THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Saluda County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number: 2013-001199

FRANK TOLEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Petition for Writ of *Certiorari*

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II. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to impeach the cooperating co-defendant about the potential sentences he faced for armed robbery if he had not cooperated with law enforcement and proceeded to trial?

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V. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law when appellate counsel failed to raise and brief the trial court's erroneous admission, over objection, of information that the investigating officer received from deceased witness Frontis Smith, when that information was inadmissible hearsay, violated the Confrontation Clause, and constituted prejudicial comments on Petitioner's character.

VI. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to object to his being retired after this Court remanded his case for resentencing only?

Statement of Case

For an incident occurring on October 2, 1996, the State charged the petitioner, Frank Tolen with armed robbery and possession of a firearm by a person previously convicted of a crime of violence. A. 359-60, 362-63. .

The State first tried Mr. Tolen on these charges from January 27-28, 1998 before the Honorable James W. Johnson, Jr. and a jury. A. 1-314. Assistant Solicitors Ervin J. Maye and Julius H. Baggett prosecuted. Vannie Williams, Jr. represented Mr. Tolen. The jurors convicted, and Judge Johnson sentences Mr. Tolen to life without the possibility of parole pursuant to S.C. Code §17-25-45 for armed robbery and five years imprisonment for possession of a firearm by a person convicted of a crime of violence. The sentences were concurrent.

Mr. Tolen did not appeal the convictions or sentences. On April 15, 1998, Mr. Tolen filed an application for post-conviction relief (hereinafter "PCR"). A. 316-19. By order dated November 15, 2000, the Honorable Rodney A. Peoples allowed a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). A. 341. This Court affirmed the convictions and sentences. *Tolen v. State*, (S.C.S.Ct. Op. No. 2002-MO-024) (Filed March 22, 2002). A. 373-74.

On May 17, 2002, Mr. Tolen filed a PCR Application. A. 375-79. On December 13, 2002, the State served a return. A. 390-94. On April 17, 2003, the Honorable Kenneth Goode, Jr. convened a PCR hearing. A. 396-433. By written order dated, June 17, 2003, Judge Goode granted post-conviction relief. A. 435-43. This Court granted the State's petition for writ of *certiorari.* On December 19, 2005, the Court "dismiss[ed] *certiorari* as improvidently granted with respect to the PCR court's ruling on the issue of

the State's failure to given proper notice of intent to seek a sentence of life imprisonment without parole pursuant to S.C. Code § 17-25-45(H) (2003)." The Court also held, "The remainder of the holdings of the PCR court are vacated, and the matter is remanded for a new trial." *Tolen v. State*, S.C.S.Ct. Memorandum Op. No. 2005-MO-061 (filed December 19, 2005). A. 444-45.

The State tried Mr. Tolen a second time during the week of November 11, 2006 before the Honorable William P. Keesley and a jury. A. 446-727. Ervin J. Maye again represented the State. Andrew Thompson defended Mr. Tolen. The jurors convicted Mr. Tolen, and Judge Keesley sentenced him to life imprisonment without the possibility of parole for armed robbery pursuant to S.C. Code § 17-25-45 and five years concurrent for possession of a firearm by a person convicted of a crime of violence. The sentences are concurrent.

Mr. Tolen appealed. The Court of Appeals affirmed the convictions and sentences. *State v. Tolen*, (S.C.Ct.App. Unpublished Op. No. 2009-UP-220) (filed May 26, 2009). A. 743-44.

On June 30, 2009, Mr. Tolen filed a PCR application. A. 745-50. The Honorable R. Lawton McIntosh convened a hearing on January 30, 2013. A. 773-890. Stephen D. Geoly represented Mr. Tolen, and Ashleigh R. Wilson represented the State. By written order dated March 25, 2013, Judge McIntosh denied PCR. A. 892-910. On April 12, 2013, Mr. Tolen filed a Rule 59(e) motion. 911-14. Judge McIntosh denied that motion on or about April 23, 2013. A. 917-18.

This petition for writ of *certiorari* follows.

Applicable Legal Principles

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

To identify the prevailing professional norms, in addition to settled case law, courts look to the American Bar Association Criminal Justice Standards (Defense Function), the National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation, the Department of Justice Compendium of Standards for Indigent Defense Representation, "criminal defense and public defender organizations, authoritative treatises, and state and city bar publications." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

In assessing the investigation in *Strickland*, the Court stated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Any decision to halt investigation must be assessed for reasonableness. 466 U.S. at 690-91. "The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was **no** trial strategy in mind" concerning the deficient performance. *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010).

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors.

"This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Walker v. State*, 2012-211267, 2014 WL 1052609 (S.C. Mar. 19, 2014) (quoting *Lomax v. State,* 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008)).

Reasons Why the Writ Should Be Granted

I. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to question the validity of the eyewitness identification of petitioner by the victim?[1]

A. 1998 Trial Record.

When the victim, Oaten Dyson, testified at Mr. Tolen's first trial, he had an unusual motive to assist the prosecution. After the robbery, Mr. Dyson, left South Carolina. In November 1997, a co-worker informed him "that South Carolina has been looking for me concerning this case," but he did not return that call. Mr. Dyson returned to South Carolina "when [he] was arrested" on a material witness warrant. Mr. Dyson explained:

> I didn't think that they was [sic] going to pursue the case the way they did. I thought it was going to be, you know, I got robbed and that was it. I had no idea that anyone was going to find these guys.

A. 92, line 12 – 94, line 12.

Mr. Dyson "refused" to talk to defense counsel about the case and only talked to the Solicitors Office. A. 95, lines 8-14. The Solicitor did not offer to release Mr. Dyson until after he testified before the jurors and identified Mr. Tolen. A. 119, lines 18-23.

The trial court judge convened a *Neil v. Biggers*[2] hearing. A. 35, line 21. During that hearing, Mr. Dyson acknowledged that Mr. Tolen "is larger than" the person that robbed him in his truck. A. 46, line 22 – 47, line 15. According to Mr. Dyson, law

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[1] *See* Amended PCR application, paragraphs 10(f), 10(i), 11 (f) and 11(i). A. 763-64.

[2] *Neil v. Biggers*, 409 U.S. 188 (1972).

enforcement showed him "a photographic lineup" containing "six guys." A. 48, lines 8-22. The six-person photographic lineup was never presented to the trial court judge. That Mr. Dyson was under arrest when he identified Mr. Tolen was not revealed during the pre-trial hearing.

On direct examination, in the presence of the jurors, Mr. Dyson identified Mr. Tolen by name, without any explanation about how the identification was made. A. 75, lines 1-16. He then testified:

> They showed me some pictures of some guys and asked me, "Was that the guy, there?" I told them no, I couldn't pick him out of that, out of those pictures they showed me.

A. 83, lines 13-17.

On cross-examination, Mr. Dyson acknowledged, "Mr. Tolen is larger than the [sic] both of the men who approached the window [of his truck and robbed him] that evening." A. 104, line 23 – 105, line 5.

B. 2003 PCR Record.

At the 2003 PCR hearing, Mr. Tolen explained how a pre-trial identification actually occurred – only fifteen minutes before his trial started:

> I was taken out of the courtroom into a secluded area room in the courtroom and was asked to step in the room, and the Assistant Solicitor and the Solicitor as well as my attorney was there along with the victim, but my attorney was like in the background where I couldn't see him. So as I entered the room, just the Assistant Solicitor and the Solicitor and the victim was standing there. I backed up out of the room. My attorney came back out [of] the room and asked me to enter the room again. They left. So he asked me, did I recognize the three individuals that was in the room. I stated two of the three, which was the Assistant Solicitor and the Solicitor.

A. 400, line 15 – 401, line 15. The 1998 trial counsel could neither "confirm no deny that happened." A. 421, lines 3-6.

C. 2006 Trial Record.

Jury Out

The trial court judge convened a *Neil v. Biggers* hearing. A. 510, line 17. The solicitor called Mr. Dyson, who is a truck driver from New Orleans. On October 1-2, 1996, while driving through South Carolina, he stopped near the Saluda traffic circle to take a nap. Mr. Dyson "was awakened by a tap on my window" and saw "this guy and a friend of his. He had a gun in his hand and told me to open the door." Mr. Dyson identified Mr. Tolen. He testified that he got "a good look," his vision was not obstructed, and there was "adequate light . . . to see his facial features." One of the perpetrators got into Mr. Dyson's truck and sat "on the passenger's seat" with "the gun in is hand." The other perpetrator sat on the "bunk" located "right behind the driver's seat and passenger's seat" and was "ransacking the truck." The two perpetrators stayed inside the cab of the truck "anywhere from 10 to 15 minutes." The two armed robbers stole $60.00 from Mr. Dyson. A. 511, line 1 – 518, line 24.

The armed robbers told Mr. Dyson to drive his truck into a wooded area. Mr. Dyson saw that the gunman "had a problem with the gun. He was struggling with it in his hand." Mr. Dyson "bail[ed] out of the truck" and "ran to this house that was the only lighted house" he saw. Mr. Dyson screamed that he had "been robbed." The two armed robbers chased him. After banging on the door of the house without getting an answer, Mr. Dyson "climbed the ladder and got on the roof of the house." "After the lights came

on in the house," the armed robbers "took off down the road." A. 518, line 25 – 520, line 23.[3]

The solicitor informed the trial court judge, "I'm establishing that [Mr. Dyson has] not seen [Mr. Tolen] at any other point in time outside of this, that nobody showed him any photographs ***or anything else."*** Without ever seeing any photographs of Mr. Tolen, Mr. Dyson identified him "in 1998 ***during another court proceeding.***" A. 521, line 25 – 522, line 21 (emphasis added).

Trial counsel cross-examined and showed Mr. Dyson a photograph with a note saying, "Victim was able to pick suspect out of a lineup." Mr. Dyson testified, "I [have] never seen this picture before" and claimed he "never" picked out a suspect from a lineup. A. 533, line 25 – 535, line 2. Despite the 1998 secluded room show up procedure, Mr. Dyson's claimed his only chance to view Mr. Tolen occurred "in the courtroom" at the 1998 trial. A. 536, lines 9-23.

The solicitor called Investigator Mark Whisenant, who testified that he never showed Mr. Dyson "a photograph of Frank Tolen at any time." A. 541, line 1 – 542, line 6.

Trial counsel argued to exclude any in court identification of Mr. Tolen by Mr. Dyson. A. 543, line 19 – 544, line 20. The trial court judge found "that the state has more than met its burden of proof and has established that the identification of the defendant is admissible." A. 545, line 13 – 548, line 12.

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[3] During the trial, Joel Linder verified that Mr. Dyson climbed onto the roof of his house. A. 606-13. Bill Linder verified his brother's account. A. 613-15.

During the *Neil v. Bigger's* hearing, no one informed the judge of the prior six-person photographic line up, that Mr. Dyson was under arrest as a material witness at the time of the 1998 identification, or the pre-trial show up identification procedure.

Jury In

On direct examination with the jury present, Mr. Dyson testified that he stopped near the traffic circle in Saluda to take a nap. He was awakened by a man that "knocked on the window with a gun in his hand." Mr. Dyson identified Mr. Tolen as this person. Trial counsel did not renew the objection. A. 565, line 12 – 567, line 22. Mr. Tolen then testified to the same facts as he did in the *Neil v. Biggers* hearing. A. 567, line 23 – 573, line 20.

Law enforcement responded and took Mr. Dyson to the Batesburg-Leesville Police Station to look at mug shots. Mr. Dyson did not identify anyone. Mr. Tolen testified that no one ever showed him a picture of Mr. Tolen. Mr. Dyson testified that his identification of Mr. Tolen was based on ***"seein' him in this courtroom."*** A. 573, line 21 – 575, line 7 (emphasis added). Trial counsel never renewed the objection to the suggestive identification.

On cross-examination, Mr. Dyson testified that he did not describe any "physical peculiarities" of the gunman that knocked on his window. Trial counsel asked Mr. Dyson to look at Mr. Tolen in the courtroom. Mr. Tolen has "something wrong with his lip" which appeared related to "surgery." A. 586, line 7 – 587, line 16.

Trial counsel then showed Mr. Dyson a picture of Mr. Tolen. The following exchange occurred:

> Q: I'm going to show you a piece of paper. Can you describe what is on this piece of paper?

A: A picture.

Q: Of who?

A: I don't know who that is.

Q: You don't know who that is.

A: No.

Q: Is that a picture of the defendant?

A: At the time of the robbery this wasn't the person that – that robbed me.

Q: This is not the individual that robbed you?

A: At the time. This must [have] been a recent picture of him at the time.

Q: Okay.

A: He didn't look nothin' like that.

Q: This doesn't look anything like the defendant.

A: No. At the time of the robbery. That's been 10 years ago. Maybe he – if that's him he done changed quite a bit.

Q: So this picture doesn't look anything like the individual sitting over there at the table.

A: At the time of the robbery.

Q: What are the words at the top of this?

A: Victim was able to pick the suspect out of a lineup.

Q: Did you pick this man out of a line up—

A: No, I didn't.

Q: —as out assailant?

A: No, I didn't.

Q: At anytime did you pick a man out of a photo lineup?

A: Never.

Q: Out of a physical lineup?

A: Never.

A. 589, line 13 – 590, line 25; 598, line 22 -- 599, line 25; Defendant's Ex. 1.[4] Trial counsel neither renewed the motion to suppress the identification nor moved for a mistrial. Trial counsel did not question Mr. Tolen about being under arrest at the time he first identified Mr. Tolen as one of the defendants.

D. 2013 PCR Record.

At the PCR hearing, trial counsel acknowledged that this case was his first General Sessions Court trial. To learn more about defending criminal cases, trial counsel spoke to long time Saluda County Public Defender Lee Sturkey and "discussed the case with the prosecution several times in their offices."[5] A. 803, lines 11 – 805, line 12. When trial counsel received a copy of the 1998 trial transcript, he did not review it with Mr. Tolen. A. 818, lines 5-10.

Trial counsel "met with Mr. Tolen once at the jail" for "20 minutes tops" and "had correspondence once or twice back and forth." Mr. Tolen, however, wanted more meetings with trial counsel more often. Trial counsel wrote Mr. Tolen to "reject your insinuation that I am predisposed against you in this matter." Counsel said he would "not make repetitive visits to your location to review documents you will not release to me." A. 807, line 18 – 811, line 25; 865, lines 13-14.

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[4] Initially, Defense Ex. 1 was marked from identification only, with the State not objecting to the document as a defense exhibit. A. 590, line 20 – 591, line 4. The State, however, subsequently objected. A. 598, line 22 – 599, line 25.

[5] Trial counsel recognized the prosecutor was not on his side. A. 804, line 24 – 805, line 2. Trial counsel should also have questioned Mr. Strukey's loyalty to Mr. Tolen in this situation. The Circuit Court initially appointed Mr. Sturkey to represent Mr. Tolen. A. 734. Mr. Surkey, however, withdrew because of a conflict of interest. Mr. Sturkey previously practiced law with retired Circuit Court Judge Julius H. Baggett who was one of the prosecutors during the 1998 trial. A. 735. Mr. Baggett's law partner at the time of the 1998 trial, Ralph Kennedy, represented cooperating co-defendant Wade Brannon. A. 168, line 22 – 169, line 23.

Trail counsel acknowledged that how Mr. Tolen became a suspect in the case and the victim's eyewitness identification were "big issues" in the case. Trial counsel, nevertheless, did not investigate the photograph of Mr. Tolen stating "victim was able to pick the suspect out of a lineup." A. 818, line 11 – 821, line 6.

The PCR judge described this evidence as a "troubling photograph." The PCR court judge found trial counsel "did not investigate the origin of the writing" on the photograph and "he thought the photo was simply a photo of his client and did not draw the conclusion that the photo was an identification by the victim." The PCR court found that there was a pre-trial *Neil v. Biggers* hearing and "trial counsel cross-examined the victim about the basis of the in court identification." A. 8097, 904-06.

E. Argument.

The victim's first identification of Mr. Tolen occurred under the most unusual of circumstances—the victim was under arrest. The arrest is state action that rendered the identification procedure coercive. The presence of state action requires the trial court is required to convene a *Neil v. Biggers* hearing. *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012); *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

In addition, the 1998 identification resulted from a show up identification procedure arranged by the prosecutors trying the case. "A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000) (internal citations omitted).

The "failure to object to this clearly inadmissible evidence was ineffective assistance of counsel." *Holman v. State*, 381 S.C. 491, 493, 674 S.E.2d 171, 172 (2009). Had counsel informed the trial judge that Mr. Dyson was under arrest when he made the identification under suggestive circumstances, then the in court identification would have been suppressed.

Assuming *arguendo* that the eyewitness identification was properly admitted, trial counsel was ineffective by failing to adequately cross-examine the victim about the circumstances of the identification. *See Ard v. Catoe*, 372 S.C. 318, 334, 642 S.E.2d 590, 598 (2007) ("counsel's decision to not cross-examine [State's expert] on the gunshot residue evidence was not an objectively reasonable strategy."); *Miller v. State*, 379 S.C. 108, 117, 665 S.E.2d 596, 600 (2008) (trial "counsel was deficient in adequately cross-examining [adverse witness] regarding the specifics of the other" crimes establishing third party guilt). Had trial counsel adequately cross-examined the victim about the circumstances of the identification—including that that victim was under arrest at the time of the initial identification—there is a reasonable probability the Jurors would have acquitted Mr. Tolen.

Counsel, furthermore, should have investigated the the photograph, which was provided in discovery. *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.")

This Court, therefore, should grant the writ.

II. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to impeach the cooperating co-defendant about the potential sentences he faced for armed robbery if he had not cooperated with law enforcement and proceeded to trial?[6]

A. 1998 Trial Record.

The co-defendant, Wade "Killer"[7] Brannon, was initially charged with armed robbery. In exchange for his cooperation, the state allowed Brannon to plead guilty to lesser-included offense of strong armed robbery so he could "go back to my family." Brannon's guilty plea occurred prior to Mr. Tolen's trial, with sentencing deferred until after the trial. During his testimony, Brannon claimed the state had not made him any promises other than the charge reduction.[8] A. 163, line 10 – 164, line 9.

On cross-examination, Trial counsel asked Brannon about his lawyer being Ralph Kennedy, who was sitting at the table with the prosecution. Brannon claimed not to know that his lawyer was also a law partner with Julius Baggett, one of the prosecutors.[9] A. 168, line 22 – 169, line 23.

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[6] *See* Amended PCR Application, paragraphs 10(e) and 11(e). A. 763.

[7] "Killer" is his Brannon's nickname. He is also known as Wade Christy. A. 167, lines, 5-19.

[8] On April 24, 1998, the Honorable Frank Epps sentenced Brannon to fifteen years suspended with five years probation. http://publicindex.sccourts.org/Saluda/PublicIndex/CaseDetails.aspx?County=41&CourtAgency=41001&Casenum=E159366&CaseType=C (last viewed April 12, 2014).

[9] According to this Court's records, Mr. Baggett still practices law at the Kennedy Law Firm, LLC. http://www.sccourts.org/attorneys/locateAttorney.cfm?barnumber=462 (last viewed April 13, 2014).

Also on cross-examination, Brannon claimed he was not going to ask for any "help from the State" or "consideration in exchange for his testimony."[10] A. 201, line 6 – 202, line 21.

B. 2003 PCR Record.

At the PCR hearing, Mr. Tolen testified that Brannon's sentencing arrangement was not revealed during his trial, despite questioning by his lawyer. By the 2003 PCR hearing, it was know that Brannon did not receive any time for this crime. Mr. Tolen also complained that his lawyer did not make any motion contesting the fact that one of the prosecutors, Julius Baggett, and Brannon's lawyer, Ralph Kennedy, were law partners. A. 403, line 15 – 405, line 23.

Judge Goode found "that trial counsel should have objected to [Mr. Tolen] being prosecuted by the law partner of his co-defendant's lawyer particularly when that relationship may have influenced the decision to give the co-defendant a deal in exchange for his testimony." A. 439-40. This Court vacated that portion of Judge Goode's order granting PCR. A. 444-45.

C. 2006 Trial Record.

During his opening statement, the solicitor told the jurors:

> Now you [sic] gonna hear from the co-defendant in this case. The State's gonna tell it to you up front, Wade Brannon in this case, the co-defendant, was offered a reduction in charge.

A. 561, lines 4-6.

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[10] Brannon also claimed he had plead guilty to carjacking, A. 200, lines 15-16, but judicial department records show that a carjacking charge was actually dismissed. http://publicindex.sccourts.org/Saluda/PublicIndex/PIError.aspx?County=41&CourtAgency=41001&Casenum=E159367&CaseType=C (last viewed April 12, 2014).

During the State's case in chief, Mr. Brannon claimed he and Mr. Tolen were together on the day of the armed robbery. He testified Mr. Tolen said, "Come on," and they went to the truck. Mr. Brannon went "straight to the back" of the cab and started "lookin' around for stuff." He claimed Mr. Tolen had the gun. According to Mr. Brannon, Mr. Tolen stole the money." A. 617, line17 – 622, line 19.

According to Mr. Brannon, the two went to Batesburg after the robbery. The next day, they went to Mr. Tolen's Uncle Tony's house near the traffic circle. According to Mr. Brannon, the two were trying to avoid law enforcement. Neither came outside to talk to the police. Law enforcement apprehended the two later that night. Mr. Brannon had the gun and threw it in the woods. A. 623, line 7 – 626, line 21.

The State initially charged Mr. Brannon with armed robbery but allowed him to plead guilty to strong arm robbery. Mr. Brannon testified at Mr. Tolen's first trial in 1998 and claimed he did not know what his sentence ultimately would be when he testified.[11] After the first trial, the court sentenced Mr. Brannon to fifteen years suspended and five years probation. A. 626, line 22 – 627, line 16. The solicitor did not ask Mr. Brannon about the potential penalty for armed robbery—neither the mandatory minimum sentence nor the maximum term of imprisonment.

On cross-examination, trial counsel attempted to impeach Mr. Brannon with convictions that do not constitute impeachable offenses. The trial court judge sustained the solicitor's objection. Trial counsel asked Mr. Brannon about a pending criminal

[11] *But see Giglio v. United States*, 405 U.S. 150 (1972) (due process requires prosecutor to disclose all material evidence to the jurors, including any promises regarding future prosecution).

domestic violence, second offense, indictment, and his crack cocaine addiction at the time of the crime. A. 628, line 5 – 635, line 14; 638, lines 3-11.

Trial counsel never impeached Mr. Brannon by asking him how much time he had faced if convicted of armed robbery—neither the mandatory minimum sentence nor the maximum term of imprisonment.

D. 2013 PCR Record.

Trial counsel recalled the jurors knowing that Mr. Brannon was facing the same potential sentence, but for his deal to testify. Trial counsel, however, acknowledged that the jurors never learned "the exact amount of time my client was facing." A. 832, line 13 – 834, line 25. Trial counsel did not offer any strategy for not bringing out this information on cross-examination.

The PCR judge, nevertheless, found:

> [T]rial counsel adequately impeached the credibility of the Applicant's co-defendant Wade Brannon. On direct examination, the State elicited testimony that Brannon was originally charged with armed robbery and was allowed to plead guilty to strong armed [sic] robbery. The State also elicited testimony about the sentence Brannon receive after pleading guilty.

A. 903 (citations to record omitted).

E. Argument

Mr. Tolen had a right to confront and cross-examine Wade Brannon about his criminal charge and potential sentence—both the mandatory minimum sentence and the maximum term of imprisonment. U.S. Const. Am. VI & XIV; S.C. Const. Art. I, Sec. 14; S.C. Code Ann. § 17-23-60; and Rule 608(c), SCRE. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to ***possible***

sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (emphasis added and internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). *See also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the ***severity of the potential sentences***, we find the evidence was probative on the issue of bias and should have been admitted." (emphasis added)); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the ***possible sentence*** for a defendant who faces the same charges as a witness against him." (emphasis added)).

Additionally, "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012). *See also State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) ("The fact [a cooperating witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.").

Failure to impeach a witness can be ineffective assistance of counsel. *Ard v. Catoe*, 372 S.C. 318, 334, 642 S.E.2d 590, 598 (2007) ("we find that counsel's decision to not cross-examine [State's expert] on the gunshot residue evidence was not an objectively reasonable strategy."); *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008) (defense

counsel's failure to cross-examine witness regarding similar armed robberies allegedly committed by her and defendant's nephew was ineffective assistance warranting post-conviction relief).

Mr. Tolen's jurors never learned that Wade Brannon faced a mandatory minimum ten (10) years and the possibility of thirty (30) years imprisonment for armed robbery, "no part of which may be suspended or probation granted." S.C. Code Ann. § 16-11-330. The jurors, therefore, could not appreciate the significance of the charge reduction. Had trail counsel informed the jurors of the information through cross-examination, there is a reasonable probability the jurors would have rejected the co-defendant's testimony and found Mr. Tolen not guilty.

Mr. Tolen was prejudiced by trial counsel's deficient performance. In cases implicating the Confrontation Clause,

> [w]hether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). This Court has applied the *Van Arsdall* factors and held improperly limited cross-examination required new trials. *Mizzell* and *Gracely*, *supra.*

Here, the State's case was not very strong, and Mr. Brannon's testimony was critical to the prosecution. The State did not present any physical evidence demonstrating Mr. Tolen committed this crime. The only other evince implicating Mr. Tolen in the

armed robbery was Mr. Dyson's eyewitness identification. As seen, no reliable out-of-court procedure was utilized to secure a pre-trial identification. The first time Mr. Dyson identified Mr. Tolen while Mr. Dyson was under arrest for not cooperating with the prosecution. Mr. Dyson testified that a photograph of Mr. Tolen did not look like the person that committed the robbery. Without Mr. Brannon's testimony, there is a reasonable probability the jurors would have acquitted Mr. Tolen. Likewise, had trial counsel conducted a proper and zealous cross-examination, there is a reasonable probability that the jurors would have discounted Mr. Brannon's testimony and acquitted Mr. Tolen.

The PCR judge's order was controlled by an error of law and should be reversed. *Walker and Lomax, supra.* This Court, therefore, should grant the writ.

III. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law when trial counsel failed to make a *Batson* motion because he did not understand the law.[12]

A. Additional Facts.

At the 2006 trial, the State used its preemptory strikes to exclude three black males (jurors 32, 105, and 203) and one black female (juror 3). The State also struck juror 22, a black male, as an alternate juror. The resulting jury consisted of seven whites, four blacks, and one Hispanic. Trial counsel did not make a *Batson*[13] motion. A. 489, line 5 – 499, line 17.

At the PCR hearing, trial counsel acknowledged that he didn't understand the purpose of a *Batson* motion, explaining:

> My understanding at the time had to do with the composite, the panel of the jury, and that if the races were struck so that the panel was no – so the panel did not have any black people or races other than the defendant, then a Batson motion could be made. Whether he used all his strikes to strike people who were black and the panel continued to have black people in there, I probably would not have drawn a distinction at that time.

PCR counsel then asked, "You didn't realize you could make a motion since there were other blacks on the jury, is that what you are saying?" Trial counsel responded, "That's what I am saying, yes." A. 814,line 2 – 817, line 7.

At the PCR hearing, the State did not offer any race or gender neutral justifications for the strikes.

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[12] *See* Amended PCR Application, paragraphs 10(b) and 11(b). A. 762.

[13] *Batson v. Kentucky*, 476 U.S. 79 (1986).

The PCR court, nevertheless, found that "trial counsel was not ineffective for failing to make a *Batson* motion" as "he understood the purpose of a Batson motion at trial and he was satisfied with the racial composition of the jury." A. 897, 901.

The Rule 59(e), SCRCP motion pointed out that trial counsel

> testified he believed he was prohibited from making a *Batson* motion because there were some blacks on the jury. He admitted he didn't really understand Batson and believed it had to do with whether a black was on the jury, and not whether the State had used their strikes in a racially discriminatory manner. The State used each strike on a potential black juror and none on white jurors. The jury was predominately white.

A 913.

B. Argument.

Regardless of the racial composition of the jury, striking a single juror based on race violates *Batson* because "the right to serve on a jury and not to be discriminated against because of race or gender belongs to the potential juror, not the party." *Payton v. Kearse*, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) (reversing because the justification of striking one particular juror was not race neutral on its face). *See also McCrea v. Gheraibeh*, 380 S.C. 183, 187, 669 S.E.2d 333, 335 (2008) ("While we recognize the importance of properly allocating the burden of proof in a *Batson* inquiry, in our view, counsel's explanation that he struck the particular juror based simply on counsel's 'uneasiness' over the juror's dreadlocks was not a race-neutral reason for exercising a peremptory strike.").

Trial counsel's decision not to make a *Batson* motion, therefore, was influenced by an error of law and "counsel made no tactical 'choice,' unless a failure to become informed of the law affecting his client can be so considered." *Luchenburg v. Smith*, 79

F.3d 388, 392-93 (4th Cir. 1996). *See also United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007) ("Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation. Counsel in criminal cases are charged with the responsibility of conducting '*appropriate investigations, both factual and legal*,' to determine if matters of defense can be developed"); *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997) (counsel ineffective for failing to object to first-degree burglary indictment which alleged burglary of dwelling, but the evidence revealed that the only building on the property was a barn; not valid strategy where "it appears counsel did not recognize a distinction between Richardson's barn and a dwelling for first degree burglary purposes"); ABA Criminal Justice Standards, Defense Function, Standard 4-7.2 ("Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges.").

Turing to the merits of the *Batson* motion, as this Court has explained:

> The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one. The proponent of the strike must offer a race or gender neutral explanation. The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment.

State v. Edwards, 384 S.C. 504, 508-09, 682 S.E.2d 820, 822 (2009) (internal citations omitted). Here, the State struck five African-American jurors and accepted each and every non-black juror presented. Mr. Tolen, therefore, established that the State used all of its strikes to exclude members of cognizable racial group. The State—the proponent of the strikes—did not offer any race neutral reason for striking these jurors.

The PCR Court, therefore, erred by not ordering a new trial based on the *Batson* violation. This Court should grant the writ.

IV. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because of complete breakdown of the attorney-client relationship when trial counsel refused to meet with Petitioner at the detention, failed to review with Petitioner the transcript of the prior trial, and failed to investigate the evidence the State intended to use at trial and the cumulative error denied petitioner a fair trial.[14]

A. Additional Facts.

At the PCR hearing, trial counsel acknowledged that this case was his first General Sessions Court trial. To learn more about defending criminal cases, trial counsel spoke to long time Saluda County Public Defender Lee Sturkey[15] and "discussed the case with the prosecution several times in their offices." A. 803, lines 11 – 805, line 12.

Trial counsel "met with Mr. Tolen once at the jail" and "had correspondence once or twice back and forth." Mr. Tolen, however, wanted more meetings with trial counsel more often. Trial counsel wrote to "reject your insinuation that I am predisposed against you in this matter." Counsel said he would "not make repetitive visits to your location to review documents you will not release to me." A. 807, line 18 – 811, line 25; 865, lines 13-14.

Mr. Tolen explained that trial counsel "got upset because I refused to given him my photographs" that would also be include in the State's discovery response. A. 861, lines 4-21. Trial counsel acknowledged that he was upset with Mr. Tolen. A. 812, lines 6-10.

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[14] *See* Amended PCR Application, paragraphs 10(a) and 11(a). A. 762.

[15] The Circuit Court initially appointed Mr. Sturkey to represent Mr. Tolen. Mr. Surkie, however, withdrew because of a conflict of interest. Mr. Sturkey previously practiced law with retired Judge Julius Baggett who was one of the prosecutors during the 1998 trial. A. 734-36.

The PCR judge, accordingly, found "the Applicant's case was [trial counsel's] first criminal trial." The judge found trial counsel met with Mr. Tolen "at least once at the jail and corresponded with the Applicant via mail." The judge also found, "Counsel also testified that when he visited the Applicant in the jail he review with the Applicant a copy of the previous transcript." A. 896.

In his Rule 59(e) motion, Mr. Tolen challenged the PCR judge's findings. He argued, "In fact, trial counsel testified unequivocally that he only met with the Applicant once at the jail prior to trial." He argued, "[T]rail counsel admitted he never returned to the jail after receiving the discovery response from the state." And, he took issue with the PCR judge's finding "that trial counsel spent about 20 to 25 hours preparing for trial and that trial counsel was as prepared as he could be." He reminded the PCR judge that "trial counsel spent only 20 to 25 minutes with the Applicant while preparing for trial." A. 912. Mr. Tolen further argued, "In a case where a man in facing life in prison even the most veteran attorney would need to meet with his client more than once." Had Tiral counsel met with his client "in any meaningful way," then he would have realized the significance of the issues that previously arose during the case. A. 914.

B. Argument.

"Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation." ABA Criminal Justice Standard, Defense Function, Standard 4-3.1. The South Carolina Commission on Indigent Defense (SCCID) has adopted Performance Standards for the Performance of

Public Defenders and Appointed Counsel in Non-capital Cases.[16] Guideline 2.2 contemplates multiple client interviews where the attorney acquires information from the client relevant to the defense in the case. Although the SCCID standards were not effective until July 1, 2013, Guideline 2.2 is substantially similar to the National Legal Aid & Defender Association's Performance Guidelines for Criminal Defense Representation, Guideline 2.2.

Counsel's lack of preparation resulted in his failure to make a *Batson* motion, inadequate challenge of the victim's eyewitness identification, and ineffective cross-examination of the co-defendant. Mr. Tolen was prejudiced by the cumulative effect of counsel's ineffectiveness. *See Kyles v. Whitley*, 514 U.S 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considered "the entire post-conviction record...as a whole"); *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("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"); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

This Court should grant the writ to clarify the obligations of appointed counsel to their client.

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[16] https://sccid.sc.gov/docs/SCCID%20%20Performance%20Standards%20(Non-Capital)%20for%20Public%20Defenders%20and%20Assigned%20Counsel%20as%20adopted%20by%20SCCID%206-7-2013%20with%20revised%20Preamble%208-22-2013.pdf (last viewed April 13, 2014).

V. Was petitioner denied effective assistance of appellate counsel in violation of the Sixth Amendment of the United States Constitution when appellate counsel failed to raise and brief the trial court's erroneous admission, over objection, of information that the investigating officer received from deceased witness Frontis Smith, when that information was inadmissible hearsay, violated the Confrontation Clause, and constituted prejudicial comments on Petitioner's character.[17]

A. 1998 Trial Record.

At the time of the robbery, Frotis Smith operated a store at the Saluda traffic circle. According to Mr. Smith, the morning after the robbery, Ben Tolen "gave me some information about where these people were and said he was scared of him and wanted to get them out of his house." Mr. Smith called Saluda law enforcement and "told them that I had information where the people that robbed the man, where they were at. I directed them to the house." A. 204, line 12 – 207, line 9.

B. 2006 Trial record

Ben Tolen testified, "I told Frontis Smith – he's deceased now. I told Mr. Frontis Smith that there was two guys may be [connected to] this crime." Trial counsel objected. The trial judge sustained the objection and instructed the jurors to "disregard that response." The solicitor continued to ask Ben Tolen about "tell[ing] on your cousin" to Frontis Smith. The trial judge sustained counsel's objection. A. 658, line 13 – 660, line 1.

The prosecution then called Officer Bobby Jones of the Saluda County Sheriff's Department as a witness. His involvement in the case started on the afternoon on the day the crime occurred. The Solicitor almost immediately asked, "Did you attempt to make arrest in this case?" Officer Jones replied, "Yes, sir." The Solicitor then asked, "Who

[17] *See* Amended PCR Application, paragraphs 10(l) and 11(l). A. 764.

were you looking for?" Officer Jones answered, "Frank Tolen and Wade Brannon." Trial counsel interjected, "Foundation, Your Honor. Objection." The trial court judge overruled by stating, "He can testify about whether he was involved in an attempt to arrest somebody." A. 669, line 8 – 670, line 5.

When asked what he did to "effect their arrest," Officer Jones volunteered, "After receiving information." The Solicitor interrupted, "Don't go into what anybody else said." Officer Jones and another officer proceeded to "where the subject was supposed to be," but no one answered the door. Office Jones went to a second location and asked Ben Tolen "to go to the residence where he had previously been to and see if he could get Frank Tolen and Wade Brannon to come back with him." The prosecutor asked, "Why did you want him to go up there and get them? Why didn't you just go up there and get them if you thought you were there?" Officer Jones responded, "Well, the information I received, they were armed. I didn't wanna have a confrontation." Trial counsel interjected, "He's testifying to information he's received from other people. It's hearsay." The trial court judge ruled, "It's not offered for the truth of the matter asserted. Objection is overruled. Plus, it's redundant." A. 670, line 6 – 671, line 5.

The prosecutor continued, "What did you do then? What was the next thing that you did in order to try to get them into custody since you believed they were armed?" The officers "went back to the residence we first went to try to find the subjects." He added, "We were told they had run into the woods." Further testimony followed about Officer Jones asking "Ben Tolen to go and see if he could ten 'em in his truck and bring 'em back." The prosecutor then asked, "Why did you try to enlist his aid?" Officer Jones replied, "Sgt. Whisenant has already told informed me there has been an armed

robbery." The trial court judge finally sustained an objection for hearsay. A. 671, line 6 – 673, line 4.

Officer Jones testified about purportedly observing "where the subject went through the grass behind the house. There was a fresh path where the grass was mashed down." A manhunt utilizing bloodhounds and helicopters ensued by the Sheriffs Department, "DNR, Highway Patrol, SLED. Basically anybody we could get." This enormous effort, however, did not lead to an arrest. A. 673, lines 5-25.

On cross-examination, trial counsel asked, "What information did you get that would indicate that Frank Tolen as a suspect?" Officer Jones responded, "The information I received was from the owner of the stop and shop concerning the armed robbery." Trial counsel reconfirmed this information and that the store owner is named Frontis Smith. After a bench conference, the trial judge excused the jurors from the courtroom. Trial counsel argued, "I have an issue with the officer's testimony. That issue is Frontis Smith is not available for me to cross-examine,[18] and it is anticipated that his statement dictating—." The Solicitor interrupted, "I'm not gonna offer his statement, Your Honor. I'm not gonna offer any statement from Frontis Smith. I can't circumvent that. I'm not gonna offer it." Trial counsel explained that law enforcement was acting on a tip from Frontis Smith about Mr. Tolen's whereabouts and that he was a suspect. Trial counsel objected based on hearsay and lack of foundation. The trial judge overruled the objection. A. 678, line 13 – 681, line 11.

[18] U.S. Const. Am. VI; S.C. Const. Art. I, Section 14.

Admission of some of this evidence forced trial counsel to address it during closing arguments. He referred to Frontis Smith testifying at a prior hearing.[19] Counsel then argued:

> I didn't hear what was there. He testified at a prior hearing. But the State didn't put that testimony up for you. I wonder why.
>
> Officer Jones. Officer Jones testified that somehow he was led by information from Mr. Smith, who you didn't hear any of his testimony, to believe that my client was part of the crime.

A. 702, lines 9-17.

C. 2013 PCR Record.

Trial counsel recalled there was an issue "about how the police came to identify my client at the time." He recalled making "an objection." A. 824, lines 13-20.

Appellate counsel was questioned about the objections for hearsay and that the prosecution "laid no foundation to establish Mr. Tolen as a suspect in the first place." Appellate counsel reviewed pages 223 through 334 of the trial transcript (A. 669-80) during the hearing and testified, "I didn't feel that was the strongest issue." A. 786, line 20 – 19, line 4. Appellate counsel however, had not "read my file from archives" and only "briefly reviewed" the trial transcript prior to the hearing. A. 785, lines 4-9. She had never talked to Mr. Tolen about the incident, explaining "the way Appellate Defense works we . . . sometimes talk to our clients briefly on the phone. We very rarely, unless they are capital defendants, meet with our clients." A. 791, lines 5-15.

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[19] The prosecution called Gayle Smith to testify that her husband, Frontis Smith, died in 2002 and he provided testimony at the prior trial. A. 615-17. No reason existed to call her as a witness other than to suggest to the jurors Mr. Smith had important information about the case that they were not hearing directly.

The PCR judge found that trial counsel "objected to testimony elicited by the State on the substance of a tip from a deceased witness implicating Applicant." The PCR judge specifically noted the testimony of Officer Jones getting information from Frontis Smith. The PCR judge, nevertheless, found "appellate counsel was not in effective for failing to raise other meritorious issues on appeal." A. 908.

D. Argument.

The trial court, over objection, allowed Investigator Jones to testify that he received information from Frontis Smith that led him to look for Mr. Tolen at a relative's house. After Investigator Jones was not able to locate Mr. Tolen at his relative's house, the same information from Frontis Smith led him to initiate a manhunt for armed suspects involving assets from multiple state and local law enforcement agencies. This manhunt, however, ***did not*** led to arresting anyone.

This information from Frontis Smith was not admissible. It was hearsay and violated the confrontation clause. U.S. Const. Am. VI; Rules 801 and 802, SCRE. This information from Frontis Smith was testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). Frontis Smith's statements were made during an investigation and not in response to any ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (victim's statements in response to 911 operator's interrogation were not testimonial, and therefore, were not subject to Confrontation Clause).

Appellate counsel was ineffective for failing to raise and brief this issue. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (held that defendant was prejudiced by appellate counsel's ineffectiveness in failing to raise and brief issue of trial

court's refusal to instruct jury that terms "life" and "death" are to be understood in their plain and ordinary meaning); *Patrick v. State*, 349 S.C. 203, 210, 562 S.E.2d 609, 612 (2002) ("we find counsel was deficient in failing to adequately raise or brief the issue of prosecutorial retaliation.").

The information from Frontis Smith was also prejudicial because it led to improper comments on Mr. Tolen's character. Rule 404(a), SCRE; *State v. Pollard*, 260 S.C. 457, 196 S.E.2d 839 (1973) *abrogated by German v. State*, 325 S.C. 25, 28 (fn. 2), 478 S.E.2d 687, 689 (fn. 2) (1996) (holding statements "were objectionable as improper comments on the defendant's character"). Thus, had appellate counsel raised and briefed this issue, then the Court of Appeals would have reversed Mr. Tolen's conviction.

This Court, therefore, should grant the writ.

VI. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution because trial counsel failed to object to his being retired after this Court remanded his case for resentencing only.[20]

A. 2003 PCR Record.

Following the 2003 PCR hearing, Judge Goode found that Mr. Tolen "never received written notice that the State intended to seek a sentence of Life without Parole for his armed robbery charge" and the State "did not introduce any evidence to show that written notice was given." Judge Goode then ruled, "Applicant has shown by preponderance of the evidence that the solicitor failed to comply with the requirements of § 17-25-45(H) and ***his sentence of life without parole must be vacated.***" A.436-37 (emphasis added). Judge Goode repeated this finding in his findings of fact and conclusions of law number one. A. 440. On the final page of the order, Judge Goode "ORDERED that the Applicant's sentence of Life without Parole be an hereby is vacated." A. 443.[21]

Judge Goode also granted PCR based on numerous other allegations of ineffective assistance of counsel. For these grounds, Judge Goode vacated the convictions ***and*** sentences. A. 443 (emphasis added).

B. This Court's Memorandum Opinion Number 2005-MO-061.

On December 19, 2005, this Court issued the following opinion:

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[20] See Amended PCR Application, paragraphs 10(k) and 11(k). A. 764.

[21] The PCR judge found, "There is no ambiguity in the language of the order granting post-conviction relief from Judge Goode. The order stated, 'Applicant's convictions of armed robbery and possession of a pistol by a person convicted of a violent crime should be reversed and the applicant's sentences vacated and this matter is remanded for Applicant to have a nee trial.'" A. 907. The PCR judge did not read Judge Goode's order correctly. The quoted language addressed ineffective assistance of counsel claims during the trial. This Court vacated that portion of Judge Goode's order.

> **PER CURIAM:** We granted a writ of certiorari to review the grant of post-conviction relief (PCR) to Respondent, Frank Tolen, Jr. We dismiss, in part, as improvidently granted, and vacate the remainder of the PCR Court's rulings.
>
> We dismiss as improvidently granted with respect to the PCR court's ruling on the issue of the State's failure to give proper notice of intent to seek sentence of life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45(H) (2003).
>
> The remainder of the holdings of the PCR court are vacated, and the matter is remanded for a new trial.

A. 444-45.

C. 2013 PCR Record.

Prior to the 2006 trial, the State served Mr. Tolen with written notice of intent to seek life without the possibility of parole. A. 737-38, 804, lines 1-7. Trial counsel never talked to the prosecution about simply resentencing Mr. Tolen. Trial counsel explained:

> At the time I didn't even think about it. I was preparing for the trial and provided notice a few months beforehand and then just started working towards getting ready for trial. I didn't even think about the resentencing matter.

Trial counsel acknowledged that he looked at this Court's opinion but "didn't pick up on that issue." A. 805, line 15 – 806, line 15.

Appellate counsel testified "there were two issues that were raised in my brief, both having to do with being retried rather than being resentenced." She explained "there was some ambiguity in terms of whether this was a reversal that would lead to a new trial or a reversal that simply led to resentencing, as the error was in sentencing and did not have to do with trial error." Even though "the issue was not raised below," she presented

this issue to the Court of Appeals as issues of subject matter jurisdiction and double jeopardy. A. 785, line 15 – 786, line 19.

The PCR judge found, "Counsel testified that when he was appointed he did not think about whether the remedy given to the Applicant after granting of his previous post-conviction relief application was improper." A. 896.

D. Court of Appeals Opinion.

The Court of Appeals rejected the appeal based on trial counsel's failure to raise the issue. On May 26, 2009, that Court entered the following unpublished opinion:

> **PER CURIAM:** Frank Tolen Jr. appeals his conviction and sentence of life without parole for armed robbery and possession of a pistol by a person convicted of a violent crime. Tolen argues the trial court lacked subject matter jurisdiction to hear his second trial and his conviction and sentence violate the constitutional prohibition against double jeopardy. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006) ("As a general rule, if an issue was not raised and ruled on below, it will not be considered for the first time on appeal."); *State v. Nelson*, 336 S.C. 186, 195, 519 S.E.2d 786, 790-91 (1999) (finding "where a verdict is set aside by a defendant's own motion and a new trial granted, the defendant may be again tried for the offense").

A. 743-44.

E. Argument.

Respectfully, this Court should grant the writ to correct the error contained in its Memorandum Opinion Number 2005-MO-061. If this Court truly dismissed *certiorari* on the issue of proper notice for life without parole, then that portion of Judge Goode's order vacating sentence only remained in effect, meaning that State could not retry Mr. Tolen. Because proper notice was not provided, Mr. Tolen faced a maximum sentences

of thirty (30) years form armed robbery, S.C. Code Ann. § 16-11-330(A), and five (5) years for possession of a pistol by someone previously convicted of a crime of violence, S.C. Code Ann. § 16-23-30 and 50(a)(1). Life imprisonment without the possibility of parole, therefore, was an illegal sentence.

"In the case of an illegal sentence, the well settled practice in [South Carolina] is to affirm the conviction but set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant. *State v. Petty*, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964). *See also Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) ("Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense."); *Dervin v. State*, 386 S.C. 164, 168, 687 S.E.2d 712, 714 (2009) (remanding for resentencing when trial judge imposed 25 years for offense that carried a maximum sentence of 10 years); *State v. Storgee*, 277 S.C. 412, 413, 288 S.E.2d 397 (1982) ("Since the sentence imposed here exceeds the statutory maximum, the sentence must be vacated and the case remanded for resentencing."); *State v. Hill*, 254 S.C. 321, 331, 175 S.E.2d 227, 232 (1970) ("The sentences imposed were therefore illegal, which requires that the case be remanded for the purpose of resentencing."); *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 536 (1941) ("we conclude that [the trial judge] erred in the exercise of his discretion in meting out the sentence and we are constrained on that account to affirm the conviction but set aside the sentence and remand the case to the Court of General Sessions of Spartanburg County for the sole purpose of the resentencing of the appellant to a lesser punishment than that contained in the sentence from which he has appealed.").

"Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court." ABA Criminal Justice Standards, Defense Function, Standard 4-8.1. Ineffective assistance of counsel during sentencing normally requires remand for resentencing, not retrial. *E.g. Sprouse v. State*, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) ("[R]equiring specific performance is the most efficient option because it eliminates the need for a new trial or new plea hearings, and also grants the parties nothing more and nothing less than the benefit for which they originally bargained.").

Mr. Tolen was prejudiced by the State prosecuting him for the same offense twice. "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." *State v. Jolly*, 405 S.C. 622, 626, 749 S.E.2d 114, 116 (Ct. App. 2013) (quoting *Stevenson v. State,* 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). Essentially, the prosecution got a second bite at the apple—anther opportunity to notice life without parole—when Mr. Tolen should have been resentenced because notice was never given.

The Court, therefore, should grant the writ to clarify its 2005 memorandum opinion.

Conclusion

For the foregoing reasons, this Court should grant the writ and review order dismissing Mr. Tolen's PCR Application.

Respectfully Submitted,

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April 16, 2014