ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

CHRISTOPHER COMMANDER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002690

AMENDED PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

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2. Was trial counsel ineffective in failing to object when witness John Presley offered testimony as to his opinion regarding the truth of petitioner's statements describing the manner of the victim's death?
3. Was trial counsel ineffective in failing to sufficiently challenge the forensic pathologist's findings of homicide as a manner of death?
4. Was trial counsel ineffective in failing to effectively communicate with petitioner regarding the decision not to present the evidence that petitioner's DNA was absent from the scene of the crime during closing arguments?
5. Was trial counsel ineffective in failing to request a mistrial when the solicitor advised the jurors that they could consider events occurring after the victim's death in determining whether malice was present to support a charge of murder?
6. Was trial counsel ineffective in failing to object to the court's instruction that "inferred malice may also rise where a deed is done with a deadly weapon?"
7. Was petitioner prejudiced by trial counsel's cumulative errors?

STATEMENT

Petitioner was convicted of murder after a jury trial held before the Hon. James W. Johnson, Jr. on October 10-16, 2006, in Richland County. A sentence of life imprisonment without the possibility of parole was imposed. Doug Strickler, Esq. and Lauren Mobley, Esq. represented petitioner. John P. Meadows, Esq. and K. Luck Campbell, Esq. were the assistant solicitors. (App. p. 1-p. 930). Petitioner appealed his conviction and it was affirmed by the Court of Appeals on June 11, 2009. State v. Commander, Op. No. 27062. (App. p. 939).

Petitioner filed an application for post-conviction relief on June 1, 2012. (App. p. 936- p. 937) Respondent filed a return dated June 25, 2012. (App. p. 938- p. 944). An evidentiary hearing was held on September 2, 2014, before the Hon. Robert E. Hood. Petitioner was present and was represented by Kristy Goldberg, Esq. Respondent was represented by Suzanne White, Assistant Attorney General. Petitioner, Kimberly Collins, and Doug Strickler testified at the hearing. (App. p. 945- p. 1036). On December 5, 2014, Judge Hood issued an order denying and dismissing the application for post-conviction relief. (App. p. 1037- p. 1057)

A Johnson petition for writ of certiorari was filed with the Court on April 29, 2015. On July 24, 2015, this Court issued an order directing the parties to address the issue raised in the petition, and the petitioner's pro se issues.

A petition for writ of certiorari was filed on August 21, 2015. The instant amended petition addresses petitioner's questions that were raised in his pro se response.

ARGUMENT I

Trial counsel was ineffective in failing to object when witness John Pressely introduced evidence of petitioner's prior domestic violence against the victim.

Petitioner was tried for the murder of the victim. The victim and petitioner "worked together, lived together, and shared an intimate relationship,.. Petitioner fathered the victim's "unborn child." The victim "tried to end the relationship shortly before she disappeared." State v. Commander, 396 S.C. 254, 258, 721 S.E.2d 413, 415 (2011). The case against petitioner was largely circumstantial.

In the published opinion on this case this Court further wrote:

> A police investigation revealed (and numerous trial witnesses attested) that Petitioner stole Victim's purse, mobile telephone, and vehicle from her home, sent text messages from Victim's phone to her family members in which Petitioner pretended to be Victim alive and on vacation, withdrew money from her bank account, used her credit cards, made calls on Victim's behalf from her mobile telephone, and used that telephone number as a contact number for a telephone chat line.
>
> At the time of his arrest in New Orleans, Louisiana, Petitioner possessed Victim's vehicle. After police officers gained entry into his hotel room, Petitioner admitted killing Victim. The arresting officers recovered items from Petitioner's hotel room that connected Petitioner to Victim, including her checkbook, driver's license, birth certificate, ultrasound image, OB-GYN appointment card, a medical slip bearing her name, car keys, and keys to another vehicle that police located in Victim's driveway.

396 S.C. at257-258, 721 S.E.2d at 415 (footnote deleted)

During the trial, the assistant solicitor called John Presley to testify. He was housed with petitioner at Alvin S. Glenn Detention Center. (App. p. 596, line 7- p. 597, line 4). Petitioner told him that he and the victim had constant fights. (App. p. 600, lines 7-9). Later, Presley said petitioner told him that they had fights and the victim would lash out at him. "And one time he hit

her, that he was arrested for domestic violence, and that she later dropped the charges and they discharged him, they released him." (App. p. 608, lines 2- 7).

At no time did defense counsel object to this line of questioning. At the evidentiary hearing he admitted that he should have objected to the improper character evidence. (App. p. 997, line 12- p. 998, line 5).

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches.

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). the Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. *State v. McElveen*, 280, S.C. 325, 313 S.E.2d 298 (1984); *State v. Swords*, 279 S.C. 554, 309 S.E.2d 750 (1983); S*tate v. Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad

> acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), this Court elaborated on the subject:

> It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory,* 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. *See, United States v. Johnson,* 610 F.2d 194 (4th Cir.1979); *State v. Byers,* 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See, State v. Wilson,* 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. *See, e.g.., State v. Lyle, supra*; *State v. South,* 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins,* 285 S.C. 361, 329 S.E.2d 759 (1985)

293 S.C. at 324-325, 360 S.E.2d at 319.

Credibility was a key issue in this case. In State v. Reeves, 301 S.C. 191, 391 S.E. 2d 241 (1990), the Court held that "error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense."

The PCR court found that counsel was deficient in failing to object to the prior bad act but it could not find prejudice. (App. p. 1047- p. 1049) But the case cited above says that it is prejudicial. The solicitor brought up the prior bad act in closing argument. (App. p. 857, lines 8-14) The trial court gave a charge on the prior records of a witness or witnesses. (App. p. 803, lines 1-19) But it

did not give a limiting charge on petitioner's prior bad act. See, State v. Timmons, 327 S.C. 48, 448 S.E.2d 323 (1997). So the jury was free to view the prior bad act as propensity evidence.

ARGUMENT II

Trial counsel was ineffective in failing to object when witness John Presely offered testimony as to his opinion regarding the truth of petitioner's statements describing the manner of the victim's death.

Inmate John Pressley testified that petitioner allegedly admitted his involvement in the victim's death as follows:

> And he said that he and she had an argument, she hit him with a stick, and in other words he – she pissed him off and he fell on her and suffocated her.
>
> And I asked him were you unconscious and he said, no, he wasn't unconscious, he suffocated her.

(App. p. 603, line 22-p. 604, line 1)

The solicitor then asked Pressley if the victim had provoked petitioner. Pressley answered:

> A Well, I mean, when -- I mean, of course, it's common sense if someone hit you with a stick that is enough to provoke anyone. Did she actually hit him with a stick? In my opinion, I mean, I don't believe --you know, I don't believe that she hit him with a stick. I believe that he was-- he just made this up to lead me on, you know. I don't believe that is true at all about the stick parts.

(App. p. 604, lines 6-13)

On cross examination of Pressley the following transpired:

> Q And then he said that she hit him in the head with a stick and --

A This was maybe – which part is it, which statement, the part when he lied and said that he fell unconscious on her…

(App. p. 636, lines 10-16)

Q Second – both of them were hit with stick, right?

A So he says.

Q Right.

A God knows best. So he said.

(App. p. 637, lines 4-7)

Q Okay. That's part of any deal, correct?

A Well, if they hadn't – first of all, I highly oppose murder. I have never murdered anyone, I have no intentions of doing so. If it were my own son, I would not uphold him.

(App. p. 643, lines 16-20)

This is an innocent person here. It is an entirely different thing.

(App. p. 645, lines 16-17)

As a witness, Pressley should not have been allowed to given an opinion as to whether he believed petitioners account of events surrounding the victim's death. Rule 608 (a), SCRE provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, <u>but subject to these limitations</u>:
>
> (1) the evidence may refer only to character for truthfulness or untruthfulness, <u>and</u> (2) evidence of truthful character is admissible only after

the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (emphasis supplied)

In State v. McKarley, 397 S.C. 461, 725 S.E. 2d 139 (Ct. App. 2012) the Court held that a forensic interviewer's testimony indicating belief in the complainant's truthfulness was inadmissible. See, also, State v. Kromah, 410 S.C. 340, 737 S.E.2d 490 (2013); State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015) If an expert can not offer their opinion on truthfulness, certainly a lay inmate witness should not be able to do so.

Trial counsel's failure to object to Pressley's opinion testimony was prejudiced. The solicitor put Pressley on the stand for the purpose to prejudice petitioner. It was the jury's role to assess credibility. The solicitor compounded the prejudice by bringing up Pressley's opinion testimony in his closing argument:

> Well, John Pressley said -- he said they were having trouble, this confirms it. Mr. Pressely, do you believe him? No, these other stories and it wasn't credible, he just suffocated her. I knew he wasn't telling the truth about that stick. He suffocated her.

(App. p. 859, lines 14-18)

Counsel's failure to object to the opinion testimony was unreasonable and prejudiced. Trial counsel testified that there was no particular reason he did not object, but he should have.

(App. p. 998, lines 9-17)

ARGUMENT III

Trial counsel was ineffective in failing to sufficiently challenge the forensic pathologist's findings of homicide as a manner of death.

One of the questions on petitioner's appeal before this Court was whether testimony from an expert in forensic pathology that the victim dies as a result of a homicide was admissible. This Court held that it was admissible. State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011) Trial counsel did not put up their own expert in forensic pathology to rebut the findings of a homicide and to create a reasonable doubt.

At the post-conviction relief hearing, petitioner called Dr. Kimberly Ann Collins to testify. She was a board certified forensic pathologist, a board certified anatomical pathologist and a clinical pathologist. She was qualified without objection as an expert in forensic pathology. (App. p. 950, line 12- p. 952, line 16) She testified that she reviewed the following material in preparation for this case:

> A I reviewed the post mortem records which included the autopsy report, the death certificate, the coroner report, the activity log, evidence transfer and incident report, toxicology report, the trial transcript of Clay Allen Nichols, MD, a CD of the entire complete trial transcript, handwritten notes from defense counsel regarding a conversation with Dr. Sinja Condrati, a CD with photographs which included 39 scene perhaps and 14 autopsy photographs, investigative records from law enforcement, and medical records from Dravania D. Goodwin (phonetic).

(App. p. 953, lines 1-10)

Her review of Dr. Nichols diagnosis at petitioner's trial was:

> The final anatomic diagnosis by the end of the autopsy by Dr. Nicols as history of the suspicious death, moderate decomposition, post mortem expulsion of a previable fetus and toxicology pending, which later turned out to be negative. The cause of death was listed as possible asphyxiation. (emphasis added)

(App. p. 956, lines 19-24) Her opinion as to the cause of death was:

> A You can – this is an undetermined cause of death. You've got two things that are taking place. One is you've got a decomposed body and a decomposed fetus.
>
> The adult body was not even x-rayed, which all decomposed bodies should be x-rayed looking for any types of fractures, any projectile paths, any sharp wound injuries.
>
> The fetus should have been fully x-rayed also. When you get a mother that dies, and you have decomposition, you entertain a very different list of differential diagnoses with a maternal death.
>
> So you could have a blood clot to the lung. You could have preeclampsia, seizures. Most women will have a cardiomyopathy when they're pregnant, which is a natural response of being pregnant.
>
> You could have infections. The list goes on with maternal deaths, and none of those were able to be ruled out or even considered or attempted to be ruled out at the time of autopsy.

Q Was there any-- as to the cause of death that was determined possible asphyxia, from the review of the records, was there any medical basis to back that up?

A No. There was trauma to the neck. There was no ligature that was found at the scene. (emphasis supplied)

(App. p. 956, line 25- p. 957, line 25)

She continued:

> So there was nothing in the autopsy report at all to point one person in the direction of asphyxia as opposed to a heart attack, as opposed to a pulmonary thromboembolus, as opposed to eclampsia with seizure. There is nothing in this autopsy report that can allow you to conclude a definite cause of death. (emphasis added)

(App. p. 958, lines 6-11)

Dr. Collins testified that the definition of homicide is the death of one person by another. (App. p. 959, lines 14-16) She said it would have been better to have autopsied the fetus and the placenta for a better determination of the cause of death, but this was not done. (App. p. 961, lines 14-21) She again said the cause of death should have been certified as undetermined. (App. p. 962, line 16) And that there was no scientific basis for asphyxia as a cause of death. (App. p. 963, lines 4-9)

In light of Dr. Collins' expert testimony, trial counsel was ineffective in failing to call her or somebody like her as an expert to challenge the State's forensic pathologist. This was prejudicial to petitioner because there was a reasonable probability the result of the proceeding would have been different. A "reasonable probability" is simply a probability sufficient to undermine confidence in

the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) Trial counsel admitted he did not present any alternative testimony on the subject. (App. p. 994, lines 18-19) In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) this Court held that a criminal defense attorney has a duty to investigate. "At a minimum, counsel has a duty to interview potential witnesses, and make an independent investigation of the facts and circumstances of the case." (citation omitted) Concerning forensic evidence, the ABA guidelines call for the following: "with the assistance of the appropriate expert counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." (citation omitted) 372 S.C. at 331-332, 642 S.E.2d at 597. This Court then concluded:

> In our opinion, the PCR court correctly found ineffective assistance of counsel. We find respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence. Furthermore, the evidence at the PCR hearing established that if they had made an appropriate challenge, it would have had a significant impact on the guilt phase of this case.

372 S.C. at 332, 642 S.E.2d at 597.

If trial counsel had made an appropriate challenge in this case and gotten before the jury that the victim's cause of death was undetermined, it also would have had a significant impact on petitioner's guilt.

ARGUMENT IV

Trial counsel was ineffective in failing to effectively communicate with petitioner regarding the decision not to present the evidence that petitioner's DNA was absent from the scene of the crime and in failing to request a mistrial when the solicitor implied petitioner's DNA evidence was present at the scene of the crime during closing arguments.

Petitioner testified at the PCR evidentiary hearing that he was aware prior to trial that DNA was involved in his case. He consented to have his DNA tested. (App. p. 978, line 9- p. 979, line 2) He talked to trial counsel and there was DNA found but it was not petitioner's. He thought trial counsel was going to introduce it at trial. The DNA was found on some gloves inside the victim's house where the crime scene was. The DNA was a mixture of the victim's DNA and some other guy's DNA. Trial counsel never introduced the DNA supposedly because he wanted the last argument. (App. p. 979, line 25- p. 981, line 14)

By not introducing the DNA results, the solicitor seized on that fact in closing arguments and implied that petitioner's DNA was found at the crime scene. He said:

> Dr. Nichols said only one time in my 25 years have we found something underneath fingernails. He's cleaning up. There are gloves in there. If he tries to make any issue about why anything wasn't else there, DNA his client, may try to get, they're cleaning, he cleaned it up.
>
> That's a question that's got nothing to do with this case. There's no doubt who killed Vonnie.
>
> Cleaning fluid, it kind of sealed the case, but it wasn't the cleaning fluid.

(App. p. 849, line 18- p. 850, line 2)

Trial counsel did not object or move for a mistrial. He said the solicitor's argument was improper and he should have objected. (Supp. App. p. 3, lines 6-16) In Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) the Court wrote that "A solicitor's closing argument... should stay within the record and reasonable inferences to it." The petitioner's DNA was not found at the scene and no reasonable inference could say that his DNA was at the scene. There was no evidence that petitioner tampered with the crime scene and tried to clean things up. The solicitor's argument put petitioner's character into issue again. Failure to object to such argument constitutes ineffective assistance of counsel. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989).

ARGUMENT V

Trial counsel was ineffective in failing to request a mistrial when the solicitor advised the jurors that they could consider events occurring after the victim's death in determining whether malice was present to support a charge of murder.

During the solicitor's closing argument the following transpired.

> Sometime on or about November 30th, late the 29th, early morning hours of the 30th , I don't know when, that's when Gervonya Goodwin departed this world. The evidence said there's no question about it. A timeline.
>
> Let's go back. December 2nd comes. The call to share joy and excitement of what the sex of the new baby. What sex is it? We don't know, because the call never comes, because she's dead.
>
> What does Keyonna do? She is dialing. She's dialing. She's dialing. Mama, you're supposed to let me know what the sex of the baby is. She's dialing. And she gets -- she gets --if this isn't malice, malice doesn't exist. She gets the first text message back. And do you remember, by the way, mama's an inference --
>
> MR.STRICKLER: I object to his inference -- to infer malice from statements made after the fact.
>
> MR. MEADORS: I think that's clearly the law, Judge.
>
> THE COURT: Come up -- come up.
>
> (WHEREUPION, a bench conference was held in the presence of the jury but out of the hearing of the jury)
>
> THE COURT: The objection is overruled. Go ahead.
>
> MR. MEADORS CONTINUES:

> You can take statements and actions made after the events have happened and infer malice existed at the time this happened, and I'm begging y'all to do that, because that is what it was.

(App. p. 842, line 12- p. 843, line 17)

Later, the trial court did instruct the jury that "malice must exist in the mind of the defendant just before and at the time the act is committed." It did not correct the improper argument. (App. p. 904, line 24- p. 905, line 1) After the jury instructions, the solicitor asked that the jury be instructed that "if they believe acts by the Defendant after the event, if they believed that they showed malice, they could be -- that could be an inference of malice if they felt that that was his state of mind at the time of the incident." (App. p. 913, lines 10-15) Trial counsel said he had no exception to the trial court's charge as given. (App. p. 914, lines 5-12) The trial court did refuse to charge the solicitor's requested instruction. (App. p. 915, lines 18-23) The problem was that defense counsel never requested a mistrial to the solicitor's argument to the jury that they could look to statements and actions after the victim died and infer that malice existed at the time of the event. A large portion of the solicitor's argument dealt with more of what happened after the victim's death to persuade the jury to infer malice just prior to and at the time of death. (App. p. 842, line 12- p. 855, line 23) Trial counsel's objection to the solicitor's closing argument was overruled, but he did not move for a mistrial. The solicitor went on for twelve more pages on the post death statements and actions of petitioner as to how they showed malice.

In Simmons V. State, 331 S.C. 333, 503 S.E.2d 164 (1998) this Court held a trial counsel ineffective for failing to object and move for a mistrial based upon a solicitor's closing argument that was inflammatory and misstated the law.

Counsel's performance fell below an objective standard of reasonableness, and but for his errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).Trial counsel admitted he should have requested a mistrial. (Supp. App. p. 5, lines 6-11)

ARGUMENT VI

Trial counsel was ineffective in failing to object to the court's instruction that "inferred malice may also rise where a deed is done with a deadly weapon."

The indictment charging petitioner with murder alleged that it occurred on or about November 30, 2004. Petitioner's trial was held on October 10-16, 2006. During jury instructions the trial court said, "Inferred malice may also rise where a deed is done with a deadly weapon." (App. p. 905, lines 18-19) Trial counsel did not object to this instruction. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) this Court held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." 685 S.E.2d at 803-804.[1] There was evidence presented at Belcher's trial of self-defense and to tell the jury that it may infer malice from the use of a deadly weapon was a comment on the facts in favor of murder over self-defense. In petitioner's case that trial court instructed the jury on murder and the lesser included offenses of voluntary manslaughter and involuntary manslaughter. The jury instruction that "inferred malice may also rise where a deal is done with a deadly weapon." was confusing and prejudicial in light of the lesser included offenses. It could also be considered burden shifting in that petitioner would have to explain why it was not murder. Without the improper inferred malice charge there is a reasonable probability that the result of petitioner's trial would have been different. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)

[1] The trial court also charged on circumstantial evidence. (App. p. 902, lines 1-6) In State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) that charge was no longer held to be good law.

Although the holding in Belcher does not apply to convictions challenged on post-conviction relief, it should still be considered an error of law when looking at the cumulative nature and effort of the errors in this case.

ARGUMENT VII

Petitioner was prejudiced by trial counsel's cumulative errors.

In State v. Peterson and Stubbs, 287 S.C. 244, 245-246, 335 S.E.2d 800, 801 (1985) this Court wrote:

> Appellant Stubbs contends that the trial court erred by (1) failing to give a limiting instruction regarding the use of his prior convictions. Both appellants contend that the trial court erred by (2) giving the jury an erroneous conspiracy charge; (3) giving the jury an erroneous malice charge; (4) failing to instruct the jury to determine each appellant's individual culpability before imposing the death penalty, and (5) failing to instruct the jury to disregard the possibility of parole.
>
> Some, if not all, of these arguments have some merit. The combination opf numerous errors committed b the trial court ion this death penalty case compels us to reverse and remand doe a new trial.

In Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988) a post conviction /habeas case this Court held that counsel's ineffectiveness was so pervasive as to exempt a particularized prejudice analysis.

In Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), a case which this appellate counsel handled, the Court held:

> Because none of the alleged errors are meritorious, we hold the PCR judge incorrectly relied on Nance in finding that the cumulative effort of these alleged errors established a claim of ineffective assistance of counsel.

376 S.C. at 535

In a footnote to the above sentence the Court wrote:

> Although we recognize that whether the cumulation of several errors, "which by themselves are not prejudiced, would warrant relief is an unsettled question in South Carolina" we do not believe the facts of this case present an opportunity to definitively decide this question. (citations omitted)

376 S.C. at 535

PCR counsel argued that the cumulative nature of trial counsel's should be taken into consideration in this case in determining whether to grant relief. (App. p. 1033, line 23- p. 1034, line12) There were seven issues raised in the post-conviction relief hearing. Trial counsel admitted to making errors on most of them. The PCR court noticed that this court found on direct appeal that the circumstantial evidence was overwhelming.[2] The PCR court also found that the doctrine of cumulative error contradicts the use of the Strickland test.[3] At some point with the cumulative effect of all these errors, one has to ask if petitioner had a fair trial under all these circumstances. We should be reminded that under Strickland that the standard in proving prejudice is whether there is a reasonable probability that but for counsel's errors, the result of the proceeding would be different. And a "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. The question to ask also is whether petitioner got a fair jury trial in light of all of trial counsels errors? The answer is that he did not.

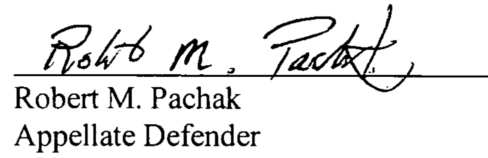
[2] Petitioner did not get the benefit of the circumstantial evidence change set forth in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

[3] See, Rebutting The "Strong Presumption of Reliability"..., 65 S.C.L. Rev. 685 which states that Strickland's language supports a cumulative error analysis.

<u>CONCLUSION</u>

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

CHRISTOPHER COMMANDER,

PETITIONER,

V.

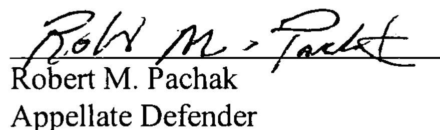
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002690

CERTIFICATE OF SERVICE

I certify that a true copy of the amended petition for writ of certiorari in this case have been served on J. Clayton Mitchell, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Christopher Commander # 318173, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472 this 1st day of October, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of October, 2015.

_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.