

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals

Appeal from Richland County
Henry F. Floyd, Circuit Court Judge
J. Ernest Kinard, Jr., Post-Conviction Relief Judge
Appellate Case No. 2016-001079

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S.C. SUPREME COURT

STEPHEN SMALLS,

Petitioner,

vs.

THE STATE,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

On February 7, 2018, this Court issued a published opinion reversing Petitioner Stephen Smalls's denial of post-conviction relief and remanding the case for a new trial. Smalls v. State, Op. No. 27764 (S.C. Supreme Court, filed February 7, 2018). In reversing, this Court held the State's overwhelming evidence argument was flawed in its analysis, while taking the opportunity to further outline a standard to be used in consideration of future overwhelming evidence analyses. Pursuant to Rule 221(a), SCACR Respondent submits this Court misapprehended and misconstrued its own canon of case law regarding the concept of overwhelming evidence in consideration of post-conviction relief matters and, therefore, should grant rehearing and reconsider its decision for the following reasons.

Erroneous Focus on Harmless Error in Direct Appeal Cases

First and foremost, this Court may have overlooked that its reliance upon harmless error cases decided on direct appeal, while helpful, are not controlling in determining whether counsel's errors entitled Petitioner to a new trial, because a convicted person seeking relief based on ineffective assistance of counsel bears the burden of proving that he was prejudiced by counsel's performance. Strickland v. Washington, 466 U.S. 668, 691 (1984) (“[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, ... and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. at 693 (citation omitted).

To prevail, Petitioner has the burden of proving “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. It is insufficient to prove that “the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Rather, “[c]ounsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, supra). Based on the record before this Court, when the burden of proof is appropriately placed on Petitioner, he fails to meet that burden as the other points in this rehearing petition make unerringly clear.

Improper Reliance on *Simmons* and *Smith*

In its consideration of overwhelming evidence of guilt, this Court relies on two cases that discuss the role of overwhelming evidence after improper remarks were made by solicitors during closing arguments. *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007); *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998). In particular, this Court relies on *Simmons* for the proposition that, even if evidence is overwhelming, prejudice can be proven. While that may have been true in *Simmons*, its application is improper here. At the heart of the issue in *Simmons* was whether comments made by the solicitor affected the jury's decision to recommend mercy as to sentencing on the defendant's burglary conviction. It is error for this Court to rely on the holding in *Simmons* when the main consideration in that case was one of mitigating factors regarding a recommendation of mercy as to sentencing, not guilt or innocence of the offense. For that sentencing determination to be made, it does not matter how guilty a defendant is; rather, it is a balancing of aggravating versus mitigating factors and, simply, overwhelming evidence has no place in that consideration.

As this Court held in *Simmons*, “[t]he solicitor's improper comments prevented petitioner from having the jury fairly consider the possible **sentencing** alternatives.” *Id.*, 331 S.C. at 341, 503 S.E.2d at 168 (emphasis added). That is precisely why overwhelming evidence was not found to prevent a prejudice finding, because the prejudice lay only in sentencing. It did not matter if the defendant's guilt was proven by a landslide or only barely carried reasonable doubt, because guilt had been established. Prejudice lay in the determination of the defendant's sentence, rather than the outcome of his trial as a whole.

This is contrary to the case at bar, in which the existence of overwhelming evidence of guilt factored into the jury's determination of a verdict of guilty or not guilty. To use *Smith*,

which was decided in light of Simmons, as a contrast to Simmons is also inappropriate. Simply because both cases deal with objectionable statements in closing argument does not equate them in terms of potential opportunity for prejudice. These two cases are quite different, and deal with two different portions of trial. Overall, because the case at bar is being evaluated for the effect overwhelming evidence of guilt had on the rendering of a verdict, rather than sentencing, any reliance on Simmons for guidance is inappropriate.

Probative Value of Evidence of Flight

It is undisputed that evidence of flight is probative evidence of guilt. This Court cites to State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) and State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) for this proposition, though in a way that minimizes the weight it wishes to give that evidence. This is simply not the appropriate amount of consideration and probative value when presented with evidence of flight as egregious as exists in this case. Here, Petitioner fled from law enforcement after being specifically informed that he was wanted for questioning related to a robbery. In making the decision to run, he abandoned a child in the middle of the road, presumably in order to move more quickly.¹ Additionally, he was found hours later hiding in bushes mere blocks from where he began his flight. App. p.291;23 – 292;5; p.315;9 – 11. These factors take evidence of flight from a suspicion or “some evidence” to affirmative actions

¹ Investigator Gray being questioned by defense counsel:

Q: Okay. Actually, wasn't the child sitting down in the yard?

A: No, ma'am.

Q: Are you saying it was in the middle of the road, then?

A: It wasn't, no. He was standing, on the side of the road, and when he started running, he ran down the road and put the child down in the road, just on the side of the pavement. But it was in the road.

Q: But on the side --

A: It wasn't off the road. It was in the road.

Q: Okay. But on the side, not in the road?

A: I was in the right lane, and he put the child in the left lane.

App. p.296

made by a man who was confronted with the fact that he had been found out. The lengths to which Petitioner felt the need to go in order to engage in flight and attempt to evade police are starkly different than the cases cited by this Court.

These actions deserve the highest probative value, as they are truly evidence of a guilty conscience. As the Eleventh Circuit Court of Appeals has explained, “[p]eople, including jurors, realize that while ‘[t]he wicked flee when no man pursueth,’ Proverbs 28:1(KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative.” United States v. Kennard, 472 F.3d 851, 855 (11th Cir. 2006). In Freely, this Court adopted that logic, with its own addendum: “The flight of one charged with crime has always been held to be some evidence tending to prove guilt. Solomon wrote as a proverb the ‘wicked flee when no man pursueth;’ and Shakespeare made guilty Hamlet to soliloquize that ‘conscience does make cowards of us all.’” State v. Freely, 105 S.C. 243, 250, 89 S.E. 643, 645 (1916). To drop a child in the middle of a road after approached by law enforcement, only to flee and hide in the bushes for hours afterward, is certainly the type of flight that deserves the highest degree of probative value. In fact, as the trial court stated, “That's the best kind of flight there is. He dropped a kid.” App. 37; 7 – 8 (pre-trial hearing). The many aggravating factors in Petitioner’s flight lead it to merit consideration above and beyond a suspicious person fleeing a marked police car, for example. Petitioner showed obvious intent to flee and stay hidden, thus warranting a significant degree of consideration and probative value.

Reviewing Evidence as Individual Elements

In its analysis of whether the evidence presented at trial constituted overwhelming evidence such that it precluded a finding of prejudice, this Court takes great care to parse out individual pieces of evidence and analyze them individually. This is directly contrary to the case

law governing post-conviction relief review. See Strickland v. Washington, 466 U.S. 668, 695 (1984) (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . . In making this determination, a court hearing an ineffectiveness claim must consider **the totality of the evidence** before the judge or jury.” (emphasis added)); cf. United States v. Arvizu, 534 U.S. 266, 274 (2002) (disapproving an appellate court’s “divide-and-conquer analysis” that evaluated and rejected various factors in isolation rather than reviewing the “totality of the circumstances”). This consideration was stated in this Court’s opinion, including a citation to Jones v. State, 332, S.C. 329, 333, 504 S.E.2d 822, 824 (1998), which requires analysis of the totality of the evidence, but this Court has not followed its own guideline. Parsing out different elements of evidence and evaluating them individually is in direct contravention of this Court’s own case law, as well as that of the Supreme Court of the United States.

Overwhelming Evidence is Highly Individualized

This Court’s opinion espoused the idea that a conclusive piece of evidence, such as a confession or DNA evidence, may be enough to find overwhelming evidence of guilt. However, this Court has specifically found to the contrary, noting that DNA is not necessary to prove guilt, and “the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury’s ability to make credibility determinations and decide whether a defendant is guilty.... DNA evidence can be disputed.” State v. Jenkins, 412 S.C. 643, 653, 773 S.E.2d 906, 911 (2015). Certainly, sometimes DNA is dispositive to a finding of guilt in a case, but sometimes it is not. This Court’s assertion that such a single piece of evidence is conclusive of guilt, and to imply that it is necessary for evidence to be overwhelming is not aligned with its prior holdings. See Jenkins, Id.

Findings of overwhelming evidence of guilt, as well as prejudice that may or may not be bound up in that determination, are highly individualized considerations. These are not one-size-fits-all determinations. Therefore, for this Court to find that DNA is a conclusive piece of evidence is in contravention of prior case law regarding the appropriate weight and value of DNA evidence.

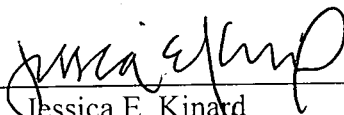
Conclusion

These five major points must be reconsidered in order to carefully delineate if, and how, this Court wishes to abrogate prior case law on these topics. This Court's opinion improperly relies on many cases for assertions that do not actually support its ruling, as the holdings do not apply to evidence of this nature. Accordingly, for the foregoing reasons combined with the all the reasons raised in the Final Brief of Respondent and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision in light of its application of standing case law regarding overwhelming evidence, vacate its previous opinion, and ultimately deny Petitioner's application for post-conviction relief.

Respectfully submitted,

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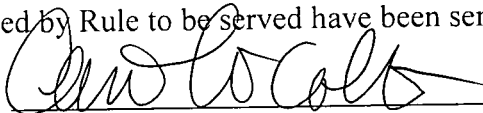
Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
Office of Appellate Defense
Post Office Box 11433
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I further certify that all parties required by Rule to be served have been served.
This 22nd day of February, 2018.



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