

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Circuit Court Judge

Opinion No. 4981
(S.C. Ct. App. Refiled July 18, 2012)

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S.C. Supreme Court

State of South Carolina,

Respondent,

v.

Hollie McEachern,

Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for petitioner certifies that a petition for rehearing was made by petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the admission of testimony concerning the civil forfeiture of money seized during petitioner's arrest and petitioner's consent to the forfeiture?
2. Did the Court of Appeals err in affirming the admission of testimony concerning post-arrest assistance provided by petitioner to her cousin Terrence, a co-defendant, and in affirming the ruling on the defense objection to the state's argument based on that evidence which exceeded the limitation imposed by the court?
3. Did the Court of Appeals err in affirming the denial of a mistrial based on an improper comment by the state and in affirming the trial court's ruling which allowed the state to question petitioner about selling drugs to specified individuals without a proper foundation for such questions?
4. Did the Court of Appeals err in affirming the denial of the defense motion for a new trial, on the basis of the above errors, singly or cumulatively, and in light of multiple instances of improper argument by the state?

STATEMENT OF THE CASE

Petitioner, Hollie McEachern, was indicted in Kershaw County in 2007 on charges of possession with intent to distribute marijuana, trafficking in crack (10 to 28 grams), and trafficking in cocaine (100 to 200 grams). App. pp. 5-10. She was tried by a jury on January 25-27, 2010, with Judge G. Thomas Cooper presiding. App. p. 14. The jury found her guilty of the three charges. App. pp. 312-13. Judge Cooper sentenced her to concurrent terms of imprisonment of 5 years, 10 years, and 25 years, respectively, and a fine of \$50,000 for the cocaine trafficking charge. App. pp. 11-13, 316-17.

On appeal, petitioner challenged a number of the trial court's rulings with respect to admission of evidence and improper comments and argument by the prosecution, and also raised a claim of cumulative error. The Court of Appeals affirmed in a published opinion filed June 6, 2012, Opinion No. 4981. Petitioner sought rehearing, which the Court of Appeals denied by order dated July 18, 2012. App. p. 428. On that date, the Court also withdrew its earlier opinion and refiled the opinion. App. pp. 398-418.

CONSIDERATIONS GOVERNING CERTIORARI REVIEW

A writ of certiorari should be granted where there are special and important reasons. Rule 242(b), SCACR. While the considerations set forth in Rule 242(b) are neither controlling nor fully measuring the Court's discretion or power to grant review, they indicate the character of reasons for such review. *Id.* Several of those reasons are presented in this case. Question 1 challenges the trial court's admission of evidence of a civil forfeiture of money by consent and the Court of Appeals' affirmance of that ruling. It presents a novel question of law. *See* Rule 242(b)(1), SCACR. The ruling is also in conflict with prior decisions of the Supreme Court. *See* Rule 242(b)(3), SCACR. All four questions challenge improper evidence, comments, or argument, and the resulting prejudice to petitioner implicates her constitutional due process right to a fair trial. *See* Rule 242(b)(4), SCACR. This Court should grant a writ of certiorari and reverse the decision of the Court of Appeals.

ARGUMENT AND AUTHORITIES

Hollie McEachern, Terrence Rivera, and Theodore "Raheem" Sheppard are cousins. On the evening of March 9, 2007, Raheem was planning to host a party, and Hollie and Terrence gave him a ride to meet someone to obtain money for the party.

App. pp. 136, 206. They went in Hollie's vehicle. App. p. 50. By all accounts, Terrence drove, Hollie rode in the front passenger seat, and Raheem was in the back seat. App. pp. 122, 144. They stopped for Raheem to meet Dominic Thomas, who got into the back seat with Raheem. App. pp. 23, 122, 144-45. Following an exchange between Raheem and Dominic in the back seat, Dominic got out, and the police rushed in and arrested Hollie, Terrence, and Raheem. App. pp. 123, 162.

Terrence had some marijuana on his person and Hollie had some in her purse. App. pp. 55-56. In the back seat, where Raheem had been seated, the police found two bags containing quantities of crack, cocaine, and marijuana. App. pp. 54, 86-87. The bags were at his feet, on the rear floorboard, tucked up under his seat and the seat in front of him. App. pp. 53-54, 86-88. Raheem resisted arrest and had to be tased. App. pp. 51, 91, 162-63. Terrence and Hollie did not. App. p. 91. Notwithstanding that the drugs were found in proximity to Raheem in the back seat, all three were charged with offenses based on those drugs. App. p. 53. Hollie admitted the marijuana in her purse was hers, for her personal use. App. p. 211. That marijuana was in a single bag, not packaged in small individual bags for resale like the marijuana found on Terrence. App. p. 92. Hollie denied any knowledge of or connection with the drugs found in the back where Raheem had been. App. pp. 212-13, 215.

Earlier that day, Dominic and his girlfriend had been arrested on drug charges, and Dominic had offered to set up others in exchange for favorable treatment for himself and his girlfriend. App. pp. 18-19, 26, 31-34. He telephoned Raheem, with whom he had dealt before, and arranged to buy drugs from him. App. p. 35. He knew Terrence, with whom he had also dealt before, but he did not know Hollie and had never seen her

before. App. pp. 35, 37. When he got into the car, he spoke to both Terrence and Raheem, but he said nothing to Hollie. App. p. 37. He acknowledged that she could have just been there. App. p. 37.

The evidence linking Hollie to the drugs found in the back seat was weak and of questionable credibility. The two witnesses who linked Hollie to the drugs in the back seat – Dominic and Raheem – had a personal stake in testifying against Hollie, in order to obtain favorable treatment on their own criminal charges. App. pp. 25-26, 141. The officers failed to preserve evidence related to the drugs found in the back seat, including the two bags and a box in which the drugs were allegedly found. App. p. 72. The testimony of the state's witnesses – the others charged with drug offenses and the officers involved in the arrests – was replete with inconsistencies.

David Dowey was the officer who arrested Dominic and allowed him to set up this deal. App. pp. 44-45. Dowey testified the cocaine and crack were found in black and red bags, and in a box which was inside the black bag, and the drugs could not be seen without opening the bags. App. pp. 88-89. No fingerprints were taken of the black and red bags to determine who had touched them. App. pp. 81-82, 85.

Raheem claimed Hollie handed the drugs to him from the front seat. App. p. 145. However, in the three years prior to trial, he had never before made this claim. App. pp. 152-53. Dominic testified he *believed* Hollie handed the drugs to Raheem. App. p. 25. However, according to Raheem, this happened before Dominic got into the car. App. p. 146. Terrence, who was in the front seat with Hollie, said she simply turned toward the back; he did not see the black or red bag, and he did not see Hollie hand anything to Raheem. App. pp. 132-32, 135. Both Raheem and Dominic claimed what she handed

Raheem was a clear plastic bag containing drugs. App. pp. 25, 38, 145-46. This testimony was contradicted by the officer's testimony that the drugs were in the black and red bags and could not be seen. App. pp. 88-89. Dominic denied seeing a black bag. App. p. 38. To explain how the black bag was found in the back, Raheem claimed someone must have thrown it back there. App. pp. 146-47. No other witness so testified, and the drugs were found tucked up under the seats in the back where Raheem had been.

Raheem's story changed throughout his testimony. At one point, he said the drugs were already under the seat when Terrence and Hollie picked him up. App. p. 143. Later, he claimed Hollie passed the drugs over the front seat to him. App. p. 145. At one point, he admitted putting the drugs under the front seat of the car. App. p. 147. At another, he claimed he "never touched nothing." App. p. 156. At other times, he claimed he never even saw either the black or the red bag. App. pp. 156, 161-62.

Although Raheem gave the details of all other aspects of this transaction, including his conversation with Dominic about price and quantity, he gave no detail whatsoever about getting the drugs from Hollie, simply saying he called her to see if she had the drugs. App. pp. 143, 148. He did not give any specifics about his alleged conversation with her -- not the quantity he wanted, the price he would pay her, or what their payment arrangements would be.

Dominic testified he placed the call to Raheem to set up the deal from the sheriff's office, on a speaker phone. App. pp. 20, 30. Dowey contradicted this testimony, stating the call was made from the field and was not on a speaker phone. App. pp. 74-76. No recording was made of the telephone conversation between Dominic and Raheem. App. p. 74. Although the call was not on a speaker phone and was not

recorded, Dowey claimed he could hear the conversation and testified as to what was allegedly said. App. p. 76.

Dowey did not keep any notes related to this incident. App. pp. 72, 74. The incident report was prepared by another officer, and Dowey claimed he assisted in its preparation. App. pp. 73-74.

Apart from the testimony of the witnesses who implicated Hollie to help themselves, only two pieces of evidence tended to link Hollie to the drugs in the back seat. One was a statement Dowey claimed Raheem made in the telephone conversation with Dominic, and the other was a statement allegedly made by Terrence to Dowey a couple of hours after the arrests. Dowey testified that a couple of hours after the incident and arrest Dominic told him Hollie had passed the bag to Raheem. App. p. 85. With respect to where the transaction was to take place, Dowey testified he heard Raheem say Hollie did not want to ride far with that much weight. App. p. 77. Neither of these statements was included in the incident report made contemporaneously with the events. App. pp. 77, 81, 86. Without any notes or any mention in the incident report of these purported statements, Dowey claimed the statements were made and that he could remember them specifically, despite the fact that three years had passed and he had been involved in over 1,000 intervening arrests. App. pp. 76-77, 81.

The incident report reflected that Raheem had the cocaine in his possession. App. p. 90. The first version of the report did so using his nickname, "Raheem." A later version reflected the same information but changed the reference to reflect his last name, "Sheppard." Dowey testified he likely reviewed the report and had the other officer change it to use last names. App. pp. 89-90. Notwithstanding his review of the report

and his instructions to have it revised, the report was not revised to reflect, as Dowey claimed at trial, that Raheem had mentioned Hollie in his conversation with Dominic or that Dominic told Dowey following the arrest that Hollie handed the drugs to Raheem.

I. The Court of Appeals erred in affirming the admission of testimony concerning the civil forfeiture of money seized during petitioner's arrest and petitioner's consent to the forfeiture.

Approximately \$2,000 in cash was seized from Hollie's purse at the time of her arrest. The state contended this cash was drug money. In her testimony, Hollie explained where the money had come from. She was the manager of a restaurant owned by her mother. App. p. 194. Part of the money was hers, from her last two payroll checks of \$400 each, which she had cashed. App. pp. 197-98. Part of the money was just over \$700 to pay for furniture that had been ordered and was to be delivered to the restaurant the next day. App. pp. 198-99. Part of the money was the last three days' cash receipts from the restaurant, which she was to deposit in the bank the following day. App. p. 201. The remainder was her own money, approximately \$180 in \$20 bills she had in her purse. App. pp. 201-02.

During cross-examination, the state sought to impeach Hollie's testimony as to the legitimacy of this money by introducing evidence that she had consented to forfeiture of the cash seized during her arrest. The defense objected to introduction of the consent forfeiture order or testimony about the forfeiture, on the basis that it was not relevant, that it was not an admission, and that a civil judgment is not admissible in a criminal prosecution. The trial court sustained the objection with respect to admission of the forfeiture order, but the court allowed testimony that Hollie had forfeited the money, on relevance grounds. App. pp. 234-40, 248-49. The court specifically ruled the state could

use this evidence only in a limited fashion and not as an admission, and the prosecutor indicated he understood the limitation. App. p. 241. In contravention of this admonition, however, the prosecutor exceeded this limitation, arguing to the jury that Hollie had consented to the forfeiture. App. p. 286. The court sustained the defense's objection and motion to strike this portion of the closing argument. App. p. 286.

The trial court erred in admitting the testimony concerning forfeiture of the money. Like the forfeiture judgment itself, this testimony was inadmissible. As the court correctly ruled, a civil judgment is not admissible in a criminal prosecution. *See Mizell v. Glover*, 351 S.C. 392, 401 n.4, 570 S.E.2d 176, 180 n.4 (2002). The court relied on the following language from *Mizell*:

Rule 609, SCRE, permits admission of evidence of criminal convictions for impeachment purposes, and is pointedly silent as to admission of civil judgments. Further, Rule 803(22) carves an exception to the hearsay rule for admission of *criminal convictions*, and does not mention civil judgments or verdicts.

Id. (emphasis in original). In this state, a judgment in a civil action cannot be introduced as evidence in a criminal action to establish the facts on which it was rendered. *State v. Johnson*, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989); *State v. Weil*, 83 S.C. 478, 479-80, 65 S.E. 634, 635 (1909); *State v. Hendrix*, 319 S.C. 20, 22, 459 S.E.2d 322, 323 (Ct. App. 1995). Here, the state was attempting to do just that. It sought to introduce the consent forfeiture order to establish the fact on which it was rendered – that Hollie had agreed to forfeit the money seized at the time of her arrest. The court correctly found the forfeiture order was inadmissible.

However, the state also sought to introduce the same evidence through Hollie's testimony and for the same reason, and the defense raised the same objection it had with

respect to the forfeiture order. App. p. 239. The trial court erroneously allowed any testimony about the forfeiture. The *Mizell* decision on which the trial court relied in excluding the forfeiture order precludes such testimony. In *Mizell*, a medical malpractice action, the plaintiffs' expert testified concerning a jury finding in an earlier civil action that the defendant doctor had made misrepresentations to his insurance carrier. The written jury finding was not introduced. The Supreme Court found no distinction between the written finding and the oral testimony as to that finding and held the admission of the testimony was reversible error. See *Mizell*, 351 S.C. at 401, 570 S.E.2d at 181. Similarly, in this case, it was not only improper to admit the consent forfeiture order, it was equally improper to allow testimony that Hollie had forfeited the money and had done so by consent.

Contrary to the trial court's holding, this evidence was not relevant. The fact of the forfeiture was not relevant to the issue of Hollie's guilt. Nor was her consent to the forfeiture an admission that the money was drug money, as the state characterized it. As the defense correctly noted, the legal standard in civil forfeiture proceedings is different than the standard in a criminal matter. App. p. 237. Under the drug forfeiture statutes, the initial burden is on the state to demonstrate probable cause for the belief that a substantial connection exists between the property to be forfeited and the illegal activity; if probable cause is shown, the burden then shifts to the property owner to show innocent ownership by a preponderance of the evidence. See *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 130-31, 470 S.E.2d 373, 376 (1996) (recognizing legislative intent to reduce state's burden from the preponderance-of-the-evidence standard applied in other forfeiture contexts to a lesser burden under the drug forfeiture statutes, a showing of only

probable cause); *see also Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) (reiterating probable cause standard articulated in *Medlock*).

In light of the reduced standard of proof, trial counsel advised Hollie to consent to forfeiture of the money, because marijuana was found in her purse and she admitted guilt as to the marijuana charge. App. pp. 237, 249. Based on the state's reduced burden of proof, counsel reasonably believed there was no basis for contesting the forfeiture but also appropriately believed the consent to forfeiture could not be construed as an admission or used as evidence against her in the criminal prosecution. App. p. 237. Indeed, the order itself recited Hollie's understanding that it "will not affect pending criminal charges, if any, against her." App. p. 2. Although the state claimed it was not offering the evidence as an admission, the very purpose for the evidence was to establish she agreed to the forfeiture and that this was an admission of guilt.

As a matter of policy, this Court should adhere to an evidentiary rule that the fact of a civil forfeiture is inadmissible in a criminal proceeding because of the differing standards of proof in the two proceedings. This rule should extend equally to forfeitures by consent, again because of the differing standards of proof but additionally because of the public policy favoring settlement of disputes by agreement. *Cf.* Rule 408, SCRE (offers to compromise and statements made in settlement negotiations not admissible); Rule 409, SCRE (payment and offer or promise to pay medical expenses not admissible to prove liability for injury); *see Hunter v. Hyder*, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) (compromises are favored); *Fesmire v. Digh*, 385 S.C. 296, 307-08, 683 S.E.2d 803, 809-10 (Ct. App. 2009) (same). Just as a civil settlement or settlement offer should not be admitted into evidence on the issue of liability, consent to forfeiture should

not be admissible in a criminal prosecution in support of an inference of guilt. The effect of a rule allowing admission of such evidence would be to eliminate any possibility that the state might obtain forfeitures by consent in cases in which criminal charges are pending.

Contrary to the trial court's finding, the fact of the forfeiture was not relevant to the criminal charge, and it was not made relevant simply because Hollie consented to it. She consented on the advice of counsel, advice premised on the differences in the burdens of proof in separate judicial proceedings. Neither the forfeiture nor her consent was relevant to any issue pertaining to the charges against her or to the question of her guilt. *See* Rules 401, 402, SCRE. However, the inference sought by the state from this evidence was extremely prejudicial, an unfounded inference of guilt on the criminal charges based on consent to the forfeiture. This prejudice so outweighed the probative value of the testimony that its admission was reversible error. *See* Rule 403, SCRE.

Moreover, the prejudice was heightened when the state contravened the trial court's prior limitation on the use of this evidence and argued the fact of consent to the jury. Although the court struck this part of the argument, the jury had already heard it and the taint could not be removed. App. p. 286. Under these circumstances, the erroneous admission of the testimony cannot be deemed harmless.

The Court of Appeals did not consider the merits of petitioner's arguments that evidence related to the civil forfeiture by consent was inadmissible. Instead, the Court found Hollie opened the door to admission of this evidence by testifying concerning where the money came from and stating that none of the money was drug money. App. pp. 405-06. The Court of Appeals noted the principle that, "[w]hen a party introduces

evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.” App. p. 405. This principle is not applicable under the circumstances of this case.

Hollie’s testimony did not open the door to evidence that she consented to the forfeiture. Evidence of her consent to the forfeiture did not explain or rebut her testimony about the legitimate reasons she had the money in her possession. Her consent to forfeit the money did not establish that the funds were *in fact* the proceeds of drug transactions. Her consent to forfeit the money had nothing to do with its source. Rather, she consented to the forfeiture on the advice of counsel, based on the extremely low evidentiary burden applicable in civil forfeiture actions – probable cause – a burden counsel believed would be met under the circumstances of the case. App. pp. 237, 249. The forfeiture did not establish that the funds were drug money, and the fact of Hollie’s consent to forfeit the money did not rebut or explain her testimony about its source.

The Court of Appeals also held that, because Hollie explained that she agreed to the forfeiture on the advice of her attorney, she failed to establish prejudicial error. The Court of Appeals did not comprehend the nature of the prejudice. The admission of evidence that she consented to the forfeiture was extremely prejudicial. No explanation concerning why she agreed to do so could eliminate the prejudice. It is likely that this fact alone resonated with the jurors and negated the considerable doubt as to her guilt created by the inconsistencies and contradictions in the evidence and the demonstrated bias of the state’s witnesses, detailed above. *See supra* pp. 2-7. This Court should grant a writ of certiorari and find the admission of this evidence was reversible error.

- II. The Court of Appeals erred in affirming the admission of testimony concerning post-arrest assistance provided by petitioner to her cousin Terrence, a co-defendant, and in affirming the ruling on the defense objection to the state's argument based on that evidence which exceeded the limitation imposed by the court.

The state sought to introduce evidence that Hollie had assisted her cousin Terrence after their arrests, helping hire a lawyer for him. App. p. 124. The defense objected, on relevance grounds. App. p. 124. The state argued the evidence was relevant to the conspiracy component of the trafficking charges. App. pp. 125-26. The defense contended it had not been established that Terrence was part of any conspiracy, but further argued any conspiracy had ended upon arrest. App. pp. 127-28. The trial court sustained the objection and held that how Terrence's lawyer was retained was not admissible. App. pp. 128, 130.

Thereafter, Terrence testified Hollie had helped him financially following his arrest, just prior to when his attorney was retained. App. pp. 137-38. However, he also testified he and Hollie had not spoken since their arrests and her financial assistance was not tied to his testimony. App. p. 138.

After Hollie testified in her defense, the state sought to cross-examine her with questions about the hiring of Terrence's lawyer and her providing financial assistance. In a proffer, she testified she did not assist in hiring Terrence's lawyer except to give his mother a ride to the attorney's office, and her only financial assistance was to give his mother money to put into his jail account for incidental items he needed. App. pp. 242-43. The defense renewed its relevance objection and argued the prejudice from this testimony outweighed its probative value, but the trial court allowed this cross-examination. App. pp. 243-48, 249-50.

In its closing, the state argued to the jury that Hollie's financial assistance was evidence of a conspiracy. The defense objected because of the court's ruling that it was not evidence of an ongoing conspiracy, but the court did not sustain this objection and did not strike the argument. App. pp. 289-90. Thereafter, the state revisited this argument, focusing on the very information the court had ruled inadmissible. App. pp. 130, 291.

As the defense correctly argued in the court below, any conspiracy that may have existed terminated upon the arrests of the defendants. *See State v. Harris*, 351 S.C. 643, 649-651, 572 S.E.2d 267, 271-72 (2002). Following their arrests, for the alleged conspiracy to be ongoing, "reentry" into criminal activity or a "new agreement" to commit a crime was required. *Id.* Here, unlike *Harris*, there was no reentry into an existing conspiracy and no formation of a new agreement. There was no evidence Hollie and Terrence had any contact following their arrests. Terrence specifically denied they had spoken at all. App. p. 132. The limited assistance Hollie provided did not pertain to illegal activity. It related to her family's efforts to hire a lawyer for her cousin and provide money for his incidental expenses while in jail. That assistance was not evidence of an ongoing conspiracy. It was irrelevant to any issue in the case, and it should not have been admitted. *See* Rules 401, 402, SCRE.

The Court of Appeals affirmed the admission of this testimony, not on the basis argued in the court below but as evidence of bias. App. pp. 408-09. In so ruling, the Court of Appeals misapprehended the nature of the assistance. As trial counsel argued in the court below, the assistance was innocuous. R. p. 247. It did not have a legitimate tendency to throw light on the accuracy, truthfulness, or sincerity of the witness's testimony, as required for admission under Rule 608(c) of the South Carolina Rules of

Evidence. *See State v. Burgess*, 393 S.C. 396, 404-05, 712 S.E.2d 1, 5 (Ct. App. 2011). It was inconsequential and does not rise to the level of demonstrating bias on the part of her cousin.

Even if the Court of Appeals correctly found the evidence admissible to establish bias, this ruling does not resolve the entire question presented in this appeal. Petitioner also challenged the state's closing argument that this evidence demonstrated the existence of an ongoing conspiracy, argument that exceeded the limitation placed on the state by the trial court when the evidence was admitted. During the proffer, the state elicited petitioner's testimony concerning giving Terrence's mother money for his jail account and driving her to the lawyer's office. Defense counsel argued the state should not be allowed to use this testimony to draw an inference related to a conspiracy or to influencing testimony. R. pp. 246-47. The trial court allowed the testimony but "only in a very limited sense" and stated it would not allow the state to "go beyond what she just testified." R. p. 247. In closing argument, the state exceeded this limitation, arguing an ongoing conspiracy based on this evidence. App. p. 289. The defense objected, and the court admonished the state to "move on." App. pp. 289-90. On appeal, petitioner challenged the court's failure to sustain this objection and strike the argument.

The Court of Appeals' determination that the evidence was admissible as evidence of bias, rather than as evidence of an ongoing conspiracy, does not dispose of this facet of the argument presented on this question – the prejudice resulting from the manner in which the state used this evidence. The state argued it demonstrated an ongoing conspiracy. That argument exceeded the court's limitation and was highly prejudicial. If the evidence were admissible only to show bias, the argument was also

improper. The finding of the Court of Appeals does not negate the prejudice resulting from this argument.

The Court of Appeals also noted that defense counsel made no further objection to the argument after the court told the prosecutor to “move on.” App. p. 410. No further objection was necessary, since the trial court did not actually sustain the defense objection.

The Court of Appeals held the admission of this evidence, if erroneous, was harmless because it was cumulative to evidence admitted through Terrence’s testimony. App. pp. 409-410. While Hollie’s testimony was *similar* to Terrence’s testimony, it was not in fact *cumulative* to that testimony. Terrence testified only about financial assistance, not about assistance in hiring his attorney, because the court sustained an objection to any evidence about the hiring of his lawyer, George Speedy. App. pp. 130, 137-38. However, during Hollie’s cross-examination, the court permitted the additional testimony that Hollie assisted Terrence’s mother in hiring Mr. Speedy by taking his mother to the attorney’s office. App. pp. 247, 250.

This Court should grant a writ of certiorari and find that the trial court erred in allowing this evidence under the state’s theory of a continuing conspiracy, that the Court of Appeals erred in concluding the evidence was admissible to establish bias, and that the argument of an inference of an ongoing conspiracy based on this evidence was improper and prejudicial to petitioner.

III. The Court of Appeals erred in affirming the denial of a mistrial based on an improper comment by the state and in affirming the trial court's ruling which allowed the state to question petitioner about selling drugs to specified individuals without a proper foundation for such questions.

In cross-examination, the state sought to ask Hollie if she had sold drugs to three specific individuals not involved in this case. When the state asked if she had sold to Earl Warren, the defense objected. App. p. 226. The prosecutor stated, in the hearing of the jury, "She testified earlier that she had never sold any before, so I'm going to ask her specific names of people that we have heard that she was supplying to." *Id.* The defense again objected. *Id.* The jury was sent out, and the defense argued its objections to the questions, based on lack of foundation, and to the statement made by the prosecutor in the presence of the jury. App. p. 227. The defense moved for a mistrial based on the prosecutor's improper comment. The court ultimately denied the mistrial motion but charged the jury to disregard the comment. App. pp. 230-32. The trial court erred in allowing the testimony and in not granting the defense motion for a mistrial, and the Court of Appeals erred in affirming on this question.

A. Improper comment.

The prosecutor's comment in the presence of the jury concerning having heard Hollie was supplying others was improper. The resulting prejudice was not capable of being cured by telling the jury to disregard the comment. As trial counsel argued, because of the nature of the comment, a curative charge could not "unring that bell." App. p. 227. Regardless of any denial Hollie would subsequently make concerning sales to the named individuals, the jurors carried with them into their deliberations an improper (and unsupported, as argued below, *infra* pp. 20-22) understanding that the state had

information she was supplying drugs to others. Addressing a similar comment made by a police officer while testifying, the Court of Appeals found such comment prejudicial:

Quite obviously, testimony that the police had information the defendant had previously sold crack cocaine would tend to influence the jury in deciding whether he did so on the occasion in question. “The inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.”

See State v. Bostick, 307 S.C. 226, 229, 414 S.E.2d 175, 176 (Ct. App. 1992) (citation omitted). This case turned solely on the credibility of the witnesses. By hearing about other purported drug sales, the jurors’ ability to fairly weigh and evaluate Hollie’s denial that she had any involvement with the drugs found in the back seat was completely undermined. Under these circumstances, failure to grant a mistrial was an abuse of discretion.

The Court of Appeals found the mistrial issue was not properly preserved because of the sequence of trial counsel’s requests for the alternative relief of a curative charge or a mistrial. App. p. 414. Although trial counsel articulated the requested relief in reverse, in the context of the argument it is clear trial counsel intended first to seek a mistrial and, if a mistrial was not granted, to seek a curative charge. Counsel’s argument concerning not being able to “unring that bell” clearly was a contention that a curative charge would not be able to remove the prejudice resulting from the improper comment, and the only effective remedy was a mistrial. After the court ruled it would give a curative charge, the defense again raised the mistrial issue, further demonstrating that the defense was seeking a mistrial because a curative instruction was insufficient to eliminate the prejudice resulting from the comment. App. p. 230. This Court should find that, however

inartfully worded at the outset, counsel's motion was first for a mistrial and, alternatively, for a curative charge.

The Court of Appeals also found this issue was not preserved because counsel did not object to the sufficiency of the curative charge. App. pp. 414-15. The cases on which the Court of Appeals relied are not applicable to the circumstances of this case. Here, trial counsel contended the prejudice ("bell") could not be cured ("unrung"). App. p. 227. The trial court indicated it would give a curative charge and trial counsel again raised the issue of mistrial. App. p. 230. Under these circumstances, the objection and argument were adequate to preserve the mistrial issue for review. *See State v. Williams*, 386 S.C. 503, 516 n.8, 690 S.E.2d 62, 68 n.8 (2010) (mistrial issue was preserved for review where mistrial motion was made and denied, then curative instruction was sought and given by the court); *State v. Bantan*, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (Ct. App. 2010) (mistrial issue was preserved where motion was made and denied, court offered curative instruction, and defendant did not accept the ruling but again argued for mistrial; no further objection was necessary in presence of jury to the sufficiency of the charge).

Although the Court of Appeals found the mistrial issue was not preserved, it also made a conclusory finding that the court's instruction cured any error, the prejudicial effect was minimal, and a mistrial was not warranted. App. p. 415. To the contrary, the prejudice resulting from the prosecution's representation that Hollie was selling to other individuals was substantial. She admitted that she used marijuana but denied being a drug dealer. The co-defendants denied their culpability in the sale to the informant, and each was attempting to place the responsibility on others in the car. Under these

circumstances, the state's improper comment that Hollie supplied drugs to others likely influenced the jury in its determination that Hollie was guilty of these charges. As the defense argued, the prejudice could not be cured. This Court should grant certiorari and find the trial court abused its discretion in denying a mistrial.

B. Lack of sufficient foundation.

When the state attempted to question Hollie about alleged prior dealings with others, the defense objected on the basis of foundation. The state argued it had a good faith basis to ask the questions, claiming the attorney for Raheem had related information that Hollie was the supplier for Earl Warren and Jarminski Cook. App. p. 228. The state gave no basis for asking about the third individual, Jarvis Gibbs. App. p. 233. The court allowed the questioning, and the state asked Hollie about three individuals, Earl Warren, Jarvis Gibbs, and Jarminski Cook. She denied any drug dealings with them. App. p. 233.

Petitioner challenges the sufficiency of the foundation for these questions. The Court of Appeals held the issue unpreserved because the defense did not assert an additional objection to the sufficiency of the foundation. App. pp. 415-16. The basis for the objection – lack of foundation – was clearly stated prior to the court's ruling. App. p. 227. Nothing more was required to preserve the issue for appellate review. This Court should grant a writ of certiorari and address the merits of the question.

The prosecutor did not demonstrate a proper foundation for asking about drug sales to other individuals. He did not give any basis whatsoever for questioning Hollie about one of the named individuals, Jarvis Gibbs. As to the others, the state's information was based on pure hearsay from an unnamed attorney for one of the co-defendants. App. p. 228. There was no representation that the information was based on

that attorney's personal knowledge of the alleged facts. There was no representation as to the source of the attorney's alleged knowledge. While the attorney may have obtained the information from the co-defendant in this case, the attorney also could have obtained the information through unreliable sources in the course of investigating the charges against the client or even through other cases. There was no representation by the state that it had verified the information provided by the attorney.

Based on the state's representation to the trial court, it is clear that the source of the state's information was not the specific individuals allegedly involved in prior sales. Had it been, the state certainly would have so informed the court. Because this information was not from someone with first-hand knowledge of the alleged sales, the state did not have a good faith basis for the questions. No proffer was made as to what the attorney, the co-defendant, or any of the named individuals would have said if called to testify. The state did not demonstrate a proper foundation for asking Hollie whether she had previously sold drugs to these three persons.

The state is given wide latitude in cross-examining a witness, and the scope of such examination is in the discretion of the trial judge. *State v. Pee Dee News Co., Inc.*, 286 S.C. 562, 566, 336 S.E.2d 8, 9-10 (1985). However, it is improper for the cross-examiner to testify by making statements of fact. *State v. Sierra*, 337 S.C. 368, 374, 523 S.E.2d 187, 190 (Ct. App. 1999). Moreover, the cross-examiner must have a good faith factual basis before questioning a witness about past conduct. *State v. Joseph*, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997). Both this Court and the Supreme Court have recognized that "prejudice may result from the question, irrespective of the answer." *See id.*, 337 S.C. at 375, 523 S.E.2d at 190. As both appellate courts have noted, "[t]he

probable and, no doubt, logical result of improper questioning is to give the jury the impression that the facts assumed actually exist, and that the reason why the opposite party objects to the questions is that he is trying to keep such facts from the jury.” See *id.*, quoting *Entzminger v. Seigler*, 186 S.C. 194, 195 S.E.244, 246 (1938). Merely asking a question that is without a basis in fact may be prejudicial. *State v. McGuire*, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979). Here, because the state did not provide any foundation for its questions concerning Jarvis Gibbs, and because it did not provide a sufficient foundation for its questions concerning Earl Warren and Jarminski Cook, the court abused its discretion in allowing this line of cross-examination.

Contrary to the finding of the Court of Appeals, the resulting prejudice from these questions was such that the error cannot be deemed harmless, because the questions themselves allowed the jury to conclude, as if the prosecutor had so testified, that Hollie was a drug dealer, not merely a personal user. This conclusion likely contributed to the jury’s rejection of her defense and its determination that she was guilty of the trafficking and possession with intent to distribute charges. This Court should grant a writ of certiorari and find that this line of questioning was improper and prejudicial.

IV. The Court of Appeals erred in affirming the denial of the defense motion for a new trial, on the basis of the above errors, singly or cumulatively, and in light of multiple instances of improper argument by the state.

Following the jury’s verdict, the defense moved for judgment notwithstanding the verdict or a new trial on the basis of the earlier motions and objections. Based on each of the questions argued above, the trial court abused its discretion in not granting a new trial, and the Court of Appeals erred in affirming the conviction.

However, if this Court grants a writ of certiorari and finds error with respect to some or all of the questions argued above but finds that no single error sufficiently prejudiced petitioner that it undermined her right to a fair trial, it should nonetheless find that the cumulative effect of the errors was so prejudicial as to deprive her of the fairness required by due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct. App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of certain evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

The cumulative error doctrine requires reversal when multiple errors, deemed insignificant or harmless in isolation, in combination prevent the defendant from receiving a fair trial and affect the outcome of the trial. In this case, the combination of any errors with respect to inadmissible evidence or improper cross-examination was unduly prejudicial and denied Hollie a fair trial. The evidence of Hollie's consent to forfeiture of the money allowed the jury to conclude she had admitted guilt. The testimony concerning assisting a co-defendant allowed the jury to draw an improper conclusion about a continuing conspiracy, and the prosecutor's improper argument outside the court's limitation on the use of this evidence enhanced the likelihood the jury drew such a conclusion. Cross-examination about other drug sales allowed the jury improperly to conclude Hollie was a drug dealer and to premise its verdict on that

conclusion. If the trial court erred as to any two or all three of these issues, the jury likely based its verdict on these multiple improper considerations:

However, the question of prejudice should also be evaluated in light of the other improper comments and arguments by the prosecutor, as to which objections were sustained. In closing argument, the prosecutor argued facts not in evidence. App. pp. 276-77, 280. The prosecutor continued to argue one of those points even after the judge sustained the defense objection. App. p. 277. The prosecutor argued Hollie consented to the forfeiture in disregard of the court's limitation, then repeated this argument after the objection was sustained. App. p. 286. The prosecutor made a burden-shifting argument, and, again, continued the same argument after the objection was sustained. App. pp. 287-88. The prosecutor referred to the case of former South Carolina Treasurer Thomas Ravenel and continued to argue with the judge after such argument was disallowed. App. p. 292. All these improper arguments, like the improper comment about having heard Hollie was supplying others with drugs, were heard by the jury. Although the court sustained the objections, the taint from the repeated improper comments and suggestions was to solidify the jury's belief in Hollie's guilt, on improper bases. Against the backdrop of these numerous prosecutorial excesses, the court's error with respect to any single evidentiary issue, or multiple errors in combination, was so prejudicial as to require reversal and a new trial.

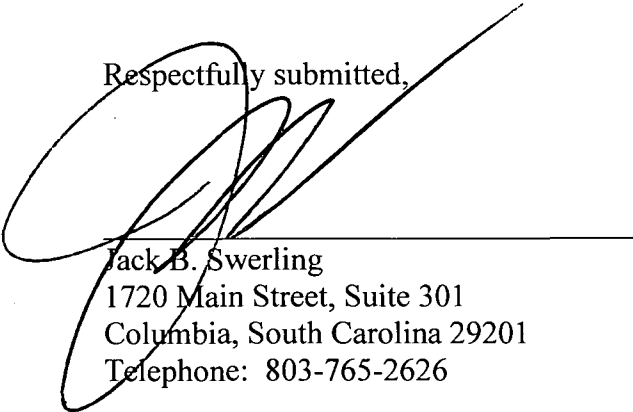
The Court of Appeals rejected the cumulative error argument, noting that it found no errors but also noting that, if error was committed, it was harmless. App. p. 418. To the contrary, the errors challenged in the first three questions presented were not harmless. The state's case was weak, involving contradictory evidence from biased

witnesses, each of whom had a clear self-interest and motive to fabricate testimony against petitioner. In each instance, the jurors heard extraneous matters that were not relevant or proper for their consideration. Those matters were highly prejudicial and raised an inference of guilt on improper bases. In closing argument, the solicitor exceeded limitations the court placed on the use of evidence, ignored one of the court's rulings sustaining an objection to argument, argued facts not in evidence, and even argued an extraneous matter involving a public figure. Although objections to parts of the solicitor's argument were sustained, the jury heard the arguments nonetheless. The jury heard so many improper and extraneous matters that the likelihood of unfair prejudice is great. If the Court finds that the individual errors raised by the first three questions were harmless in isolation, the Court should find that, in combination, the multiple errors denied petitioner her due process right to a fair trial.

CONCLUSION

The Court should grant a writ of certiorari, reverse petitioners' convictions, and grant her a new trial.

Respectfully submitted,



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Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions

G. Thomas Cooper, Circuit Court Judge

Opinion No. 4981
(S.C. Ct. App. Refiled July 18, 2012)

State of South Carolina,

Respondent,

v.

Hollie McEachern,

Petitioner.

PROOF OF SERVICE

I, Kellie A. Switzer, certify that I have served the **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS and APPENDIX** on the following by depositing a copy of it in the United States Mail, postage prepaid, on August 17, 2012, addressed to:

David Spencer, Assistant Attorney General
SC Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

August 17, 2012



Kellie A. Switzer
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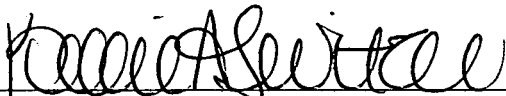
Petitioner.

PROOF OF SERVICE

I, Kellie A. Switzer, certify that I have served the **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS** by hand-delivering a copy of it on August 17, 2012, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

August 17, 2012


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August 17, 2012

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

AUG 17 2012

S.C. Supreme Court

RE: State v. Hollie McEachern


Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Petition for Writ of Certiorari to the South Carolina Court of Appeals, two (2) copies of the Appendix and Proofs of Service in the above referenced appeal.

By copy of this letter, I am serving David Spencer, Assistant Attorney General, with a copy of same by mail.

If you have any questions, do not hesitate to contact me.

Very truly yours,



Jack B. Swerling

JBS/kas
Enclosure

cc: David Spencer, Assistant Attorney General
Katherine Carruth Goode, Esquire
Hollie McEachern, #00339013
LuShan W. McEachern

COA# 2010-151570