STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable J. Ernest Kinard, Circuit Court Judge

STEPHEN SMALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001079

BRIEF OF PETITIONER

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1. 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?

2. Did the Court Appeals err in refusing to find that the cumulative effect of the three separate incidents of deficient performance by trial counsel established prejudice requiring a new trial?

STATEMENT

In July of 2000, the Richland County Grand Jury indicted Petitioner Smalls for armed robbery, indictment #2000-GS-40-52623. On May 1, 2002, Smalls proceeded to jury trial before the Honorable Henry Floyd. Attorneys Sheila Dukes-Mims and LaNelle Durant represented Smalls at trial. Attorneys David Pascoe and Don Sorenson prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Floyd sentenced Smalls to 25 years. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Smalls, Op. No. 2004-UP-315 (S.C.Ct.App. filed May 13, 2004). The remittitur was issued on June 21, 2004.

On May 18, 2005, Smalls filed an application for post-conviction relief. The State filed a return on January 10, 2006. On July 31, 2007, an evidentiary hearing was held before the Honorable James C. Williams, Jr. Attorney Tara Dawn Shurling represented Smalls at the PCR hearing. Attorney Robert L. Brown was present for the State. At the close of the hearing the State asked to hold the record open so that the testimony of Robert Hood, the assistant solicitor who was assigned to prosecute a carjacking case against Eugene Green, one of the witnesses called by the State in Petitioner's trial, could be taken at a later dater after Mr. Hood reviewed his old prosecution file. (App. p. 530, line 19 – p. 531, lines 1-3). On May 19, 2008, Judge Williams signed an order requiring the Fifth Circuit Solicitor's office to provide Mr. Hood with the entire prosecution file for both Petitioner and Eugene Green. (App. pp. 537-538).

On April 25, 2011, Petitioner Smalls filed a motion for a *de novo* PCR hearing based on the fact that the solicitor's office claimed to not have a prosecution file for Eugene Green. (App. pp. 539-540). On October 18, 2011 a consent order was signed by the Honorable Alison Renee Lee, Chief Administrative Judge for the Fifth Judicial Circuit, Tara Dawn Shurling, attorney for

Petitioner Smalls and Brian T. Petrano, Assistant Attorney General for a hearing to receive additional testimony. (App. pp. 544-545). The order states:

> Given the fact that the Solicitor's Office was unable to produce adequate records concerning what if any preferential treatment a witness was given in exchange for his cooperation, the applicant asserts the ends of justice would be best served by the court holding another hearing at which he will have the opportunity to be fully heard on the merits.
>
> Since the Solicitor's office had no file concerning the witness in question, the applicant submits that he should be permitted to present testimony from individuals involved in the prosecution and defense of that witness in order to fairly resolve the question of whether he was denied access to impeachment evidence clearly discoverable pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Counsel for Respondent has agreed that the record is incomplete, and that the Applicant is entitled to pursue the issue at hand.

(App. p. 544).

On January 13, 2012, a second evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. In a written order signed March 2, 2012, Judge Kinard denied relief and dismissed the application. On April 13, 2012, Petitioner Smalls filed a Rule 59(e) motion to alter or amend. On April 19, 2012, the State filed a return. On May 8, 2012, Judge Kinard denied the motion to alter or amend. A timely notice of intent to appeal was filed on July 10, 2012. A petition for writ of certiorari was filed on April 1, 2013. The State filed a return on June 14, 2013. On August 20, 2014, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered additional briefing. The brief of petitioner was filed on December 18, 2014. The brief of respondent was filed on April 22, 2015. On October 20, 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. The petition for writ of certiorari was filed with this Court on May 23, 2016. The State filed a return on June 22, 2016. On March 7, 2017, this Court granted the petition for writ of certiorari and ordered additional briefing. This brief of petitioner follows.

ARGUMENTS

1. The Court of Appeals erred 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.

The South Carolina Court of Appeals correctly found that trial counsel was deficient in three separate instances. First, the Court of Appeals correctly found that trial counsel was ineffective for failing to object and ask for a mistrial when the prosecutor, through questioning of an investigator, told the jury that Petitioner burglarized somebody else's house and stole the gun alleged to have been used in the armed robbery for which Petitioner was being tried when there was no evidence in the record to indicate that Petitioner was involved in a burglary of a house or stealing of a gun. Second, the Court of Appeals correctly found that trial counsel was ineffective in failing to object when the State, in opening statements, told the jury that police saw Petitioner leaving the scene of the armed robbery when there was no evidence that any officer ever saw Petitioner at the scene of the robbery. Third, the Court of Appeals correctly found that trial counsel was ineffective for not preserving for appellate review the trial judge's refusal to allow cross examination of Eugene Green, a key State's witness, about a carjacking charge that was dismissed by the State on the same day the State called Petitioner's case for trial. The Court of Appeals, however, erred in finding that the State presented overwhelming evidence of guilt such that no prejudice resulted from any of the three separate incidents.

A. Trial counsel was ineffective for failing to object and ask for a mistrial when the prosecutor, through questioning of an investigator, told the jury that Petitioner burglarized somebody else's house and stole the gun alleged to have been used in the armed robbery for which Petitioner was being tried.

During the re-direct examination of Investigator Paul Mead with the City of Columbia Police Department the following took place:

Q. Investigator Mead, first with regards to the shotgun, you were asked where it originally came from?

A. Yes, sir.

Q. To make it perfectly clear, State's Exhibit Eight wasn't stolen from the defendant's house in 1999?

A. No, it was not.

Q. He burglarized somebody else's house?

A. That's correct.

Q. So is there any reason why his fingerprint would be on this weapon –

A. None that I know of, sir.

Q. -- other than he robbed the Bojangles?

A. That's correct.

(App. p. 341, lines 1-13). Trial counsel failed to object and failed to move for a mistrial when the prosecutor told the jury that Petitioner burglarized somebody else's house and stole the gun later alleged to have been used in the robbery of the Bojangles when there was no evidence in the record to indicate that Petitioner was involved in a burglary of a house or stealing of a gun.

At the PCR hearing when asked why she did not object and move for a mistrial, trial counsel stated, "I have no idea. That's a huge problem. I have no idea why that didn't happen." (App. p. 493, lines 16-24). The prosecutor did not move to admit evidence of a prior burglary by Petitioner. Instead, he just blurted this information out in front of the jury. If he had moved to introduce evidence of a prior burglary, the judge would have denied the request.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of

mistake or accident, or intent." Rule 404(b), SCRE. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App.2000). Other than the prosecutor's unsubstantiated comment, there is no evidence in the record to indicate that Petitioner was involved in the burglary of a house and stealing of a gun that was later alleged to have been used in the Bojangles robbery. If the prosecutor's point was to show that Petitioner was not the legal owner of the gun and the only way his fingerprint would have been on the gun was if he used the gun in the robbery of the Bojangles, he could have simply asked the officer if the gun was registered to Petitioner. The reference to a prior burglary was irrelevant and highly prejudicial.

In the order of dismissal the PCR judge wrote:

> It is clear, considering the context of the direct and cross examination of that witness, that on re-direct the attempt was to explain that the weapon came from a burglary from someone other than the defendant's house. The argument was to simply show that the weapon would only have the applicant's fingerprint because he used it in the robbery – that it is not as though it was his lawfully owned weapon. There is no suggestion that the testimony was an attempt to prejudice the applicant and suggest that he should be convicted of the armed robbery because he had supposedly committed a burglary. An isolated sectioning of the cold record does suggest an implication that "he" was referring to the defendant and that he had committed an unrelated burglary; however, the flow of the examination of that witness makes it clear that the burglary being referred to was "unsolved." *See full testimony of Investigator Mead.* Trial transcript, p. 301-346.
>
> Considering the other overwhelming evidence in this case, i.e. victim identification, fingerprint, flight etc, there is no prejudice relating to this allegation. "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 v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

(App. pp. 543-544). The PCR judge erred. The prosecutor was clearly referring to Petitioner when he stated, "**He** burglarized somebody else's house?" (App. p. 341, line 7) (emphasis added). The prosecutor's statement to the jury that Petitioner burglarized somebody else's house and stole the gun later alleged to have been used in the robbery of the Bojangles for which petitioner was on trial, when there was no evidence presented by the State linking Petitioner to a burglary, was improper and highly prejudicial. Counsel was ineffective in failing to object and then ask for a mistrial based on the improper comment.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's 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, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

Trial counsel admitted that the failure to object when the prosecutor told the jury that Petitioner burglarized somebody else's house and stole the gun later alleged to have been used in the robbery of the Bojangles was a "huge problem" and she did not know why she did not object. (App. p. 493, lines 16-24). Counsel was deficient for failing to object and then failing to move for a mistrial. There is a reasonable probability that the outcome of the trial would have been different if counsel had objected and moved for mistrial. While the decision to grant a mistrial is within the sound discretion of the trial judge, the unsubstantiated statement by the prosecutor that Petitioner was involved in burglarizing a home and stealing a gun is so improper and prejudicial that there is a substantial likelihood that the trial judge would have granted a mistrial motion, if

one had been made. At the least, trial counsel should have objected to the improper comment and asked the judge to give a curative instruction.

The Court of Appeals correctly found counsel deficient for failing to object to the redirect examination of Investigator Mead. The Court of Appeals wrote:

> We hold trial counsel was deficient for failing to object to Mead's testimony on redirect concerning the prior burglary. See State v. Wallace, 384 S.C. 428, 432, 683 S.E.2d 275, 277 (2009) ("Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent." (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923))). Here, the State asked the obviously improper question, "He burglarized someone else's house?" and Mead responded, "That's correct." No other evidence in the record supports the contention that Petitioner committed the prior burglary, and no arguments were made demonstrating why this inquiry would have been proper under South Carolina's Rules of Evidence. Accordingly, we find trial counsel was deficient for failing to object to this testimony, which impermissibly suggested Petitioner was responsible for a prior burglary involving the shotgun.

Smalls v. State, 415 S.C. 490, 783 S.E.2d 817, 820-21 (Ct. App. 2016) (fn #1 omitted). As will be discussed in subsection D below, however, the Court of Appeals erred in finding no prejudice resulting from trial counsel's deficient performance because the State presented overwhelming evidence of guilt. The State's evidence was not overwhelming. Petitioner was prejudiced by trial counsel's failure to object to Mead's questioning and testimony on redirect.

> **B.** Trial counsel was ineffective in failing to object when the State, in opening statements, told the jury that police saw Petitioner leaving the scene of the armed robbery when there was no evidence that any officer ever saw Petitioner at the scene of the robbery.

In opening statement the prosecution told the jury, "The Columbia Police Department responded. Mr. Smalls [Petitioner] ultimately took off out of the store with over $1,900 in a plastic bag with the shotgun. **The police saw him as he was leaving the store**. He ended up getting away that night, but he ended up leaving some very important pieces of evidence. He left behind the

shotgun, he also left behind the money, in his quest to get away." (App. p. 54, lines 18-25) (emphasis added).

During the PCR hearing trial counsel confirmed that when the police arrived at the Bojangles, the perpetrator of the armed robbery was long gone. (App. p. 488, line 8 – p. 489, lines 1-5). Contrary to what the prosecutor said in opening statement, no officers ever saw Petitioner at the scene of the armed robbery of the Bojangles. When asked why she did not object to the opening statement trial counsel responded, "I don't even recall that, but I don't remember any officer seeing him, and if I didn't object, I should've at that point." (App. p. 489, lines 6-14). Later, trial counsel agreed that the prosecutor's statement that officers saw petitioner at the scene of the armed robbery was damaging. (App. p. 490, lines 13-23). When asked if she had a reason for not objecting, trial counsel testified, "No, it's obviously something I missed." (App. p. 490, line 24 – p. 491, line1).

In the order of dismissal the PCR judge, addressing the false comment made to the jury by the prosecutor in opening statement and trial counsel's failure to object, wrote: "There is no merit to this claim, opening statements are not evidence, and the jury was told several times to base their verdict on the evidence only. (Trial transcript, p. 359, 387). There is no prejudice considering the overwhelming evidence in this case, i.e. the identification of the applicant, his fingerprint on the weapon, his flight, etc." (App. pp. 542-543). The PCR judge erred.

The fact that opening statements are not evidence does not relieve trial counsel of the duty to object when the statements are not supported by the evidence. In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), the South Carolina Supreme Court found that trial counsel was deficient for failing to object to the State vouching for the credibility of a witness in opening statement. In Gilchrist the Court found prejudice although the judge instructed the jury that opening statements were not evidence. Id. at fn 1. The statement made by the prosecutor in the present case was

unsubstantiated by the evidence and trial counsel was deficient in failing to object to the statement. The problem was made worse by the fact that trial counsel failed to capitalize on the State's failure of proof in closing argument. Trail counsel confirmed that if she had been aware of the statement, she would have capitalized on the lack of proof in closing argument. (App. p. 506, line 10 – p. 507, lines 1-5).

The present case is distinguished from State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct.App. 2010). In Wiley the State, in opening statement, made reference to an outstanding warrant. Wiley objected and the judge sustained the objection and immediately instructed the jury that opening statements were not evidence. At the close of State's opening, Wiley moved for a mistrial. The trial judge denied the motion for a mistrial. The Court of Appeals affirmed the trial judge's denial of the mistrial motion. First, as there was no objection during the opening statement in the present case, the judge was not asked to give a curative instruction. Second, there is no indication that the information about the outstanding warrant in Wiley was false. The statement made by the prosecutor in opening in the present case was simply not true.

Trial counsel admitted that she should have objected to the statement made by the prosecutor in opening that an officer saw Petitioner at the scene of the armed robbery. (App. p. 489, lines 6-14). Counsel was deficient for failing to object. There is a reasonable probability that the outcome of the trial would have been different if counsel had objected and a curative instruction immediately given. Counsel also could have capitalized on the lack of proof in her closing argument.

The Court of Appeals correctly found counsel deficient for failing to challenge the comments made by the prosecutor in opening statement writing:

> We hold trial counsel was deficient for failing to challenge the State's comments either by objecting or by pointing out during the closing arguments that the State

> failed to prove this assertion. Trial counsel's testimony at the PCR hearing indicated she did not recall any discovery materials indicating that police saw Petitioner at the scene of the robbery. Additionally, during the State's case-in-chief, none of the State's police witnesses testified that they observed Petitioner leaving the restaurant after the robbery. Accordingly, the State failed to introduce evidence during the trial to "reasonably support" this assertion from its opening statement. Kornahrens, 290 S.C. at 284, 350 S.E.2d at 183. Even if trial counsel had chosen not to object when the comments were initially made during opening statements, there is no reason she should not have pointed out the State's failure to prove its assertion during her summation. Notably, trial counsel testified during the PCR hearing that she "absolutely" would have pointed out the comments during her closing argument had she noticed them.

Smalls v. State, 415 S.C. 490, 783 S.E.2d 817, 821 (Ct. App. 2016). The Court of Appeals, however, erred in finding no prejudice. Again, the State's evidence was not overwhelming. Petitioner was prejudiced by trial counsel's failure to challenge the State's false comment in opening statement.

> **C.** Trial counsel was ineffective for not preserving for appellate review the trial judge's refusal to allow cross examination of a State's witness about a carjacking charge that was dismissed by the State on the same day the State called Petitioner's case for trial.

Eugene Green was the only witness who positively identified Petitioner. Green was called as a witness by the State to testify against Petitioner. (App. pp. 61 – 101). Records from the Richland County Clerk of Court show that on May 1, 2002, the Fifth Circuit Solicitor's Office dismissed a carjacking charge that was pending against Eugene Green. (App. p. 587). Petitioner's case was called for trial on May 1, 2002, the same day the charges were dismissed against Green. (App. p. 1).

During pre-trial hearings trial counsel asked about the pending carjacking charge against Eugene Green. (App. p. 35, lines 11 – 15). The prosecutor advised that the charges had been dismissed. (App. p. 35, lines 16-21). No further inquiry was made by trial counsel about the

existence of any type of agreement between Green and the Fifth Circuit Solicitor's office in regard to dropping the charge in exchange for cooperation at Petitioner's trial.

During the PCR hearing trial counsel testified that she argued to the trial judge that she should be able to question Green about the dismissal of the carjacking charges because it went to bias. (App. p. 494, line 11 – p. 495, lines 1-24). Trial counsel testified that the trial judge would not allow the questioning. (App. p. 495, lines 11-24). The argument and ruling do not appear in the record. When asked why trial counsel did not place on the record the argument in regard to cross examination of Green about the dismissed carjacking charge, trial counsel testified that it was due to "inexperience, not knowing exactly what I should be doing at that point." (App. p. 498, lines 13 – 23). PCR counsel then asked trial counsel, "Had you known that the charge was dismissed the very day of this trial, would you have insisted that Judge Floyd examine Mr. Green on the record to determine whether or not he knew that the charge had already been dismissed at the time you testified?" (App. p. 499, lines 9-13). Trial counsel responded, "Absolutley. Absolutely. That's huge. We were already hanging our hat on Eugene Green, coming in hanging our hat on Eugene Green, so that information would've been vital. We were just completely deflated." (Tr. p. 499, lines 14-17).

In the order of dismissal the PCR judge wrote, "Accordingly, there is no merit whatsoever to the Applicant's claim that the victim's carjacking charge was not dismissed prior to his testimony at trial; the victim did not dispute the legitimacy of his testimony at the Applicant's trial." (App. p. 588). The PCR judge erred. Trial counsel was either ineffective in failing to question Green about the dismissed carjacking charge or ineffective in failing to preserve for appellate review the trial judge's refusal to allow her to question Green about the dismissed carjacking charge.

In State v. Hinson, 293 S.C. 406, 407-408, 361 S.E.2d 120, 120-121 (1987), the South Carolina Supreme Court wrote:

> Due process requires disclosure by the prosecution, upon motion of the defendant, of evidence which would be favorable to the accused and which is material to guilt or punishment. Brady v. Maryland, *supra.* Evidence which may be used to impeach a witness's credibility is favorable to an accused under Brady. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).
>
> "When the reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of a promise of immunity made to that witness is a violation of due process. Giglio v. United States, 92 S.Ct. at 154, citing Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A new trial will be required when the nondisclosed evidence is material. Brady v. Maryland, *supra.* Evidence is material when there is a reasonable probability that the result of trial would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Eugene Green testified at the PCR hearing:

> So they brought me back up here again the next day, and I talked to that man over there, Pascoe, back there in the back, and he was like if I – you know what I'm saying? They were going to subpoena me to come to court, so I didn't come – you know, if I didn't come, you know, to participate in the trial that my charge wasn't going anywhere. I didn't want anything to do with it.

(App. p. 555, line 20 – p. 556, lines 1-2).

Trial counsel admitted that she did not preserve the issue of cross examining Green in regard to the carjacking charge that was dismissed on the day he testified against Petitioner because of inexperience and not knowing what she was doing. Trial counsel was deficient in failing to preserve the issue for appellate review. There is a reasonable probability that if counsel had preserved the issue for appeal, the appellate court would have reversed the trial judge's decision to limit cross examination of Green.

The Court of Appeals correctly found that counsel was deficient for failing to preserve the issue of the trial judge's refusal to allow cross examination of a State's witness about a carjacking charge that was dismissed by the State on the same day the State called Petitioner's case for trial. The Court of Appeals wrote:

> We hold trial counsel was deficient for failing to preserve the issue of whether she could cross-examine Green about the dismissal of his carjacking charge. Green's testimony provided key evidence for the State's case, yet the State failed to inform trial counsel about the dismissal of his carjacking charge until the morning of Petitioner's trial. Trial counsel neither sought a ruling on the record concerning whether she could cross-examine Green about the dismissal nor requested to proffer any questions about the circumstances surrounding the dismissal or Green's potential motivations. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (holding trial counsel was deficient for failing to adequately preserve an issue when trial counsel asked the trial court to question jurors regarding whether they saw petitioner wearing chains but the request was not made on the record). Accordingly, trial counsel's performance was deficient.

Smalls v. State, 415 S.C. 490, 783 S.E.2d 817, 822 (Ct. App. 2016). The Court of Appeals, however, found no prejudice. The Court of Appeals erred. As discussed below, the State's evidence was not overwhelming. Petitioner was prejudiced by counsel's failure to preserve the issue of whether she could cross examine Green about the dismissal of his carjacking charge.

D. The State's evidence was not overwhelming.

Despite finding three separate instances of ineffective assistance of counsel, one in which trial counsel failed to object when the prosecutor, through re-direct examination of Investigator Mead, told the jury that Petitioner burglarized someone's house and stole the gun used in the Bojangles robbery when there was no evidence to support the statement, one in which trial counsel failed to challenge the prosecutor's statement in opening that officers saw Petitioner leaving the Bojangles when there was no evidence to support the statement and a third instance

in which trial counsel failed to preserve the issue of whether she could cross examine Green, a key State's witness, about the dismissal of his carjacking charge, the Court of Appeals found no prejudice. The Court of Appeals wrote, "Despite these errors, we hold there was no prejudice resulting from trial counsel's deficient performance because the State presented overwhelming evidence of Petitioner's guilt. See Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) ("[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt.")." Smalls v. State, 415 S.C. 490, 783 S.E.2d 817, 822 (Ct. App. 2016). The Court of Appeals erred in finding that the State presented overwhelming evidence of guilt.

Green was the only witness to conclusively identify Petitioner. While the defense was able to cast doubt on Green's credibility through his prior convictions, the defense was not able to provide the jury with Green's possible motive to misrepresent pursuant to Rule 608(c), SCRE, through the dismissed carjacking charge. Petitioner was not seen at the Bojangles, as alleged by the State in opening statement, without objection. There was no evidence that Petitioner broke into a house and stole the gun used in the Bojangles robbery. The remaining evidence presented by the State consisted of one witness, Jim Lightner, who could not be sure between two of the six photos presented in a six person photo line- up (App. p. 119, line 9 – p. 120, lines 1-7), evidence that Petitioner's fingerprint was found on the gun that was recovered behind the Bojangles with a bag of money and Investigator Gray's testimony that Petitioner fled when, four days after the Bojangles robbery, Investigator Gray pulled up in his car, opened his door with his handcuffs in hand and told Petitioner to stop. (App. p. 290, lines 1-10). The evidence presented by the State was not overwhelming.

Each of the three instances of ineffective assistance of counsel individually results in prejudice. Petitioner was prejudiced when the prosecutor, through questioning Investigator Mead, told the jury that Petitioner burglarized somebody else's home and stole the gun found with the money bag behind the Bojangles. There is a reasonable probability that, but for counsel's failure to object and request a mistrial, the outcome of the trial would have been different. Petitioner was prejudiced by the prosecutor telling the jury in opening that officers saw Petitioner leaving the Bojangles. The statement placed Petitioner at the scene of the robbery although there was no evidence to support the statement. There is a reasonable probability that, but for counsel's failure to object to the statement, that the result of the trial would have been different. Petitioner was prejudiced by the trial judge's refusal to allow cross examination of Green about the dismissed carjacking charge. There is a reasonable probability that, but for counsel's failure to preserve the issue for appeal, the outcome of the trial and/or direct appeal would have been different. The cumulative effect of the three errors is discussed below in issue two.

2. The Court Appeals erred in refusing to find that the cumulative effect of the three separate incidents of deficient performance by trial counsel established prejudice requiring a new trial.

As argued in both the initial petition for writ of certiorari filed with the Court of Appeals and the brief of petitioner as well as the petition for rehearing, the cumulative effect of the three separate instances of deficient performance on the part of trial counsel establishes prejudice requiring a new trial. In Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002) the South Carolina Supreme Court wrote, "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. Compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation of errors warranted reversal, but Court also found each individual error caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together)." In Green this Court found that trial counsel was not ineffective in any of the three allegations. In contrast, in the present case trial counsel was ineffective in three separate instances, as correctly found by the Court of Appeals.

As noted in Green v. State, id., South Carolina Appellate Courts have recognized cumulative error analysis of trial errors on direct appeal. See Also *Rebutting the "Strong Presumption of Reliability" for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina*, 65 S.C. L. Rev. 685 (2014) (Benjamin Dudek). In State v. Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801(1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court reversed the death sentences imposed upon Peterson and his co-defendant, Stubbs, and remanded the cases for a new trial "[d]ue to the collective impact

of numerous errors committed by the trial court . . ." This Court found that, "Some, if not all, of these arguments have some merit. The combination of numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial." Peterson, 287 S.C. at 246, 335 S.E.2d at 801.

In State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), the South Carolina Court of Appeals found that numerous unsolicited comments by the trial judge and the limitation of cross-examination unduly prejudiced the defendant. In Freeman the court wrote:

> Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. See Myers v. Moffett, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); see also Ryan v. United Parcel Service, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do). We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

319 S.C. at 123–24, 459 S.E.2d at 875.

In State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), this Court wrote:

> In our opinion, the facts of this case do not support a finding cumulative errors warranted reversal. While the admission of the search warrant was prejudicial error, the error of refusing to admit the prior shoplifting conviction for impeachment purposes was not prejudicial and the inadvertent mention of the polygraph examination was not error. Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial. See Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it

> requires the cumulative effect of the errors to affect the outcome of the trial). Here, respondent has failed to show he suffered prejudice warranting a new trial based on cumulative trial error. Compare with State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (although Court held cumulation of errors warranted reversal, each error caused prejudice against appellant); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding the cumulative effect of the trial conduct, not trial errors, warranted reversal).

This Court in Johnson recognized a cumulative error analysis in the direct appeal but found no prejudice. This Court should apply a cumulative error analysis in this post-conviction relief action and find prejudice pursuant to Strickland. In contrast to Johnson, the facts of the present case support a finding that cumulative errors warrant reversal. The State presented minimal evidence of guilt. The jury in this case was presented with evidence which impermissibly suggested Petitioner was responsible for a prior burglary involving the shotgun recovered near the scene of the robbery. The jury was told that Petitioner was seen by police leaving the scene of the armed robbery when in fact there was no evidence presented at trial that any officer ever saw Petitioner leaving the scene of the armed robbery. Trial counsel failed to raise that point in her closing argument. The jury was not told that a carjacking charge pending against Green was dismissed by the State on the same day as Petitioner's trial. Without conceding that the individual errors result in prejudice alone, as argued in issue one, the cumulative effect of all three errors creates prejudice requiring a new trial.

A majority of state courts have recognized some form of cumulative error analysis in reviewing ineffective assistance of counsel claims. Id. 65 S.C. L. Rev. 685 fn. #52. In Cirincione v. State, 119 Md. App. 471, 506, 705 A.2d 96, 112–13 (1998), the Maryland Court of Special Appeals wrote:

> Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance.

> Apparently, this cumulative effect may be applied to either prong of the Strickland test. That is, numerous non-deficient errors may cumulatively amount to a deficiency, Bowers v. State, 320 Md. 416, 436, 578 A.2d 734, 744 (1990), or numerous non-prejudicial deficiencies may cumulatively cause prejudice. Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir.1995).

Petitioner does not need to rely on a cumulative error analysis to demonstrate deficient performance as discussed by the Maryland Court of Special Appeals in Cirincione. Petitioner demonstrated and the South Carolina Court of Appeals found three separate instances of deficient performance on the part of trial counsel. As argued in issue one, Petitioner was prejudiced by each of those instances of deficient performance. As an alternative theory, however, if this Court finds that prejudice did not result from the three instances of deficient performance individually, this Court should find that the cumulative effect of the deficient performances resulted in prejudice.

While establishing Strickland prejudice from the cumulative effect of several instances of deficient performance by trial counsel in the context of habeas relief pursuant to 28 U.S.C § 2254 is not yet "clearly established federal law as determined by the Supreme Court of the United States," a majority of federal courts of appeals (the First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits) have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. See Ruth A. Moyer, To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors, 61 Drake L. Rev. 447, 451 (2013).

In Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (fn #9 omitted), the Fourth Circuit Court of Appeals wrote, "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." The position taken by the Fourth Circuit in Fisher in regard to cumulative error, however, is no longer the majority taken by the other federal circuit courts of appeal. While the Eighth and the Sixth Circuit Courts of Appeals have specifically rejected a cumulative error analysis to establish prejudice in a § 2254 action[1] (Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006); Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir.2002) and the Eleventh Circuit has not yet answered the question of whether cumulative errors by trial counsel will establish Strickland for § 2254 review (Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011), as noted above, a majority of federal courts of appeals have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. More recently in Oken v. Corcoran, 220 F.3d 259, 271 (4th Cir. 2000), the Fourth Circuit Court of Appeals wrote, "Finally, even were we to find one or more of these purported instances of objectively unreasonable performance by counsel to be such, either individually or cumulatively, we still could not say that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694, 104 S.Ct. 2052."

This Court should follow the majority of other state courts as well as the majority of federal circuit courts of appeal and apply cumulative error analysis in reviewing post-conviction relief cases. The cumulative effect of trial counsel's three separate instances of deficient performance results in prejudice requiring a new trial.

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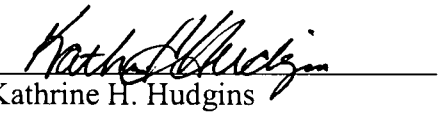
[1] The reasoning for the Eighth and Sixth Circuits rejecting the cumulative error analysis in § 2254 review appears to be based on the fact that such analysis is not yet clearly established federal law as determined by the Supreme Court of the United States.

CONCLUSION

Prejudice results from each of the three separate incidents of ineffective assistance of counsel. Petitioner is entitled to relief on each of the three issues. Additionally, the cumulative effect of the three errors also establishes prejudice requiring a new trial. Based on the above arguments, the decision of the Court of Appeals finding no prejudice should be reversed, the convictions overturned and the case remanded for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable J. Ernest Kinard, Circuit Court Judge

STEPHEN SMALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Stephen Smalls, #283971, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of April, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025