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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

JIMMY TAYLOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000669

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object or to supplement the State's on the record recitation of a stipulation agreed to between the parties in chambers that counsel would later argue did not accurately reflect the complete terms of the parties' agreement?

STATEMENT

On March 6, 2006, Petitioner, Jimmy Taylor, was indicted for three counts of Felony Driving Under the influence, Resulting in Death. App. 724-726. On May 1, 2007, Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein. App. 1 – 545. The State was represented by David Pascoe and Bryan Jefferies. App. 1. Petitioner was represented by Everett K. Chandler (hereinafter "counsel"). *Id.* Petitioner was found guilty, and sentenced to twenty years imprisonment for each offense. App.542, ll. 22 – App. 543, ll. 7. The sentences were to be served concurrently. *Id.*

A notice of appeal was filed on Petitioner's behalf and perfected by counsel and Tara D. Shurling. App. 546 – 563. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion filed on March 30, 2009. App. 564; *State v. Jimmy Taylor*, 2009-UP-148.

Petitioner filed an application for post-conviction relief (PCR) on July 27, 2011. App. 547 -554. On December 11, 2011, Petitioner amended his application. App. 554-562. The State filed a return dated January 11, 2012. App. 563-567. On May 22, 2013 an evidentiary hearing was held before the Honorable Edgar W. Dickson. App. 568 - 711. Petitioner was represented by W. Scott Palmer, and the State was represented by Assistant Attorney General Walt Whitmire, App. 568. Judge Dickson denied Petitioner relief by an order filed on October 10, 2013. A notice of appeal was filed on March 24, 2014. App. 712 – 723.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when trial counsel failed to object or to supplement the State's on the record recitation of a stipulation agreed to between the parties in chambers that counsel would later argue did not accurately reflect the complete terms of the parties' agreement.

Relevant Facts

On October 21, 2005, Petitioner was returning home heading westbound on Highway 70 outside of Orangeburg after meeting a friend for drinks. App. 224 – 225. Simultaneously, the Neeley family (George Neeley, 71, Ann Neeley, 70, and Madison Neeley, 41) were traveling eastbound on Highway 70. *Id.* Petitioner lost control of his vehicle and impacted the Neeleys' vehicle. *Id.* The Neeleys' vehicle, a Ford Escort, was disabled in the road following the collision. *Id.*

An undetermined amount of time later, a third vehicle, driven by Jessie Glover and traveling at roughly sixty-nine (69) miles an hour, impacted the Neeleys' vehicle. *Id.* At the time of impact, Glover was traveling around sixty-nine miles per hour, fourteen miles over the speed limit when he struck the Neeleys. App. 203, ll. 19-21; App. 448, ll. 6-20. He impacted the Neeleys' vehicle with sufficient force so as to cause Mr. Neeley to be pushed from the driver's seat to the middle of the back seat. App. 340, ll. 21 – App. 341, ll. 4. After striking the Neeleys, Glover's car continued into a cotton field and, as a result of the collision, Glover's wife had to be airlifted because her head hit the front windshield of their vehicle. App. 207, ll. 13-19; App. 209, ll. 2-9.

Petitioner would testify that he recalled that Ms. Neeley checked on him after the collision and returned to her car to wait for first responders prior to the second collision. App. 417, ll. 5-18. None of the Neeleys were wearing seat belts. App. 448, ll. 6- 20. Sufficient time passed for coolant and other liquids to pool beneath the Neeleys' car before it was struck by

Glover. App. 397, ll. 4-17. Glover testified at trial that he "didn't have time to hit the brakes, and I still evidently must have had the cruise control because I went up . . . [a] cotton field a good ways." App. 206, ll. 17-19; *see also* App. 215, ll. 9-16. Glover was never subjected to sobriety tests or charged with any traffic offenses. App. 214, ll. 6-8; App. 216, ll. 2-11. All three members of the Neeley family were killed as a result of these collisions.

Pre-Trial Stipulation

Prior to opening statements, Circuit Solicitor David Pascoe placed the following agreed to stipulation on the record:

> "I think it was Monday, [counsel], I can't remember if we put it on the record, we talked about it in chambers, that [counsel] is going to object to something in the *coroner's report* down at the bottom. It's the opinion of the coroner that all the decedents were killed instantly when the first impact took place. I just wanted to put on the record that *I am not going to elicit any such testimony from the coroner, Mr. Bonnette, with regards to that opinion.*"

App. 134, ll. 11-22 (emphasis added). The Court then asked if the defense had anything to add to the stipulation, counsel responded he did not. App. 135, ll. 2-4.

Trial and Testimony of Deputy Coroner

In opening statements, the State emphasized their theory that the first collision, involving Petitioner, was fatal, "[n]ow you are going to hear testimony that the first collision in all likelihood killed the victims." App 149, ll. 7-9. The State's first witness, Deputy Coroner George Bonnette testified that Ann Neeley was thrown through the front windshield up to her shoulders from the force of the collisions. App. 170, ll. 12-16. The State's last question to Bonnette asked, "[h]ave you ever known of a case where someone's head went through a windshield and they survived?" App. 173, ll. 16-18. Bonnette responded he did not. *Id.*

The defense's theory was that Petitioner's collision with the Neeleys did not kill them, but that the second collision with Glover was fatal. App.691, ll. 3-11. Additionally, defense

argued that a tire blow-out, not alcohol, had caused him to lose control of his vehicle. App. 154, ll. 13-25. Petitioner argued with respect to proximate cause, that Glover's negligent driving coupled with the time between the first collision and the second, meant that Petitioner's collision was not the proximate cause of the Neeleys' deaths. *Id.*[1] In executing this strategy, counsel asked Bonnette, if the Neeleys were trapped in the car, why did the first responders not find anyone in the driver's seat? App 178, ll. 6-11. Further, counsel elicited testimony that the police had initially been looking for a fourth fatality from the Neeley's car, in the belief the driver might have been ejected. *Id.* at 11-21. The State attempted to address these issues on recross, at which point defense counsel asked for a bench conference. App. 184, ll. 15-20. Counsel alleged the State was attempting to circumvent the stipulation prohibiting Bonnette from testifying as to which accident caused the Neeleys' deaths. *Id.* The objection was sustained and Bonnette concluded his testimony shortly thereafter. App. 186, ll. 15-16.

Testimony of Ricky Dixon

The limitations on testimony imposed by the stipulation were at issue again during the State's examination of Lieutenant Ricky Dixon, a SLED accident reconstructionist. App. 283, ll. 14 – App. 354, ll. 4. Counsel again requested a bench conference to review the scope of Dixon's testimony. App. 289, ll. 12-18. Dixon confirmed that no momentum study had been done to definitively determine which of the two collisions caused the Neeleys' death. App. 291, ll. 1-15. The Court instructed Dixon, "not to delve into the medical part" of the reconstruction.

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[1] Petitioner was charged under S.C. Code Ann. § 56-5-2945(A): A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence.

Id.[2] Dixon began by testifying about his investigation of the accident scene and the impact of each collision on the Neeleys' vehicle. App. 300, ll. 9 – App. 306, ll. 19. Counsel again objected when Dixon began to describe the effect of each collision on the Neeleys themselves. App. 311, ll. 7-16.

At the second bench conference, counsel argued that Dixon and his team had not conducted a momentum study on the effect of each impact on the Neeleys, and therefore, Dixon could not testify as to which of the two collisions caused their deaths. App. 312, ll. 2-9. Counsel also noted that the State had, in reaction to the defense's theory on the lethality of the second collision, attempted to conduct a momentum study the weekend before trial and that the defense would have likely been successful in suppressing the results or getting a continuance. *Id.* at 20 – App. 313, ll. 11. Counsel contended that, prior to trial, the parties had reached:

> a consensus … prior to this testimony that the State would not go into any matters which would regard to [verbatim] any momentum of any of the passengers in the vehicle with respect to any individual collision and that is the nature of the questioning which the – which the solicitor is heading into and so that the nature of our objection.

App. 313, ll. 3-11. The State denied making any such agreement and that, as an accident reconstructionist, Dixon would testify to the effect of the impacts on the passengers in a vehicle in any felony DUI trial. *Id.* at ll. 13-22. The State agreed that Dixon could not testify on "medical part" but that he was qualified to testify "as to how the victims ended up where they are and the direction they go as a result of impacts." App. 314, ll. 1-3.

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[2] According to Dixon the momentum study or analysis would: "definitively define direction and when we discuss direction thrust and principal directional force and the directions that the bodies would move. And… the change of velocity that a body or a vehicle experiences in the collision. App. 327, ll. 9-18. He continued: "We were not able, because of what we discussed earlier on the post momentum or the post impact movement of vehicles, to determine momentum, but through experience and training we can discuss to a degree of certainty how bodies would move in the vehicle." *Id.* at ll. 19-25.

Counsel continued to argue that the report he received from the State in discovery stated the reconstruction team could not differentiate between the collisions and that the assistant solicitor involved in the case said there was no way to perform a study to determine the effect of each collision on the positions of the Neeleys. App. 316, ll. 4-20. The State denied making this commitment: "That's just not accurate. I'm not saying he's trying to, but I think there's some miscommunication or whatnot. I would have asked that question on him because it's all based on his findings that October 21st, the direction of the people, it just has nothing to do with the momentum report ever." App. *Id.* at ll. 21 – App. 317, ll. 3.

The trial judge noted that Dixon's report stated, "all three occupants of sustained fatal injuries as a result of these *two collisions.*" App. 317, 16-23 (*emphasis added*). The trial judge also noted that in the mathematical discussion of the collisions, the two accidents are differentiated. *Id.* at 8-15. The trial judge then requested to hear Dixon's potential testimony on the matter. App. 318, ll. 10. On proffer, Dixon testified that the different impacts are:

> not specifically addressed in the report, these were determinations that we made, were able to make just by the – viewing the collision. After having seen as many collisions as we've seen, the frontal collision, there's no motion in the second collision that would put the passenger through the windshield of the car.

App. 321, ll. 9-15. On cross-examination, Dixon admitted that the specific topic of which collision killed the Neeleys was not in the report and that while his team does not have the ability to do a momentum study, they are able to determine "how things happen in an accident." App. 322, ll. 22 – App. 323, ll. 8. Dixon concluded that the information necessary for them to determine which collision killed the Neeleys was contained in the report, but was not included in the analysis or conclusions. App. 324, ll. 2-4. When pressed as to whether the information in the report allowed them to conclude which accident killed the Neeleys, Dixon again demurred, "We're not really offering any scientific data; he's asking [for] an opinion as to how that person

might have moved in the vehicle. That can be done without regards to specific momentum analysis." App. 324, ll. 17-20.

In the concluding arguments on the admissibility of testimony opining on which collision was fatal, defense counsel argued the following: that simply providing raw data does not satisfy discovery responsibilities, that Dixon's conclusions and the analysis supporting them were excluded from the report given to the defense; and, that the State indicated prior to trial they could not present testimony on which collision was fatal because they had not done the necessary tests. App. 325, ll. 2 – App. 326, ll. 15. The State then summarized its understanding of the stipulation entered into before trial:

> Our understanding was *our discussions with [counsel] was that I wasn't going to put a highway patrolman up there, ask them how are they going to die....* But again, our understanding is I'm not going to ask a highway patrolman how the victims died and that's why I didn't do that with the coroner.

(emphasis added) App. 331, ll. 3-23. Counsel countered that the defense had prepared with the understanding, after speaking with the assistant solicitor, that evidence on which of the collisions was fatal could not be proven without a momentum study. App. 333, ll. 9-15. Further, that if the State wished to conduct a momentum study, the defense would be entitled to a continuance so as to secure an expert. *Id.* at ll. 19-25. The assistant solicitor alleged to have made the representations, Bryan Jefferies, was present throughout the trial, but did not participate in this bench conference.

The trial judge concluded that Dixon could testify that a frontal collision would move the Neeleys in a particular direction and that what he observed on the scene was consistent with movement in a frontal collision. App. 335, ll. 1-13. However, the trial judge concluded that testimony on which collision caused the Neeleys' deaths was inadmissible because the State did not conduct a momentum study on the specific forces of each collision. App. 336, ll. 13-20. With

those limitations established, Dixon testified that the Neeleys' positions in the vehicle were consistent with both collisions. App. 339, ll. 21 – App. 342, ll. 14. When asked by the State about Ms. Neeleys' position in the vehicle, Dixon testified without objection, that in his experience, going through the windshield was consistent with a frontal collision and that he had never seen anyone survive going through the windshield. App. 342, ll. 15-21.

State's Closing Argument

In closing argument, the State returned to Dixon's and Bonnette's testimony on Ms. Neeley being thrown through the windshield:

> From that frontal impact [Dixon] *told you as an expert* Ms. Neeley went through the windshield .... *Eight people he's known to go through a windshield, none have survived.....* [Bonnette] told you Ms. Neeley went through the windshield on the frontal impact. He told you the vehicle was in such damage from the frontal impact the victims had to be extricated. *He told you that their injuries were such that they died immediately. But at least they didn't suffer.*

(emphasis added) App. 488, ll. 19 – App. 490, ll. 23.

Direct Appeal

On direct appeal, counsel and Ms. Shurling argued that the trial judge erred in allowing Dixon's testimony as to which collision caused the death; thus violating Petitioner's due process of law. App. 546 – 547. Further, counsel contended that the State violated the pre-trial agreement between the parties, and that a momentum study was a necessary prerequisite for introducing testimony as to which collision caused death. *Id.* The Court of Appeals affirmed the conviction, holding that there was no reversible error from any potential violation of the pre-trial agreement because the solicitor made a good faith effort to comply with it and that the trial judge acted within the scope of her discretion when ruling on the admissibility of expert testimony. App. 564.

PCR and Evidentiary Hearing

At the evidentiary hearing, counsel testified that a few days before trial, the State informed him that they were not going to have their expert testify on which collision killed the Neeley. App. 681, ll. 1-7. Counsel testified further, "I indicated to the Court in chambers that if in fact they were going to do that [introduce testimony on which collision was fatal] we were going to need to bring in an expert to do a momentum study." App. 681, ll. 8-10. Counsel also testified that the trial judge allowed the case to move forward on the condition that the State's expert would not testify on which accident was fatal, but that during the trial the State was able to present testimony, over counsel's objection, that the first collision caused the Neeleys' deaths. *Id.* at ll. 11-19.

Counsel testified that he appealed the conviction because he believed the State had violated the stipulation, "I thought it was improper. I still do. I appealed it." *Id.* Counsel explained that he believed the stipulation entered into and put on the record was a blanket prohibition on any testimony about which accident caused death and that the trial judge allowed testimony on the cause of death despite the agreement entered into "in chambers and put on the record". App. 664, ll. 8-18. Counsel declared, "that what the circuit solicitor did amounted to prosecutorial misconduct because he offered evidence that was contrary to an agreement that was made in court. And that was my position then and that is my position now." App. 682, ll. 20-23. Counsel continued, "I think had it not been for the allowance of the testimony of the trooper that that the jury would have found a different conclusion. Unfortunately the judge let in the information and [Petitioner] was found guilty." App. 684, ll. 1-4.

<u>Order of Dismissal</u>

In dismissing Petitioner's request for relief, the PCR judge specifically noted that counsel's testimony at the evidentiary hearing was credible on all matters relating to trial strategy

and with respect to counsel's decisions on objections. App. 738. The PCR judge concluded that counsel had properly objected to Lieutenant Dixon's testimony on the likely fatal consequences of Ms. Neeley going through the windshield and that counsel was not ineffective. *Id.* Rather, that the trial judge had simply ruled the evidence was relevant and did not require a momentum study to be admissible. *Id.*

Discussion

Counsel's failure to ensure that the record reflected the complete terms of the stipulation, as testified to by counsel at PCR, prohibiting any testimony on which collision killed the Neeleys, constituted deficient performance falling below prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland.* "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). *v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

<u>Deficient Performance</u>

Throughout Petitioner's case, including on PCR, counsel has maintained that the State improperly and deliberately violated the terms of a stipulation between the parties, which prohibited any testimony on which collision killed the Neeleys. App. 313, ll. 3-11; App.546 - 563; App. 663, ll. 1-19; App. 665, ll. 20-23. Counsel also testified that the trial judge had failed to uphold the terms of the in-chambers agreement. App. 688, 5-7. The issue of whether counsel's failure to ensure that a stipulation is completely and accurately entered into the record constitutes deficient performance is a question of first impression in South Carolina.[3]

A stipulation is an agreement, admission or concession made in judicial proceedings by the parties. *Porter v. South Carolina Pub. Serv. Comm'n,* 333 S.C. 12, 507 S.E.2d 328 (1998); *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 496 S.E.2d 624 (1998); *South Carolina Dep't of Transp. v. Richardson,* 335 S.C. 278, 516 S.E.2d 3 (Ct.App.1999). Stipulations are binding on the parties who make them. *Id.; see also Webster v. Holly Hill Lumber Co.,* 268 S.C. 416, 234 S.E.2d 232 (1977) (a stipulation is an agreement, like a contract, designed to effect the intent of the parties); *State v. Anderson,* 318 S.C. 395, 399–400, 458 S.E.2d 56, 58 (Ct. App.1995) (a stipulation is an agreement between the parties to which there must be mutual assent and the record must clearly reflect what the parties agreed to). The court must accept stipulations as binding upon the parties. *State v. Pichardo*, 367 S.C. 84, 95, 623 S.E.2d 840, 846 (Ct. App. 2005).

[3] Other states and several federal circuits have held that entering into inaccurate or erroneous stipulations may constitute deficient performance. *People v. Coleman*, 301 All. App. 3d 37, 46-47 (1998)(use of stipulation does not, by itself, establish ineffective assistance of counsel, but stipulation must be shown to be part of a valid trial strategy); *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005)(counsel not ineffective for agreeing to stipulate to the admissibility of polygraph evidence where the prosecutor had agreed to drop the murder charges against defendant if she passed and defendant assured counsel that she was telling the truth); *Butcher v. Marquez*, 758 F.2d 373, (9th Cir. 1985)(counsel not deficient for stipulating to evidence in order to avoid proof of a point that implied defendant's guilt).

Counsel, respectfully found credible in the Order of Dismissal, believed the stipulation prevented any testimony from any witness as to which accident killed the Neeleys. App. 682, ll. 8-18; App. 738. Whatever the extent of the agreement in chambers or between the parties, the stipulation entered into on the record is much more limited. Prior to trial, the State orally entered a stipulation which only prohibited the coroner from testifying on his opinion that the first collision killed the Neeleys. App. 134, ll. 11-22. Counsel was present for this colloquy and did not object. App. 135, ll. 2-4. Counsel was able to successfully object when Bonnette's testimony encroached on this stipulation. App. 184, ll. 15 – App. 186, ll. 16. Once the State sought to generate testimony from Lieutenant Dixon, the accident reconstructionist, counsel objected based on his understanding of the stipulation. App. 313, ll. 3-11. The State then countered that it had never agreed to a total prohibition on evidence that the first collision killed the Neeleys. *Id.* at ll. 13-22. Instead, the State referenced the limited stipulation which it had put on the record prior to trial. App. 313, ll. 13-22. The trial judge, who according to counsel, was present in chambers when the stipulation was agreed to, sided with the State. App. 335, ll. 1 – App. 336, ll. 20.

Counsel's failure in the present case is analogous to a defense counsel's failure to object to inadmissible hearsay testimony or improper comments on an accused's exercise of constitutional rights. In both situations, the State is able to introduce otherwise improper evidence, either improper by mutual agreement or under the Rules of Evidence, that defense counsel could have prevented reaching the jury had he or she acted competently. However, the failure to object to improper testimony or hearsay can be the outgrowth of a valid trial strategy depending on the context. *Watson v. State,* 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing *Dawkins v. State,* 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of

ineffectiveness); *See also Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (counsel's decision not object to hearsay was part of strategy to discredit witness and not ineffective).

In contrast, the failure to ensure that the stipulation entered into the record is a complete and accurate statement of the parties' agreement would never qualify as an objectively reasonable trial strategy. Stipulations are optional agreements, specifically bargained for between the parties and, like contracts; are limited to the terms memorialized in a record. *Anderson*, at 398, 458 S.E.2d at 58 (defendant has no right to a stipulation from the state except by agreement with solicitor); *State v. Hamilton*, 327 S.C. 440, 443-444, 486 S.E.2d 512, 213-214 (1997)(solicitor was not required to stipulate that defendant had the legal status to be charged with first degree burglary). Therefore, the failure to ensure all the terms of an agreed to stipulation on the record is necessarily a failure of trial strategy. *See Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (presumption of adequate representation based on a valid trial strategy is inapplicable where counsel cannot articulate a valid trial strategy).

Here, instead of explaining how a more limited stipulation might have been an appropriate trial strategy; counsel has consistently alleged misconduct by the State and error by the trial judge in introducing and allowing testimony on which collision was fatal. App. 683, ll. 19-22; App. 707, ll. 13-19. Yet a review of the record reveals that counsel either failed to ensure the full stipulation was on the record or misunderstood the terms and limits of the stipulation. Moreover, a limitation solely on the testimony of the coroner, by itself, was of little value to the defense in light of Dixon's testimony. In either case, counsel's failure to object to or correct the State's colloquy on the stipulation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland v. Washington, supra; Brown v. State, supra.*

Prejudice

As to prejudice, counsel's failure to ensure that the complete stipulation was entered into the record was complete "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result," because the issue of which collision killed the Neeleys was essential to the Petitioner's defense. App. 154, ll. 13 – App. 156, ll.18; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

Like the deficient performance prong, when the failure of counsel to enter the complete terms of a stipulation sufficiently prejudices the defendant so as to require reversal of a conviction on PCR is a question of first impression in South Carolina.[4] Again, the standard of PCR appellate review for reversing a conviction based on improper comments on an accused's exercise of constitutional rights is instructive. *Edmond v. State*, 341 S.C 340, 348, 534 S.E.2d 682, 686-87 (2000). On appeal from a PCR hearing, improper comments rise to the level of a prejudice requiring reversal if: (1) the record shows the reference to the defendant's constitutional rights was more than a single reference; (2) the prosecutor tied the defendant's exercise of her right directly to her exculpatory story; (3) the exculpatory story was not totally implausible; and (4) the evidence of guilt was not overwhelming. *Id.*

[4] Courts that have addressed the prejudicial impact of an inaccurate or erroneous stipulation focus on the nexus between the stipulation, the elements of the indictment and the strength of the State's case without the stipulation. *Coleman* at 47, 704 N.E.2d at 698 (stipulation to positive results of laboratory tests for the presence of heroin in substance possessed by defendant in weight much greater than that which was actually tested prejudiced defendant; stipulation was untrue, and was material to guilty verdict); *Parker v. State*, 89 So. 3d 844 (Fla. 2011) (counsel not ineffective for stipulating to the admissibility of otherwise inadmissible, significant hearsay statements in light of the overwhelming evidence of defendant's guilt); *Parker v. Lockhart*, 907 F.2d 859 (8th Cir. 1990) (defendant not prejudiced by stipulation as defendant could not dispute that he shot victim).

In the present case the testimony presented on which collision caused the Neeleys' death would merit reversal applying the improper comments framework. With respect to the first and second reversal factors, at trial, the State extensively questioned both Bonnette and Dixon about which accident caused the fatal injury to Ms. Neeley. App. 173, ll. 4-18; App. 342, ll. 15-21. The State also asked them both if, in their experience, anyone had ever survived being thrown through the windshield. *Id.* Both men said no; effectively testifying that the first collision killed the Neeleys. App 681, ll. 15-17. The State then emphasized their testimony during closing argument. App. 474, ll. 16 – App. 476, ll. 9. While counsel objected, the stipulation as it was entered in the record, did not support his objection. App. 313, ll. 3-11.

As to the plausibility and guilt analysis under the third and fourth prongs, Petitioner's exculpatory story was plausible, and the evidence of his guilt not overwhelming in light of the second collision. At the time of impact, Glover was traveling around sixty-nine miles per hour, fourteen miles over the speed limit, in a full size SUV when he struck the Neeleys. App. 203, ll. 19-21; App. 448, ll. 6-20. He impacted the Neeleys' vehicle with sufficient force so as to cause Mr. Neeley to be pushed from the driver's seat to the middle of the back seat. App. 340, ll. 21 – App. 341, ll. 4. After striking the Neeleys, Glover's car continued into a cotton field and, as a result of the collision, Glover's wife had to be airlifted because her head hit the front windshield of their vehicle. App. 207, ll. 13-19; App. 209, ll. 2-9. Evidence was also presented that a significant amount of time had passed between the first and second collision. Petitioner testified that Ms. Neeley checked on him after the collision and returned to her car prior to the second collision. App. 417, ll. 5-18. None of the Neeleys were wearing seat belts. App. 448, ll. 6- 20. At a minimum, enough time had passed for coolant and other liquids to pool beneath the Neeleys' car before it was struck by Glover. App. 397, ll. 4-17. Finally, the trial judge

determined sufficient evidence existed, to justify including a charge on misdemeanor driving under the influence. App. 513, ll. 9-19.

In addition, counsel believed the State sought to introduce testimony that the first collision killed the Neeleys in order to refute the Petitioner's theory that the collision caused by Glover's negligence either; (1) killed the Neeleys exclusively, or (2) was a supervening cause that broke the chain connecting Petitioner to their deaths. App. 689, ll. 8 – App. 690, ll. 8. Counsel admitted that he shared this theory with the State a few days before trial in an effort to get a favorable plea offer and that doing so risked the State being able to adapt their case to his theory. *Id.* Counsel claimed that the stipulation, as he understood it, **protected** the Petitioner despite disclosing his theory to the State, "because [the State's] counter would require us having leeway with having additional experts because they had information that they hadn't provided before." App. 670, ll. 3-5.

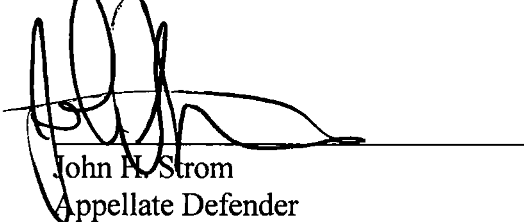
Absent evidence that the first collision caused the Neeley's death, the State's case against Petitioner was not overwhelming. In addition, the testimony elicited by the State arguably went beyond what was allowed by the trial judge by linking the motion of the bodies as a result of each collision with testimony on which position in the vehicle would indicate a fatal accident. App. 335, ll. 1 – App. 336, ll. 20; App. 488, ll. 19 – App. 490, ll. 23. This is exactly the kind of testimony the stipulation, as understood by counsel, would have excluded. However, since counsel never objected to or sought to supplement the stipulation entered into the record by the State, he was unable to prevent this damaging testimony from reaching the jury. Finally, counsel, in testimony the PCR court found credible, believed that if the judge had upheld the stipulation under the terms as counsel understood them, the outcome of Petitioner's trial would have been different. App. 738.

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668. Thus, the PCR judge erred in holding that counsel provided effective assistance of counsel. *Id.*

CONCLUSION

Based on the foregoing reason, Petitioner Jimmy Taylor's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

JIMMY TAYLOR,

PETITIONER,

V.

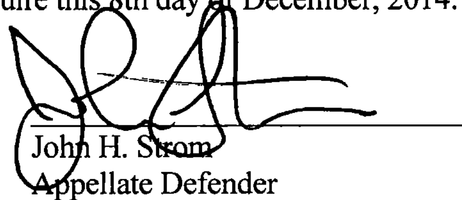
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000669

CERTIFICATE OF SERVICE

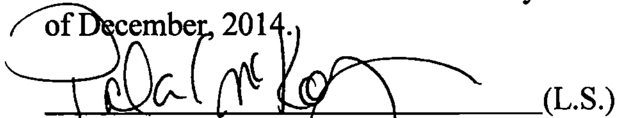
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire this 8th day of December, 2014.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of December, 2014.


_______________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.