

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

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ALFRED GUY HENSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001273

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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**ISSUES PRESENTED**

I.

Whether the PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court aptly found that trial counsel was deficient in failing to preserve the suppression issue for direct appeal but erred in its finding that there was no prejudice to Petitioner?

II.

Whether the PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court aptly found that trial counsel was deficient in unnecessarily calling deputy Wilson as a witness for the defense, losing last closing argument, but erred in its finding that there was no prejudice to Petitioner?

III.

Whether the PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court erred in finding that trial counsel was not deficient in stipulating to Petitioner's prior burglary convictions, at least one of which was uncounseled and resulted in imprisonment, and erred in its finding that there was no prejudice to Petitioner?

## STATEMENT OF THE CASE

On February 18, 2011, the Spartanburg County Grand Jury returned an indictment against Petitioner Alfred Henson for grand larceny. App. 431. Henson was also indicted for first degree burglary specifying only that Henson was armed with a deadly weapon. App. 6, l. 3 – 8, l. 14; App. 335, ll. 16-23. On September 19, 2011, the Grand Jury returned an amended indictment against Henson for first degree burglary, which listed all potential variations of first degree burglary. App. 429.

On October 10-11, 2011,<sup>1</sup> Henson appeared for trial before the Honorable Roger L. Couch and a jury. Henson was represented by Max Singleton,<sup>2</sup> and the State was represented by assistant solicitor Timi Poulos. App. 1. The jury convicted Henson of both offenses. App. 286, l. 22 – 287, l. 7. Judge Couch sentenced Henson to serve concurrent terms of twenty years for burglary and ten years for grand larceny. App. 293, l. 19 – 294, l. 7.

Henson filed a notice of appeal, but his later motion to withdraw the appeal was granted and the appeal was dismissed. App. 296. The remittitur was filed on September 14, 2012. App. 297.

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<sup>1</sup> The October 10, 2011 trial transcript contains a scrivener’s error listing the trial year as 2012. App. 1. The accurate year, 2011, is properly listed on the transcript of the second day of trial and by the petit jury foreperson’s signature on the indictments. App. 197; App. 429; App. 431.

<sup>2</sup> Max Singleton is currently suspended from the practice of law in South Carolina pursuant to this Court’s opinion in In re Singleton, 412 S.C. 316772 S.E.2d 267 (2015). Singleton previously received a public reprimand in In re Singleton, 395 S.C. 521, 719 S.E.2d 667 (2011), and a 2012 letter of caution. Singleton was recently held ineffective in the case of Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) (holding that Singleton was deficient in his examination of “forensic interviewer” and that his deficient performance prejudiced defendant).

On April 25, 2013, Henson filed his application for post-conviction relief. App. 298. The State filed its return on May 8, 2014. App. 306. An evidentiary hearing was held before the Honorable Frank R. Addy on November 9, 2016. Henson was represented by J. Falkner Wilkes, and the State was represented by assistant attorney general Alicia Olive. App. 312. The witnesses at the hearing included Henson, trial counsel Max Singleton, former trial counsel Matthew Shealy, and assistant solicitor Timi Poulos. App. 313. Following the hearing, both parties submitted a post-trial memorandum for the PCR court's consideration. App. 410 (State's memo); Supp App. 1 (Applicant's memo).

On May 23, 2017, Judge Addy filed an Order of Dismissal denying Henson's application for relief. App. 414.

This appeal follows.

## RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

While this Court gives great deference to a PCR judge's findings of fact, Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), “[a] PCR judge's findings will not be upheld if such findings are not supported by probative evidence.” Horton v. State, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991) (emphasis added); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992). Further, the Court will review questions of law *de novo*, and reverse the decision of the PCR court when it is controlled by an error of law.” Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

## ARGUMENT

### I.

**The PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court aptly found that trial counsel was deficient in failing to preserve the suppression issue for direct appeal but erred in its finding that there was no prejudice to Petitioner.**

#### *Relevant Facts*

The prosecution's case against Petitioner Henson was entirely circumstantial. Leslie Ofori was home on the afternoon of Monday, November 8, 2010, when she went upstairs at about 1:00 or 1:15 p.m. to take a ten minute shower. While in the shower, Ofori thought she could feel the vibrations of someone walking downstairs. She thought that her husband may have returned from work early. Once she turned the water off she thought that she heard footsteps and called out for her husband. Things went silent and then she felt the vibrations of walking resume, followed by the chirp of her alarm system, indicating a door was opened. While getting dressed, she heard a motor crank. As she came down the steps Ofori could see a moped leaving the end of her driveway. She could not provide any specific description of the moped or the person driving it. Ofori called her husband and a friend to tell them about her suspicion that someone had been in the house, but she did not call police because there was evidence anything was taken. She did note that the door from the mudroom to the garage was open, and that she recalled it being closed earlier in the morning. App. 97, l. 12 – 102, l. 10; 110, l. 3 – 117, l. 22; App. 188, ll. 7-12.

Earlier that day, at approximately 12:30 p.m. that day, Henson pulled into the parking lot of a convenience store on his moped, where he approached deputy Jason Wilson. Henson told Wilson he thought he was someone else and walked away. Wilson asked Henson for his name,

but Henson would not tell him anything more than “Al.” Wilson returned inside where he and other deputies determined Henson’s full name and learned that his driver’s license was suspended. Henson did not have the separate moped license required under the law. App. 32, l. 6 – 33, l. 11. After determining Henson’s home address, Wilson and another deputy were on “routine patrol” in the same area. App. 33, ll. 12-20; App. 37, l. 2 – 38, l. 9; App. 46, ll. 2-10. At 1:52 p.m., Wilson saw Henson on his moped in his rearview mirror and turned around to initiate a traffic stop. According to Wilson, as he pulled into Henson’s driveway and activated his blue lights, he saw Henson throw what he recognized as an expensive digital camera under a parked car on the property. Henson was immediately handcuffed and arrested for the license offense. App. 33, l. 12 – 43, l. 5. Other deputies reached under the car and pulled out the digital camera and three cards – one debit and two credit – with the names Leslie Ofori and Leslie Robinson printed on them. One of the cards also had a small photograph of a black female. App. 43, ll. 10-14; App. 51, l. 24 – 52, l. 1; App. 144, ll. 9-12; App. 148, ll. 1-12; App. 154, ll. 16-23; App. 161, l. 22 – 162, l. 6.

Wilson called Sergeant Travis Barnette, who came to Henson’s property. After some brief small talk with Henson, Barnette was shown the camera and cards found under the car. Approximately five to ten minutes later, he went to what they determined was Ofori’s home address. Barnette asked Ofori if she was familiar with Alfred Henson, who drove a moped. Ofori told him that she did not know Henson but had seen a moped in her driveway earlier. Barnette then asked her if she was missing a camera or debit/credit cards. She checked and was unable to find her husband’s digital camera and discovered that her entire wallet was missing from her purse. App. 51, l. 6 – 60, l. 8. Ofori last recalled using her debit card at her doctor’s office on Tuesday of the week prior and the camera was last used to photograph her nephew’s

high school football game. She could not recall whether the football game was the Friday prior to the incident or even earlier. App. 117, l. 23 – 119, l. 18; App. 194, ll. 3-14. Approximately one week after the incident, Ofori received her wallet and the remainder of its contents in the mail. It was purportedly found in the driveway of a chiropractor who lived off of the same main road as Ofori's neighborhood. App. 124, l. 4 – 127, l. 4. Ofori's house was processed for evidence and a photograph was taken of one of several shoe prints. App. 178, l. 18 – 180, l. 23; App. 210, l. 19-23; App. 212, l. 22 – 213, l. 8. While Henson wore a size 10 Timberland boot, Ofori's husband owned size 13 Timberland boots. App. 130, ll. 5-13; App. 131, ll. 5-9; App. 211, ll. 11-21. The photograph taken of one of the foot prints did not reveal the size or brand of the shoe that made them, and the State provided no expert in shoe print analysis. App. 188, l. 24 – 189, l. 9; App. 215, ll. 6-19.

Trial counsel made a pre-trial motion to suppress the camera, debit card, and credit cards seized taken from the under the car on Henson's property. App. 61 – 75. The trial judge denied the motion, ruling that the officers were properly on Henson's property conducting a lawful traffic stop and that the items under the case were in plain view. He reasoned that "a viewing of those items would have indicated that there was a possibility or potential for criminal activity that would require additional investigation." App. 76, ll. 10-18. He further found that upon seeing the item thrown under the car, the officers had a right to look at it "for officer safety." App. 76, ll. 18-23. Trial counsel had argued that the plain view doctrine was inapplicable because the incriminating nature of the items was no apparent without taking them out from under the car for further examination, i.e. turning on the camera to look at the photographs and reading the information on the debit and credit cards. App. 67, l. 8 – 71, l. 15; App. 73, l. 2 – 75, l. 15. Notably, there was no evidence presented at the pre-trial hearing that the reason for

looking under the car was related to safety; rather, deputy Wilson said they wanted to determine ownership of the items. App. 42, ll. 18-19; App. 45, ll. 15-23.

Trial counsel failed to renew his objection to evidence of the camera and cards when they were first discussed at trial. App. 102, ll. 16-24. He responded “no objection” when the prosecution offered photographs of the items into evidence. App. 105, l. 15 – 106, l. 8.

At the PCR hearing, both Henson and trial counsel recalled that their main defense rested upon the suppression of the seized items, without which the prosecution’s case would have collapsed. App. 324, l. 22 – 325, l. 7; App. 344, ll. 10-14. Nonetheless, trial counsel failed to renew his objection to the evidence. App. 333, ll. 2-20; App. 353, l. 25 – 356, l. 22. While counsel did not think that the trial judge’s *in limine* ruling would have changed had he renewed his objection, the consequence of his failure to object was a lack of issue preservation for direct appeal. App. 360, l. 21 – 361, l. 2.

In the Order of Dismissal, the PCR court found that trial counsel “was deficient for failing to object, this rendering the [suppression] issue unpreserved for appellate review.” App. 421. However, the court found that “there is no reasonable probability that but for counsel’s unprofessional error, the result of the proceedings would have been different.” App. 421. The PCR court found that the search fell under the plain view exception to the warrant requirement and that Henson had no reasonable expectation of privacy in the area searched. App. 421 – 422. Additionally, the PCR court found that trial court’s findings would be reversed only “due to clear error” such that, even if preserved for appellate review, there was no reasonable probability that Henson would have prevailed on appeal. App. 422.

### *Discussion*

“A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.” State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). Here, the PCR court properly found that trial counsel was deficient in failing to renew his objection to the admission of evidence of the camera and debit and credit cards seized following Henson’s arrest. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (finding counsel’s failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the first prong of the Strickland test).

Under the second prong of Strickland, the PCR applicant “must show 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. This requires the PCR court to review the potential merits of the claim that was left unpreserved for appellate review. See McHam, 404 S.C. at 481-82, 746 S.E.2d at 50 (finding that even if trial counsel had renewed his motion in order to preserve the issue, McHam did not show a reasonable probability that the outcome of the trial would have been different because his Fourth Amendment claim fails on its merits). Here, the PCR court erred in its analysis of the merits of Henson’s suppression motion.

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citation omitted). When

reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (citation omitted). “The appellate court will reverse only when there is clear error.” Id. (citation omitted).

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. “A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133 (1990)). “Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014). Under certain circumstances, the governmental interest in officer safety can also justify certain measures to protect the police or public. See Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

In the present case, the trial court’s denial of the motion to suppress was grounded in two theories – plain view and officer safety. App. 76, ll. 10-23. The trial court rejected the prosecution’s abandonment argument. App. 72, ll. 1-9. The PCR court found that Henson was not prejudiced because both the plain view doctrine and abandonment justified the officers in

removing the camera and debit and credit cards out from under the car that was parked on Henson's property. App. 421 – 422.

The officer safety exception is perhaps the most easily dispensed with, as there was no testimony at the suppression hearing that the officers were motivated in any manner by officer safety to support the trial judge's finding. On the contrary, deputy Wilson was very specific that he knew the item thrown was a camera and was unaware of the debit and credit cards until the other deputy found them. Though there has been no report of a robbery, the officers were looking at the items to "determin[e] if it was his or somebody else's," which they could not do without removing the items from under the car. App. 39, l. 20 – 40, l. 20; App. 42, l. 8 – 44, l. 21; App. 45, l. 15 – 46, l. 1. Further, Henson was immediately arrested, handcuffed, and taken to a police car, such that there was no risk that he could reach any potentially dangerous item under the car. App. 41, l. 12 – 42, l. 4; see also App. 153, ll. 3-17; App. 160, l. 24 – 161, l. 2. See Arizona v. Gant, 556 U.S. 332 (2009) (finding that if the arrestee was already secured and outside of reaching distance from the passenger compartment of the vehicle at the time of the search, a search could not be justified under the traditional rationale of protecting officer safety and preventing the destruction of evidence). Thus, there was no evidence to support the trial judge's finding that officer safety justified the search.

The plain view doctrine is also inapplicable in the present case. "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (quoting State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999)). The two elements needed to satisfy the plain view exception are: "(1) the initial intrusion which afforded the

authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.” Id. In Wright, the items seen in plain view were obviously dogfighting paraphernalia, including the dogfighting pit, dog muzzles, drugs, syringes, several injured dogs, and a dog suspension collar. Id. at 445-46, 706 S.E.2d at 328. This Court ruled that “[t]he incriminating nature of this evidence was immediately apparent considering the deputies were there to investigate a tip concerning dogfighting.” Id. at 445-46, 706 S.E.2d at 328.

Here, the police had not received any report of a missing camera or wallet; they pulled Henson over solely to arrest him for the license violation. App. 40, l. 21 – 41, l. 22; App. 42, l. 20 – 43, l. 5. Deputy Wilson further admitted that they could not determine who the camera belonged to without taking it out from under the car and turning it on. Even then, the content of the photographs on the camera would not truly identify the owner of the camera. Similarly, the name and information on the debit and credit cards could not be seen without taking them out from under the car. As a result, the incriminating nature of the evidence was not “immediately apparent.” It was only with additional investigation that the potentially incriminating nature of the evidence was revealed. App. 42, ll. 6-19; App. 43, l. 6 – 44, l. 21; see also App. 209, ll. 4 – 210, l. 15. Thus, the plain view doctrine cannot save the unlawful search and seizure in this case.

Abandonment likewise provides no avenue for the admission of the camera and credit cards. “Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment.” State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)).

In determining whether the defendant abandoned the evidence for Fourth Amendment purposes, “[t]he distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue. In the law of property, the question ... is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

Where the presence of the police is lawful and the discard occurs *in a public place* where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure.”

Id. (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 370-71 (1975)) (emphasis added).

The cases relied upon in the Order of Dismissal both involved the discarding of drugs in a public place. App. 421 – 422. In Dupree, this Court found that “Dupree could not have had a continued reasonable expectation of privacy in crack cocaine discarded on the floor of a business open to the public.” 319 S.C. at 460, 462 S.E.2d at 283 (1995). In Fernandez v. State, 306 S.C. 264, 266, 411 S.E.2d 426, 427 (1991), the defendant was standing in a group of six or eight people on Piedmont Street in Spartanburg, South Carolina. When police officers approached the group, Fernandez broke away and ran carrying two packages, which he eventually dropped. 306 S.C. at 266, 411 S.E.2d at 427. Thus, the evidence in Fernandez was abandoned in a public place. Here, Henson had pulled into his own driveway before the officers pulled in behind him and initiated their blue lights. The officers knew that it was Henson’s residence because they had determined his address during the check they ran on him earlier in the afternoon. App. 33, ll. 16-23; App. 38, ll. 2-3; App. 46, ll. 2-10. Henson’s placement of items under a vehicle on his own property did not abandon his expectation of privacy.

Thus, taking the facts at the suppression hearing in the light most favorable to the State, there was no evidence to support the trial court's ruling that the warrantless search under the car on Henson's property was lawful under the plain view doctrine or necessitated to protect officer safety. The PCR court's finding that abandonment provided an alternative basis for affirmance of the trial court's suppression ruling is likewise unsupported by the law and evidence. Consequently, the PCR court erred in finding that Henson failed to prove prejudice. This court should reverse the PCR court's ruling and find that PCR counsel was ineffective in failing to preserve the suppression motion for appellate review and that Henson is entitled to a new trial.

## II.

**The PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court aptly found that trial counsel was deficient in unnecessarily calling deputy Wilson as a witness for the defense, losing last closing argument, but erred in its finding that there was no prejudice to Petitioner.**

### *Relevant Facts*

Trial counsel's decision to call Jason Wilson as a witness in the defense's case had the consequence of losing the defense's right to give the last closing argument. See State v. Beaty, Op. No. 2015-000718, 2016 WL 7474479 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13), *reh'g granted* (Mar. 24, 2017) (discussing development of rules and practice regarding order of closing arguments); App. 227 – 233. It is apparent from the trial transcript that trial counsel was unaware of this repercussion, as he told the trial judge he “thought [he] went last again.” App. 235, l. 22 – 236, l. 11.

Deputy Jason Wilson testified in the prosecution's case on the first day of trial and was subject to cross-examination. See App. 132 – 150. When recalled in the defense's case, trial

counsel elicited on the direct-examination: more information regarding the tone and language of Henson's refusal to provide his last name during their initial encounter at the convenience store; confronted Wilson with the fact that Henson's coveralls were black, not brown as Wilson testified to the day prior; confirmed that Wilson was certain he saw Henson toss a camera, not just an object; and confirmed that Henson was cordial to the officers during his arrest. App. 227, l. 5 – 231, l. 23. On re-direct examination, Wilson repeated his testimony from the day prior that the only object he saw thrown was the camera — no credit cards. App. 233, ll. 14-18; see App. 136, ll. 2-14; App. 148, ll. 1-12.

At the PCR hearing, trial counsel averred that his decision to call Wilson in the defense's case stemmed from his surprise at learning that Ofori's wallet was returned to her by a chiropractor who lived near her. He "guessed" that his purpose in calling Wilson was to find out what additional investigation, if any, was conducted following the wallet's return. Agreeing that Wilson testified immediately after Ofori, trial counsel claimed that he has been "caught off-guard" by her testimony and did not think of those questions during his original cross-examination of Wilson. App. 345, l. 9 – 347, l. 17; App. 351, l. 4 – 353, l. 25; App. 359, l. 5 – 360, l. 13; App. 361, l. 8 – 362, l. 7. Trial counsel attempted to connect his questioning of Wilson to what he averred was a third party guilt defense. App. 345, l. 7-16; App. 351, ll. 22-25. Notably, the trial court granted the State's motion to exclude evidence of third party guilt. App. 26 – 27; App. 225 – 226. Moreover, the trial record reveals that trial counsel did not ask Wilson anything about the wallet when he was recalled in the defense's case. App. 227 – 233. The reality is that trial counsel simply did not recall what thought process, if any, he employed. App. 362, ll. 5-7.

In the Order of Dismissal, the PCR court found that trial counsel could have asked all of the questions posed to deputy Wilson during his original cross-examination. App. 422.

However, the court found that “the loss of last argument did not so prejudice Applicant as to warrant relief.” App. 422. The court reasoned that a review of both closing arguments revealed “nothing that Assistant Solicitor Poulos argued that would have required Counsel to rebut,” such that trial counsel’s closing argument “would likely have remained the same.” App. 423. Thus, the court concluded that Henson “has not demonstrated that there is a reasonable probability that, but for the loss of last argument, the outcome would have been different.” App. 423.

### *Discussion*

Under the rules in place at the time of Henson’s trial, by presenting evidence the defense lost the right to give the last closing argument. See State v. Battle, 304 S.C. 191, 165 403 S.E.2d 331, 333 (Ct. App. 1991); State v. Mouzon, 321 S.C. 27, 31, 467 S.E.2d 122, 125 (Ct. App. 1995), *aff’d*, 326 S.C. 199, 485 S.E.2d 918 (1997). In a criminal trial, which is in the end basically a fact finding process, no aspect of advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment. Mouzon, 321 S.C. at 31, 467 S.E.2d at 124-25. In Herring v. New York, the United States Supreme Court elaborated on the role of closing argument as a basic or fundamental right of the accused to make his defense:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries’ positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

422 U.S. 853, 862 (1975). The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error. State v. Rodgers, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977); Mouzon, 321 S.C. at 31, 467 S.E.2d at 125.

The PCR court properly found that trial counsel's recall of deputy Wilson caused him to unnecessarily lose the important right to make the last closing argument. However, the PCR court erred in finding that Henson did not prove prejudice from the loss of the right to last closing. See App. 422. It is evident from the record that trial counsel did not realize that he had lost the right to deliver the last argument, which showed in his scattered delivery of his argument. App. 235, l. 22 – 257, l. 9. Additionally, trial counsel improperly defined reasonable doubt as requiring that the jurors “have some strong belief that he [Henson] committed this crime.” App. 237, ll. 16-21.

With respect to the arguments made by the prosecutor to which the defense was unable to respond, there were several. The prosecutor asserted: “Defense in this case wants you to believe that it wasn't him, it was somebody else. I like to call that the mystery man defense. How did the Defendant get those [items] in his possession? He had them.” App. 260, ll. 15-18. The response to this argument would have been that it is the State's burden to prove guilt and not the defendant's burden to prove his innocence. Moreover, when coupled with the prosecutor's questions regarding Henson's failure to give a verbal or written statement, the prosecutor's argument was an improper comment upon the defendant's silence after receiving Miranda<sup>3</sup> warnings in violation of the Due Process Clause of the Fourteenth Amendment. See Doyle v. Ohio, 426 U.S. 610 (1976); App. 136, ll. 22-24; App. 153, l. 8 – 154, l. 13; App. 211, ll. 5-10.

The prosecutor further argued that the lack of fingerprints may have been because Henson wore gloves but threw them out. App. 262, ll. 15-20. Similarly, the prosecutor admitted to the jury that it was asking the jury to find that Henson possessed a weapon merely based upon the fact that he was in possession of a weapon when he was arrested. The State recited a number

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

of possibilities of what Henson could have done with the knife during the burglary, but ultimately said “[w]e don’t know that.” App. 263, ll. 7-22. The response from the defense would have been to remind the jury that the State was required to present proof, not ask the jury to speculate and point out the prosecution’s admissions of what was unknown.

Lastly, in the prosecutor’s final remarks to the jury, she told them:

We believe that we’ve met our burden in proving this case to you beyond a reasonable doubt that the Defendant is guilty of burglary first degree and grand larceny, but it doesn’t matter what I say. It doesn’t matter what Mr. Singleton says. **All that matters is what’s right and that you leave this courthouse today and in the end you have done what you feel is right.** I don’t make up these facts. I just interpret them, present them to you in the best way that I know how. **And as long as you feel like justice has been done, you have done your job.**

Thank you all for your patience during the last couple of days. I want thank you all for your service as jurors. And remember when you go back to the deliberation room, what I told y’all at the very beginning of this trial, use your common sense and **let justice be done.** Thank you.

App. 264, ll. 5-19. The language used by the prosecutor is similar to the disfavored “search for the truth” language now prohibited by State v. Beaty, Op. No. 2015-000718, 2016 WL 7474479 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13), *reh’g granted* (Mar. 24, 2017). Notably, the trial judge in Henson’s case also used the “search for the truth” language in his opening remarks to the jury. App. 79, l. 19 – 80, l. 22. As this Court explained in Beaty, “[t]hese phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury’s perception of justice.” 2016 WL 7474479 at \*2. They divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant’s guilt beyond a reasonable doubt. Id. at \*2.

Based on the foregoing, the PCR court erred in ruling that Henson failed to prove prejudice. This court should reverse the PCR court's ruling and find that PCR counsel was ineffective in calling an unnecessary witness, thereby losing the right to deliver the last closing argument, and that Henson is entitled to a new trial.

### III.

**The PCR court erred in ruling that trial counsel rendered effective assistance of counsel, as required under the Sixth and Fourteenth Amendments, where the PCR court erred in finding that trial counsel was not deficient in stipulating to Petitioner's prior burglary convictions, at least one of which was uncounseled and resulted in imprisonment, and erred in its finding that there was no prejudice to Petitioner.**

#### *Relevant Facts*

On September 19, 2011, three weeks prior to Henson's trial, the prosecution amended the first degree burglary indictment against Henson to add all of the possible variations under the statute. App. 6, l. 3 – 8, l. 14; App. 429. The only two factual scenarios they pursued at trial were that Henson was armed with a deadly weapon and that Henson had a record of two or more prior convictions for burglary. App. 263, l. 7 – 264, l. 4. Henson was provided with a stipulation to sign regarding his prior convictions, which he reluctantly signed when advised by trial counsel that he did not have a choice.<sup>4</sup> App. 319, l. 4 – 321, l. 15. The stipulation and accompanying documents were admitted at trial as Court's Exhibit 1. App. 28 – 29; App. 216 – 218; App. 381.

At the PCR hearing, Henson said that had he known there was a basis to object to the use of his uncounseled prior convictions, he would not have signed the stipulation. App. 331, ll. 1-

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<sup>4</sup> Prior to the amendment, Henson refused the prosecution's original plea offer to burglary second violent and grand larceny, which was communicated to him via prior counsel Matthew Shealy on March 16, 2011. App. 367, l. 6 – 370, l. 11; App. 406; App. 407. The prosecution refused to make any additional plea offers in the case, despite retained counsel Singleton's requests. App. 374, l. 16 – 375, l. 5.

11. Henson's prior convictions were for a 1993 second degree burglary and a 2001 third degree burglary. Henson testified that both pleas were uncounseled guilty pleas where he was given suspended sentences and probation. However, he violated his probation on the 1993 conviction and ordered to serve two years imprisonment, which resulted in just under one year of actual incarceration. App. 321, l. 16 – 324, l. 4; App. 338, ll. 2-13; App. 388 – 390. The sentencing sheet on the 2001 sentencing sheet shows an empty signature block for "Attorney for Defendant." App. 384. The 1993 sentencing sheet was an older version that did not contain a line for defense counsel's signature. App. 387; see App. 365, ll. 4-19.

Trial counsel could not recall whether Henson told him that his prior convictions were uncounseled, what advice he gave Henson regarding the stipulation, or what actions he did or did not take regarding admission of the prior convictions at trial. App. 357, l. 4 – 358, l. 21; App. 360, ll. 14-20. The prosecutor, assistant solicitor Timi Poulos, was unaware of the uncounseled nature of Henson's prior convictions. She would typically have called the Clerk to testify regarding the defendant's prior convictions, but Henson and trial counsel both signed the stipulation. App. 375, ll. 6-21. She noted that Henson's prior convictions were only one means of establishing first degree burglary. Poulos "felt" they could have prevailed on proving that Henson was in possession of a weapon. App. 375, l. 22 – 377, l. 4. She could not recall if they admitted a photograph of the knife or the knife itself. App. 376, l. 23 – 377, l. 1. The record reveals that neither were used, as the only evidence of the knife was Brent Brown's testimony that he removed a pocket knife from Henson's pocket during his pat down. App. 166, l. 2 – 167, l. 12; App. 170, l. 23 – 171, l. 8. Interestingly, none of the other deputies present during the arrest provided any testimony regarding a knife.

The following portion of Poulos' closing argument provides further enlightenment regarding the strength of the evidence:

Now, burglary in the first degree, ladies and gentlemen, in South Carolina, Judge Couch is going to instruct you [in] a little more detail about this, but burglary in the first degree is when a person enters the dwelling without the consent and with the intent to commit a crime. One of the elements of that is while armed with a deadly weapon. We believe that we have proven that he was armed with a deadly weapon. He had the knife in his possession when he was stopped and arrested. **Now, if you believe for some reason maybe he left the knife out on the ground, he left it on his moped, he didn't have it at all, that's totally fine.** Maybe he was in the house and he had the knife pulled out. **We don't know that.** Maybe he had it in his hand. Maybe he still had in his pocket. **We don't know that.** But there is evidence that he was in possession of a weapon at the time.

**There's also evidence of two or prior convictions for burglary.** And we're not offering the burglary convictions to show that he – the nature of the offenses that he committed before. But an element of what we have to prove for burglary, one of the elements, is that he has two prior convictions. **And he signed a document and agreed that he had those two prior burglary convictions on his record.**

App. 263, l. 7 – 264, l. 4 (emphasis added).

The PCR court ruled the trial counsel was no deficient in stipulating to Henson's prior convictions. App. 423. The court found "assuming *arguendo* that the prior pleas truly were uncounseled . . . the prior convictions were not used to *enhance* Applicant's crime." App. 423. "Instead, they constituted an element of the burglary first charge." App. 423. Further, absent a stipulation, the solicitor would have called a representative from the Clerk's office to testify regarding the existence of the prior convictions. App. 423. The court also noted "that a significant amount of evidence was presented that Applicant was armed with a knife at the time of the burglary." App. 423. Thus, the court ruled that to the extent there was a valid objection to the use of Henson's prior convictions, Henson "suffered no prejudice because evidence that he was armed with a deadly weapon would have also supported the burglary first indictment and conviction." App. 423 – 424.

### *Discussion*

Trial counsel made a serious error in stipulating to Henson's prior convictions and failing to raise an objection that they could not be used to enhance his offense, if convicted, to a first degree burglary. The PCR court erred in ruling otherwise and in finding that Henson was not prejudiced due to the alternative theory that he was armed with a knife. See App. 423 – 424. “The use of an uncounseled conviction resulting in a sentence of imprisonment to enhance the punishment in a subsequent conviction violates the Sixth and Fourteenth Amendments to the United States Constitution. State v. Sosbee, 371 S.C. 104, 110–11, 637 S.E.2d 571, 574 (Ct. App. 2006) (citing Nichols v. United States, 511 U.S. 738, 746-47 (1994)). However, an uncounseled conviction that does not result in actual imprisonment may be used to enhance a subsequent conviction. Id.

This Court's opinion in Robinson v. State, 380 S.C. 201, 669 S.E.2d 588 (2008), is significant for two reasons. First, this Court found that although Robinson “was originally sentenced to public service only, he subsequently served time in jail as a result of the conviction.” 380 S.C. at 205, 669 S.E.2d at 590. Because the pleas was also uncounseled, it could not be used for enhancement purposes and Robinson's counsel was deficient in failing to challenge the prior conviction. Id. Similarly here, Henson was initially sentenced to probation but it was subsequently revoked and he served jail time on the 1993 burglary conviction. App. 338, ll. 2-13; App. 388 – 390.

Second, the Robinson Court applied the enhancement prohibition to a trafficking offense, where Robinson's crime would have only been a first offense rather than a second offense absent use of the prior conviction. 380 S.C. at 203-04, 669 S.E.2d at 589. Section 44-53-375(C) of the South Carolina Code prohibits the felony of “trafficking in methamphetamine or cocaine base.”

The statute specifies that upon conviction a defendant must be punished “as follows,” thereafter providing progressive sentencing ranges depending upon the quantity and involved and whether the crime is a “first offense,” “second offense,” or “third or subsequent offense.” S.C. CODE ANN. § 44-53-375(C). Here, the PCR court found that because Henson’s prior convictions were elements of first degree burglary, they were not used to enhance Henson’s sentence. App. 423; see State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (approving admission of prior convictions to prove element of first degree burglary that defendant has two or more prior burglary and/or housebreaking convictions, with limitation on evidence admitted and instruction to jury).

While the burglary and controlled substances statutes are structured differently, the reality is that they function quite similarly with respect to the use of prior offenses to increase a defendant’s potential sentence. Without a prior drug conviction, a trafficking in cocaine base of ten to twenty-eight grams second offense would be a trafficking first offense subject to a lower sentencing range of three to ten years rather than five to thirty years. S.C. Code Ann. § 44-53-375(C)(1)(a)-(b). Without the two prior burglary or housebreaking convictions, a first degree burglary would be a second degree burglary, subject to a lower sentencing range not more than ten years rather than fifteen years to life. S.C. Code Ann. §§ 16-11-311, -312. Thus, the result of the use of the prior burglary convictions is to enhance a defendant’s sentence, which would have otherwise been a second degree burglary.

The solicitor’s contention that she would have called a member of the Clerk’s office to testify regarding the prior convictions absent the stipulation has no effect on the analysis of this case. Trial counsel’s refusal to stipulate to the prior convictions would have necessarily been premised upon his recognition that their use was an improper enhancement based upon an


uncounseled conviction that resulted in imprisonment. Accordingly, he would have objected to the admission of the prior convictions regardless of the means by which the prosecution attempted to admit them.

Additionally, the PCR court erred in finding that the presentation of that alternative theory of liability precluded a finding of prejudice. The prosecutor's closing argument reveals the weakness of the evidence that Henson, if found to be burglar, was armed with a deadly weapon. App. 263, l. 7 – 264, l. 4.

This court should reverse the PCR court's ruling and find that PCR counsel was ineffective in stipulating to Henson's prior convictions, making no objection their use to enhance his punishment, and that Henson is entitled to a new trial.

### CONCLUSION

Based on the foregoing, Petitioner Alfred Guy Henson respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on the issues raised herein. In the event this Court dispenses with further briefing, Petitioner requests that his convictions be reversed and he be granted a new trial.

  
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Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of January, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

JAN 31 2018

S.C. SUPREME COURT

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Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

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ALFRED GUY HENSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_

CERTIFICATE OF SERVICE

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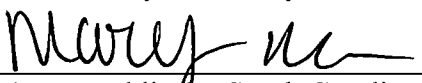
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and have been served on Alfred Guy Henson, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of January, 2018.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of January, 2018.

 (L.S)  
Notary Public for South Carolina

My Commission Expires: May 12, 2027