STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2015-000544

Noah C. Mumford, ...Respondent-Petitioner,

v.

State of South Carolina, ...Petitioner-Respondent.

PETITION FOR WRIT OF CERTIORARI
OF PETITIONER-RESPONDENT

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QUESTION PRESENTED

1. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for failing to object to portions of Corporal Scott's testimony where the testimony could not have reasonably affected the jury's verdict?

2. Is certiorari warranted to review the post-conviction relief judge's finding there are multiple errors of trial counsel forming a cumulative prejudicial effect where the doctrine of cumulative error has not been recognized in this state and where the post-conviction relief judge only found counsel ineffective in a single respect?

STATEMENT OF THE CASE

In February 2011, the Chesterfield County Grand Jury indicted Respondent-Petitioner for attempted murder. (App. p. 9, lines 4-14). Larry W. Knox, Esquire ("trial counsel"), represented Respondent-Petitioner. (App. p. 1). On October 24, 2011, Respondent-Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. (App. p. 1). On October 26, 2011, the jury found Respondent-Petitioner guilty of the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"). (App. p. 366, lines 21-24). Judge Russo sentenced Respondent-Petitioner to ten years imprisonment. (App. p. 379, lines 20-23).

Respondent-Petitioner filed a timely notice of appeal, but the South Carolina Court of Appeals granted Respondent-Petitioner's request to withdraw appeal by order dated July 24, 2012. (App. p. 382). The court of appeals returned the remittitur to the circuit court on September 19, 2014. (App. p. 383).

Respondent-Petitioner filed an application for post-conviction relief on February 28, 2013, and an amended application on May 13, 2013. (App. p. 384; p. 391). Petitioner-Respondent ("the State") filed a return on or about May 16, 2013. (App. p. 398) The Honorable Paul M. Burch ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Dillon County Courthouse on July 31, 2014. (App. p. 402). Respondent-Petitioner was present and represented by Jack B. Swerling, Esquire. (App. p. 402). The post-conviction relief judge granted relief in an order filed November 21, 2014. (App. p. 543). The post-conviction relief judge denied the State's motion for reconsideration on February 6, 2015, and he denied Respondent-Petitioner's motion for reconsideration on February 23, 2015. (App. p. 586; p. 587). This Petition

for a Writ of Certiorari follows.[1]

ARGUMENT

I. The post-conviction relief judge erred in finding trial counsel ineffective for failing to object to certain portions of Corporal Scott's testimony.

The post-conviction relief judge found trial counsel ineffective in failing to object to testimony from Corporal Scott that he had the same military training as Respondent-Petitioner and that such training taught them that shooting someone in the femoral artery would cause them to bleed out. (App. p. 577). Specifically, the post-conviction relief judge found Corporal Scott's testimony was prejudicial to Respondent-Petitioner and there was a reasonable probability the result of the proceedings would have been different had trial counsel objected to this testimony. (App. p. 577-78). The State submits this finding of prejudice is not supported by any evidence in the record. Thus, certiorari is warranted to review and correct the post-conviction relief judge's error.

Standard of Review

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

[1] Respondent-Petitioner filed a notice of cross-appeal on March 25, 2015, and Respondent-Petitioner's cross-petition is still pending. Respondent reserves the right to file a return to that cross-petition at the appropriate time.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v.

State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (U.S.S.C. 2015) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

Corporal Scott's Testimony Could Not Have Affected the Jury's Verdict

Corporal Scott was the investigating officer who took Respondent-Petitioner's statement. (App. p. 182, lines 1-3). Corporal Scott testified he had twenty-one years' experience as a military police officer. (App. p. 180, lines 1-7). At the end of direct examination, Corporal Scott testified his military training taught him that a person can "bleed out" if shot in the leg. (App. p. 188, lines 5-10). He further testified all military personnel have the same identical training. (App. p. 188, lines 19-20). Respondent-Petitioner served seven years in the military. (App. p. 258, line 23-p. 259, line 21).

Respondent-Petitioner was charged with attempted murder. Judge Russo properly charged the jury on the elements of attempted murder, including the requirement that the State prove malice and an intent to kill. (App. p. 351, line 17-p. 353, line 9). Judge Russo also charged the jury that the lesser-included offense of ABHAN included the elements of attempted murder except for malice and an intent to kill.[2] (App. p. 363, lines 12-18). The jury eventually convicted Respondent-Petitioner of ABHAN.

The post-conviction relief judge erred in finding Corporal Scott's testimony affected the jury's verdict. The record does not support the post-conviction relief judge's finding this testimony prejudicially allowed the jury to speculate that the victim's injury

[2] The State notes the propriety of this charge has not been heretofore challenged by any party.

was more serious than it was and that Respondent-Petitioner has the state of mind to kill the victim. Had the jury interpreted Corporal Scott's testimony to mean Respondent-Petitioner had the intent to kill the victim, and given credence to this testimony, it would have convicted Respondent-Petitioner of attempted murder. Instead, the jury convicted Respondent-Petitioner of ABHAN, which it was specifically instructed did not include an intent to kill. The only inference to be drawn from the jury's verdict is that Corporal Scott's testimony did not sway the jury to believe Respondent-Petitioner intended to kill the victim. Because the jury obviously discarded this testimony, there is no reasonable probability it would have reached a different verdict had Corporal Scott not testified in this manner. Accordingly, the post-conviction relief judge's finding that the exclusion of this testimony would have changed the outcome of trial is wholly unsupported by the record. This Court should grant certiorari and reverse this erroneous finding.

II. The post-conviction relief judge erred in engaging in a cumulative error analysis.

The post-conviction relied judge further found trial counsel committed multiple errors that, when taken as a whole, could amount to ineffective assistance of counsel. (App. p. 578). This finding is erroneous as a matter of law because it applies a concept of prejudice that is foreign to this state's jurisprudence and anathematic to the Strickland standard. This finding is also not supported by any evidence in the record or in the post-conviction relief judge's own order.

This Court has consistently declined to adopt the concept of cumulative error analysis in post-conviction relief cases. See Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n.3 (2008) (declining opportunity to decide whether to recognize cumulative error); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006);

Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002); see also Walker v. State, 407 S.C. 400, 407 n.1, 756 S.E.2d 144, 147 n.1 (2014) (reversing on other grounds and declining to address cumulative error issue). The United States Court of Appeals for the Fourth Circuit, though, has clearly rejected the doctrine in context of ineffective assistance of counsel claims:

> Next, Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) ("[U]nder Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance *and* (2) prejudice."(emphasis added)), it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir.1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir.1997), cert. denied, 522 U.S. 1058, 118 S.Ct. 715, 139 L.Ed.2d 655 (1998), this Court recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See id. at 1364 ("Based on the findings of this court concerning the individual claims of error, we reject this claim.").
>
> To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue. For example, in Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir.), cert. denied, 519 U.S. 968, 117 S.Ct. 395, 136 L.Ed.2d 310 (1996), the Eighth Circuit expressly held that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation." Id. at 1233; see also Jones v. Stotts, 59 F.3d 143, 147 (10th Cir.1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors); United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir.1994) (same); United States v. Gutierrez, 995 F.2d 169, 173 (9th Cir.1993) (same). But see Williams v. Washington, 59 F.3d 673,

> 682 (7th Cir.1995) (stating that "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir.1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"). Accordingly, the district court did not err in refusing to grant habeas relief on this claim.

Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998) cert. denied, 526 U.S. 1035 (1999). Most significantly, the Fourth Circuit noted it was "in agreement with the majority of [its] sister circuits that have considered the issue." Id. These courts all decline to adopt such a prejudice framework because that framework is manifestly contrary to the constitutional standard set forth in Strickland. See Strickland, 466 U.S. at 687 ("Unless a defendant makes **both showings** it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable" (emphasis added)); see also Forrest v. Steele, 764 F.3d 848, 861 (8th Cir. 2014) ("The Missouri Supreme Court reasonably applied Strickland by analyzing individually each of the four discrete claims before the court and considering those circumstances appearing relevant to each claim."). This Court, like the majority of others around the country, has properly declined to engage in cumulative error analysis, and the post-conviction relief judge committed an error of law by attempting otherwise.

Furthermore, the post-conviction relief judge's order finds only a single constitutional error in the form of trial counsel's failure to object to Corporal Scott's testimony. Under the post-conviction relief judge's own reasoning, this is still not a case where there are multiple errors. As such, the post-conviction relief judge erred as a matter of law in engaging in a cumulative error analysis under the facts of this case. Simpson, 367 S.C. at 604, 627 S.E.2d at 710 ("Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error

analysis"); see also Fisher, 163 F.3d at 853 n.9 ("[L]egitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient."). Furthermore, because the post-conviction relief judge's order only finds one constitutional error, there are not multiple constitutional errors to accumulate and, as such, there is no evidence to support his finding of cumulative error. Accordingly, this Court must grant certiorari and correct this error.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous finding of ineffectiveness and his improper application of a cumulative error analysis.

Respectfully submitted,

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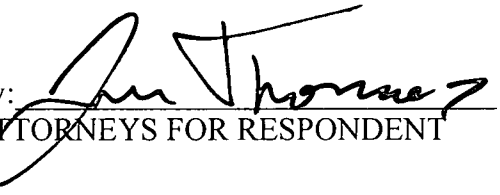
By: 
ATTORNEYS FOR RESPONDENT

August 14, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2015-000544

Noah C. Mumford, ...Respondent-Petitioner,

v.

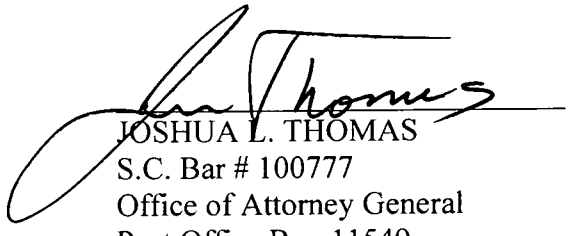
State of South Carolina, ...Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, Joshua L. Thomas, certify that I have today served the within **Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 14th day of August, 2015.



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August 14, 2015

The Honorable Daniel E. Shearouse
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Re: **Noah C. Mumford, Respondent-Petitioner**
vs.
State of South Carolina, Petitioner-Respondent
Appellate Case No.: 2015-000544
Lower Court Case: 2013-CP-13-0097

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** and two copies of the Appendix in the above-referenced case.

Sincerely,

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KCR/jacc
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services Counselor