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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County
Court of Common Pleas
Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2024-001375

Desmond Collins, Appellant,

vs.

The State, Respondent.

INITIAL BRIEF OF APPELLANT DESMOND COLLINS

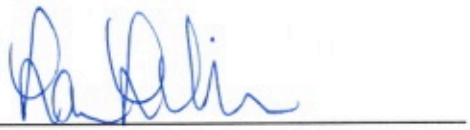

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Rules of Evidence

QUESTIONS PRESENTED

I. Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where Trial Counsel employed the unreasonable trial strategy of repeatedly telling the jury that his client was guilty as charged of trafficking heroin (that his client was a drug addict who was driving around a drug dealer in exchange for heroin to use).

II. Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where the Trial Court did not permit Appellant to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, and where Trial Counsel did not preserve the error for appellate review.

III. Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where Appellate Counsel did not raise the issue on direct appeal of the Trial Court's denial of Appellant's right to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, where Trial Counsel preserved the issue at trial, and where Appellate Counsel failed to raise the issue on direct appeal.

PROCEDURAL HISTORY

In September 2016, the Horry County Grand Jury indicted Appellant (Mr. Collins) for trafficking heroin (2016-GS-26-03956). On November 13-15, 2017, Mr. Collins proceeded to trial before the Honorable Benjamin H. Culbertson and a Jury. T. Kirk Truslow represented Mr. Collins, and W. Grayson Ervin prosecuted the case on behalf of the State. The jury found Mr. Collins guilty as charged. The Trial Court sentenced Mr. Collins to twenty-five (25) years imprisonment and ordered him to pay a $200,000 fine. Mr. Collins filed a timely notice of appeal.

On December 18, 2019, the South Carolina Court of Appeals affirmed Mr. Collins' convictions and sentences (Appellate Case No. 2017-2405). State v. Collins, 2019-UP-387 (S.C. Ct. App. filed December 18, 2019). T. Kirk Truslow also represented Mr. Collins in his direct appeal. The Court of Appeals found that the sole issue Mr. Truslow raised in the direct appeal, that the Trial Court erred by finding that there was no exculpatory material in a 12th hour disclosure by the Solicitor's office, was not preserved for appeal because Mr. Truslow stipulated at trial that the evidence was not relevant. Id.

On July 27, 2020, Mr. Collins filed an application requesting post-conviction relief, alleging ineffective assistance of trial and appellate counsel. On December 2, 2022, Mr. Collins appeared before the Circuit Court for an evidentiary hearing. Post-conviction relief was denied by the Honorable H. Steven DeBerry, IV, in a written Order dated July 26, 2024. Order of Dismissal. Mr. Collins filed a timely Notice of Appeal and now requests certiorari for this Court's review of the three Questions Presented above.

STANDARD OF REVIEW

To establish a claim of ineffective assistance of counsel, a PCR applicant must show: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687 (1984).

This Court has held that it gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Thus, on review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

A defendant is also constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Our Supreme Court has declined to adopt different rules for appellate and trial counsel in terms of strategy. State v. Tisdale, 357 S.C. 474, 594 S.E.2d 166 (2004). Even where appellate counsel files an Anders brief, the Strickland test should be applied in determining whether appellate counsel was ineffective. Bennett v. State, 383 S.C. 303, 680 S.E.2d 273 (2009). The burden of proof is upon the petitioner to show counsel's performance was deficient as

measured by the standard of reasonableness under prevailing professional norms. The petitioner must then prove that, because of appellate counsel's deficient performance there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (appeal, not trial) would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001) (finding where the result of an appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant a new trial).

STATEMENT OF FACTS

Mr. Collins was charged with trafficking heroin, 14-28 grams. He was arrested following a traffic stop where Mr. Collins was the driver of the vehicle. A passenger named Darrin was also present, but law enforcement allowed the passenger to leave after Mr. Collins told them to "put it all on me." Trial Tr. 55/10-14. Mr. Collins pleaded not guilty, retained an attorney, and proceeded to trial in November of 2017.

In opening statement, Trial Counsel told the jury, "Remember what I told you about constructive possession; he's in the same car, same dope in plain view, it's not like it was in the trunk, it was riding in the cab or the interior of the vehicle, riding with both of them. Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The drug dealer is in the car, he's doing business, he's on the phone, he's doing his thing, he's riding, he's driving. The passenger, they just let him walk away." Trial Tr. 103/22-24.

When cross-examining the lead officer, Trial Counsel agrees with the officer that Mr. Collins was in possession of the heroin as well as the uncharged passenger:

Q: You agree with me, prior to the limited investigation was done after that, that these two individuals are in possession of drugs?

A: They're both in the vehicle, yes.

Q: So, they're both in possession of that dope?

A: To an extent, yes.

Q: It wasn't hidden, was it?

A: It wasn't hidden, no.

Q: Okay. And -- and really fair -- is it fair to say, that Darrin had access to grab the dope; he could touch it, right, pick it up?

Trial Tr. 147/15-25.

When cross-examining the lead officer, Trial Counsel attempts to get the officer to agree with him that Mr. Collins owned the bag of heroin containing only three grams (possession with intent weight), while the passenger owned the larger bag of heroin that contained trafficking-weight:

Q: Okay. Is it possible that -- and I'm not conceding anything -- but the little bag is his as a user and the big bag is what Darrin is selling; is that possible?

A: That you'd have to -- I'd have to look at the weights, but, as far as the user standpoint, that would probably be a lot of heroin.

Q: Three grams?

A: I'd have to look at the weights that I put in the report.

Q: But is that a possible scenario? Stick them one bag because you don't want bags everywhere, but that one would be one person's and one would be the other persons?

A: Both bags looked like, at some point, they had been knotted because they were like crinkled up together kind of.

Q: All right. But one bag could be one, and one other bag could be the other person's? It could be?

A: I don't know at that point. I don't know.

Q: Is it possible?

Trial Tr. 168/9-25.

In closing argument, Trial Counsel explicitly states to the jury that Mr. Collins was a person "with limited means" who was "driving a drug dealer around," and who "should probably get the three grams" (which wasn't even an option on the verdict form). Trial Tr. 276/23 – 279/6.

Regarding the amount of money found in the vehicle, Trial Counsel argued that his client "don't know; it ain't his money. You know whose money it is. It's the guy who walked away." Trial Tr. 276/23-25.

Continuing to make the case that the passenger was a drug dealer, Trial Counsel tells the jurors, "This guy is sitting in the car with all of his dope, scales, money, and he walks away. You know, that's the guys that make money in this business. I'm not gonna call him smart, because I hate to even give him that, okay, but somehow he walked

away from this thing and he got to pick out which phone he wanted to bring with him." Trial Tr. 277/4-9.

Trial Counsel then explains that Mr. Collins was driving the drug dealer around and that Mr. Collins should "probably get the three grams:"

> My guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he's responsible for anything. And I'm not conceding that he is, but you know, three grams, that's usually the person that's got to have the heroin. The guy in the passenger seat walked away, got to pick his phone, probably because he didn't do heroin. You know, these people are smart. They're selling junk to people, they're giving junk to people so that they'll drive them around so they don't get busted, because that person needs that drug.

Trial Tr. 278/22 – 279/6. Referring to drug dealers and drug users, Trial Counsel tells the jurors:

> And some of them have a lot of money at the expense of people's lives, their health, the community, their families, they trade all that for a bunch of money.
>
> Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things they would ordinarily never think that they would do. I can't imagine one person when they're 8, 10, 12-years-old saying I want to grow up to be a heroin addict or drive a drug dealer around. Unfortunately, some of these people can get in that position. Unfortunately, that drug takes precedence.

Now, I don't think you should convict my client because he showed you a bag of heroin. I think it's a evil despicable thing. It's killing people. That didn't start today; it's been killing people for a long time, that drug and many others.

Trial Tr. 274/6-21.

ARGUMENT AND LAW

I. **Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where Trial Counsel employed the unreasonable trial strategy of repeatedly telling the jury that his client was guilty as charged of trafficking heroin (that his client was a drug addict who was driving around a drug dealer in exchange for heroin to use).**

The Circuit Court held that Mr. Collin's allegations that "Trial Counsel employed an unreasonable trial strategy by stating he was a heroin addict, was driving around drug dealer… are without merit," Order of Dismissal, 48, and "Trial Counsel articulated a reasonable strategy as to his purpose in his opening statement." Id. at 52.

The Circuit Court also noted that, "On direct examination, Trial Counsel testified he does not recall his trial strategy in opening, but that he is certain he addressed his overall theory of the case and attempted to bolster Applicant's defense in opening. (PCR Tr. p. 43). Trial Counsel testified he was attempting to argue in opening that there was another person there who was a drug dealer. Id." Order of Dismissal, 50.

From opening statement through closing argument, Trial Counsel's theory of the case was that his client, Mr. Collins, was "driving a drug dealer around" so the drug

dealer, the passenger in the vehicle, would give Mr. Collins three grams of heroin, which was contained in a separate baggy within the larger baggy of heroin, because Mr. Collins was a heroin addict.

At times, it was unclear whether Trial Counsel was saying 1) the drug dealer was the passenger who walked away or 2) the drug dealer was his client, Mr. Collins, who was driving the vehicle. For example, in opening statement, Trial Counsel asked, "Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The drug dealer is in the car, he's doing business, he's on the phone, he's doing his thing, he's riding, he's driving. The passenger, they just let him walk away."

This statement, in particular, was subject to two possible interpretations. First, the jurors may have believed Trial Counsel was telling them his client was the drug dealer who was driving, and they let the passenger walk away, in which case Mr. Collins would be guilty of trafficking heroin. The second possible interpretation is that the passenger, Darrin, was the drug dealer, and that Mr. Collins was a drug addict who was driving Darrin around while Darrin conducted his business, in which case Mr. Collins would still be guilty of trafficking heroin as an accomplice.

On cross-examination, Trial Counsel pressed the lead officer to agree that Mr. Collins was in possession of the drugs, just as the passenger was in possession of the drugs, Trial Tr. 147/15-25, and goes on to attempt to get the officer to agree that it is possible the bag of heroin weighing three grams belonged to Mr. Collins and the larger bag of heroin belonged to the passenger. Trial Tr. 168/9-25.

If Trial Counsel successfully convinced the jurors that Mr. Collins was driving the passenger around while the passenger sold drugs, and that the three-gram bag of heroin was Mr. Collins' payment for being the driver, then Mr. Collins is guilty of trafficking heroin under the theory of accomplice liability.

If Trial Counsel successfully convinced the jurors that Mr. Collins should only be held responsible for the three-gram bag of heroin, Mr. Collins would be guilty of possession with intent to distribute heroin, which was not an option that was available to the jurors because no evidence was presented at trial of possession with intent to distribute as opposed to trafficking heroin.

Telling the jurors that Mr. Collins was guilty of the offense with which he was charged, in opening statement, cross-examination, and closing argument, was not a reasonable trial strategy. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness." Roseboro v. State, 317 S.C. 292,294,454 S.E.2d 312, 313 (1995).

Counsel's Concession of Guilt is a Structural Error that Requires no Showing of Prejudice

In McCoy v. Louisiana, 200 L.Ed.2d 821, 138 S.Ct. 1500 (2018), the United States Supreme Court held that it is unconstitutional and a structural error (requiring no showing of prejudice) for defense counsel to concede guilt over a defendant's "intransigent and unambiguous objection" to doing so. Id. at 1507, 1511. When informed

of counsel's strategy, the defendant in McCoy explicitly instructed counsel not to make that concession, and instead insisted that counsel seek an acquittal. Id.

McCoy held that the defendant was entitled to a new trial, based on the Sixth Amendment right to have the "[a]utonomy to decide ... the objective of [his] defense," including whether the objective of that defense is to maintain an assertion of innocence even in the face of overwhelming evidence. McCoy, 138 S.Ct. at 1508. The Court found the violation of a defendant's right to make such a choice constitutes a structural error and is not subject to harmless error review. Id. at 1511.

McCoy equated the defendant's "right to autonomy" with a defendant's right to decide "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." 138 S.Ct. at 1508, citing Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983). McCoy further explained that a "[s]tructural error affects the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself." (Citation and punctuation omitted.) McCoy, 138 S.Ct. at 1511.

The Court stated that they would not apply "Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), to McCoy's claim. Although ordinarily a defendant must show prejudice resulting from counsel's errors, this is not the case when counsel "usurps control of an issue within [the client's] sole prerogative," McCoy, 138 S.Ct. at 1500:

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, e.g., McKaskle, 465 U.S., at 177, n. 8, 104 S.Ct. 944 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); United States v. Gonzalez–Lopez, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (choice of counsel is structural); Waller v. Georgia, 467 U.S. 39, 49–50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Weaver, 582 U.S., at ——, 137 S.Ct., at 1908 (citing Faretta, 422 U.S., at 834, 95 S.Ct. 2525). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S., at —— – ——, 137 S.Ct., at 1908 (citing Gonzalez–Lopez, 548 U.S., at 149, n. 4, 126 S.Ct. 2557, and Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

Id.

The Court cites with approval Cooke v. State, 977 A.2d 803, 849 (2009) ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole.") and finds that counsel's admission of their client's guilt "blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice."

Similarly, in State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000) (not a death penalty case), the Kansas Supreme Court found that there was no need to prove prejudice where counsel admitted to facts to support a felony murder conviction in an attempt to achieve a lighter sentence by avoiding a premeditated murder conviction:

> Defense counsel's thinking undoubtedly was that his client's conviction of one of the murder charges was inevitable so that his effort ought to be directed to lessening the penalty potential. A hard 40 sentence may be imposed on a conviction of premeditated but not felony murder. K.S.A. 1999 Supp. 21-4635(a). Hence, defense counsel urged the jury to view Carter's killing of Hawkins as an incident of the robbery rather than as a premeditated act.

Carter, 270 Kan.at 426, 14 P.3d at 1138.

In this case, unlike in McCoy or Carter, there was nothing for Mr. Collins to gain by admitting guilt. According to Trial Counsel, Mr. Collins was either guilty of trafficking

heroin as charged because he was driving around a drug dealer, or he was guilty of possession with intent to distribute heroin, which was not an option given to the jurors on the verdict form or in the Trial Court's instructions. Calling a defense attorney's admission of his client's guilt "trial strategy" when there is nothing to gain and the client does not agree "is to ignore the obvious," that defense counsel "was betraying the defendant by deliberately overriding his plea of not guilty." Id. It is solely the defendant's decision whether to enter a plea of guilt or not guilty, and it is a fundamental constitutional right. Id.

Mr. Collins pleaded not guilty to the charges against him. His "plea of not guilty required the State to prove guilt beyond a reasonable doubt. Defense counsel's conduct relieved the State of that burden." Id. "The result was a breakdown in our adversarial system of justice." Id. The conduct of defense counsel was inherently prejudicial, and, as in McCoy and Carter, Mr. Collins should be granted a new trial, and no separate showing of prejudice should be required.

II. **Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where the Trial Court did not permit Appellant to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, and where Trial Counsel did not preserve the error for appellate review.**

The Circuit Court held that Mr. Collins' allegation that "Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve the issue of whether the Trial Court erred in prohibiting him from cross examining Officer Crews about the Solicitor's Office dismissing his DUI charge prior to trial... is without merit." Order of Dismissal, 25.

The Circuit Court found that evidence of conviction of a crime punishable by one year or more is admissible under Rule 609. Id., citing Michelson v. United States, 335 U.S. 469 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.").

The Circuit Court goes on to say, "Where a party seeks to impeach a witness on cross-examination of specific instances of conduct that do not constitute a criminal conviction, the inquiry must be *clearly* probative of the witness's character for truthfulness or untruthfulness." Id. at 25-26, citing Rule 608(b), SCRE; State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (The inquiry into specific instances of a witness's misconduct is limited to those instances which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement).

Finally, the Circuit Court notes that a "witness may also be impeached for bias by examination or other evidence, but determining the admissibility of testimony concerning bias is a matter within the trial court's discretion, as questions attempting to prove bias are not always proper. Id. at 26, citing Rule 608(c), SCRE; State v. Gracely.

399 S.C. 363, 731 S.E.2d 880 (2012) (reversing a trafficking conviction where the defendant was prohibiting from cross-examining a witness about the mandatory minimum sentences they faced even though the mandatory minimums were the same that the defendant faced); State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014) (the trial court did not abuse its discretion in prohibiting cross-examination of an officer regarding the contents of his personnel file).

In addition to the cases cited in the Order of Dismissal, however, there is a long line of South Carolina appellate opinions dealing with a defendant's right to cross-examine witnesses concerning bias under the Confrontation Clause.

"A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315 (2002), citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991).

"'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

Criminal defendants can prove a violation of the Confrontation Clause "by showing that [they were] prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences

relating to the reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986).

South Carolina's appellate courts and the United States Supreme Court have repeatedly found that it was improper to limit a criminal defendant's cross-examination of a witness regarding bias including:

- The witness' pending charges, including specific details of the allegations and potential penalties, State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002),
- The potential sentence faced by the witness, even if it is the same as the defendant's potential sentence, State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315 (2002),
- The mandatory minimum sentences faced by the witness, even if they are the same as the defendant's mandatory minimum sentences, State v. Gracely. 399 S.C. 363, 731 S.E.2d 880 (2012),
- The witness's experience negotiating plea bargains with prosecutors, even if there are no pending charges, to show jurors that the witness is familiar with the system of plea bargaining and reward for favorable testimony, State v. Jones, 343 S.C. 562, (S.C. 2001),
- What the witness's potential sentence would have been, even if their charges have been reduced, State v. Brown, 399 S.E.2d 593 (S.C. 1991),
- The witness's probation status, even if they are a juvenile offender, Davis v. Alaska, 415 U.S. 308 (1974),
- The potential sentences for pending charges, State v. Williams, 854 S.E.2d 166, 432 S.C. 515 (2021), and

- Pending indictments, State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994).

Undersigned counsel is unaware of case law directly on point stating that a witness's dismissed charges, when the charges were dismissed before trial by the same Solicitor's Office before the trial in which they call the witness, can or cannot be inquired into upon cross-examination of the witness, and this is a matter of first impression in South Carolina.

It is not correct that only a conviction by greater than one year is admissible as evidence of bias against a state's witness, however. Evidence of bias under Rule 609 covers a broad range of conduct or statuses, including scenarios where the charges are still pending, see, Sims, 348 S.C. 16; Mizzell, 349 S.C. 326; Gracely. 399 S.C. 363; Williams, 854 S.E.2d 166; Clark, 315 S.C. 478, where the witness was only convicted of a lesser offense, see Brown, 399 S.E.2d 593, and where there are no charges at all, see Jones, 343 S.C. 562.

Although ordinarily the witness who is testifying in exchange for leniency in an unrelated criminal case is not a police officer, the analysis should be no different for a police officer than it is for any other witness.

The officer was facing driving under the influence charges and entered negotiations in his case that resulted in the dismissal of his charges before the start of Mr. Collins' trial.

At Mr. Collins' trial, the officer provided favorable testimony on behalf of the same party that negotiated a dismissal of his criminal charges.

Whether the Trial Court or Circuit Court believed the officer was biased or not, Mr. Collins had the right to present that evidence of bias to the jurors in his case so they could decide.

The Denial of Mr. Collins' Right to Confrontation was not Harmless Error

"A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), citing State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). The Court should look to the factors found in Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674, 686 (1986), to determine whether an error is harmless, including:

- The importance of the witness's testimony to the prosecution's case,
- Whether the testimony was cumulative,
- The presence or absence of corroborating evidence on material points,
- The extent of cross-examination otherwise permitted, and
- The overall strength of the prosecution's case.

Id.

The Court in Mizell stated that "[h]armless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, citing Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). In determining whether an error is harmless, "the reviewing court must review the entire record to determine what effect the error had on the verdict."

State v. Clark, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) (Toal, J. dissenting); see, e.g., Arnold v. State, supra.

Considering the Van Arsdall factors, the Court should note that the witness was the state's lead officer, and his testimony was essential to the prosecution's case. The officer's testimony was not cumulative, as there were various matters that could only be testified to by the lead officer in the case, including the probable cause for the traffic stop which was observed only by the lead officer, the search of the vehicle which conducted only by the lead officer, and the field tests conducted at the police station which were performed only by the lead officer at that location.

As to the third and fourth factors, there were varying degrees of corroborating evidence on the material points of evidence, including body camera footage and dashcam footage, and Trial Counsel was not otherwise limited in his cross-examination of the officer. The State's evidence was not overwhelming, however, considering that there was a passenger in the vehicle who left the scene after being released by the police and who was also in constructive possession of the narcotics found in the vehicle.

The Van Arsdall factors weigh in favor of Mr. Collins, and, after considering the entire record including the effect Trial Counsel's admissions of guilt to the jurors had on the verdict, this Court should reverse the Circuit Court and order a new trial for Mr. Collins.

III. Whether the Court should grant a Writ of Certiorari to review the Circuit Court's decision denying post-conviction relief where Appellate

Counsel did not raise the issue on direct appeal of the Trial Court's denial of Appellant's right to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, where Trial Counsel preserved the issue at trial, and where Appellant Counsel failed to raise the issue on direct appeal.

Appellant incorporates all facts, arguments, and law from the above discussion of Question Presented II, Trial Counsel's failure to preserve the issue of the Trial Court's denial of Appellant's right to cross-examine the officer regarding his DUI charge that was dismissed by the Solicitor's Office into this discussion of Question Presented III, Appellant Counsel's failure to raise the same issue on direct appeal.

Should this Court find that the issue was not preserved for appeal, Mr. Collins asks this Court to order a new trial on the grounds in Question Presented II. Should this Court find that the issue was preserved for appeal, as the Circuit Court did, see Order of Dismissal, 29, Mr. Collins asks this Court to order a new trial on the grounds in Question Presented III.

The Circuit Court held that "Trial Counsel did preserve this issue for appeal. Assuming, *in arguendo,* Trial Counsel had failed to argue and preserve the issue, evidence of Officer Crews's arrest is not admissible impeachment evidence as it does not constitute a prior bad act, go to his truthfulness, or show bias." Id.

The Circuit Court Found that Appellate Counsel's Performance was Deficient

The Circuit Court held that Appellate Counsel's performance – raising only one issue that was unpreserved while ignoring other issues – was deficient:

> Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303,309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259,288 (2000) (citing Gray v. Greer, 800 F.2d 644,646 (7th Cir. 1986))...
>
> On direct examination, Trial Counsel testified that he raised on appeal the glaring issue in his mind that he left with from Applicant's trial. (PCR Tr. p. 41). Trial Counsel testified he may have looked at other issues, and believes Applicant asked him to raise certain issues, but Trial Counsel decided to keep it simple and assert the issue he believed was good. Id. Trial Counsel testified he believed the issue he raised on appeal was the best issue. Id., On cross-examination, Trial Counsel testified there were other issues he could have raised on appeal, and he does not recall his thought process in not raising other issues on appeal. (PCR Tr. p. 51). Trial Counsel testified he put all his eggs in one basket on appeal because it seemed like the best issue, but it was not preserved. (PCR Tr. p. 53).

Trial Counsel testified that in hindsight, he would have raised other issues on appeal. (PCR Tr. pp. 50 - 53; 60 - 62). This Court must first look at the issue raised on appeal and compare it to the viable issues raised by Applicant at the PCR evidentiary hearing to determine whether the pled issues are stronger than the one raised on appeal. This Court finds that because the issue raised on appeal was not preserved for appeal, then any other issue that could have been raised on appeal would have been a stronger issue than the one raised on appeal. Thus, this Court finds Trial Counsel's performance on this matter was deficient. However, a finding of deficiency only satisfies Strickland's first prong. Order of Dismissal, 68-69.

Mr. Collins appeals the Circuit Court's determination that he was not prejudiced by Trial Counsel's deficiency and asks this Court to determine the question asked by the Circuit Court, "whether the issue, or issues, if raised, would have been successful on appeal." Id. at 69.

For the reasons stated above in the discussions of Questions Presented II and III, Mr. Collins' Sixth Amendment right to Confrontation was violated by his attorney's deficiency, it was not harmless error, and this Court should grant Certiorari to review the Circuit Court's denial of post-conviction relief.

CONCLUSION

For the reasons stated above, this Court should grant Certiorari to review the Circuit Court's denial of post-conviction relief in the following matters:

1) Trial counsel's unreasonable trial strategy of repeatedly telling the jury that his client was guilty as charged of trafficking heroin,

2) Trial counsel's failure to preserve for appeal the Trial Court's refusal to allow Appellant to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, and

3) Appellate counsel's failure to raise on direct appeal the Trial Court's refusal to allow Appellant to cross-examine the lead officer in his case about the lead officer's driving under the influence charge that was dismissed by the 15th Circuit Solicitor's Office prior to Appellant's trial, where the DUI offense was prosecuted by the same Solicitor's Office prosecuting Appellant, if Trial Counsel preserved the issue for direct appeal.

Respectfully Submitted,

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