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February 11, 2014

Hand Delivered

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Randy Thomas v. State of South Carolina
Appellate Case No.: 2013-001287
Our file no.: 38769/01510

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of Petition For Writ of Certiorari in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier.

Also enclosed please find three copies (one copy unbound) of the Appendix to the Petition for Writ of Certiorari along with proof of service in this matter. Please file the two copies and return a clocked copy of the Appendix to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel with a copy of the Petition for Writ of Certiorari and Appendix.

Very truly yours,

Matthew A. Abee

MAA:mws
Enclosures

cc: Megan Harrigan

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 11 2014

S.C. Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-01543
Appellate Case No. 2013-001287

Randy Thomas, SCDC # 313802, ... Petitioner

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

I.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to present character evidence during the jury trial where Thomas's character was the seminal issue in the case.

II.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to object or request a mistrial based upon a violation of the sequestration order by the State's witness.

III.

Whether, even if no single error is sufficient standing alone, the cumulative effect of trial counsel's errors caused the deprivation of effective assistance of counsel as provided by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

Testimony at trial alleged that on October 30, 2004, Randy Thomas ("Thomas") arrived unannounced and uninvited at the house of the victim's parents in Irmo, South Carolina, while only the victim—Thomas's former girlfriend and roommate—and her three-year old son were present at the house. (App. 458-73.) After the victim alleged to have struggled with Thomas, testimony indicated that he carried the victim into her parents' bedroom, took off her clothes, and required her to perform oral sex on him. (App. 468-73.) Thereafter, the victim alleged that Thomas then attempted to have vaginal intercourse, but she told him to stop. (App. 474-78.) Thomas complied, though testimony regarding whether he did so before or after vaginal penetration occurred was contradictory. (App. 478, 539.) Thomas maintained that the interaction was consensual and testified to that effect. (App. 941, 952, 1033.) Apart from the victim and Thomas, no other witnesses observed the events that took place inside the house.

Thomas was then alleged to have grabbed a knife from the kitchen and put it to the back of the victim's neck before putting the knife in his pocket. (App. 489.) The victim then testified that Thomas picked up her son and took him outside where he put him in a car and drove away. (App. 490.) The victim testified that Thomas stopped and let her son out of the car before leaving the scene. (App. 497.)

After Thomas left the scene, the victim's neighbor, Katria Weyl, who had witnessed Thomas drive off, comforted the victim and spoke with her about what happened while she waited on the police to arrive. (App. 618.) Officer Rodney Gonzales arrived at the scene after being dispatched. (App. 585.) Officer Gonzales spoke with the victim who told him what

happened in front of Weyl. (App. 620.) The victim told Officer Gonzales all the details of the incident and alleged that Thomas had sexually assaulted her. (App. 586-89.) Following this discussion, Investigator Roy Livingston arrived at the scene, and Officer Gonzales told him what the victim said transpired. (App. 650.) Investigator Livingston then talked to the victim who told him the details of the events. (App. 651-54.)

Investigator Livingston then followed the victim to Palmetto Richland Memorial Hospital for a "sexual protocol." (App. 658.) The victim called her friend, Ashley Mishoe, and told her what happened while on the way to the hospital. (App. 562.) Mishoe met the victim at the hospital shortly after she was admitted. (App. 631.) It was not until 9:45 p.m. that evening when Dr. John Stewart, an emergency room physician, conducted a physical examination. (App. 631.) Dr. Stewart did not speak with the victim until over seven and a half hours after Officer Gonzales was dispatched to the scene. (App. 631.) During that examination, the victim told Dr. Stewart about her physical symptoms, but then also told him every detail of the chain of events. (App. 629-30.) Two days later, the victim also gave a written statement to Investigator Brian Godfrey. (App. 845.)

B. Procedural History

On February 16, 2005, the Richland County Grand Jury returned true bill indictments against Thomas for First Degree Criminal Sexual Conduct ("CSC"), 2005-GS-40-10296, Assault and Battery of a High and Aggravated Nature ("ABHAN"), 2005-GS-40-10297, and two counts of Kidnapping, 2005-GS-40-10298, -10299.[1] (App. 1128-36.) From February 6-10, 2006, the State tried Thomas before the Honorable James W. Johnson, Jr. and a jury. Richland County Public Defenders LaNelle DuRant, Esquire, and Jeanette VanGinhoven,

[1] One count of kidnapping concerned the victim, and one count concerned the victim's son.

Esquire (the "trial counsel"), represented Thomas. On February 10, 2006, the jury returned a verdict of "guilty" on all four counts. (App. 1125.) At sentencing, trial counsel introduced sixteen different character reference letters and presented the testimony of two character witnesses, Terry Burnett and his son, Knox. (App. 1321-27.) Judge Johnson then sentenced Thomas to concurrent twenty-two year prison terms for the CSC and the two counts of kidnapping. (App. 1127.) The judge also imposed a concurrent ten year prison term for the ABHAN count. (App. 1127.)

Thomas served his notice of direct appeal on February 14, 2006, and filed his final brief with the Court of Appeals on October 27, 2008. (App. 1141.) Thomas's brief argued that (1) the trial court erred in admitting evidence according to *State v. Lyle,* 125 S.C. 406,118 S.E.2d 803 (1983); and (2) the trial court violated Thomas's right to confrontation by admitting evidence at trial over his chain of custody objection. (App. 1145.) The Court of Appeals affirmed the conviction in an unpublished opinion pursuant to South Carolina Appellate Court Rules, Rule 220(b)(1). (App. 187-89, *State v. Thomas*, No. 2009-UP-437, 2009 S.C. App. Unpub. LEXIS 436, at *1-2 (Ct. App. September 10, 2009)). The South Carolina Supreme Court denied certiorari on March 2, 2011, without opinion. (App. 181.)

On February 23, 2012, Thomas filed his Application for Post Conviction Relief ("PCR"). (App. 174-79.) Thomas's court-appointed PCR counsel, Kristy Goldberg, Esquire, filed an amended application on December 21, 2012.[2] (App. 163-66.) The Honorable G. Thomas Cooper held a hearing on Thomas's PCR application and on May 10, 2013, he denied

[2] In his amended Application for Post-Conviction Relief, Thomas asserted that the trial court erred in failing to charge the jury that false imprisonment is a lesser-included offense of kidnapping. (App. 165.) On appeal, Thomas waives this issue. *See State v. Berntsen*, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988) (holding that the crime of false imprisonment has been incorporated as one method of proving kidnapping.)

Thomas's PCR application in a twenty-two page order. (App. 1-22.) On June 7, 2012, Thomas filed his notice of appeal.

ARGUMENTS

The United States Supreme Court has set forth a two-pronged test to establish ineffective assistance of counsel requiring the petitioner to prove that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011). "Where counsel articulates a ***valid*** reason for employing certain strategy, such conduct will not be deemed ineffective." *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (emphasis added). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The burden is on the PCR applicant to prove the allegations in his application. *McHam v. State*, 404 S.C. 465, 473-74, 746 S.E.2d 41, 46 (2013). Although the Court gives great deference to the PCR judge's findings of fact and conclusions of law, *Dempsey v. State*, 363 S.C. 365, 368-69, 610 S.E.2d 812, 814 (2005), the court "will reverse the PCR judge's decision when it is controlled by an error of law." *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007).

I. Trial counsel rendered ineffective assistance by failing to present character witnesses to the jury when trial counsel should have been aware that Thomas's character was the seminal issue in the case.

Because of the lack of independent eyewitnesses and other evidence, many sexual assault cases are decided upon whether the jury finds the defendant or the victim's testimony more convincing. *See, e.g. Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987)

(noting that case "amounted to essentially a swearing contest" where "witness credibility was crucial"). This is because the jury is generally not presented with corroborating evidence but is instead left with two separate versions of the same story. Thus, in most sexual assault cases, the jury must determine whom it believes more—the victim or the defendant.

Such was the case in Thomas's trial for criminal sexual conduct. Because the alleged sexual assault occurred exclusively within the victim's parents' residence, the State was not able to present an independent eyewitness to the jury. Furthermore, although the State did present some physical evidence in the case, that evidence was entirely consistent with a consensual sexual encounter—just as Thomas admitted. Thus, in order to prove its case, the State had to depend entirely upon the victim's version of the events and Thomas's inability to refute that testimony. To ensure that Thomas was unable to refute the victim's testimony, the State took steps to undermine Thomas's credibility in hopes that it could create a sufficient credibility gap that the jury would believe the victim's testimony over Thomas's assertions that she consented. The jury was thus left to determine whether it believed Thomas or the victim more. This decision put Thomas's character directly in question and made the jury's credibility determination the seminal issue in the case.

Prior to trial, Thomas provided trial counsel with sixteen character reference letters to be used at trial. (App. 126.) At the PCR Hearing, two of these character witnesses submitted affidavits stating that trial counsel never interviewed them or asked them to testify. (App. 75, 157-160.) Two additional witnesses testified at the PCR Hearing that they were prepared to testify but also were never approached by trial counsel. (App. 70, 75.) One witness in particular, Terry Burnett, the Continuing Legal Education Director of the South Carolina Bar

Association, testified at the PCR Hearing that he was present for the majority of the trial, but trial counsel never once asked him to testify. (App. 70.)

Instead of presenting these character witnesses to the jury, trial counsel used the evidence at sentencing. (App. 1321-27.) By this time, it was too late. Thomas had already suffered the consequences of the credibility gap that trial counsel created by failing to present the evidence to the jury. Exacerbating the credibility gap was trial counsel's failure to object to inadmissible corroborative hearsay testimony; failure to object to the State's admission of improper evidence of flight; and failure to object to improper evidence regarding Thomas's bond. These failures of counsel were deficient and caused the jury to lend a disproportionate weight to the victim's testimony while simultaneously discrediting Thomas's testimony unfairly. Therefore, trial counsel's failure to present the character witnesses prejudiced Thomas because trial counsel did not permit the jury to take into consideration valid evidence of his good character when weighing the credibility of his testimony against that of the victim's testimony.

A. Trial counsel rendered ineffective assistance because trial counsel's reason for failing to offer character evidence during the jury trial was not objectively reasonable.

When asked at the PCR Hearing if she should have considered calling character witnesses, trial counsel conceded that "I think in hindsight I think I should have done that. I think in all honesty I think I probably should have called character witnesses." (App. 117.) Trial counsel did not offer any reason for not doing so, other than to say that she should have called the witnesses. (App. 117.) It was not until some careful questioning by the State that trial counsel formulated the arguable grounds for not presenting the character witnesses. (App. 124-25.) These grounds, as explained by Judge Cooper, were that "there are substantial risks

associated with calling character witnesses as their testimonies may open the door for the state's introduction of evidence to rebut the character traits presented." (App. 15.) The Judge went on further to say that trial counsel made the affirmative decision to avoid that risk in favor of presenting the character witnesses in mitigation. (App. 16.)

However, trial counsel never testified that she made the conscious decision to present the evidence at sentencing instead of at trial. Rather, the opposite is true. (App. 125.) When asked on cross-examination if she remembered specifically deciding that calling character witnesses would be risky, trial counsel explicitly stated, "I don't remember necessarily making that decision." (App. 125.) In fact, the record establishes that trial counsel could not have made such a decision because trial counsel operated on an erroneous belief that Thomas's credibility was not in issue.[3] (App. 63.)

Furthermore, trial counsel could not possibly have made that decision or have weighed the risk because she failed to conduct a reasonable investigation into the matter in derogation of her duty as Thomas's defense attorney. *See Lounds*, 380 S.C. at 460, 670 S.E.2d at 649 (citing *Ard v. Catoe,* 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."). Trial counsel testified that while she thinks she spoke with one of the character witnesses, she did not remember even approaching any of the other fifteen or more possible witnesses. (App. 125.) Trial counsel could not remember conducting this investigation because she failed to do so. (App. 97); (App. 157-58, Ex. 6, Affidavit of Steve Ridlehoover) (stating that trial counsel never asked him about being a

[3] Trial Counsel repeated this erroneous belief to Thomas when he asked her on several occasions about utilizing the character witnesses. (App. 63.)

witness even though he supplied her with a character reference letter prior to trial); (App. 159-60, Ex. 7, Affidavit of Anita Marcy) (same).

Even though she had this information months prior to trial, trial counsel could not have been in the position to weigh the risk of calling the character witnesses without investigating the existence of possible damning rebuttal evidence. (App. 62.) Thus, although trial counsel testified that it would have been appropriate, if not necessary, to call character witnesses during the trial, she was not able to do so because she failed to interview those witnesses altogether. This is especially true where one of the witnesses, Terry Burnett, testified at the PCR Hearing that he was present in the very courtroom where Thomas was tried, but was never called to the stand. (App. 70.)

The PCR Order's characterization of trial counsel's omission is not just a mischaracterization of the facts, but it is also an error of law. Although a conscious decision to avoid the risk associated with the possible rebuttal testimony may constitute a valid trial strategy as envisioned by *Underwood*, such is not the case here. Rather, trial counsel's failure to weigh the risk of the character witnesses' testimony is an objectively ***unreasonable*** trial strategy. *See Lounds*, 380 S.C. at 462, 670 S.E.2d at 650. Compounding this prejudicial error was trial counsel's wholesale failure to investigate the issue. This Court has held that such a violation establishes ineffective assistance of counsel. *See Id.* at 460, 670 S.E.2d at 649 (holding that, as a minimum, counsel has the duty to make an independent investigation of the circumstances of the case.) Trial counsel failed to do so here. Had trial counsel conducted the interviews, then she would have known that character was the critical issue for his defense.

B. Trial counsel's deficient performance prejudiced Thomas because his credibility was the seminal issue in the trial.

The importance of character evidence in a criminal case cannot be overemphasized. Our Court of Appeals has held that the jury may take the good reputation of the accused into consideration in determining whether he committed the crime. *State v. Harrison*, 343 S.C. 165, 171-72, 539 S.E.2d 71, 74 (Ct. App. 2000) (citing *State v. Hill*, 129 S.C. 166, 170, 123 S.E. 817, 818 (1924) ("Evidence of the defendant's good reputation for peace and good order is strongly persuasive of his good character in that respect, and is offered for the very purpose stated by the circuit judge, to show the improbability that the defendant would have committed or did commit the crime charged.")). South Carolina courts place such great weight on the accused's character evidence that the failure to charge on its importance is itself reversible error. *State v. Lee-Grigg*, 374 S.C. 388, 418, 649 S.E.2d 41, 57 (Ct. App. 2007).

At trial, the State presented scant independently verifiable evidence of Thomas's guilt. Instead, the vast majority of the State's case relied on the testimony of the victim whose story numerous secondhand witnesses later parroted on the stand. (*See, e.g.* App. 562; (testimony of Mishoe); App. 587-89, 601; (Officer Gonzales); App. 618-20; (Weyl); App. 629-630; (Dr. Stewart); App. 651-55; (Officer Livingston).) Apart from the victim, the State was unable to provide any eyewitness testimony of the alleged sexual assault. Thus, the case turned upon the credibility of the victim in presenting her version of the events. As can be the case in many sexual assault cases because of the lack of independent eyewitnesses, this case became one largely of "he said, she said," pitting the victim's credibility against Thomas's and making that the seminal issue in the case. *See, e.g. Sosebee*, 293 S.C. at 535, 362 S.E.2d at 24 (noting

that case "amounted to essentially a swearing contest" where "witness credibility was crucial").

When asked later about discussing the case with the jurors at the PCR Hearing, trial counsel conceded this point, stating that she was told that the jurors "said that they simply found the victim more credible than Randy," and that "they felt that Randy didn't come across as a really good witness . . . ." (App. 119.) In fact, even the presiding judge stated, "I think to a large degree the case came down to the issue of credibility, and the [ ] jury, of course, is the only one who can make that determination." (App. 1316.) The State illustrated the jury's role in judging the credibility of the witnesses in closing argument:

> And so how do you execute your duties as the judges of the facts? Well, you judge the credibility or the believability of every witness for the State, for the defense that took that witness stand, every single one, and you judge whether they were telling you the truth or whether they were telling you a lie."

(App. 1025.)

In the face of this reality, however, trial counsel erroneously believed that Thomas's credibility was not in issue and that the character witnesses would not help his perception with the jury. (App. 63.) As is discussed above, this was the basis for trial counsel's decision not to present the character witnesses even after Thomas repeatedly asked her to do so. (App. 63.) Thomas's requests evidence his position that character evidence was important and mirrors our Court's treatment of the importance of such evidence. *See Harrison*, 343 S.C. at 171-72, 539 S.E.2d at 74 (holding that the jury may consider good reputation and court's failure to instruct is a reversible error). Nevertheless, trial counsel declined to present the evidence of good character to the only one that could make such a credibility determination—the jury.

It was precisely trial counsel's failure to present this "strongly persuasive" evidence that caused the credibility gap in the case. Widening that gap was the improper evidence the State presented regarding Thomas's unemployment and laziness. (App. 428.) Counsel failed to object to this evidence. This point was emphasized again during closing arguments by the State. (App. 1038.) After commenting on how the victim had successfully been accepted into Clemson and had goals in life, the State argued that "Randy Thomas was a freeloader. He admitted on the witness stand that when he lived with her he didn't pay a single bill, he didn't have a job." (App. 1038.) Again, trial counsel failed to object.

Trial counsel's failure to object had the effect of permitting the State to widen the credibility gap in the case, falsely inflating the credibility of the victim and her testimony. The jury was then left to consider the testimony of the victim, a college student with goals in life, with that of an unemployed "freeloader." (App. 1038.) The prejudice of trial counsel's failure to object to this improper character evidence, especially in light of her failure to introduce evidence of Thomas's good character, is that the jury was inclined to believe the testimony of the victim over that of Thomas based upon improper motives.

C. Trial counsel's failure to object to the State's improper cumulative hearsay testimony further prejudiced Thomas by improperly inflating the victim's credibility at the expense of Thomas's credibility.

This Court has held that the failure to object to improper hearsay testimony in a sexual assault case because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming ***or*** the improper testimony bolsters the victim's testimony." *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (emphasis added) (citing *Dawkins v. State*, 346 S.C. 151, 156-57, 551 S.E.2d 260, 263 (2001)). It is precisely the cumulative effect of the improper testimony "'which enhances the

devastating impact of improper corroboration.'" Dawkins, 346 S.C. at 157, 551 S.E.2d at 263 (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)).

In a similar sexual assault case where the State presented little independently verifiable corroborative evidence, the Court of Appeals cited *Dawkins* in concluding that trial counsel's failure to object to the introduction of improper hearsay testimony above and beyond the permitted evidence of time and place had the effect of prejudicing the defendant by wrongly bolstering the credibility of the victim. *See Vail v. State*, 402 S.C. 77, 88-89, 738 S.E.2d 503, 509 (Ct. App. 2013). The Court of Appeals held that trial counsel's failure was prejudicial because "[i]mproper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." *Id.* (quoting *Dawkins,* 346 S.C. at 156, 551 S.E.2d at 263).

As mentioned above, the State's case for sexual assault against Thomas centered almost exclusively upon the victim's parroted statements by Mishoe, Weyl, Dr. Stewart and Officers Gonzales, Livingston, and Godfrey.[4] Mishoe, a friend of the victim, testified before the jury to what the victim told her happened over four hours after the incident:

> She was crying, she was very upset. She said that he came back, he came in the house, he had a knife, he raped me. She was telling me about trying to hold on for dear life to a beam inside the house and that her legs were hurting.

(App. 562.) Weyl, a neighbor of the victim, testified as to what the victim told police happened during the incident. (App. 618-20.) Dr. Stewart, an emergency room physician testified, not to what he was told for the purposes of diagnosing the victim's condition, but to the specific facts of the alleged assault told to him by the victim more than seven hours after the incident. (App. 629-30.) These facts Dr. Stewart disclosed to the jury exceeded that

[4] Although the State did present physical evidence of a mix of semen and other bodily fluids found on a comforter, this physical evidence was entirely consistent with Thomas's admissions of consensual sexual relations on that occasion and others. (App. 740.)

which was necessary to offer treatment or understand the general character of the cause or external source of her injury, including the allegation that Thomas threatened the victim's son. (App. 630.) Officer Gonzales, the police officer responding to the scene, testified from his police report as to every precise detail of the chain of events as told to him by the victim. (App. 587-89, 601.) Officer Livingston, an officer with the special victims unit that responded to the scene several hours later, testified before the jury regarding the same details of the incident as was told to him by Officer Gonzales and the victim. (App. 651-55.) Lastly, Investigator Godfrey testified before the jury as to written statements made by the victim during the course of talking with her two days after the incident. (App. 849.) Investigator Godfrey not only read from the victim's written statement, but also improperly testified as to the veracity and truthfulness of the numerous witnesses' testimony:

> Q And you have been present for this entire trial; is that correct?
> A Yes, ma'am.
> Q And you were here when [the victim] testified; is that correct?
> A That's correct.
> Q Everything she testified to, is that consistent with the written statement that you took from her on November 1st, 2004?
> A Yes, ma'am.
> . . . .
> Q Now, based on -- after you obtained arrest warrants, did you interview or make contact with the witness, Katria Weyl?
> A I did.
> Q Okay. And what about Sena Long?
> A I did.
> Q And you were present for both of their testimony; is that correct?
> A That's correct.
> Q And is everything that they testified to in that witness stand consistent with what they reported to you when you interviewed them in your investigation?
> A That's correct. That's correct.

(App. 849-50, 855.)

The testimony of these six individuals was almost entirely limited to parroting what the victim told them happened. It served no other purpose than to repeatedly reiterate the consistency of the victim's story, a theme the State emphasized in closing argument:

> Was the witness's testimony consistent? Consistency, ladies and gentlemen. I'm going to get to more of that later on. Just remember that. Was their testimony consistent with what they told other people?
>
> . . . .
>
> However, you heard from [the victim]. She has been consistent from the get-go. She has told at least seven people her story, and then she told you all.
>
> . . . .
>
> Eight times. Consistency. And you know what? When you're telling the truth, you don't forget. You don't forget where you are in your story. You don't forget.

(App. 1026, 1053, 1061.)

Here, the effect of the improper corroboration was the impermissible inflation of the victim's credibility at the expense of Thomas's credibility. The credibility gap that this improper testimony created could have been bridged by presenting evidence of Thomas's good character. Nevertheless, trial counsel failed even to attempt to change the jury's impression of Thomas as a "freeloader." At the same time, trial counsel permitted the State to offer impermissible corroborative hearsay testimony, and even permitted the State to go so far as having a witness comment that the prior witnesses' testimony was truthful because it was consistent with their prior hearsay statements. (App. 849-50, 855.) Although either deficit alone caused sufficient prejudice to Thomas to warrant a new trial, the combination of the omissions that created the insurmountable credibility gap constitutes the error. *See Vail*, 402 S.C. at 88-89, 738 S.E.2d at 509.

D. Trial counsel's failure to object to the State's improper argument regarding flight further prejudiced Thomas by again putting his character in issue.

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This Court has identified the "critical factor to the admissibility of evidence of flight" is "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities ... [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). Thus, "[f]light evidence is relevant when there is a nexus between the flight and the offense charged. . . . Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted." *State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (Ct. App. 2011) (citations and internal quotation marks omitted) *cert. granted* (Oct. 17, 2012); *see also State v. Martin*, 403 S.C. 19, 26-27, 742 S.E.2d 42, 46 (Ct. App. 2013); *State v. Grant*, 275 S.C. 404, 404, 272 S.E.2d 169, 169 (1980). However, the line of cases establishing the general rule is inapplicable to the case at hand.

At an *in camera* hearing, the State agreed not to discuss Thomas's hospitalization or the time-period between the alleged incident date and the date of the arrest so long as trial counsel did not somehow allege that the officers were derelict in their duty to arrest Thomas by waiting fifteen days to do so. (App. 1218.) After questioning the defense to ensure that neither intended to discuss the issue, the court ruled that the State would not introduce evidence about it. (App. 1218.) Instead of adhering to the directive of the court, the State attempted to make

an end-run around the exclusion by seeking to admit testimony that Thomas had to be extradited from North Carolina two weeks after the incident. (App. 856.) In fact, the State even admitted an Extradition Approval Request, despite knowing that Thomas was in North Carolina seeking mental health treatment. (App. 856, 1331.) Trial counsel failed to object to this admission even though the purpose for the admission of the exhibit was to establish evidence of flight from South Carolina. (App. 856.) The State then used the exhibit exactly for that purpose, arguing to the jury during closing argument that:

> Evidence of flight is admissible to show guilty knowledge, intent, and that the defendant sought to avoid apprehension, another legal matter, evidence of flight. There is testimony by Investigator Godfrey that on November 1st after he interviewed [the victim], he had arrest warrants issued for this defendant's arrest. And there's also testimony on the record before you that you can consider that it took 16 days. He was not arrested until -- I'm sorry -- 15 days. He was not arrested until November 15th from North Carolina. Remember the extradition paperwork. Evidence of flight is evidence of guilty knowledge, intent, trying to avoid apprehension. So that's another factor you can consider.

(App. 1027-1028.) Again, the State made this impermissible argument without objection.

The State's use of Investigator Godfrey's testimony regarding extradition and the State's argument as to flight in closing were improper for two reasons. First, it involved a matter specifically excluded from the trial pursuant to Judge Johnson's pre-trial order. Second, it was argued to the jury even without making the requisite showings that the flight was premised on a nexus between the flight and the charges.[5] *See Martin*, 403 S.C. at 26-27, 742 S.E.2d at 46. Nevertheless, trial counsel permitted the argument. Trial counsel was

[5] Furthermore, Judge Cooper's finding that the solicitor's comments "were proper and did not constitute an error of law" is itself an error of law because of the failure of the judge to require a specific showing of the nexus between the flight and the charges. (App. 13.)

deficient in failing to object to the testimony and her subsequent failure to request Judge Johnson strike the comment and issue a limiting instruction to the jury.

The effect of trial counsel's failure to object was to allow the State to paint Thomas as a fugitive evading the law when the real purpose of being in North Carolina was to seek mental health treatment. This portrayal prejudiced Thomas because Judge Johnson was not able to instruct the jury that the flight was improper for them to consider. Thomas, already suffering from a lack of credibility was unable to overcome this credibility gap to counter the victim's version of the events. Thus, trial counsel's failure to present evidence of Thomas's good character prejudiced him by leaving him unable to overcome the credibility gap trial counsel's deficiencies created.

E. Trial counsel's failure to object to the State's improper admission of testimony regarding Thomas's bond prejudiced him by again putting his character in issue.

During its case-in-chief, the State elicited unduly prejudicial testimony from Investigator Godfrey regarding bond. Trial counsel failed to object. (App. 874-75.) This failure to object was deficient because it added to Thomas's character deficiency before the jury. Thus, Thomas suffered prejudice from trial counsel's error.

Generally, the court is permitted wide discretion to exercise reasonable control of the interrogation of witnesses, including deciding whether areas of questioning are improper. *See* Rule 611, SCRE. Although no South Carolina case holds that questioning regarding the grant or denial of bond is an improper line of questioning for the prosecution, cases from other jurisdictions have held that a prosecutor's questioning related to the granting or denial of bond is improper. *See, e.g. Gutierrez v. State*, 510 S.E.2d 570, 572 (Ga. Ct. App. 1998) (instructing the jury that any testimony suggesting that defendant had no bond was improper to

consider and must be disregarded.); *State v. Williams*, 575 So.2d 452, 455 (La. Ct. App. 1991) (noting that prosecutor's remark regarding defendant's bond was "egregiously fallacious and "was fundamentally prejudicial."); *Thurpin v. Commonwealth*, 137 S.E. 528, 530 (Va. 1927) (holding that while the prosecutor could prove the general reputation of the accused as a violator of the prohibition law, he did not have the right to elicit testimony that the accused was under bond for a violation at the time of the trial); *Dickens v. State*, 53 S.W.2d 41, 43 (Tex. Crim. App. 1932) (affirming court's sustaining of defendant's objection regarding prosecution eliciting testimony from the defendant's bondsman that bond had been withheld); *People v. Fleming*, 203 N.E.2d 716, 719 (Ill. App. Ct. 1964) (affirming court's sustaining of defendant's objection regarding prosecution eliciting testimony that the defendant posted bond)

Nevertheless, simply asking improper questions is not prejudicial. *State v. Benning*, 338 S.C. 59, 63-64, 524 S.E.2d 852, 855 (Ct. App. 1999) (finding the mere asking of improper questions was not prejudicial where no evidence was introduced as a result thereof). Instead, it is the burden of the trial counsel to object to the improper question or to the improper argument of the prosecutor in order to preserve the issue for review. *State v. Richardson*, 358 S.C. 586, 597, 595 S.E.2d 858, 863-64 (Ct. App. 2004) (holding issue of whether the trial court erred in permitting the solicitor to make improper and prejudicial comments to the jury during closing arguments was not properly preserved for review where trial counsel failed to make any objection).

In certain situations, where the trial counsel fails to object to the improper question or comment, the failure is sufficient to establish ineffective assistance of counsel. *See, e.g. McFadden v. State*, 342 S.C. 637, 645, 539 S.E.2d 391, 395 (2000) (failing to object to the prosecutor's improper closing argument commenting on the failure to present a defense);

Sosebee, 293 S.C. at 534-35, 362 S.E.2d at 24 (failing to object to improper comments regarding the victim's credibility); *Fossick v. State*, 317 S.C. 375, 376, 453 S.E.2d 899, 900 (1995) (per curiam) (failing to object to prosecutor's comments that the defendant showed no remorse). However, where the trial counsel illustrates a valid trial strategy or reason for failing to object, post-conviction relief is not required. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

The valid trial strategy rule does not completely absolve trial counsel of a failure to object to questions or statements by the State. For example, in *Brown v. State*, the South Carolina Supreme Court held that trial counsel was deficient for failing to object to improper comments by the prosecutor during closing argument where trial counsel's strategy was that he did not "want to exacerbate a bad set of facts to point out to the jury something that would already aggravate what appeared to be a pretty bad case," and that he did not want to give the jury a reason to dislike or hate his client. *Brown,* 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). The Court reasoned that "it was incumbent upon Brown's trial counsel to object to the solicitor's closing remarks," and counsel's "strategy" for not objecting could not "be construed as a valid one given the evident impropriety of the solicitor's remarks." *Id.*

This is the precise situation presented in this matter. Trial counsel failed to object to this testimony or to preserve the issue for appeal. In fact, at the PCR Hearing trial counsel could not even remember the testimony, much less articulate a valid strategy for her failure to object. (App. 116.) Judge Cooper's finding that she did not object because the testimony went on to show that Thomas was granted bond was in error because trial counsel specifically testified at the hearing that she did not recall the testimony on this point. (App. 19.) Without a valid strategy, trial counsel's failure to object was deficient. By permitting the State to elicit

the irrelevant and unfairly prejudicial testimony without objection, trial counsel added to Thomas's character deficiency—a deficiency that could have been cured by the presentation of available character witnesses.

II. Trial counsel rendered ineffective assistance by failing to object to a violation of the sequestration order.

South Carolina Rules of Evidence Rule 615 gives the court wide discretion to "order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." Rule 615, SCRE; *State v. Cabbagestalk*, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984). The purpose of the exclusion rule is to prevent the possibility of one witness shaping his testimony. *State v. Huckabee*, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010).

On the first day of the proceedings, the trial court ordered that all witnesses were prohibited from being in the courtroom during the testimony of other witnesses and were prohibited from discussing their testimony with anyone. (App. 302, 512.) The court noted that:

> [A]ll witnesses in this case are sequestered. That simply means that you will be outside the courtroom and you'll not be hearing the testimony of any other witness. That is to ensure that your testimony is based on what you know about the case and not based on what somebody else may know or testify to. When a witness is sequestered they are not permitted to discuss their testimony or anybody else's testimony with anyone else, including any other witness who has found out what someone may or may not have said in the courtroom.

(App. 405.)

Trial counsel called James Aakhus, a friend of Thomas, to testify regarding Thomas and the victim's relationship. (App. 892.) On direct examination, Aakhus testified that Thomas and the victim lived together for around a year and that the victim's son sometimes

called Thomas "daddy." (App. 894-95.) Aakhus further testified that around August 2004, he visited Thomas in Columbia. (App. 895.) During that visit, Aakhus observed Thomas talking with the victim's father at her parents' house. (App. 896.) On cross-examination, the State elicited testimony that the victim spoke with Aakhus on the phone Monday evening, the day the proceedings began. (App. 899.) Aakhus testified that the victim called him regarding the date of Thomas and Aakhus's visit to Columbia.[6] (App. 899.)

First, trial counsel was deficient in failing to recognize from this testimony that the sequestration order had been violated. Aakhus's cross-examination testimony establishes that the victim called him the evening that the proceedings began and after the trial court entered the sequestration order. (App. 900.) Rather than explore the violation of the sequestration order on redirect examination, trial counsel asked only four questions, one of which invited an objection that ended the questioning. (App. 902-03.)

Second, trial counsel was deficient in failing to object to the violation and move for a mistrial. Although the testimony clearly established a violation of the order by the State's main witness prior to her testimony before the jury, trial counsel failed to object altogether, much less move for enforcement of the court's sequestration order.

Failing to object to the sequestration order violation prejudiced Thomas by permitting the witnesses against him to testify outside of their own personal knowledge. Because trial counsel failed to move for enforcement of the sequestration order or for a limiting instruction, witnesses were permitted to present evidence to the jury following improper influences on their testimony. Without a limiting instruction, the jury had no way of knowing of these improper

[6] During closing arguments the State argued that the sequestration order bolstered the version of the events testified to by the State's witnesses: "There's been a witness sequestration order in place for this entire trial. [Mishoe] had no idea what [the victim] testified to, where he grabbed her by the right bicep and led her back downstairs after the rape." (App. 1058.)

influences. Had the jury been aware of these improper influences, it would have been permitted to lend appropriate weight to the witnesses' testimonies.

III. Even if no single error is sufficient standing alone, the cumulative effect of trial counsel's errors deprived Thomas of adequate assistance of counsel.

The PCR Court erred in failing to consider whether the cumulative errors of trial counsel constitute ineffective assistance. It is an unsettled question in South Carolina whether multiple deficiencies may be combined to prove resulting "cumulative prejudice" when none of the deficiencies standing alone are sufficient to satisfy the second prong of the *Strickland* test. *See, e.g. Lorenzen v. State*, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002); *Walker v. State*, 397 S.C. 226, 243, 723 S.E.2d 610, 619 (Ct. App. 2012). Nevertheless, courts from other jurisdictions have entertained the question, and the consensus appears to hold that when a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. *See Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland*, rather than the individual errors."); *Harris v. Wood*, 64 F.3d 1432, 1439 (9th Cir. 1995); *State v. Thiel*, 665 N.W.2d 305, 321-22 (Wis. 2003); *Gonzales v. McKune*, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) ("Since Rodriguez's claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together."); *but see Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

No other case better illustrates the viability of the cumulative error analysis than the cumulative prejudice established above resulting from trial counsel's numerous deficiencies.

CONCLUSION

For all of the reasons stated above, this Court should grant Thomas's Petition for Writ of Certiorari to review the denial of his application for Post-Conviction Relief.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 11th day of February, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-01543
Appellate Case No. 2013-001287

Randy Thomas, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Proof of Service

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Randy Thomas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for a Writ of Certiorari and Appendix

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February 11, 2014