

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO KERSHAW COUNTY  
Court of Common Pleas

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S.C. SUPREME COURT

The Honorable Jocelyn Newman, Post-Conviction Relief Judge

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Appellate Case No. 2017-001351

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Gregory Vincent Smith, .....Respondent,

v.

State of South Carolina, ..... Petitioner.

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**PETITION FOR WRIT OF CERTIORARI**

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668, 695 (1984).

<sup>2</sup> Jackson v. Denno, 378 U.S. 368 (1964).

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## ISSUES PRESENTED

- I. Overwhelming evidence of guilt exists to the extent that the Strickland standard of “a reasonable probability...the factfinder would have had a reasonable doubt” cannot be met.
- II. There is no probative evidence to support the PCR court’s finding that trial counsel was ineffective for allegedly failing to adequately challenge the admissibility of Smith’s statement provided to law enforcement, thus failing to preserve the argument for appeal.
- III. There is no probative evidence to support the PCR court’s finding that trial counsel was ineffective for not objecting to the testimony and admissibility of an expert who testified during the Jackson v. Denno<sup>3</sup> hearing regarding the effect of methamphetamine fumes on a human, and Smith’s potential impairment during his interrogation and confession.
- IV. The PCR court erred in finding that trial counsel failed to advise Smith that he was able to testify at the Jackson v. Denno hearing and maintain his right to remain silent, thus prejudicing him.
- V. There is no probative evidence to support the PCR court’s finding that trial counsel was ineffective for allegedly failing to object when the Assistant Solicitor made comments during his opening statement that were not admitted into evidence during trial.
- VI. There is no probative evidence to support the PCR court’s finding that trial counsel was ineffective for failing to object to allegedly prejudicial, irrelevant, and highly inflammatory statements from witness Samantha Steeprook.
- VII. The PCR court erred in finding that trial counsel was ineffective for failing to object to leading questions by the assistant solicitor, thus prejudicing him.
- VIII. The PCR court erred in finding that trial counsel was ineffective because he prejudiced Smith when he opened the door to questions regarding an alleged conspiracy between Steeprook and Smith to bring contraband into the jail.
- IX. There is no probative evidence to support the PCR court’s finding that trial counsel was ineffective and prejudiced Smith for failing to object to allegedly impermissible victim impact testimony.
- X. There is no probative evidence to support the PCR court’s finding that trial counsel failed to provide effective assistance of counsel when he did not adequately cross-examine Dr. Janice Ross and Steeprook in an attempt to discredit Steeprook’s assertion that she saw the victim move after she was shot.
- XI. The PCR court erred in finding that trial counsel prejudiced Smith when he failed to object to the admissibility of handwritten notes.
- XII. There is no probative evidence to support the PCR court’s finding that trial counsel provided ineffective assistance of counsel when he failed to object to incorrect factual references in trial testimony.

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<sup>3</sup> 378 U.S. 368 (1964).

- XIII. The PCR court erred in finding that Smith was prejudiced by trial counsel's alleged ineffectiveness for allegedly failing to adequately cross-examine Investigator Phillips regarding the searching of and seizure of documents from Smith's cell while awaiting trial.
- XIV. The PCR court erred in finding that trial counsel provided ineffective assistance because he allegedly was not prepared to effectively cross-examine the jailhouse snitch Morris Nixon, including correcting the prosecutor's misleading statements regarding his charges.
- XV. Cumulative error is not recognized under South Carolina post-conviction relief laws, and it should not be adopted.

### STATEMENT OF THE CASE

Respondent Gregory Vincent Smith ("Smith") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Smith was indicted at the January 2012 term of the Kershaw County Grand Jury for murder (2012-GS-28-0076), manufacturing marijuana (2012-GS-28-0075), and manufacturing methamphetamine (2012-GS-28-0074). Smith was represented by Cornelius Riley, Esquire, at trial. This case was called to trial on October 22, 2012. On the first day of trial, the Honorable G. Thomas Cooper, Jr. granted the defense's motion to sever the manufacturing marijuana charge. That offense was later *nolle prossed* by the State on May 21, 2013. On October 25, 2012, a jury convicted Smith on the remaining murder and manufacturing methamphetamine charges. Judge Cooper sentenced Smith to thirty years in prison for murder and a consecutive five years for manufacturing methamphetamine.

A notice of appeal was filed, and perfected by Benjamin Tripp, Esquire, of the South Carolina Commission on Indigent Defense – Office of Appellate Defense pursuant to Anders<sup>4</sup>. Smith also filed a *pro se* brief and a supplemental record on appeal. The South Carolina Court of Appeals affirmed Smith's convictions and sentences by unpublished opinion. State v. Gregory Smith, 2014-UP-459 (S.C. Ct. App. filed December 17, 2014). The remittitur was issued on

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<sup>4</sup> Anders v. California, 386 U.S. 738 (1967).

January 5, 2015.

Smith filed an application for post-conviction relief (“PCR”) on January 2, 2015, and amended it August 22, 2016. Petitioner (“the State”) made its return on March 3, 2016. An evidentiary hearing was held on September 1, 2016, at the Richland County Courthouse. Applicant was present and represented by Kristy Goldberg, Esquire. Assistant Attorney General Jessica E. Kinard represented the State.

Witnesses who testified at the hearing included Smith; Ronald Moak, Esquire; Brett Perry, Esquire; Dr. Janice Ross; and Smith’s trial counsel, Cornelius Riley, Esquire.<sup>5</sup> The Court had before it Smith’s record on appeal, including the original trial transcript and an attached exhibit consisting of a SLED investigation report; the Kershaw County Clerk of Court records; the South Carolina Department of Corrections records; the PCR applications; the return; and the following Applicant exhibits: (1) statements of Samantha Steeprock; (2) statements of Morris Nixon; (3) DVD of Gregory Smith’s statement to law enforcement; and (4) photographs of gun and holster.

#### **STATEMENT OF THE FACTS**

On May 28, 2011, Smith was living in a trailer owned by David and Deborah Tyler, who were also known as Nicole and Goat Man, respectively. App. p. 164; 184. He had been living there essentially rent-free, because he was growing marijuana and producing methamphetamine, then sharing it with the Tylers. App. p. 165; 323. Tensions had become strained due to Smith’s difficult behavior, and they were particularly strained that weekend because the methamphetamine Smith was cooking was not turning out well. *Id.*, p.186; 188. This meant that

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<sup>5</sup> The transcript of the PCR hearing is incomplete due to problems with the recording. The reporter at the hearing, Crystal Holmes, left the office of Court Administration, and the transcription was done by Harriet P. Bennett. It is missing testimony of both Assistant Solicitor Perry and Dr. Janice Ross.

the group, who were all addicted to methamphetamine, had gone without it and tempers were running short. App. p. 166; 189. In fact, Ms. Tyler had turned off the power to Smith's trailer out of frustration. App. p. 188.

Around noon on May 28, 2011, Samantha Steeprock ("Steeprock")<sup>6</sup>, a friend of them all, arrived to pick up Smith so he could help with some add jobs at her sister's ice cream parlor. App. p. 166; 187. Deborah Tyler ("victim") followed her into Smith's trailer and started arguing, telling them that Smith had to move out. App. p. 167; 189. An argument ensued as the group was in the trailer's living room, and eventually Smith pondent grabbed a .357 revolver and shot Ms. Tyler in the head. Id., p.188-92. According to the pathologist, this severed her brainstem and killed her instantly. App. p.349. Steeprock witnessed the entire incident, though she did not report that until her third statement to law enforcement. App. p. 167. She ran toward Cedric Blackmon, a friend who had driven her to the scene, left in his car, and called 911, to whom she reported that she had heard an argument and a gunshot or a car backfire. App. p, 168; 189-92. Mr. Blackmon reiterated this testimony. App. p.253.

Steeprock returned to the scene with her brother-in-law, Horace Lee, because she felt that she had to check to see if Ms. Tyler were still alive or potentially bleeding out. App. p.197. Mr. Tyler ran with her to the trailer where he found a deceased Mrs. Tyler, and told Steeprock not to call the police due to the marijuana plants and methamphetamine lab. App. p.169; 198-99. This was reiterated by Horace Lee. App. p.269. She informed Mr. Tyler that it was too late, as she had asked her niece to call 911 again. App. p.200. He was so distraught that, by the time law enforcement arrived, he had to be taken into custody for disorderly conduct. App. p.169. This was reiterated by Deputy Houser, one of the responding officers. App. p.279 – 83. On the way to

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<sup>6</sup> The transcript of the evidentiary hearing refers to her as Ms. Seabrook. This is a scrivener's error.

jail, he suffered a heart attack and perished. App. p.174; 283. As law enforcement arrived, Steeprock, who had seen Smith walking down Koon Road, discovered that he was at her house, and asked police to go get him. App. p.201. He was recovered and placed under arrest. App. p. 170. He was checked out at the hospital due to exposure to methamphetamine fumes, and received an all-clear. This was out of an abundance of caution, as the responding officers felt unwell after similar exposure. App. p.171.

While in detention at Kershaw County Sheriff's Department, Smith decided to confess, and requested a lawyer. He was assisted by William Tetterton, Esquire.<sup>7</sup> App. p.119; 423. They spent time together, including reviewing his Miranda rights and, eventually, Smith gave a full, videotaped confession. See disc attached to Appendix; App. p.119 – 20; 444 – 47. . The confession included that he did not intend to kill her, but to shoot near her head. App. p. 172. He also stated that he had hidden the gun, to which he then took law enforcement directly. App. p.173;422 -29; 436. It contained only one spent shell, which SLED found was a ballistics match to the bullet lodged in the victim. App. p.173-74; 452-53.

### **STANDARD OF REVIEW**

In a post-conviction relief appeal, great deference is given to the lower court's findings of fact, but deference is not given to conclusions of law. The proper standard of review in a post-conviction relief action is whether “any evidence of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations

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<sup>7</sup> The PCR evidentiary hearing transcript incorrectly refers to Mr. Tetterton as both Mr. Peterton and Mr. Peterson. These are scrivener’s errors.

in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 688. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

## ARGUMENT

- I. Overwhelming evidence of guilt exists to the extent that the Strickland standard of “a reasonable probability...the factfinder would have had a reasonable doubt” cannot be met.

An argument regarding overwhelming evidence of guilt should not be undertaken lightly, especially in light of this Court’s recent holding in Smalls v. State, *supra*. In that opinion, this Court held that the proper consideration of the strength of the State’s case is that “it is one significant factor the court must consider – along with the specific impact of counsel’s error and other relevant considerations – in determining whether the applicant has met his burden of providing prejudice.” Smalls, *supra*. Further, only “in rare cases” would overwhelming evidence be a categorical bar to preclude a finding of prejudice is not error, and would include a showing of “something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* This decision is in keeping with the line of case law that has preceded it<sup>8</sup>, yet puts a fine point on the high bar that must be met to have an effective case regarding overwhelming evidence of guilt.

This case includes such evidence. As described above in the statement of facts, there were several major pieces of evidence in this trial: an eyewitness to the shooting (See testimony of Samantha Steeprock, App. p.182-250); a confession produced after repeated Miranda<sup>9</sup> warnings, with assistance of counsel, and captured on video (App. p.118-121; 444-46; 854; video exhibit in appendix); and, after providing the confession, Smith led law enforcement officers directly to where he had hidden the murder weapon, which showed only one spent shell casing,

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<sup>8</sup> Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

<sup>9</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

the bullet from which was a ballistic match to the victim. App. p.173-74;422 -29; 436; 452-53. Certainly these meet the elements contemplated in Smalls to create an overwhelming bar to prejudice. Petitioner will analyze each allegation and trial counsel's performance regarding those, but avers that, ultimately, the gross amount of evidence of guilt prevents the finding of prejudice that must be made in order to find trial counsel's performance ineffective.

- II. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for allegedly failing to adequately challenge the admissibility of Smith's statement provided to law enforcement, thus failing to preserve the argument for appeal.

The PCR court found that trial counsel should have brought certain issues regarding Smith's confession to the trial court's attention and, due to this failure, prejudiced Smith by failing to preserve these arguments for appeal. Smith argued that counsel failed to argue the fact that, rather than providing legal advice to the Applicant during the interrogation, Attorney Tetterton only gave the Smith implied promises of leniency. Smith repeatedly asked Tetterton if he would remain his lawyer, and Tetterton provided that assurance.

Rather than harming Smith, Tetterton provided adequate assistance to Smith to such a degree that Smith felt comfortable acknowledging his Miranda rights. He ensured Smith understood his Miranda rights, and counseled him through the charges that he was facing. He was with Smith throughout his confession, and continued to represent him into preparation for a plea or trial. In fact, at the evidentiary hearing, Smith testified that Tetterton remained his attorney until he presented Smith with evidence that a jailhouse snitch had provided the State with evidence. App. p. 1185;21 – 1186;22. Smith then testified that he decided to lie to Tetterton by accepting a plea agreement, all the while intending to renege on that agreement and ask for a new attorney. Id. Tetterton kept up his end of the bargain made during the interrogation by remaining his lawyer and negotiating a fifteen year deal, thereby making good on any assurances of leniency that Smith alleges were made. Id.

When questioned about his performance during the Denno hearing, trial counsel testified that his strategy was “to play hard tack about it,” and acknowledged that he knew he needed “to hope for the best and prepare for the worst.” App. p. 1219;15 – 23. He further testified that he knew Smith would testify about Tetterton and his jail cell being tossed, though he did not recall if that weighed into any advice he may have provided Smith. App. p. 1213;8 – 15. Petitioner further argues that the question of whether Tetterton’s advice was proper is not at issue in this matter; rather, the allegation is whether trial counsel adequately argued that Smith’s statement was admissible. Trial counsel testified that he was unsure how to present a reasonable argument regarding coercion by Tetterton or anyone else due to the strength of the evidence. App. p. 1225;8 – 13; p.1227;6 – 1228;2. Applicant testified at the evidentiary hearing that he understood that the trial strategy was to work from the statement as a baseline, so to speak, because it would be difficult to have it kept out at trial. App. p. 1205;19 – 1206;1. This was reiterated by trial counsel’s testimony, as discussed above.

There is no evidence shown globally that any attorney could have overcome the circumstances of Smith’s confession as it was given, nor that, had trial counsel argued about these implied assurances of leniency, the outcome of the trial would have been any different. There is simply no evidence to show coercion, persuasion, duress, or any violation of Miranda rights in relation to Smith’s confession. Trial counsel faced an uphill battle to attempt to suppress this statement, and there is no reason to believe that he did not make this argument to the best of his ability. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. 668 (1984). Furthermore, any consideration given to whether relief should

be granted because this issue was not preserved for appellate review is inappropriate, as it is not a proper consideration in determining whether trial counsel was effective. For all of these reasons, this allegation should have been denied.

- III. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for not objecting to the testimony and admissibility of an expert who testified during the Jackson v. Denno hearing regarding the effect of methamphetamine fumes on a human, and Smith's potential impairment during his interrogation and confession.

The PCR court found that the line of questioning regarding Ashley Harris<sup>10</sup>, the law enforcement officer presented as a witness on the effects of methamphetamine on the human body, was improper and, by implication, that trial counsel was ineffective for failing to object. There is no probative evidence to support this finding. This testimony was presented only during pretrial, during the Denno hearing, when the State asked Mr. Harris to provide an opinion on whether Smith seemed to be incapacitated by exposure to methamphetamine fumes to the extent that he would not have understood Miranda warnings. His testimony was that Smith did not. App. p.93 ("He is not illustrating any of the indicators that we typically look for in somebody using methamphetamine. ...I don't see any indicators whatsoever.").

When questioned about his view of this witness, trial counsel stated he had no grounds for objecting to Mr. Harris's qualifications as an expert. App. p.1257. In fact, he had conducted a thorough *voir dire* of the witness, and satisfied himself with that conclusion. App. p.80 – 84. The propriety of this witness and his testimony is bolstered by the qualifications he provided during *voir dire*, including several degrees, continued training, and experience with people under the influence of methamphetamine. App. p.78 - 82.

As discussed in section I, the statement was produced after Smith's Miranda rights had been reviewed many times, both by law enforcement and Tetterton. There is simply no probative

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<sup>10</sup> The PCR hearing transcript refers to Mr. Harris as Ms. Pierce. This is a scrivener's error.

evidence to support the finding of ineffective assistance on this issue, as there is no evidence that, but for the testimony of Officer Harris, the statement would have been suppressed. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Trial counsel's lack of objection to this line of questioning did not prejudice Smith. This allegation should have been denied.

- IV. The PCR court erred in finding that trial counsel failed to advise Smith that he was able to testify at the Jackson v. Denno hearing and maintain his right to remain silent, thus prejudicing him.

There is no evidence to support the PCR Court's finding that Smith was unaware that he would not be giving up his Fifth Amendment right to remain silent. There was no evidence presented from Smith that he had any concerns regarding his right to remain silent. Rather, Smith testified that trial counsel informed him that he could not "take the statement back," and that if he had known he could challenge the statement he would have asked for a Jackson v. Denno hearing. App. 1201. The testimony attributed to Smith in the PCR court's order of dismissal does not appear in the transcript of the evidentiary hearing. App. p.1283-84.

Conversely, trial counsel testified that, though he did not remember why Smith did not testify at the Denno hearing, he remembers discussing the possibility. Furthermore, he testified that the decision to testify would have ultimately been made by the Smith. App. p.1213. He agreed that perhaps Smith should have testified during the hearing, but also stated that he had concerns about how the Applicant would perform, and that there was ultimately little to no likelihood of success in suppressing the statement. Id. Trial counsel thoroughly cross-examined the witnesses presented at during the Denno hearing, but the trial court found that the State had met the "very low bar" of preponderance of the evidence regarding admissibility. App. p.137.

As discussed in section I, the statement was produced after Smith's Miranda rights had been reviewed many times, both by law enforcement and Tetterton. There is simply no probative evidence to support the finding of ineffective assistance on this issue, as there is no direct

testimony that Smith was unaware that he would maintain his right to maintain silent, nor evidence that he was prejudiced by not testifying. This allegation should have been denied.

- V. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for allegedly failing to object when the Assistant Solicitor made comments during his opening statement that were not admitted into evidence during trial.

The PCR court found that two statements made by the Assistant Solicitor during his opening statement were not backed up by evidence during trial and, therefore, should have drawn objections from trial counsel. His failure to do so, the court reasoned, prejudiced Smith. This is unreasonable, given the totality of the evidence against Smith. The first statement is that Smith allegedly recanted his confession once he heard that Mr. Tyler had died, insisting then that he had been affected by methamphetamine fumes. App. p.176. This is clearly refuted, as Steeprock's testimony includes her recollection that Smith told her "he was going to blame Goat Man for it." App. p.235. The second statement is that Smith allegedly asked for water after being arrested and, when he said it was not cold enough, stated "I'm getting ready to go to jail for the rest of my life and you're worried about a cold bottle of water." App. p.170. At the evidentiary hearing, trial counsel stated that he recalled Smith making this statement to him, which was probably heard by Investigator Phillips and relayed to the Assistant Solicitor. App. p. 1237;17 – 1239;1.

Most importantly, though, there was nothing presented in the evidentiary hearing that would lead the PCR court to find that these statements and trial counsel's failure to object would sway the outcome of the trial as contemplated in Cherry, supra. They were either referenced during the case in chief, or explained by trial counsel. In fact, if a prosecutor refers to something in opening statement and fails to back up that statement during the presentation of evidence, it reflects poorly on his credibility. There is no evidentiary basis to show prejudice to Smith by trial counsel's action or inaction and, therefore, this allegation should have been denied. See

Strickland, supra.

- VI. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to object to allegedly prejudicial, irrelevant, and highly inflammatory statements from witness Samantha Steeprook.

The PCR court found that two lines of questioning presented to Steeprook were prejudicial and warranted relief: discussion of prior threats Smith had made, and Smith's request to have Steeprook publish photos of the victim on a website called gore.com. During the evidentiary hearing, trial counsel testified that he did not have a strategic reason for objecting to the statement that Smith had threatened to kill her mother. App. Tr. p.1246;6 – 18. Regarding the photos and website, trial counsel testified he thought the statement, which was initiated by Steeprook, was ultimately improper, but he did not object because he thought there were bigger issues at stake in the case, and he did not think it was prejudicial. App. p. 1246;19 – 1248;14. This is bolstered by testimony elicited on cross-examination by trial counsel, during which Steeprook testified that she "didn't think nothing of" the threat against her mother, and at the time, she did not think he would do anything like that. App. p.186. In other words, Steeprook thought it was a throw away comment by Smith and paid it no mind.

This testimony shows that the potential prejudicial value of this comment was very low due to the true nature of these comments, as well as how they compared to the balance of the overwhelming evidence against Smith as detailed in section I. Other factors and testimony throughout the trial show that Smith was often unpredictable and exaggerative, especially when using drugs, which would have been apparent to the jury. When viewed in the totality of the record, this comment was not prejudicial. See Strickland, supra ("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”).

The same analysis can be applied to the statements regarding the photographs and Smith’s request for them to be published to the internet. Steeproch testified that she never even saw the pictures in question, which was elicited by trial counsel to show the lack of follow-through that this suggestion had. App. p. 230-31. Viewed in the totality of the case, this conversation meant very little and had no prejudicial impact on the outcome of the case on balance with the overwhelming evidence mounted against Smith, as discussed in section I. Trial counsel’s alleged failure to object produced no reasonable probability that the outcome of the case would be different. Cherry, supra. It certainly does not reach the level of prejudice found by the PCR court, in that it undermined the proper functioning of the adversarial process as contemplated in Butler, supra. The jury was presented many pieces of evidence throughout the presentation of the case to show Smith’s personality. These were minor additions to the totality of those examples, and to view either of them as prejudicial acts by trial counsel would be improper. This allegation should have been denied.

- VII. The PCR court erred in finding that trial counsel was ineffective for failing to object to leading questions by the assistant solicitor, thus prejudicing him.

The PCR court agreed with Smith’s allegation that trial counsel failed to effectively assist in his defense due to failure to object to leading questions by the Assistant Solicitor during his examination of Steeproch. During re-direct examination, the trial court stopped the Assistant Solicitor due to repeated leading questions, and instructed him not to “put words in the witness’s mouth.” App. p.226. There was **no** evidence admitted at the evidentiary hearing to support this allegation and, therefore, no evidence that the action or inaction of trial counsel was deficient or

prejudicial. Because of this, Smith failed to meet his burden of proving prejudice because there is no showing that, but for these leading questions, the outcome of the trial would have been different. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The PCR court erred in finding any wrongdoing based on a mere allegation that was unsupported by evidence, and this allegation should have been deemed abandoned and dismissed.

- VIII. The PCR court erred in finding that trial counsel was ineffective because he prejudiced Smith when he opened the door to questions regarding an alleged conspiracy between Steeprock and Smith to bring contraband into the jail.

Regarding allegations of opening the door to questions regarding Steeprock and Smith's involvement in a contraband scheme, the PCR court found that trial counsel's opening the door to this line of questioning was deficient and constituted prejudice. When questioned about this during the evidentiary hearing, trial counsel testified that he believed the potential harm that would arise from the State asking Smith about these accusations was minimal in terms of the damage it would do to Steeprock's credibility. App. p. 1251;18 – 1253;22. His testimony at the evidentiary hearing was exactly that – "I was trying to show the jury what a disreputable person Ms. Seabrook [*sic*] was, but the State would not want to do that since she was their witness." App. p.1252. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Trial counsel was within professional norms and was zealously representing his client by attempting to shake the credibility of the strongest witness that the prosecution offered. For these reasons, this allegation should have been denied.

- IX. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective and prejudiced Smith for failing to object to allegedly impermissible victim impact testimony.

The PCR court found that trial counsel's failure to object to a line of questioning about how Steeprook felt about the victim's and Mr. Tyler's deaths should have been objected to by trial counsel and, therefore, Smith was prejudiced by trial counsel's inaction. When Assistant Solicitor attempted to introduce a photograph of the decedents, trial counsel properly objected.

It requires a logical leap to consider Steeprook's comments to be prejudicial victim impact statements, as she was a friend to the victims and not related by blood or marriage. The intent of eliciting these statements may have been to arouse the passions of the jury, but there is no evidence to support the idea that it was successful, especially considering the inconsistencies and lack of credibility in Steeprook's testimony. There is no evidence to show that, but for trial counsel's failure to object to these questions, the outcome of the trial would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. For that reason, it is incorrect to find prejudice in connection to this allegation, and it should have been denied.

- X. There is no probative evidence to support the PCR court's finding that trial counsel failed to provide effective assistance of counsel when he did not adequately cross-examine Dr. Janice Ross and Steeprook in an attempt to discredit Steeprook's assertion that she saw the victim move after she was shot.

The PCR court found that Smith should be granted PCR relief due to prejudice suffered by trial counsel's failure to cross-examine Dr. Ross and adequately cross-examine Steeprook about the question of whether the victim could move after she was shot. Smith argued that this line of questioning was necessary to challenge Steeprook's credibility. There is no evidence to show that, if trial counsel had entered into this line of questioning, the result of the trial would have been different, as the PCR court found.

The statement in question is Steeprook's third statement to law enforcement, in which she states that she saw the victim grab or wipe her face after being shot. See App. p.1261-66. Dr.

Ross's testimony, however, was that the victim died due to laceration of the brainstem, which have rendered her immediately immobile. Had trial counsel elicited that testimony from Dr. Ross, Smith argued, it would have harmed Steeprock's credibility. Trial counsel testified at the evidentiary hearing that his philosophy has always been to get pathologists off of the witness stand as quickly as possible, and he made a strategic decision not to ask any questions. App. p.1250. He further testified that he "would be surprised if an MD or pathologist testified [the described movement] would be impossible." App. p.1251.

It is wholly unreasonable to think that, given the fact that Steeprock's **third** statement, though it was the one in which she purportedly told the truth, contained a medical impossibility that would have swayed the jury to the point where the adversarial process was undermined, as considered by Strickland and Butler and ruled by the PCR court. Steeprock's credibility had already been attacked repeatedly by trial counsel, and there is no evidence to show that, but for this alleged failure, the outcome of the trial would have been different. This allegation should have been dismissed.

- XI. The PCR court erred in finding that trial counsel prejudiced Smith when he failed to object to the admissibility of handwritten notes.

The PCR court found that it was unreasonable for trial counsel to fail to object when the contents of a handwritten note was read aloud by a law enforcement officer during the courts of trial, and such failure prejudiced Smith. There were allusions to the fact that this was a list of grievances the victim had against Smith, and Smith argued that this would go to prove Smith's motive. He argued that it was irrelevant and prejudicial. At the evidentiary hearing, trial counsel testified that he did not believe the photograph was objectionable because it was part of the crime scene. App. p. 1239;2 – 1241;2. He likened objecting to this photograph to objecting to a photograph of the chest of drawers the note was found on due to relevance. Id. He was then

asked about the Assistant Solicitor's mention of this note during his opening statement, and whether it should have drawn an objection. Trial counsel testified that he did not see any issues regarding relevance at that point, and he certainly did not feel that it was appropriate to move for a mistrial during opening statement. App. p.1241;5 – 1242;4. He further testified that he did not feel the contents of this note directly affected Smith's trial, but rather "it was the totality of the evidence along with [the Assistant Solicitor's opening statement], but I don't think a photograph of a message or a small note that says what I read would be prejudicial to Mr. Smith's case." App. p. 1242;1 – 4. This speaks to trial counsel's awareness of the overwhelming evidence that his client was facing, as was described in section I. There is simply no indication that, but for the entry of this note, the outcome of the trial would have been different. See Cherry, supra. This allegation should have been denied.

XII. There is no probative evidence to support the PCR court's finding that trial counsel provided ineffective assistance of counsel when he failed to object to incorrect factual references in trial testimony.

In finding that trial counsel's failure to correct factual inaccuracies was "unfair" due to a lack of foundational evidence, the PCR court seems to have found that ineffective assistance was rendered. App. p.1299. This allegation essentially questions whether there was evidence presented at trial to bolster the Assistant Solicitor's comments that Smith's initials were on the holster. There is inconsistent testimony from Smith himself when questioned about this during the evidentiary hearing. On direct examination in support of his own case, he testified that he never told anyone that it was his gun and holster. App. p. 1197;9 – 11. However on cross-examination, Smith admitted that he may have stated he created the holster, though he never said his initials on it but, regardless, he told law enforcement where it was located during their investigation. App. 1203;6 – 17.

The misstatement of whether the holster bore Smith's initials is inconsequential in light

of the totality of the evidence. In fact, in this line of questioning, Smith admits that he led law enforcement to where he had hidden the gun after the commission of the crime. Id. Combined, the facts that Smith knew of the gun, testified inconsistently about whether he had made the holster, and led law enforcement directly to its hiding place without hesitation show that, regardless of the initials, there is clear evidence that Smith was familiar with this gun. App. p.173; 422 – 29; 436. Therefore, the misstatement regarding the initials is inconsequential in light of the totality of the circumstances and there is no probability that, but for this misstatement, the result of the trial may have been different. See Strickland and Cherry. This allegation should have been denied.

- XIII. The PCR court erred in finding that Smith was prejudiced by trial counsel's alleged ineffectiveness for allegedly failing to adequately cross-examine Investigator Phillips regarding the searching and seizure of documents from Smith's cell while awaiting trial.

The PCR court found that Smith was entitled to PCR relief due to trial counsel's failure to investigate and prepare questions regarding the search and seizure of items from Smith's cell, to which Investigator Phillips testified at trial. As the court also found, at first glance, this information does not seem relevant or helpful. App p.1300. Smith argued that, had these allegations been fleshed out, it could have been used to attack law enforcement's credibility. The State now argues, though, that an independent investigation by SLED was done into this situation and the trial court ruled that the information made on bearing on his decision. Specifically, the trial court requested trial counsel to continue an investigation with SLED that Smith had already begun, and to report back with findings before sentencing. App. p.726. Trial counsel then received and reviewed the summary sheet of the report before sentencing, and declined to release to the defense. App. p.747.

At the evidentiary hearing, Trial counsel testified that, in his conversations with Applicant, Applicant spoke about this issue obsessively. He was convinced that the State and its

agents were out to get him, and that this allegedly illegal shakedown proved it. Trial counsel testified that this, along with Applicant's belief that Tetterton was conspiring against him, were Applicant's primary focuses in preparation for trial. App. p.1224-25. Lastly, he testified specifically that this information would not have impacted his ability to impeach Investigator Phillips. App. p.1223. Again, trial counsel made a valid strategic decision in light of the overwhelming evidence against his client. This, along with the evaluation of the scenario by the trial court judge, show that Smith was not prejudiced by trial counsel's performance, and this allegation should have been dismissed.

- XIV. The PCR court erred in finding that trial counsel provided ineffective assistance because he allegedly was not prepared to effectively cross-examine the jailhouse snitch Morris Nixon, including correcting the prosecutor's misleading statements regarding his charges.

The PCR court found that Smith was prejudiced by trial counsel's failure to properly cross-examine the jailhouse snitch, Morris Nixon, regarding the charges he was facing and the recent issuance of a personal recognizance bond with the Assistant Solicitor's consent. Smith alleges that, essentially, the severity of Nixon's charges were minimized by the Assistant Solicitor and trial counsel failed to correct these characterizations. Trial counsel questioned Nixon as to whether or not the Solicitor offered him any leniency or whether he was trying to get out of jail on bond, but never specifically elicited testimony that the Solicitor had consented to a personal recognizance bond and let Nixon out of jail soon after providing his statement. App. 408, 413, 417-18.

During the evidentiary hearing, trial counsel testified that he did not recall why he did not clarify the nature of the assault charge or elicit the fact that the State consented to a personal recognizance bond. Though these facts may have been helpful, they do not rise to the level of deficient performance by trial counsel. Trial counsel elicited testimony regarding Nixon's charges, and was able to gain the basic nature and number of all charges that Nixon faced. More

information regarding the personal recognizance bond may have further damaged Nixon's credibility but, upon review of the transcript and testimony, there is no likelihood that Nixon's credibility would have been strong or persuasive, regardless of the case presented by trial counsel. There was not enough evidence presented by Smith to meet the burden of proving prejudice, as there is no evidence that a different tactic would have changed the outcome of the trial. See Cherry, supra. This allegation should have been denied.

- XV. Cumulative error is not recognized under South Carolina post-conviction relief laws, and it should not be adopted.

Smith argued that, despite the PCR court finding separate instances of ineffective assistance of counsel, it should take an extra step to find that, cumulatively, trial counsel was ineffective. In making this argument, he cites to Walker v. State, 397 S.C. 226 (S.C. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) for the idea that, if an applicant can show deficiency on two or more grounds, a cumulative prejudicial effect could be proven if the applicant could still prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 407 S.C. at 243, 756 S.E.2d at 619. This reliance is misplaced, as it contemplates relief due to cumulative error in the absence of individual prejudice findings, as do most jurisdictions. Smith argued that cumulative error is warranted in the case at bar in the event that there may be any doubt that Smith was prejudiced by trial counsel's actions.

First, there has been a dearth of evidence that would show Smith would have received a favorable outcome at trial if trial counsel had performed differently. He has failed to meet the burden of proving prejudice on any independent ground when reviewed through the lens of the canon of post-conviction relief case law in South Carolina. Second, It is still an unsettled question in South Carolina as to whether cumulative errors can be considered a separate ground

for a grant of post-conviction relief. Lorenzon v. State, 376 S.C. 521, 535 (2008.) In the instant matter, trial counsel should not have been found ineffective on any individual ground, and the fact that there were multiple allegations does not change the analysis of trial counsel's overall performance.

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996) (an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation."); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995) (cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors). The Eighth and Sixth Circuit Courts of Appeal have expressly rejected cumulative error analysis in terms of Federal Habeas Corpus actions because such an analysis is not in line with precedent set by the Supreme Court of the United States. See Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006); Lorraine v. Covle, 291 F.3d 416, 447 (6th Cir.2002).

Simply, the issue of granting post-conviction relief based upon the cumulative prejudicial effect of two or more instances of deficient performance is one that South Carolina has not accepted. Based on the rationales stated in the federal cases cited above, this reasoning makes sense – incidents that do not rise to the level of a constitutional violation separately cannot and should not be combined to become a constitutional violation. Even though trial counsel may have been deficient on several grounds, none of these rose to the level of causing prejudice to the Applicant. Similarly, several acts of deficiency do not rise to the level of prejudice to the Applicant. Though the PCR court again did not make a specific grant of relief on this ground, it

contemplated the idea that such relief may have been warranted. Regardless, for the reasons above, this allegation should have been denied.

### CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling.

Respectfully submitted,

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Attorney General

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By:   
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February 26, 2018

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STATE OF SOUTH CAROLINA  
In The Supreme Court

S.C. SUPREME COURT

CERTIORARI TO KERSHAW COUNTY  
Court of Common Pleas

The Honorable Jocelyn Newman, Post-Conviction Relief Judge

Appellate Case No. 2017-001351

Gregory Vincent Smith, .....Respondent,

v.


State of South Carolina, .....Petitioner.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**David Alexander, Esquire  
SC Commission on Indigent Defense  
Post Office Box 11589  
Columbia, South Carolina 29211**

This 26<sup>th</sup> day of February, 2018

  
\_\_\_\_\_  
JESSICA E. KINARD  
Attorney for Petitioner

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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

February 26, 2018

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Gregory Vincent Smith v. State of South Carolina**  
**Appellate Case No. 2017-001351**  
**Lower Court Case No. 2015-CP-28-00002**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari along with the Appendix in the above-captioned case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Jessica E. Kinard  
Assistant Attorney General  
SC Bar No. 77889

JEK/cc  
Enclosures

cc: David Alexander, Esquire (2 copies)