

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
Court of Common Pleas

**SC SUPREME COURT**

The Honorable J. Ernest Kinard, Jr., Deceased Circuit Court Judge

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Appellate Case No. 2016-001079

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Stephen Smalls,..... Petitioner,

v.

State of South Carolina,..... Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding that the State presented overwhelming evidence of guilt such that no prejudice resulted from each of three separate incidents of deficient performance by trial counsel?
  
- II. Did the Court of Appeals err in refusing to find that cumulative effect of the three separate incidents of deficient performance by trial counsel established prejudice requiring a new trial?

## STATEMENT OF THE CASE

Petitioner was indicted at the July 2000 term of the Court of General Sessions for Richland County for armed robbery (2000-GS-40-52623). Petitioner was represented by Shelia Mims, Esquire and LaNelle Cantey DuRant, Esquire. On May 2, 2002, Petitioner proceeded to trial after which he was found guilty of armed robbery. The Honorable Henry F. Floyd sentenced Petitioner to a period of twenty-five years imprisonment .

Petitioner filed a timely Notice of Appeal and an appeal was perfected. Petitioner's conviction and sentence were affirmed. State v. Smalls, Op. No. 2004-UP-315 (S.C. Ct. App. filed May 13, 2004). The remitter was issued on June 21, 2004.

Petitioner filed an application for PCR on May 18, 2005. Respondent made its Return on January 10, 2006. An evidentiary hearing was convened on July 31, 2007 before the Honorable James C. Williams. Tara Dawn Shurling, Esquire represented Petitioner. At the close of the hearing the record was left open to gather additional testimony. On January 13, 2012, a second evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. By Order dated March 2, 2012, Judge Kinard denied and dismissed the application with prejudice. On April 13, 2012, Petitioner filed a Rule 59(e) motion to alter or amend the order. On May 8, 2012, Judge Kinard denied the motion. Subsequently, Petitioner filed a timely notice of appeal on July 10, 2012, which was perfected by the filing of a Petition for Writ of Certiorari on April 1, 2013. The State filed its return on June 14, 2013. The Court of Appeals granted certiorari on August 20, 2014. Petitioner filed for its Brief of Petitioner on December 18, 2014. The State's Brief of Respondent was filed on April 22, 2015. On October 22, 2015, a three judge panel of the South Carolina Court of Appeals heard arguments. On February 10, 2016, the Court of Appeals affirmed the denial of relief by the PCR judge in a published opinion. Smalls v. State, 415 S.C.

490, 783 S.E.2d 817 (Ct. App. 2016). A timely petition for rehearing was filed but denied on April 21, 2016. Petitioner filed a Petition for Writ of Certiorari with this Court on May 23, 2016. This Return follows.

### STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that “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)).

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 courts presume that 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 Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the Petitioner must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s

performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the Petitioner 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 will affirm the post-conviction relief judge's grant of relief "if there is any probative evidence to support those 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)). Conversely, the Court will not uphold a finding that is not supported by probative evidence. 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)). Thus, an appellate court "gives great deference to the PCR court's findings of fact and conclusions of law." Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

## ARGUMENT

### **I. The State presented overwhelming evidence of guilt such that no prejudice resulted from the deficient acts of counsel.**

Petitioner argues that the Court of Appeals erred in upholding the PCR court's finding and holding that, though trial counsel was deficient, this performance did not cause prejudice to Petitioner because the State produced overwhelming evidence of the Petitioner's guilt at trial. It is well-settled case law in this state that "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). It is uncontroverted by both the PCR court and the Court of Appeals that the amount and character of evidence presented at trial could be characterized as overwhelming. Though Petitioner goes to great lengths in analyzing each instance of deficient performance, the overarching fact that no prejudice befell the Petitioner cannot be ignored. Each prior court recited the factors that demonstrated Petitioner's guilt: victim identification, fingerprint, flight, and the fact that Petitioner's status as a convicted felon was properly admitted at trial harmed his credibility.

The guiding opinion in Strickland v. Washington acknowledges that the issue of prejudice may be the turning point in evaluating ineffective assistance of counsel: "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. There is certainly probative evidence to support both the PCR court and Court of Appeals' congruous findings that, though there was deficient performance by trial counsel, there was no prejudice to Petitioner due to the existence of overwhelming evidence. There was clear evidence of probative

value in the record to support the PCR court's and Court of Appeals' findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the Court of Appeals' order should be affirmed.

**II. The Court of Appeals properly declined to apply a cumulative effect analysis when considering the prejudicial effect, if any, that counsels' acts had on Petitioner.**

The courts of this state have declined to recognize the idea that several deficient acts of counsel could have a cumulative and prejudicial effect, thus constituting ineffective assistance of counsel. Regardless, Petitioner attempts to differentiate the facts of the case at bar from that of Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), the leading case in this state regarding the notion. In Green, this Court declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error(s) is, in fact, one that prejudice's the Petitioner's rights under the Constitution.<sup>1</sup> Only then can the cumulative prejudice arising from the error be considered, as these injustices are the ones that post-conviction relief is designed to rectify. To hold otherwise is to conclude that even appropriate and effective performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set

<sup>1</sup> The protections of criminal defendants in prosecutions as delineated by the Sixth Amendment are chief among these rights.

forth in Strickland. See 466 U.S. at 687 (“Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Simply, the issue of granting post-conviction relief based upon the cumulative prejudicial effect of two or more instances of deficient performance is one that South Carolina has not accepted. Due to the nature of the deficiencies in the case at bar, there is no sound rationale for this Court to alter its line of case law at this time. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the Court of Appeals’ order should be affirmed.

**CONCLUSION**

For the reasons stated above, this Court should affirm the Court of Appeals' affirmation of the Post-Conviction Relief Court's denial of relief.

Respectfully submitted,

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By:

  
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ATTORNEYS FOR THE RESPONDENT

June 22, 2016

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APPEAL FROM RICHLAND COUNTY  
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**CERTIFICATE OF SERVICE**

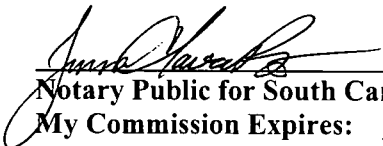
The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari to the Court of Appeals** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner’s counsel:

**Katherine H. Hudgins, Esquire  
Appellate Defender  
S.C. Commission on Indigent Defense  
PO Box 11589  
Columbia, SC 29201**

This 22<sup>nd</sup> day of June, 2016.

  
\_\_\_\_\_  
JESSICA E. KINARD  
ATTORNEY FOR RESPONDENT

SWORN to before me this 22<sup>nd</sup> day of June, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 04-28-2025