining a light at him. App.pp. 610–11. He further explained the police then shifted into reverse, and he thought they were going to come down the road on which he was travelling. App.p. 611. Therefore, he ran across the street, jumped across the victim's fence, and ran into her backyard. App.pp. 611, 615. He testified he was so scared the police would catch him with drugs, he stashed them in the telephone box in her backyard. App.pp. 611, 615–16. Petitioner testified he retrieved the drugs from the victim's backyard the same night he fled from the police and stored them there. App.pp. 616–17.

DNA swabs from the victim's home, the victim's truck, the victim, Petitioner, the cigarette butt found on Patricia Drive, an individual named Isaac Tucker, and Blankenbecklor were subsequently submitted for analysis. App.pp. 356, 359, 375, 379, 381, 503–04. From the DNA on the cigarette butt, Dr. Gray Amick determined the DNA consisted of a mixture, from which Petitioner and the victim could not be excluded as contributors. App.pp. 377, 386–88, 412–13. In fact, the likelihood of the victim and Petitioner being the contributors to that sample was 140 times more likely than the mixture being from the victim and an unknown individual. App.pp. 387–88. Furthermore, the DNA from the cigarette butt was determined to be that of Petitioner's through a CODIS search. App.pp. 432–33, 484. Blankenbecklor and Tucker were eliminated as potential contributors to the DNA sample. App.pp. 387–88. Dr. Amick was able to exclude Petitioner, the victim, Tucker, and Blankenbecklor as a contributor to the DNA mixture found on the interior passenger door. App.pp. 383, 412. In addition, the swab from the bedroom door handle matched the victim. App.p. 385. Many of the swabs submitted, however, were too weak to interpret who could have been a contributor to that DNA profile. App.p. 383–85.

After the fingerprint found at the victim's home and the DNA on the cigarette butt had been matched to Petitioner, law enforcement began a search around the Garners Ferry Road and Leesburg Road area for Petitioner. App.pp. 435–37, 449. The team encountered Petitioner at a home located on True Street, which is located in the search area, and also encountered Petitioner's girlfriend, Dawn Shea. App.pp. 437–38, 450–51, 458–59. When law enforcement first encountered Petitioner at this home, they attempted to arrest him, but Petitioner took off running. App.pp. 452, 455–56, 459. The search continued. App.pp. 450–53, 463. In continuing to search for Petitioner, law enforcement also searched Petitioner's sister's apartment pursuant to

a search warrant. App.pp. 440–42, 488, 498–99, 531. Thereafter, law enforcement received information that Petitioner was known to hang out with a friend, Zab. App.pp. 454, 460. Based on that information, law enforcement determined where Zab worked and lived, and ultimately apprehended Petitioner in Zab’s home. App.pp. 454–55, 461–62, 499–500.

Ms. Shea eventually gave law enforcement consent to search her home. App.pp. 438–39, 490, 531. During their search, law enforcement found a phone belonging to Petitioner. App.pp. 439, 490–93. On the phone, law enforcement found text messages, which indicated the police were looking for Petitioner and Petitioner was about “to go into hiding”. App.p. 497. Law enforcement was unable to recover neither the items of clothing which the victim described nor the gun. App.pp. 498, 531–32.

PCR Hearing

At the evidentiary hearing, Petitioner testified on his own behalf and presented the testimony of Gearand Williams, and Mark E. Schnee, Esquire (hereinafter “Counsel”). This Court also had before it a copy of Petitioner’s trial transcript, the records of the Richland County Clerk of Court, Petitioner’s appellate records, and Petitioner’s records from the South Carolina Department of Corrections.

Petitioner testified he was arrested for these crimes on March 27, 2009. App.p. 786. He testified Counsel originally represented him at his bond hearing, but he later hired Byron E. Gipson, Esquire. App.p. 786. He also testified, after hiring Mr. Gipson, he proceeded to a jury trial, where he was convicted of resisting arrest, acquitted of “resisting arrest B,” and the jury was hung on all other charges. App.pp. 786–87. He elaborated he was sentenced to one year for resisting arrest, but he was not transferred to the South Carolina Department of Corrections (hereinafter “SCDC”) at that time, but rather remained at the jail. App.p. 787. He further

elaborated at that point, Mr. Gipson no longer represented him, because he could not provide the necessary funds to retain Mr. Gipson. App.p. 787. Petitioner testified thereafter, his father retained Counsel to represent him at his second trial. App.pp. 787–88.

Petitioner then presented the testimony of his father, Gearand Williams. Williams testified he was aware Petitioner sold drugs and was also aware Petitioner used drugs. App.p. 829. Williams testified he hired Counsel to represent Petitioner. App.p. 818. He also testified he met with Counsel approximately one or two times, but he does not remember what they discussed during those meetings. App.p. 818. He further testified Counsel did not ask him to testify at Petitioner’s trial, and he did not recall Counsel ever asking him if he had any alibi information. App.pp. 819, 22. He elaborated, however, he believed he told Counsel about this alibi information once, and, consequently, Counsel was aware of the fact he picked Petitioner up the morning of these crimes. App.p. 828.

Williams also testified Petitioner was with him during the course of the robbery, but also testified: “I don’t know if he was with me when the crime was being done or if he wasn’t with me when the crime was being done.” App.pp. 819, 826. He elaborated he “kind of, sort of [remembered the day of these crimes]. I mean, it’s kind of vaguely in my head.” App.p. 819. He testified in 2009, he was working two different jobs. Williams also testified the day before these crimes occurred, Petitioner called him, but he could not pick him up that day. App.p. 820. Therefore, he told Petitioner he would pick him up early the next morning before he went to work. App.p. 820. He further testified he picked Petitioner up from Michelle Wilcox’s home early the next morning, approximately seven or eight o’clock in the morning—but not before, and dropped him off on Broad River Road, at his daughter’s house. App.pp. 820, 22, 24–27. Williams testified they stopped by a gas station on the way to Broad River Road, because

Williams had to purchase some cigarettes. App.p. 829. Williams speculated he picked Petitioner up on a Sunday morning, but he wasn't sure. App.p. 824. He stated he did, in fact, pick Petitioner up on a weekend. App.p. 824. When asked why he believed he picked Petitioner up from Ms. Wilcox's home on March 22, 2009, Williams stated: "Well it's because of what you tell me. You just told me that that's what it was. So I'm going by what you say really." App.p. 821. He explained: "Well, really I can't say that I honestly know that this was this day. I just know that when I went to pick him up it was shortly after that when they started chasing him and stuff like that and said he had robbed somebody. I really don't know when that robbery actually took place, or none of that." App.p. 821. Ultimately, Williams could not be sure when exactly he picked up Petitioner. App.pp. 823–24.

He testified he did not speak with Petitioner again, but two or three days after picking him up, he called Petitioner's phone. App.p. 820. He elaborated someone from the Richland County Sheriff's Department answered when he called. App.p. 820. He further elaborated at that time, he did not know that law enforcement was looking for Petitioner. App.p. 820. Williams testified law enforcement told him if he got in touch with Petitioner before they did, to bring him down to the sheriff's department. App.pp. 820–22.

Williams testified at that time, Petitioner did not have a regular place in which he would stay. App.pp. 822–23. He testified, however, Petitioner has always lived in South Carolina; and in 2009, he was not living on a farm. App.p. 823. He further testified when Petitioner was younger, they used to have farm animals. App.p. 823.

Then, Petitioner presented the testimony of Counsel. Counsel testified he has been practicing law since 2006, and he worked for the Public Defender's Office for three years immediately after passing the bar. App.p. 867. He testified he was first appointed to represent

Petitioner when he was still working for the Public Defender's Office, and he represented Petitioner during his bond hearing. App.p. 830. Counsel also testified he has represented numerous individuals who were charged with the same crimes as Petitioner. App.p. 867. He testified Petitioner did not make any requests at the bond hearing regarding any investigation, and Petitioner actually waived his bond. App.p. 830. He elaborated he attempted to waive Petitioner's presence, but the State refused. App.p. 830. He further elaborated the State wanted to "make a very big production of it and blamed [Petitioner] for the vandalism and quite a few other things, which turned out to be completely false, which was very beneficial for [Petitioner's] first trial and even for the second one. App.pp. 830-31.

Thereafter, Counsel testified Petitioner's family hired Byron E. Gipson, Esquire, to represent Petitioner. App.p. 830. He further testified he was only representing Petitioner for a short period of time at that point, and he did not believe he had obtained all discovery at that point. App.p. 830. Counsel also testified he became involved in Petitioner's case again after the initial mistrial and the hung jury. App.p. 831. He elaborated he was at the jail meeting with other clients when Petitioner approached him and asked him if he would be interested in and willing to take his case again. App.p. 831. He further elaborated at some point after that encounter, Petitioner's family came to his office and formally retained him for the retrial. App.pp. 831-32. Counsel further testified he was retained approximately six to eight months prior to the trial. App.p. 832.

He also testified in preparing for the second trial, he reviewed a copy of the transcript of the first trial. App.p. 832. He further testified he and Petitioner reviewed issues with the transcript and with discovery in significant detail. App.p. 832. Counsel testified he recalled reading in the transcript from the first trial the victim had mentioned the robber discussing

chickens, pigs, alimony, and child support, and he also remembered the victim testifying about the robber's particular dialect. App.pp. 862–63. He elaborated he did not question the victim about these things on cross-examination because the victim did not testify in the same way at the second trial. App.p. 863. He elaborated he did not delve into such statements because he thought it might show to the jury the victim had very few details about the robber. App.p. 863. Counsel further elaborated during his cross-examination of the victim, he attempted to bring out details about the robber's eyes, as Petitioner had some unique features with respect to his eyes which the victim never discussed. App.pp. 885–886. He testified to his knowledge, Petitioner did not have any pigs or chickens, and Petitioner does not have a particular dialect. App.p. 863. He also testified he had no knowledge of Petitioner ever having alimony or child support payments. App.p. 864. He testified highlighting such inconsistencies may have been used to show the robber was someone other than Petitioner, as identification was a major issue. App.p. 864. He testified, however, there was a major shift in his trial strategy a few days prior to the trial, specifically shifting to third party guilt based on receiving knowledge of the person who vandalized the victim's truck. App.p. 864. He explained he wanted more time to investigate this issue, but was not permitted to do so. App.pp. 864–65.

Counsel also testified during the first trial the victim testified the robber did not like her Virginia Slim cigarette, and there was a good bit of the cigarette left. App.pp. 865–66. He elaborated the cigarette butt introduced at trial does not comport with the victim's testimony, because only the filter remained. App.p. 866. He further testified he did not have a good reason for failing to highlight this discrepancy. App.p. 866. He also testified he did not recall whether or not he argued that it did not make sense that Petitioner would have smoked a cigarette while wearing a bandana to cover his face, but he intended to argue that point. App.p. 866.

Counsel testified he objected when the solicitor asked the victim if the robber had told him anything specific about himself, which would motivate him to commit this robbery, based on a pretrial motion. App.p. 834. He elaborated there was a pretrial motion dealing with the information that the robber had been out of prison for ten months. App.pp. 834–35, 873. Counsel explained he objected based on the State attempting to use this information in order to show Petitioner’s predisposition to commit these crimes, rather than as a form of identification, which they argued at trial. App.pp. 842–43, 873–74. The State, however, intended to admit this information as an aspect of identification, not to show motive. App.p. 869. He further elaborated the trial court ruled this information would be admissible because it was being used for the purpose of identification, rather than Petitioner’s prior record. App.p. 835. He explained following his objection to the initial question and a bench conference, the trial court instructed the State to follow the limiting instruction he had previously given. App.pp. 835, 874. He further explained he did, in fact, make a contemporaneous objection but did not reargue his entire pretrial motion. App.p. 835.

Similarly, Counsel testified he did not object when the State called the SCDC employee to testify as to when Petitioner was released from prison because he believed the issue had already been preserved at that point. App.pp. 843, 874–75. He elaborated he did not want to highlight the fact Petitioner had been in prison previously by objecting because at that point the jury had already heard that fact. App.p. 843. Counsel also testified the SCDC employee testified Petitioner was released from prison July 1, 2008, which would have been approximately eight-and-a-half to nine months before the incident date. App.pp. 844, 870. He testified he did not believe this information was relevant to identification, and he also did not believe an objection would have made any difference with regards to preserving the record. App.p. 844. He

reiterated at that point of the trial, he was attempting to downplay the fact Petitioner had been in prison. App.pp. 844–45. In addition, Counsel testified he did not recall if he considered arguing this “minor inconsistency” during his closing argument. App.pp. 845, 875. He further testified he was not sure he had counted the exact time Petitioner had released from prison, but the solicitor’s comment during closing argument that Petitioner would have been released from prison ten months prior was a misstatement of the evidence. App.p. 851.

Counsel also testified he had no specific strategy based on bolstering when he did not object to the line of testimony, through Dr. Gray Amick, which elicited information that another DNA analyst concurred with Dr. Amick’s results. App.p. 836. Counsel elaborated DNA experts typically discuss the process of peer review during their qualifications, which is a requirement to being admitted as an expert in a scientific field. App.p. 870. He further elaborated this line of testimony was simply detailing the analysis done on this particular DNA sample. App.pp. 870–71. He explained he was not concerned with this particular DNA sample. App.p. 839. Counsel further explained the DNA match on the cigarette was not an issue because Petitioner admitted he had a cigarette. App.p. 837. Counsel elaborated Petitioner testified in both trials that he was walking around the area in which these crimes occurred and approached the victim, asking for a cigarette. App.p. 837. He further elaborated Petitioner began smoking the cigarette and then dropped it. App.p. 837. Counsel, therefore, testified his strategy was to essentially concede the DNA on the cigarette was Petitioner’s, but that did not necessarily prove Petitioner committed the robbery. App.pp. 838, 871.

He elaborated his plan with respect to the DNA was to attack the way the State was utilizing it. App.pp. 836–37. He further elaborated his strategy was also to show that the DNA did not turn out the way in which the State was claiming it did, specifically highlighting the State

refused to match other DNA found to someone else. App.pp. 837, 872. Counsel also testified he challenged the DNA for a number of items, in that there were no conclusive results or, in the alternative, there was no match for the DNA that was found. App.pp. 838, 871–72. Specifically, he testified he attempted to raise an inference that the DNA found in the victim’s car was a match to Blankenbecklor. App.pp. 838–39, 872. He testified he believed he was able to poke holes in the DNA results quite extensively, both through cross-examination and closing argument. App.pp. 837, 885.

Counsel testified he objected when the State attempted to recall Dr. Amick, but he did not object immediately because he was unsure what the State was attempting to do. App.p. 840. He elaborated he should have immediately asked for a mistrial and should have asked the trial court to hold the solicitors in contempt for prosecutorial misconduct. App.p. 841. He further elaborated based on the question the solicitor asked Dr. Amick, whether or not he could compare the DNA found to that of Blankenbecklor, she admitted that she had him investigate further during a nightly recess at trial and did not provide him with any documentation of that investigation, which was a clear violation of Rule 5, SCRCrimP, and Brady⁵. App.pp. 840–41, 873. Counsel testified, however, the jury ultimately did not hear the answer to the solicitor’s question regarding a possible match, or lack thereof, to Blankenbecklor. App.pp. 841, 873. Counsel further testified the jury’s inability to hear the answer to this question could have affected his strategy with respect to the DNA. App.p. 841.

Counsel also testified he immediately objected when the solicitor attempted to ask Petitioner about the meaning of his tattoos based on “Urban Dictionary,” which was sustained. App.pp. 845, 876. He testified the absence of tattoos were somewhat relevant, and it surprised

⁵ Brady v. Maryland, 373 U.S. 83 (1963).

him when the solicitor began questioning Petitioner as to the tattoos he had. App.pp. 845–46, 875–76. He elaborated any details as to the robber’s physical appearance would have been relevant, and the victim had very few details about the robber’s appearance. App.p. 846.

Counsel testified it did not bother him when the solicitor asked Petitioner whether or not he was aware it had rained after he allegedly stashed his drugs in the victim’s telephone box. App.p. 847. He elaborated the fact that it may have rained approximately three days prior to this robbery had no relevance to the trial, and he did not feel it was worthy of an objection at the time. App.pp. 847–48, 876. He further elaborated he was unsure what information the State was attempting to elicit by this line of questioning, and the information sought certainly was not elicited. App.p. 848. He elaborated if the solicitor was attempting to suggest the fingerprints found on the telephone box had been washed off, there was no testimony elicited at trial that the fingerprints would have been washed off or if the telephone box was exposed to the elements. App.p. 848. He further elaborated he did not recall arguing this point during his closing argument. He also testified a meteorological expert had not testified as to the weather conditions prior to the robbery. App.p. 847.

Counsel similarly testified he did not object during the State’s closing argument, specifically to comments made by the solicitor that the victim’s report had been consistent, because he generally does not object during closing arguments unless there is something particularly egregious. App.pp. 849, 877. He elaborated this comment made by the solicitor was merely her interpretation of the testimony, even though it was slightly incorrect because there were, in fact, slight inconsistencies. App.pp. 849, 877–78. He further elaborated had the solicitor made up facts, he would have objected; but this was merely the State’s interpretation. App.pp. 849, 878. For the same reasons, Counsel testified he did not object to the solicitor’s

comment during closing that law enforcement officers testified truthfully. App.p. 850. He elaborated the State highlighted that the officer had thrown away his notes, thereby questioning his credibility herself. App.p. 850.

Counsel also testified the State's comment during closing that Petitioner was a drug dealer had nothing to do with his guilt or innocence, but it was something he readily admitted at trial. App.p. 851. Furthermore, he testified the State's comment during closing argument that Petitioner was a convicted burglar was consistent with the facts presented at trial, as the two prior burglary convictions were an element of the offense of first-degree burglary. App.pp. 851–52. He further testified he did not see the benefit in objecting to such a comment. App.p. 852. Counsel also testified he did not object to the State's reference to the terror attacks of 9/11, and he did not have a reason for failing to do so. App.p. 852. He further testified this statement was made in order to invoke passion in the jury, and he should have objected. App.pp. 852–53. Counsel also testified had the solicitor continued with her statement “send [Petitioner] a message,” he would have objected; but the solicitor did not go any further than that, so he did not object. App.p. 878.

Counsel testified he consented to allowing the trial court to go back into the jury room to answer a note received from the jury during deliberations, which was not unusual for the trial court to do. App.pp. 853, 879. He explained the jury had asked a very simple question, which would take less than two seconds for the trial court to answer. App.p. 853. He further explained had he insisted on the trial court answering in open court, it would have caused a substantial delay, as they would have had to brought Petitioner back in the courtroom and he would have wanted Petitioner's family there as well. App.p. 854. He elaborated no one was present for that

conversation, except the trial court and the jury, and he did not believe the trial court said anything inappropriate. App.p. 854.

Counsel also testified he made motions regarding content from a cellphone, in that the content from the phone had no relevance to the case and the text messages were the result of an illegal search. App.pp. 854, 879–80. He testified he objected on the basis that the text messages were hearsay and that they could not be authenticated, but they were entered into evidence. App.p. 856. He further testified, however, the trial court denied his pretrial motions with respect to the cellphone and determined the search was valid. App.p. 880. He elaborated the State attempted to use these text messages found on this cellphone, which was found at Petitioner's girlfriend's home, to elicit evidence of flight. App.p. 855. He testified Petitioner's girlfriend did not testify at trial and, similarly, did not testify she had given law enforcement consent to search that phone. App.p. 856. He testified he intended to preserve his objection to the text messages based on an illegal search; and if he had failed to do so, that was error. App.pp. 856–857. He further testified no one had directly testified at trial that Petitioner had used that phone, but based on where the phone was found, it was insinuated that Petitioner had used the phone. App.p. 856. Counsel testified he objected to the text messages based on Rule 403, SCRE, because there was offensive language and discussion about some drug deals in the texts, which was not relevant. App.p. 857. He elaborated almost everything Petitioner said would have objectionable under Rule 403 as overly prejudicial with no probative value. App.p. 857. He further testified the only relevant text was one from a woman informing Petitioner law enforcement was looking for him. App.p. 857. He also testified he was not sure if he ever asked these texts to be entered in a redacted format, but he probably should have. App.pp. 858–859. He elaborated he had no

reason for failing to request a redacted format, but he was unsure if he saw those text messages prior to trial. App.p. 858.

He testified Petitioner asked him to interview both Ms. Wilcox and his father, in preparation for the second trial. App.p. 860. He elaborated he spoke with Ms. Wilcox one or two times, but she did not have any particularly useful information. App.p. 860. He also testified he met with Petitioner's father at least one or two times in order to establish an alibi for Petitioner, but the information he provided did not provide a clear alibi. App.pp. 880–81. He further elaborated he did not receive any specific information which would have enabled him to assert an alibi defense. App.p. 861. He also testified raising a new defense based on alibi at the second trial would have been difficult due to the testimony at the first trial. App.pp. 861, 881–882.

Counsel testified he did not recall requesting an alibi charge during the charge conference in chambers. App.p. 866. He also testified he did not request anything specific with regards to criminal intent, other than the general charge. App.p. 867. He elaborated the defense was Petitioner did not commit these crimes and the State had the wrong person, “and if actually believed, I don’t think anyone would believe that the acts were not with a criminal intent.” App.p. 867.

STANDARD OF REVIEW

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong,

attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688).

ARGUMENT

I.

The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State.

The PCR court granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). The State is not challenging this grant of White on appeal. Accordingly, this Court should grant Petitioner relief on this issue.

II.

The PCR judge properly found trial counsel was not ineffective in failing to cross-examine the witness about prior testimony which occurred during Petitioner’s first trial because such decision was valid trial strategy.

Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Here, Counsel testified he did not delve into such prior descriptions of the robber the victim had given because he thought not highlighting those inconsistencies might show to the jury the victim had very few details about the robber. He further testified during his cross-examination of the victim, he attempted to bring out details about the robber’s eyes, as Petitioner had some unique features with respect to his eyes which the victim never discussed. Because Counsel wanted to highlight the victim, in fact, knew very little identifying information about the robber, this Court finds Counsel employed a valid trial strategy in not questioning the victim

about prior statements, which gave more details about the robber. Accordingly, the PCR judge properly found trial counsel was not deficient.

III.

The PCR judge properly found trial counsel was not deficient, nor was Petitioner prejudiced, by trial counsel's objections to the admission of text messages from his cell phone because trial counsel made numerous objections to the admission of the text messages, on a number of different grounds, but those objections were all overruled. Further, Petitioner abandoned his cell phone at his girlfriend's residence and forfeited his right to object to the contents of the phone.

The Fourth Amendment guarantees us the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; see also S.C. CONST. art. I, § 10. Generally speaking, warrantless searches are considered to be unreasonable *per se* unless they fall under an exception to the warrant requirement, and any evidence seized as the result of an unreasonable search must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); see State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978) (instructing searches conducted without a warrant are *per se* unreasonable unless an exception to the warrant requirement is applicable). However, "warrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011). Regarding the situations where a warrantless search is considered to be constitutionally reasonable, South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; (7) the abandonment exception; and (8) the exigent circumstances exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); see State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) ("A fairly perceived need to act on

the spot may justify entry and search under the exigent circumstances exception to the warrant requirement.”).

Under the abandonment exception, “abandoned property has no exception from either the search or seizure provisions of the Fourth Amendment.” State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35, 40–41 (1988)). When determining whether property has been abandoned, “the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.” Id. (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 371 (Minn. 1975)). “When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable.” United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005). When the property is a cellphone, the standard abandonment analysis applies. State v. Lamar Sequan Brown, Op. No. 27841 (S.C. Sup. Ct. filed June 13, 2018).

In determining the petitioner had abandoned his cellphone following a burglary, the South Carolina Supreme Court noted the petitioner’s decision not to attempt to recover the phone constituted his abandonment of such. Id. Specifically, the Supreme Court noted the phone remained in law enforcement’s possession for six days, during which time there was no evidence the petitioner attempted to call the phone, text the phone, or contact his service provider to determine its whereabouts. Id. Under the circumstances, it was reasonable for law enforcement to assume the cellphone was abandoned. Id.

The PCR judge properly found Petitioner has failed to establish any deficiency on the part of Counsel. During pre-trial motions, Counsel moved to suppress the text messages law enforcement obtained from Petitioner’s cellphone on the basis the cellphone and messages were obtained without a search warrant. App.pp. 84, 86–87. He further argued when law enforcement

did search Dawn Shea's home, where they found Petitioner's cellphone, they were looking for any relevant evidence to this robbery, and the cellphone did not constitute such evidence. App.pp. 86–87. Counsel further argued the text messages should be excluded under Crawford⁶ and the rule against hearsay⁷, elaborating another individual was sending these messages to this phone. App.p. 90. Counsel also argued the text messages should be excluded under Rule 403, SCRE. App.p. 90. Specifically, Counsel argued: "I would argue that some of the language in there – they're going to attempt to use that as some sort of identification in terms of how he says black power. Part of the testimony that the victim in this case brought up was that the suspect made statements to the effect that all white people are bad and it's all their fault." App.p. 90. Following argument, the trial court determined the cellphone was abandoned property and, therefore, would be admissible. When the State offered the cellphone into evidence during trial, Counsel again renewed his pre-trial motion to suppress the phone, which was again overruled. App.pp. 439–40. Similarly, when the State later attempted to introduce the text messages into evidence, Counsel again objected to the content of the text messages. App.p. 494. Counsel specifically argued the State could not pinpoint exactly when the cellphone was abandoned, could not prove who sent or received the text messages, and objected under Rule 403, SCRE. App.p. 495. The trial court again overruled Counsel's objection, ruling the messages were admissible to show evidence of flight. App.p. 495–96. Accordingly, trial counsel was not deficient in his efforts.

Similarly, Petitioner has failed to establish any resulting prejudice from this alleged deficiency. Here, Petitioner left his cellphone at Ms. Shea's home, where he would occasionally

⁶ Crawford v. Washington, 541 U.S. 36 (2004) (holding out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness).

⁷ Rule 802, SCRE.

stay. After obtaining consent to search her residence, on March 25, 2009, law enforcement found a cellphone in the residence. Law enforcement “maintained possession of the phone for a while,” during which time Petitioner made no effort to regain possession of it. App.p. 492. In fact, Petitioner’s phone received numerous calls and texts after Petitioner left it at Ms. Shea’s residence, but there is no evidence Petitioner made or initiated any of those calls or texts.. Based on the foregoing, it was reasonable for a law enforcement officer to assume the cellphone was abandoned. Consequently, law enforcement did not need a search warrant in order to obtain information from the phone.

IV.

The PCR judge properly found trial counsel was not ineffective in immediately objecting to the State recalling the DNA expert to testify because trial counsel objected as soon as he discerned the purpose of the expert’s additional testimony and Petitioner was not prejudiced by the limited statements.

Rule 611(d) provides: “A witness may be re-examined as to the same matters to which he testified only in the discretion of the court . . . After the examination of the witness has been concluded by all parties to the action, that witness may be recalled only in the discretion of the court.” Rule 611(d), SCRE.

Petitioner further contends Counsel was ineffective for failing to immediately object when the State re-called Dr. Gray Amick as a witness. Here, the State re-called Dr. Amick during the presentation of its case. When re-called the State questioned Dr. Amick regarding specific DNA swabs, which Counsel had questioned him about during cross-examination. App.p. 556. After Dr. Amick was asked whether he could compare these DNA swabs to two other individuals, after a late request to test the DNA by the State, Counsel immediately objected. App.p. 556. The trial court sent the jury out of the courtroom, and Counsel indicated

he objected to this line of testimony under both Brady and Rule 5, as well as Rule 611(d). App.p. 556. Although Counsel's initial objection was under Brady and Rule 5, Counsel indicated at the evidentiary hearing he was unsure exactly what information the State was attempting to elicit when it recalled Dr. Amick, which explained his delayed objection under Rule 611(d). Based on the foregoing, Counsel's actions were reasonable under the circumstances.

Similarly, Petitioner failed to establish any resulting prejudice from this alleged deficiency. Following Counsel's objection to the State recalling Dr. Amick, the trial court sustained his objection, and Dr. Amick was unable to testify any further. Moreover, Dr. Amick was only able to testify as to matters Counsel raised during cross-examination, specifically that certain DNA swabs were too weak to interpret and that Counsel asked about specific alleles in those samples. App.p. 556. Indeed, Dr. Amick was unable to testify any further due to Counsel's immediate objection following the State's question as to whether or not Dr. Amick had compared those DNA swabs to any other individuals. App.p. 556. As Dr. Amick merely reiterated points Counsel raised during his initial cross-examination of Dr. Amick, it is unlikely the result of the proceeding would have been different. Therefore, Petitioner failed to establish any resulting prejudice from the alleged deficiency.

V.

The PCR judge properly found trial counsel did not err in failing to renew his pretrial objection to the testimony of an SCDC employee regarding Petitioner's release date from prison because trial counsel purposely avoided drawing attention to this fact because prior testimony indicated the robber had been released from prison shortly before the events of the case.

Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland v. Washington, 466 U.S. 668, 690 (1984). There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. U.S., 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Petitioner claims Counsel was ineffective for failing to renew his pretrial motion regarding evidence Petitioner had been released from prison ten months prior to these crimes. Additionally, Petitioner alleges Counsel was ineffective for failing to object when the evidence presented at trial indicated Petitioner had been released from prison eight months prior. Specifically, Petitioner contends Counsel should have objected when the State called Michael Stobbe, an SCDC employee, to testify regarding Petitioner's release date from prison. See App.p. 567-68. Here, Counsel testified he did not want to highlight the fact Petitioner had, in

fact, been in prison shortly prior to the time in which these crimes were committed. He elaborated at this point in the trial, the jury had already heard testimony the robber indicated he had been released from prison shortly before committing these crimes. Accordingly, the PCR court properly found trial counsel possessed a valid strategic decision in choosing not to object and, therefore, was not deficient.

Further, Petitioner failed to establish he was prejudiced by this alleged deficiency. The victim testified the robber indicated he had been out of prison for ten months before he committed these crimes, whereas Mr. Stobbe indicated Petitioner had been released July 1, 2008—approximately eight-and-a-half to nine months prior to the incident date. Compare App.p. 168 and App.p. 568. Because the jury was, indeed, presented with this inconsistency, there is no indication the result would have been different had Counsel objected to this line of testimony. Accordingly, the PCR judge did not err in finding trial counsel was not ineffective in this regard.

VI.

The PCR judge properly found trial counsel was not ineffective in failing to object to the State's reference to weather on cross-examination because the State did not elicit any damaging information at trial and trial counsel did not object due to trial strategy.

Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, “no particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 689. Furthermore, “representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 693. Where counsel articulates a valid strategic reason for

his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Next, Petitioner alleges Counsel was ineffective for failing to object when the State offered testimony about the weather in the days leading up to the incident date when there was no evidence offered on this topic. In particular, Petitioner contends Counsel should have objected when the State asked Petitioner whether or not he was aware it had rained five of the eight days leading up to this incident date. App.p. 651–52. Here, Counsel testified the fact it may have rained approximately three days prior to this robbery had no relevance to the trial, and he did not feel it was worthy of an objection at the time. He further elaborated he was unsure what information the State was attempting to elicit by this line of questioning, and the information sought certainly was not elicited. Based on the Counsel's strategic decision not to object to this line of testimony, Petitioner failed to demonstrate any deficiency on the part of Counsel. Furthermore, because the State was unable to elicit any damaging information to Petitioner from this line of testimony, Petitioner failed to establish any resulting prejudice from this alleged deficiency.

VII.

The PCR judge properly refused to find trial counsel ineffective for “not immediately objecting when the prosecutor asked Petitioner about the tattoo on his arm” because trial counsel objected immediately after the State questioned Petitioner about the meaning of his tattoos and there was no evidence the robber possessed tattoos.

“Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. Evidence is unfairly prejudicial if it suggests a decision on an improper basis. State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct.

App. 2017) (quoting State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

When weighing the prejudicial effect of such evidence against the probative value, the entire record must be considered and great deference must be given to the trial court. Id.

Petitioner further alleges Counsel was ineffective for failing to object when the State questioned Petitioner about his tattoo. See App.p. 648. Specifically, Petitioner contends Counsel should have objected to this line of testimony in that it was overly prejudicial and had no probative value. Furthermore, Petitioner contends Counsel should have moved to strike this line of testimony and should have moved for a mistrial. Counsel testified when the State began eliciting testimony about Petitioner's tattoo, he was unsure exactly for what purpose the State intended to introduce this testimony, as the victim had not testified to the robber having any tattoos. He did, however, testify he immediately objected when the State attempted to elicit the meaning of this tattoo based on "Urban Dictionary." Because Counsel did, in fact, object when the purpose of this line of questioning became apparent, trial counsel was not deficient.

Similarly, this Court finds Petitioner has failed to establish any resulting prejudice. The victim never testified that the robber had any tattoos. In fact, the victim's description of the robber revealed very little details about the robber, except for a pock mark on the left side of his face. Counsel also testified the absence of tattoos, rather, were relevant. Based on the foregoing, Petitioner has failed to establish any prejudice.

VIII.

The PCR judge properly found trial counsel was not ineffective in failing to object to the State's comments in its closing regarding law enforcement because said comments were an invited response based on counsel's repeated critiques of law enforcement.

Petitioner contends Counsel was ineffective for failing to object when the solicitor made an "improperly prejudicial appeal to the jury," in that "in the wake of the anniversary of one of the largest crimes committed on U.S. soil, we should be thanking law enforcement for what they do to protect us." App.p. 690.

With respect to closing arguments generally,

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions."

State v. Mouzon, 321 S.C. 27, 31–32, 467 S.E.2d 122, 124–25 (Ct. App. 1995) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). Moreover, "a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Moreover, a solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction and is impermissible. Id. Here, Counsel testified at the evidentiary hearing he does not typically object during closing arguments, and he did not feel the solicitor's comments about the witnesses' consistency or truthfulness rose to the level of misconduct, which would warrant an objection. Petitioner failed to establish any resulting prejudice from this alleged deficiency. At trial, Counsel consistently attacked the veracity of the victim's statements to law enforcement and also attacked the processes by which law enforcement investigated this case throughout trial. Therefore, the solicitor's comments regarding the credibility of the witnesses were based on the record and its reasonable inferences. Accordingly, trial counsel was not ineffective in this regard.

IX.

The PCR judge properly found trial counsel was not ineffective in consenting to allow the trial judge to speak with jurors, in the jury room, without either party present, because the question was not improper and there is no evidence Petitioner was prejudiced by the trial judge's actions.

Petitioner contends Counsel was ineffective for failing to object when the trial court talked to the jurors in the jury room without either party present. Counsel testified he consented to allowing the trial court to answer the jury's very brief question, and neither party was present

in the jury room when the trial court spoke with the jury. Furthermore, he testified had he objected, this would have caused a significant delay. Accordingly, this Court finds Counsel's actions were reasonable under the circumstances. Moreover, there is no indication the trial court did anything improper in speaking with the jury privately, so Petitioner has failed to establish any prejudice.

X.

The PCR judge properly dismissed Petitioner's claims regarding cumulative error because it is a doctrine not recognized in South Carolina. Further, any alleged errors were harmless given the substantial evidence of Petitioner's guilt.

Petitioner 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 unsettled question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court 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).

The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.; see also State v.

McEachern, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, “even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial”). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. State v. Mitchell, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998) (finding reversal on cumulative error doctrine not warranted).

In the instant case, the PCR judge properly dismissed Petitioner’s claims related to the cumulative error doctrine. As it stands, the cumulative error doctrine is not recognized in South Carolina; thus, trial counsel cannot be deficient in failing to argue a doctrine not recognized in South Carolina courts. Further, even if the doctrine were recognized in South Carolina, it would be inapplicable to Petitioner’s case. As noted throughout this return, the PCR judge found PCR counsel was not deficient, nor was Petitioner prejudiced, by any of counsel’s actions at trial. If PCR counsel was not ineffective in any regard, then the sum of non-errors cannot possibly equate to anything but non-error.

Accordingly, PCR counsel did not err in denying Petitioner relief on this claim.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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July 16, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2018-001688

ADONIS WILLIAMS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

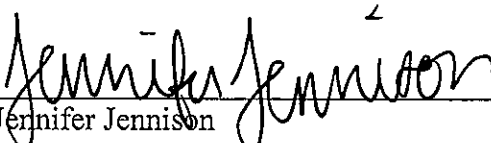
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 16th day of July, 2019.



Jennifer Jennison
Legal Assistant for Respondent

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001688

AMENDED BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?

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. 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. (App. p. 726)

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. 738-740). 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. (App. pp. 1139-1186). A timely notice of intent to appeal was served on September 19, 2018. A brief pursuant to White v. State and separately filed petition for writ of certiorari and appendix were filed on March 11, 2019. The State filed a return to the petition for writ of certiorari on July 16, 2019. 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. The State has not yet filed a brief in response to the White v. State issue. Based on the discovery of a factual error, Petitioner moved to withdraw the White v. State brief filed on March 11, 2019, and substitute with this brief. This amended brief pursuant to White v. State follows.

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

“Turning to the abandonment analysis the trial court conducted in this case, we review the trial court's decision for clear error. State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016). This means we “must affirm if there is any evidence to support the trial court's [factual] ruling,” 415 S.C. at 251, 781 S.E.2d at 900, but we “review[] questions of law de novo,” State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).” State v. Brown, 423 S.C. 519, 524, 815 S.E.2d 761, 764, cert. denied, 139 S. Ct. 486, 202 L. Ed. 2d 377 (2018)

ARGUMENT

The trial judge erred in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned.

Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). The cell phone was found pursuant to the search of the home of Dawn Shea, where Petitioner would sometimes stay. (App. p. 85, line 13 – p. 86, lines 1-12). 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). Counsel for Petitioner argued that the search warrant did not cover the contents of the phone and the police did not have a search warrant for the contents of the phone. (App. p. 86, line 16 – p. 87, lines 1-2). The prosecutor told the judge:

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)

The State argued that Petitioner did not have standing to challenge the search of a house belonging to a third party, that no warrant was needed as the phone was abandoned and that the search warrant for the house covered the contents of the phone. (App. p. 87, lines 15-21). Counsel for Petitioner argued that Petitioner had “the lawful authority to challenge a search warrant.” (App. p. 88, lines 4-6). Counsel also 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 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). The search warrant was not introduced in evidence during the pre-trial hearing. Additionally, counsel for Petitioner did not move to redact specific prejudicial language contained in the text messages and the judge was not aware of the content. This issue was raised during the PCR hearing and is addressed in the petition for writ of certiorari.

During the pre-trial hearing on the motion to suppress text messages the prosecutor told the judge that law enforcement had a search warrant for Dawn Shea's home and defense counsel did not challenge this assertion. Later in trial, however, Sergeant Matt Ellis with the Richland County Sheriff's Department testified that they obtained consent to search the residence from Ms. 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). While law enforcement did not obtain a search warrant for Dawn Shea's home, they did obtain a search warrant for Petitioner's sister's apartment on Long Creek Drive. (App. p. 440, lines 7-14).

Sergeant Don Robinson, also with the Richland County Sheriff's Department, testified that they obtained consent to search the residence from Ms. Shea. (App. p. 492, lines 1-19). 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). Prior to the admission of photographs taken of the text messages and the investigator testifying as to the contents of the text messages, Petitioner renewed the objection made pre-trial. (App. p. 491, lines 6-7). Petitioner additionally objected based on hearsay, Rule 403 and the fact that the State was unable to prove who sent or received the text messages. (App. p. 494, lines 14-15; p. 495, lines 12-18). The judge overruled the objections and the investigator testified before the jury as to the content of the text messages found on the 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 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.

CONCLUSION

Based on the above argument, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

APPELLANT

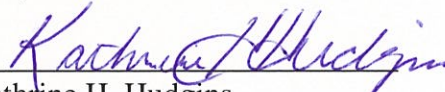
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Amended Brief of Appellant pursuant to White v. State in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Amended Brief of Appellant pursuant to White v. State has been served on Adonis K. Williams, #274626, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of December, 2019.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge
Honorable J. Derham Cole, Post-Conviction Relief Judge
Appellate Case Tracking No. 2018-001688

Adonis Williams,

Appellant,

vs.

State of South Carolina,

Respondent.

**BRIEF OF RESPONDENT
PURSUANT TO WHITE v. STATE**

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STATEMENT OF ISSUES ON APPEAL

- I. Even if the trial court improperly admitted text messages from Appellant's phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonably impacted the jury's verdict.

STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its July 2009 term, the Richland County Grand Jury indicted Appellant for kidnapping (2009-GS-40-2697), armed robbery (2009-GS-40-2698), and first-degree burglary (2009-GS-40-2701). On September 6–9, 2011, Appellant proceeded to a jury trial before the Honorable James R. Barber, III.¹ Following deliberations, the jury convicted Appellant as indicted. Judge Barber sentenced him to a term of imprisonment of twenty-five years for kidnapping, twenty-five years for armed robbery, and twenty-five years for first-degree burglary. The sentences were to run concurrently.

Appellant filed a timely notice of appeal. By written Order dated March 30, 2012, the South Carolina Court of Appeals dismissed Appellant’s appeal for failing to timely order the transcript as required by Rule 207, SCACR. The Remittitur was issued on January 24, 2013.

Appellant served and filed an Application for Post-Conviction Relief as well as two amended Applications. On February 1, 2016, an evidentiary hearing was held before the Honorable J. Derham Cole, during which Appellant proceeded on his Second Amended Application. The Application included a request for a belated appeal pursuant to White v. State. In a written order filed on September 10, 2018, Judge Cole granted a belated appeal pursuant to White v. State but denied relief on the other allegations and dismissed the application.

¹ Initially, on February 8–11, 2010, Appellant proceeded to a jury trial before the Honorable Clifton Newman, where he was represented by Byron E. Gipson, Esquire. That trial proceeded on the charges of first-degree burglary, armed robbery, and kidnapping, as well as additional charges of resisting arrest (2009-GS-40-2740) and assault on an officer while resisting arrest (2009-GS-40-2741). Following the presentation of all evidence, the jury convicted Appellant of resisting arrest and acquitted Appellant of assault on an officer while resisting arrest. Judge Newman sentenced Appellant to a term of imprisonment of one year for resisting arrest. The jury could not reach a verdict on the charges of first-degree burglary, armed robbery, and kidnapping, so Judge Newman declared a mistrial with respect to those charges.

A timely notice of intent to appeal was served on September 19, 2018. Appellant filed his Brief of Appellant Pursuant to White v. State and this Brief of Respondent follows.

STATEMENT OF FACTS

During the early morning hours of March 22, 2009, at approximately seven o'clock, The victim was asleep in her home when she heard a loud banging noise. App.p. 152. When she woke up from the noise, she saw a masked man, wearing a dark blue and white bandana, black pants, a beige coat with a green diamond on the back of it, and a toboggan-type hat. App.pp. 152–53, 190. He was not wearing gloves, and he held a revolver. App.pp. 152, 153. The man had entered the victim's bedroom from the hallway and was standing between the hallway door and the victim's bed. App.p. 153. The man then stated to the victim: "I'm coming down. I'm coming down bad. I need some money. I need you to take me to a teller." App.p. 153. The victim then got out of her bed and began to get dressed. App.p. 153. Meanwhile the man stayed in her bedroom in a location from which he could see both the victim and the side door through which he broke into the victim's home. App.pp. 153–54.

As she walked through her home, the victim noticed her furniture had been knocked all over the room. App.pp. 154–55. The victim attempted to use her front door to exit her home, but the man insisted she use the side door. App.pp. 154–56. The man then instructed the victim to drive him to the A.T.M. App.p. 156–57. The victim got into the driver's side of her Toyota Tacoma pickup truck, which was parked in her driveway right next to her house, and the man got into the passenger's side. App.p. 157–58. The man gave instructions to the victim, dictating the manner in which she should leave her neighborhood. App.p. 158. While driving, the victim was able to observe the left side of the man's face, where he had a chicken pox scar around his eye. App.p. 159. She also observed dark blood veins in the man's eyes. App.pp. 160, 189.

As the victim drove away from her home, she proceeded down Caroline Street, turned right onto Leesburg Road, and then took a left towards the V.A. hospital. App.p. 158. While on the

way to the A.T.M., the victim lit a Virginia Slim Menthol cigarette. The man asked for one, so she gave him a Virginia Slim Menthol cigarette. App.pp. 165, 197. The victim then drove to her usual A.T.M., which was located on Garners Ferry Road across the street from the V.A. hospital. App.pp. 158, 160.

When she arrived at the A.T.M., she pulled into a handicap parking space in the parking lot. App.p. 160. The man instructed the victim to get the money from the A.T.M. while he stayed in the truck. App.p. 161. The victim retrieved \$200 from the A.T.M, but the man told her to get more, so she tried again. App.p. 162. On her second attempt to get more money from the A.T.M., the victim was only able to retrieve an additional \$100. App.p. 162. The man stayed in the car each time she went to the A.T.M. App.p. 183. The man still appeared to be upset, so the victim took out her billfold and began giving him anything she had in that. App.p. 163.

The victim then got back in the car, and the man instructed her to drive back the way they had come to the A.T.M. App.pp. 163–64. At that point, the man had a key and the cigarette butt in his hand. App.p. 166. The man then instructed her to stop at a home with a red door on Patricia Drive, where he indicated his car was located and further instructed her to stay in her truck. App.pp. 167, 193, 202.

After the man exited her vehicle, with the cigarette butt, the victim immediately started her vehicle and drove to a Citgo gas station approximately two blocks away in order to call 911. App.p. 167. While in the Citgo station, the victim left her car parked on the left side of the building. App.pp. 169, 198, 210. She then informed the employees at the Citgo what had happened and called 911. App.p. 169. She waited there until law enforcement arrived. App.p. 169.

When law enforcement arrived, at approximately 8:30 in the morning, she filled out a robbery questionnaire and gave a statement, giving a description of the man. App.pp. 170, 187,

208, 263, 284–85. In her description, she indicated the man’s height and build, as well as her observations of the man’s left side of his face. App.p. 172. Specifically, the victim described the man as a black male, who was taller than she was (approximately five feet, ten inches), slender, about 170 pounds, with short black hair, dark spots in his eyes, and a chicken pox scar². App.pp. 182, 188–89, 195–96, 201, 267, 271, 277, 510–11. She further described the man was wearing a mask, a dark blue and white bandana with a design, black hat, dark pants, beige windbreaker, and no gloves. App.pp. 182, 188, 190–91, 196, 271–72. She indicated she did not know if the man had facial hair because he was wearing a bandana the entire time. App.pp. 188, 270. She also showed law enforcement the route she was forced to take, indicating the A.T.M. location and the location the man exited her truck. App.pp. 170–71, 260.

When she returned to the Citgo station to retrieve her truck, she noticed the windows had been broken. App.pp. 180, 198, 210–11, 264. Initially, law enforcement believed the vandalism of the truck was connected to the victim’s kidnapping, but another individual, Charles Alexander Blankenbecklor, who was with a man named Isaac Tucker a/k/a Boochee, was ultimately charged and convicted for that vandalism. App.pp. 478–82, 505–07, 508–09, 516–18, 534–36, 560, 562. Indeed, Blankenbecklor did not match the description of the assailant given by the victim and had no connection to Appellant. App.p. 506–08.

Upon initial observation of the truck, law enforcement observed glass on both the inside and the outside of the vehicle, as well as personal belongings of the victim. App.p. 212. Further, law enforcement had information the robber did not leave anything in the victim’s truck. App.p. 212. Investigator Kristin Polis then processed the truck for fingerprints, focusing on the passenger

² Appellant testified he does, indeed, have a mark on his temple, which he described as a “spot” or a “scratch.” App.p. 652.

side. App.p. 214. In particular, she processed the passenger side door handle, the center console, the dash area around the glove box, and the exterior of the passenger door. App.p. 219. She was unable to retrieve any usable fingerprints, which she indicated is not uncommon. App.pp. 219–20, 222, 250, 255, 341. Investigator Polis also processed a cigarette disposal container, which was left in the truck and was believed to be used to break the windows, for both fingerprints and DNA. App.pp. 220, 222. That did not produce any usable fingerprints. App.p. 220. After processing the truck for fingerprints, Investigator Polis then processed the vehicle for DNA, swabbing the interior and exterior passenger door handle, the side of the center console, the passenger door latch, and the passenger door window and lock controls. App.pp. 220–21, 250.

Law enforcement released the truck to the victim, and she and law enforcement proceeded to the victim's home. App.pp. 172, 222. Upon entering the home, it was apparent damage had been done to the side door, and there was an area with some dirt around the door, and furniture had been pushed forward. App.pp. 223, 226, 239–41, 265–66, 286. Investigator Polis also walked through the home with the victim in order to determine the relevant areas to be processed. App.pp. 223, 239. The wires to the telephone line had been cut as well, and the area around the box which housed those wires had been freshly disturbed. App.pp. 173–74, 224, 228, 250. Fingerprints and some ridge detail were found on the box that housed the telephone wires, but Investigator Polis was unable to lift them. App.pp. 229–30, 253. Consequently, the box was taken into evidence. App.pp. 230, 245.

Deputy Benjamin Lasher returned to the drop-off location on Patricia Drive and assisted in setting up a perimeter for a canine track. App.p. 261. When the canine unit arrived, he indicated to those officers the direction in which the victim indicated the man had gone. App.p. 262. Those officers then began a canine track, which was unsuccessful. App.pp. 262, 287.

The following day, law enforcement again went to the victim's home to speak with her and to go back through her home and her truck. App.pp. 300, 302, 468–69, 519. After speaking with the victim, they determined a cigarette butt could be pertinent to the investigation. App.pp. 302–03, 470–71, 525. As a result, Investigator Isenhoward proceeded to the drop-off location on Patricia Drive. App.pp. 303, 313, 472–73. Upon searching the area, law enforcement discovered a Virginia Slims cigarette butt, which was collected into evidence. App.p. 305–07, 473–75.

Subsequently, on March 25, 2009, Investigator Harold Bouknight made a comparison of the latent fingerprints found on the telephone box and Appellant's fingerprints. App.pp. 319–23. Investigator Bouknight determined Appellant's fingerprint was a match to that left on the telephone box. App.pp. 324–25, 328, 485. Sergeant Stan Richards also did an independent comparison, which yielded the same results—the fingerprint on the telephone box was a match to Appellant. App.pp. 343–44. In addition to the box with the telephone wires, Investigator Polis also processed the side door, the storm door attached to the side door, and the bedroom doorknob for fingerprints and DNA. App.pp. 232–34, 242–43. No usable fingerprints were discovered. App.pp. 233, 244.

DNA swabs taken from the victim's home, the victim's truck, the cigarette butt found on Patricia Drive, the victim, Appellant, Tucker, and Blankenbecklor were subsequently submitted for analysis. App.pp. 356, 359, 375, 379, 381, 503–04. From the DNA on the cigarette butt, Dr. Gray Amick determined the DNA consisted of a mixture, from which Appellant and the victim could not be excluded as contributors.³ App.pp. 377, 386–88, 412–13. In fact, the likelihood of the victim and Appellant being the contributors to that sample was 140 Quintillion times more likely than the mixture being from the victim and an unknown randomly selected individual.

³ Tucker and Blankenbecklor were both excluded from the mixture. App.p.387

App.pp. 387–88. Furthermore, the DNA from the cigarette butt was determined to be that of Appellant’s through a CODIS search. App.pp. 432–33, 484. Many of the swabs submitted, however, were too weak to interpret who could have been a contributor to that DNA profile. App.p. 383–85.

After the fingerprint found at the victim’s home and the DNA on the cigarette butt had been matched to Appellant, law enforcement began a search around the Garners Ferry Road and Leesburg Road area for Appellant. App.pp. 435–37, 449. The team encountered Appellant at a home located on True Street, which is located in the search area, and also encountered Appellant’s girlfriend, Dawn Shea. App.pp. 437–38, 450–51, 458–59. When law enforcement first encountered Appellant at this home, they attempted to arrest him, but Appellant took off running. App.pp. 452, 455–56, 459. The search continued. App.pp. 450–53, 463. In continuing to search for Appellant, law enforcement also searched Appellant’s sister’s apartment pursuant to a search warrant. App.pp. 440–42, 488, 498–99, 531. Thereafter, law enforcement received information that Appellant was known to hang out with a friend, Zab. App.pp. 454, 460. Based on that information, law enforcement determined where Zab worked and lived, and ultimately apprehended Appellant in Zab’s home. App.pp. 454–55, 461–62, 499–500.

Shea gave law enforcement consent to search her home. App.pp. 438–39, 490, 531. During their search, law enforcement found a phone belonging to Appellant. App.pp. 439, 490–93. On the phone, law enforcement found text messages, which indicated the police were looking for Appellant and Appellant was about “to go into hiding.” App.p. 497. Law enforcement was unable to recover the items of clothing which the victim described or the gun. App.pp. 498, 531–32.

ARGUMENT

- I. Even if the trial court improperly admitted text messages from Appellant’s phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonably impacted the jury’s verdict.**

Appellant contends the trial court erred in admitting text messages found on Appellant’s phone that was left at a residence where he “stayed on and off.” (App.88). Even if the text messages were improperly admitted any error was entirely harmless in light of the other evidence in the record. Further, it is questionable whether Appellant had any standing to contest the seizure of his phone and its subsequent search to verify identity of the owner.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In search and seizure cases, an appellate court in South Carolina is limited to determining if there is any evidence to support the trial court’s findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (“[W]e will review the trial court’s ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.”). The reviewing court may conduct its own review of the record to determine whether the trial judge’s ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (“[A]ppellate courts must affirm if there is any evidence to support the trial court’s ruling.”); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (“ ‘When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm

if there is any evidence to support the ruling.’ ” (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 (“In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge’s ultimate determination de novo but, rather, would apply a deferential standard of review.”).

Harmless Error

Even assuming the text messages were improperly admitted by the trial court, any admission would be entirely harmless in light of the evidence in the record.⁴ The evidence of flight provided by the text messages was cumulative to other evidence, including Appellant’s own statements. Additionally, given the overwhelming evidence in the record, the evidence presented in the text message could not have reasonably affected the jury’s verdict.

Over thirty years ago, our Supreme Court recognized: “Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.” State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (citing, *inter alia*, Long et al. v. Conroy et al., 246 S.C. 225, 143 S.E.2d 459 (1965)). This principle has not changed. See, e.g.,

⁴ The State notes that Appellant failed to meet his burden of having an expectation of privacy prohibiting the search of the phone. See Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) (“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”). Initially, he never established a sufficient connection to the residence such that he could challenge the initial search, whether by warrant or by consent of the actual homeowner. As a result, any item within the house was subject to search upon the consent of the homeowner, especially when officers were trying to establish ownership of the cell phone. See State v. Moore, 429 S.C. 465, 477, 839 S.E.2d 882, 888 (2020) (“To the extent Appellant retained an expectation of privacy in his cell phone left next to the victim’s body, that expectation of privacy was diminished to the point that the finder could properly examine the item in a manner limited to determining the owner.”).

State v. Brewer, 411 S.C. 401, 409, 768 S.E.2d 656, 660 (2015) (“The admission of improper evidence is harmless [when] it is merely cumulative to other evidence.” (quoting State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989))); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless).

“Some errors—when considered in the context of the facts of a particular case—are so insignificant and inconsequential they do not require reversal of a conviction.” State v. Reyes, 432 S.C. 394, 405–06, 853 S.E.2d 334, 340 (2020). As the Supreme Court has noted:

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it “could not reasonably have affected the result of the trial.”

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). Our Supreme Court has articulated:

“[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.” State v. Tapp, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). Put simply, the harmless error rule embodies a commonsense principle our appellate courts have long recognized—“whatever doesn’t make any difference, doesn’t matter.” State v. Jolly, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991) (quoting McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

In determining whether error is harmless beyond a reasonable doubt, we often look to whether the “defendant’s guilt has been conclusively proven . . . such that no other rational conclusion can be reached.” State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014) (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). Thus, “overwhelming evidence” of a defendant’s guilt is a relevant consideration in the harmless error

analysis. See State v. Kromah, 401 S.C. 340, 361-62, 737 S.E.2d 490, 501 (2013).

Reyes, 432 S.C. at 406, 853 S.E.2d at 340.

In the instant case, the evidence of flight obtained from the text messages was cumulative to other testimony and evidence in the record. Most significantly, it was cumulative to Appellant's own testimony. When asked why he was attempting to get away from police seeking to arrest him, he indicated he knew why the police were there:

Q. At that moment in time did you have any idea why they were there or why he said I'm placing you under arrest?

A. Yes, sir.

Q. **All right. So you had heard that there were warrants for you?**

A. **Yes, sir.**

Q. Okay. And you didn't want to get arrested.

A. I mean, basically I didn't want to get arrested.

App.p.599 (emphasis added). The jury heard he escaped arrest and was not found until a later time. App.p.459-460. Additionally, as discussed above, there was significant testimony regarding the manhunt for Appellant including all of the various locations searched after this incident. Appellant was eventually located in the residence of a friend. He was located hiding in a closet of a bedroom at the residence. App.p.461. As a result, the jury understood Appellant fled custody after the incident, knew the police were looking for him, and even escaped an attempt to place him in custody before being found hiding in the closet at a friend's residence. The evidence from the text messages was merely cumulative and could not have impacted the jury's verdict.

Additionally, there is overwhelming evidence tying Appellant to this crime such that the minimal evidence of guilt established through the text messages could not have impacted the

verdict of the jury beyond a reasonable doubt. Fingerprints, DNA, and a readily identifiable scar that the victim could see throughout the incident all linked Appellant to the crime. There is no allegation in the record that the victim is making up the kidnapping or the armed robbery. The only question was whether it was Appellant who committed the crime. The minimal evidence of flight from the text messages was so insignificant to the State's presentation that it was never mentioned by the State during closing argument. The State focused instead on the fingerprint found near the cut phone wires, the DNA on the cigarette that matched the cigarette given to Appellant by the victim, and the scar she used to identify Appellant to law enforcement. The text messages, even if improperly admitted, could not have impacted the jury's verdict beyond a reasonable doubt, and so any error in their admission was entirely harmless. As a result, this Court should affirm Appellant's convictions and sentences.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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BY: 

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ATTORNEYS FOR RESPONDENT

January 26, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge
Honorable J. Derham Cole, Post-Conviction Relief Judge
Appellate Case Tracking No. 2018-001688

Adonis Williams,

Appellant,

vs.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Brief of Respondent on Appellant by emailing a copy to his counsel of record, Kathrine H. Hudgins, at her primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 26th day of January, 2022.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge
Honorable J. Derham Cole, Post-Conviction Relief Judge

ADONIS WILLIAMS,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001688

REPLY BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

The admission of the contents of text messages obtained by a warrantless search of Appellant's phone in violation of the Fourth Amendment is not harmless.

As argued in Appellant's amended brief, the trial judge erred in admitting the text messages obtained from Appellant's cell-phone without a warrant when the phone was not abandoned. Respondent argues that, "Even if the trial court improperly admitted text messages from Appellant's phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonable impacted the jury's verdict." (BOR p. 10). As discussed below, the error was not harmless. A portion of the text message that included a racial slur and a reference to Black power was 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.

Prior to trial Appellant moved to suppress text messages obtained from his cell phone. (App. pp. 84-91). The cell phone was found pursuant to the search of the home of Dawn Shea, a home where Petitioner would sometimes stay with Ms. Shea. (App. p. 85, line 13 – p. 86, lines 1-12). Sergeant Don Robinson, an investigator 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). The investigator testified that they obtained consent to search the residence from Ms. Shea. (App. p. 492, lines 1-19). 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 Appellant. (App. p. 491, lines 20-23). Sergeant Robinson testified that after

he confirmed that the phone belonged to Appellant, he went through the phone and looked at text messages. (App. p. 493, lines 25 – p. 494, lines 1-3).

Sergeant Robinson was allowed to testify before the jury, over objection, as to the content of the text messages found on the phone. (App. pp. 494-496). As to one text message, Sergeant Robinson testified, “The police is looking for you. They came back one of a kind.” (App. p. 497, lines 7-8). The prosecutor did not end her questioning with the one text message but went on to question the investigator about a second text message. (App. p. 497, lines 11-18). Sergeant Robinson testified about the second text message, “‘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; pp. 1059-1060).

Prior to erroneously ruling that the phone had been abandoned, the judge questioned the prosecutor about the purpose of the text messages. (App. p. 88, lines 15-16). The prosecutor confirmed that the purpose of admitting the text messages was to show flight. (App. p. 88, line 17). 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 prosecutor indicated the evidence was limited to two of the three exhibits. (App. p. 88, line 24 – p. 89, lines 1-2).

After the judge erroneously 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). At trial, counsel for Appellant 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 hat he may have had information that the police were looking for him ither 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 Appellant 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.

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. California⁴ 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 Appellant 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). Appellant’s testimony at trial and the evidence of flight leading up to Appellant’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 Appellant 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 Appellant could be eliminated as contributors to the mixture of DNA found on the cigarette butt. (App. p. 386, lines 3-19). Appellant’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). Appellant’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 Appellant admitted having a mark on his temple, (App. p. 652, lines 13-18), the witness did not identify Appellant. The State’s evidence was not overwhelming. The error was not harmless.

CONCLUSION

Based on the arguments presented in Appellant's amended brief and in this reply brief, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

PETITIONER

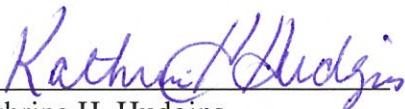
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is, wblitch@scag.gov; and Adonis K. Williams, #274626, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 22nd day of February, 2022.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Adonis Williams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001688

Appeal From Richland County
James R. Barber, Trial Judge
J. Derham Cole, Post-Conviction Relief Judge

Unpublished Opinion No. 2022-UP-380
Submitted September 1, 2022 – Filed October 12, 2022

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General William M. Blich,
Jr., both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). Because there is sufficient evidence to support the PCR court's finding that Petitioner did not knowingly and

intelligently waive his right to a direct appeal, we grant certiorari on Petitioner's Question One and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). We deny certiorari on Petitioner's Questions Two through Ten.

On direct appeal, Petitioner argues the trial court erred in denying his motion to suppress information from his cell phone and finding the phone was abandoned. We hold Petitioner failed to show the trial court erred in finding Petitioner abandoned his phone. *See Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014) ("On appeal from a motion to suppress on Fourth Amendment grounds, [the appellate court] applies a deferential standard of review and will reverse only if there is clear error."). 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))). Petitioner's remaining arguments regarding the text messages are not properly before this court because Petitioner did not raise them in his initial brief. *See State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (stating an issue in the "reply brief should not be considered on appeal because all issues must be argued in the initial briefs").

AFFIRMED.¹

KONDUROS, HEWITT, and VINSON, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Adonis K. Williams, respectfully requests rehearing on both the belated direct appeal issue addressed in the opinion as Petitioner's Question One and the denial of the post-conviction relief [PCR] issues addressed in the opinion as Petitioner's Questions Two through Ten. As to the belated direct appeal issue, counsel first respectfully submits this Court may have misapprehended the abandonment analysis. Counsel additionally requests rehearing on the belated direct appeal issue in light of the South Carolina Supreme Court's decision in State v. Frasier, Op. No. 28117 (S.C. Sup.Ct. filed September 28, 2022). Second, counsel respectfully submits that in finding that the remaining

arguments regarding the text messages, presumably discussed in the reply brief, are not properly before this Court because Petitioner did not raise them in his initial brief this Court may have overlooked the fact that the arguments in regard to the improperly admitted text messages addressed in the reply brief were in direct response to the State's harmless error argument. Finally, counsel respectfully submits that in denying certiorari on the nine PCR issues, without addressing any of the issues raised, this Court may have overlooked the fact that Petitioner alleged that the cumulative effect of nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial. Counsel respectfully seeks rehearing.

Belated Direct Appeal

On September 6, 2018, the PCR judge, the Honorable J. Derham Cole, in a 48- page written order, 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. On March 11, 2019, Petitioner filed the brief pursuant to White v. State and a separately filed petition for writ of certiorari addressing the PCR issues. The issue presented the first brief pursuant to White v. State was "Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?"

On January 8, 2020, this Court granted Petitioner's motion to withdraw the original White v. State brief and accept as filed the amended White v. State brief. Petitioner moved to amend the brief due to a factual error. While pre-trial the State argued that law enforcement had a search warrant for a house, testimony from the officers later revealed that the search was done by consent. The original brief asserted that the search was done pursuant to a search warrant. Counsel filed the amended brief to correct the error and apply the correct analysis for a consent search rather than a search done pursuant to a warrant. The issue presented in the amended White v. State brief,

however, was the same issue presented in the original brief, “Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?”

In the amended White v. State brief Petitioner specifically argued:

The judge overruled the objections and the investigator testified before the jury as to the content of the text messages found on the 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 trial judge erred in finding that the phone was abandoned and admitting the text messages obtained without a warrant.

(Amended brief pursuant to White v. State p. 7).

On January 26, 2022, the State filed a brief of respondent pursuant to White v. State. The State’s statement of issue on appeal was, “Even if the trial court improperly admitted text messages from Appellant’s phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonably impacted the jury’s verdict.” In response to the State’s harmless error argument, Petitioner filed a reply brief. The argument in the reply brief was, “The admission of the contents of text messages obtained by a warrantless search of Appellant’s phone in violation of the Fourth Amendment is not harmless.”

Standard of Review

In State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *2 (S.C. Sept. 28, 2022), the South Carolina Supreme Court wrote, “Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court’s factual findings for any evidentiary support, but the ultimate legal

conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.” In affirming the convictions this Court wrote:

On direct appeal, Petitioner argues the trial court erred in denying his motion to suppress information from his cell phone and finding the phone was abandoned. We hold Petitioner failed to show the trial court erred in finding Petitioner abandoned his phone. See Robinson v. State, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014) (“On appeal from a motion to suppress on Fourth Amendment grounds, [the appellate court] applies a deferential standard of review and will reverse only if there is clear error.”).

Williams v. State, No. 2018-001688, 2022 WL 6881820, at *1 (S.C. Ct. App. Oct. 12, 2022).

Counsel respectfully requests rehearing so that this Court may apply the standard of review clarified in Frasier.

Abandonment

Counsel respectfully suggests that this Court may have misapprehended the abandonment issue by overlooking Petitioner’s relationship to the home where the phone was seized. Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). When the trial judge denied the motion to suppress he stated:

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). The trial judge erred. Leaving something at somebody else’s place 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).

On March 22, 2009, Linda Wofford reported a burglary, armed robbery, kidnapping. On March 25, 2009, officers obtained consent to search Dawn Shea's house. Officer Ellis testified that he was told by the fugitive team that Ms. Shea was Petitioner's girlfriend. (App. p. 438, lines 1-2). Petitioner fled the home when members of the fugitive team approached the home. (App. pp. 449-452). When asked about the relationship between Petitioner and Ms. Shea, Sergeant Don Robinson testified that, "This was a rekindled girlfriend situation. They had recently rekindled their affair before this happened." (App. p. 489, lines 22-23). During the pre-trial suppression hearing the prosecutor told the judge that Petitioner would sometimes stay with Ms. Shea. (App. p. 85, lines 23-25).

In affirming the trial judge's refusal to suppress the contents of the cell phone this Court 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, No. 2018-001688, 2022 WL 6881820, at *1 (S.C. Ct. App. Oct. 12, 2022).

Respectfully, relinquishment of the reasonable expectation of privacy in the contents of a cell phone requires more than leaving the phone in a place where one does not live.

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 discusses 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 at his girlfriend’s house where he sometimes stayed. Counsel respectfully seeks rehearing on the abandonment issue.

In affirming the convictions in this belated direct appeal this Court also wrote, “Petitioner’s remaining arguments regarding the text messages are not properly before this court because Petitioner did not raise them in his initial brief. See State v. Wakefield, 323 S.C. 189,

191, 473 S.E.2d 831, 832 (Ct. App. 1996) (stating an issue in the “reply brief should not be considered on appeal because all issues must be argued in the initial briefs”).” Williams v. State, No. 2018-001688, 2022 WL 6881820, at *1 (S.C. Ct. App. Oct. 12, 2022).

In the initial brief Petitioner noted trial counsel’s additional objections to the text messages based on hearsay, Rule 403 and the fact that the State was unable to prove who sent or received the text messages. (App. p. 494, lines 14-15; p. 495, lines 12-18). (White v. State Brief p. 7). In the reply brief Petitioner noted trial counsel’s additional objections to the admission of the text messages as hearsay, a violation of the confrontation clause and Rule 403, SCRE. (Reply brief p. 3). The reference to these objections in the reply brief was not to raise them as separate issues but to support the argument that the Fourth Amendment violation was not harmless, as argued by the State. After the judge erroneously ruled that the phone had been abandoned, trial counsel failed to move to redact the highly prejudicial parts of the text messages and to limit the messages to the State’s purpose in showing flight. This is one of the additional allegations of ineffective assistance of counsel Petitioner asks this Court to rehear, as discussed below. Counsel respectfully seeks rehearing and asks this Court to apply the clarified standard of review from Frasier, find the trial judge erred in refusing to suppress text messages obtained by the warrantless seizure of a phone that was not abandoned, and find that the error in admitting the text messages was not harmless.

Ineffective Assistance of Counsel

In addition to the belated direct appeal issue, 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

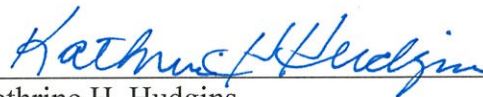
these errors, the result of the proceeding would have been different.” (App. p. 765.). This Court denied the other issues raised in the petition for writ of certiorari simply writing, “We deny certiorari on Petitioner's Questions Two through Ten.”

Williams v. State, No. 2018-001688, 2022 WL 6881820, at *1 (S.C. Ct. App. Oct. 12, 2022).

Counsel respectfully submits that this Court may have overlooked the fact that each of the allegations of ineffective assistance of counsel raised independently merit analysis by this Court. Additionally, counsel respectfully submits that summary dismissal is not warranted when there is an allegation of cumulative error.

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. Petitioner respectfully seeks rehearing and an analysis by this Court of the individual allegations raised of ineffective assistance of counsel as well as a cumulative error analysis.

Counsel respectfully requests rehearing based on the arguments raised above and as outlined in further detail in the briefs previously submitted to this Court. Counsel respectfully requests that on rehearing this Court reverse the convictions based on the belated direct appeal issue. Additionally, counsel respectfully requests that this Court reverse the convictions based on the nine allegations of ineffective assistance of counsel including cumulative error.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
ATTORNEY FOR PETITIONER

This 27th day of October, 2022.

RECEIVED
Oct 27 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Adonis K. Williams, #274626, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 27th day of October, 2022.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Adonis Williams, Petitioner,

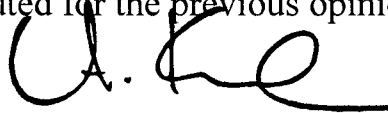
v.

State of South Carolina, Respondent.

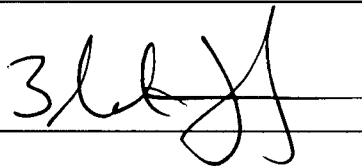
Appellate Case No. 2018-001688

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.



J.



J.



J.

Columbia, South Carolina

cc:

Kathrine Haggard Hudgins, Esquire

William M. Blitch, Jr., Esquire

Alan McCrory Wilson, Esquire

Adonis Williams, 274626

The Honorable J. Derham Cole

FILED
Nov 16 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Adonis Williams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001688

Appeal From Richland County
James R. Barber, Trial Judge
J. Derham Cole, Post-Conviction Relief Judge

Unpublished Opinion No. 2022-UP-380
Submitted September 1, 2022 – Filed October 12, 2022
Withdrawn, Substituted and Refiled November 16, 2022

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General William M. Blich,
Jr., both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). Because there is sufficient evidence

to support the PCR court's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant certiorari on Petitioner's Question One and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). We deny certiorari on Petitioner's Questions Two through Ten.

On direct appeal, Petitioner argues the trial court erred in denying his motion to suppress information from his cell phone and finding the phone was abandoned. We hold Petitioner abandoned his phone. *See State v. Frasier*, Op. No. 28117 (S.C. Sup. Ct. filed Sept. 28, 2022) (Howard Adv. Sh. No. 35 at 12, 17) ("[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review 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."). 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))). Petitioner's remaining arguments regarding the text messages are not properly before this court because Petitioner did not raise them in his initial brief. *See State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (stating an issue in the "reply brief should not be considered on appeal because all issues must be argued in the initial briefs").

AFFIRMED.¹

KONDUROS, HEWITT, and VINSON, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Nov 28 2022
SC Court of Appeals

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

Second Petition for Rehearing

On October 12, 2022, this Court heard Petitioner's belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and affirmed. Additionally, this Court denied certiorari on Petitioner's PCR issues two through ten. A timely petition for rehearing was filed on October 27, 2022. On November 16, 2022, this Court granted the petition for rehearing and filed a substituted opinion. The substituted opinion did not change the Court's initial ruling that affirmed the belated direct appeal issue and denied certiorari on Petitioner's PCR issues two through ten. Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Adonis K. Williams,

respectfully requests a second rehearing on both the belated direct appeal issue and the denial of the post-conviction relief [PCR] issues.

As to the belated direct appeal issue, counsel first respectfully submits this Court may have misapprehended the Fourth Amendment abandonment analysis. Additionally, counsel respectfully submits that this Court may have misapprehended the prejudice argument addressed in the reply brief as a result of the Fourth amendment violation, the sole issue raised on belated direct appeal. Counsel also respectfully submits that in denying certiorari on the nine PCR issues, without addressing any of the issues raised, this Court may have overlooked the fact that Petitioner alleged that the cumulative effect of nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial. Counsel respectfully seeks rehearing.

Belated Direct Appeal

On September 6, 2018, the PCR judge, the Honorable J. Derham Cole, in a 48- page written order, 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. On March 11, 2019, Petitioner filed the brief pursuant to White v. State and a separately filed petition for writ of certiorari addressing the PCR issues. The issue presented in the first brief pursuant to White v. State was “Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?” Petitioner argued that the warrantless search of the cell phone revealing the text messages violated the Fourth Amendment and required suppression of the test messages.

On January 8, 2020, this Court granted Petitioner’s motion to withdraw the original White v. State brief and accept as filed the amended White v. State brief. Petitioner moved to amend the brief due to a factual error. While pre-trial the State argued that law enforcement had a

search warrant for a house, testimony from the officers later revealed that the search was done by consent. The original brief asserted that the search was done pursuant to a search warrant. Counsel filed the amended brief to correct the error and apply the correct analysis for a consent search rather than a search done pursuant to a warrant. The issue presented in the amended White v. State brief, however, was the same Fourth Amendment issue presented in the original brief, “Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?”

In the amended White v. State brief Petitioner specifically argued:

The judge overruled the objections and the investigator testified before the jury as to the content of the text messages found on the 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 trial judge erred in finding that the phone was abandoned and admitting the text messages obtained without a warrant.

(Amended brief pursuant to White v. State p. 7).

On January 26, 2022, the State filed a brief of respondent pursuant to White v. State. The State’s statement of issue on appeal was, “Even if the trial court improperly admitted text messages from Appellant’s phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonably impacted the jury’s verdict.” In response to the State’s harmless error argument, Petitioner filed a reply brief. The argument in the reply brief was, “The admission of the contents of text messages obtained by a warrantless search of Appellant’s phone in violation of the Fourth Amendment is not harmless.”

Standard of Review

In State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *2 (S.C. Sept. 28, 2022), the South Carolina Supreme Court wrote, “Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court’s factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.”

Abandonment

Counsel respectfully suggests that this Court may have misapprehended the Fourth Amendment abandonment issue by overlooking Petitioner’s relationship to the home where the phone was seized. Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). When the trial judge denied the motion to suppress he stated:

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). The trial judge erred. Leaving something at somebody else’s place 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).

On March 22, 2009, Linda Wofford reported a burglary, armed robbery, kidnapping. On March 25, 2009, officers obtained consent to search Dawn Shea’s house. Officer Ellis testified

that he was told by the fugitive team that Ms. Shea was Petitioner's girlfriend. (App. p. 438, lines 1-2). Petitioner fled the home when members of the fugitive team approached the home. (App. pp. 449-452). When asked about the relationship between Petitioner and Ms. Shea, Sergeant Don Robinson testified that, "This was a rekindled girlfriend situation. They had recently rekindled their affair before this happened." (App. p. 489, lines 22-23). During the pre-trial suppression hearing the prosecutor told the judge that Petitioner would sometimes stay with Ms. Shea. (App. p. 85, lines 23-25).

In affirming the trial judge's refusal to suppress the contents of the cell phone this Court 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, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Nov. 16, 2022).

Respectfully, relinquishment of the reasonable expectation of privacy in the contents of a cell phone requires more than leaving the phone in a place where one does not live.

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 discusses 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 at his girlfriend’s house where he sometimes stayed. Counsel respectfully seeks rehearing on the abandonment issue.

In affirming the convictions in this belated direct appeal this Court also wrote, “Petitioner's remaining arguments regarding the text messages are not properly before this court because Petitioner did not raise them in his initial brief. See State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (stating an issue in the “reply brief should not be

considered on appeal because all issues must be argued in the initial briefs”).” Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Oct. 12, 2022).

In the initial brief Petitioner noted trial counsel’s additional objections to the text messages based on hearsay, Rule 403 and the fact that the State was unable to prove who sent or received the text messages. (App. p. 494, lines 14-15; p. 495, lines 12-18). (White v. State brief p. 7). Petitioner did not raise these issues on appeal. The only issue raised on direct appeal in both the initial White v. State brief and the reply brief was the Fourth Amendment violation.

In the reply brief Petitioner noted trial counsel’s additional objections to the admission of the text messages as hearsay, a violation of the confrontation clause and Rule 403, SCRE. (Reply brief p. 3). The reference to these objections in the reply brief was not to raise them as separate issues but to support the argument that the Fourth Amendment violation was not harmless, as argued by the State. After the judge erroneously ruled that the phone had been abandoned, trial counsel failed to move to redact the highly prejudicial parts of the text messages and to limit the messages to the State’s purpose in showing flight. This is one of the additional allegations of ineffective assistance of counsel Petitioner asks this Court to rehear, as discussed below. Counsel respectfully seeks rehearing and asks this Court to find that the trial judge erred in refusing to suppress text messages obtained by the warrantless seizure of a phone that was not abandoned. Counsel additionally seeks rehearing to find that the error in admitting the text messages in violation of the Fourth Amendment was not harmless.

Ineffective Assistance of Counsel

In addition to the belated direct appeal issue, 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.). This Court denied the other issues raised in the petition for writ of certiorari simply writing, "We deny certiorari on Petitioner's Questions Two through Ten." Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Oct. 12, 2022). Counsel respectfully submits that this Court may have overlooked the fact that each of the allegations of ineffective assistance of counsel raised independently merit analysis by this Court. Additionally, counsel respectfully submits that summary dismissal is not warranted when there is an allegation of cumulative error.

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. Petitioner respectfully seeks rehearing and an analysis by this Court of the individual allegations raised of ineffective assistance of counsel as well as a cumulative error analysis.

Counsel respectfully requests rehearing based on the arguments raised above and as outlined in further detail in the briefs previously submitted to this Court. Counsel respectfully requests that on rehearing this Court reverse the convictions based on the belated direct appeal issue. Additionally, counsel respectfully requests that this Court address the PCR issues, including cumulative error, and reverse the convictions.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
ATTORNEY FOR PETITIONER

This 28th day of November, 2022.

RECEIVED**Nov 28 2022****SC Court of Appeals**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Second Petition for Rehearing in the above-referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Adonis K. Williams, #274626, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 28th day of November, 2022.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Adonis Williams, Petitioner,

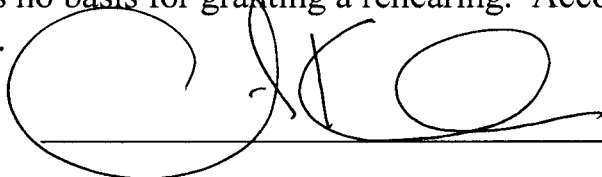
v.

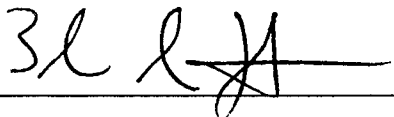
State of South Carolina, Respondent.

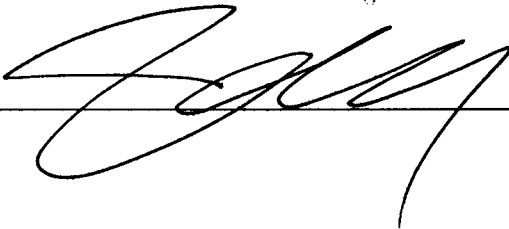
Appellate Case No. 2018-001688

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Kathrine Haggard Hudgins, Esquire

William M. Blicht, Jr., Esquire

Alan McCrory Wilson, Esquire

Adonis Williams, 274626

FILED
Jan 04 2023