

STATE OF SOUTH CAROLINA
In The Supreme Court

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Certiorari to York County
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2017-002355

KENNETH MORRIS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

- I. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to effectively cross-examine Nichols concerning the punishment he faced prior to making a deal with the State, where Counsel thoroughly impeached Nichols's credibility through other means.
- II. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to request a charge of the lesser included offense of possession of ecstasy with intent to distribute, as there was no evidence presented to the jury that would support the charge.
- III. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to introduce the sworn statement of Respondent's codefendant because Rule 613 SCRE prohibited Counsel from doing so.
- IV. The PCR court's finding Counsel was ineffective for failing to object to the constructive possession jury charge errs as a matter of law because the charge is directly from the current precedent found in *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987).
- V. There is no probative evidence to support the PCR court's finding that trial and appellate counsel were ineffective for failing to differentiate between a "Phillies Blunt" and a "Black and Mild" because this fact was one of many factors the trial court and Court of Appeals used in finding the officers had reasonable suspicion to extend the traffic stop.
- VI. Cumulative error is not recognized under South Carolina post-conviction relief laws, and it should not be adopted.

STATEMENT OF THE CASE

Underlying Facts, Trial, and Direct Appeal

On the afternoon of February 6, 2008, Officer L.T. Vinesett, Jr., a member of the York County Sheriff's Office's highway interdiction team, initiated a traffic stop. App. 12-13. After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants inside. App. 13. He asked the driver for his license and registration, and Kenneth Darrell Morris, II, the driver of the vehicle, produced a North Carolina driver's license while Brandon Nichols, the passenger, produced a rental agreement for the Ford. App. 13-14. The rental agreement stated that Nichols rented the vehicle, listed Nichols as the authorized driver, and specifically indicated that no other drivers were authorized to drive the vehicle. App. 14-15.

When Officer Vinesett initially approached the Ford, the passenger window of the vehicle was open. App. 15. Through the open window, Officer Vinesett detected an odor of marijuana emanating from inside. App. 15. Additionally, he observed what he believed to be hollowed-out cigars and loose tobacco scattered all over the interior of the car, including on the center console and on the floorboards of the vehicle. App. 16. Officer Vinesett took note of the hollowed-out cigars because his experience taught him that drug users commonly hollow out cigars and replace the tobacco inside with marijuana to allow the users to covertly smoke marijuana while creating the appearance that they are only smoking cigars. App. 16.

After obtaining Morris's license, Officer Vinesett asked Morris to step out of the vehicle. App. 15, 18. During their conversation, Morris claimed that he and Nichols were returning from a trip to Atlanta and had gone to visit some girls. App. 18. Morris also revealed that he had a prior criminal record resulting from drug charges. App. 37. After speaking with Morris, Officer Vinesett left Morris in the patrol car and went to speak with Nichols. App. 19. Outside of the

presence of Morris, Nichols offered a different account of their activities, claiming that he and Morris were returning from Atlanta and had gone to see a cousin play basketball. App. 19. Nichols then exited the Ford, and Officer Vinesett again noticed the odor of marijuana coming from the vehicle. App. 19.

After speaking with both Morris and Nichols, Officer Vinesett requested the assistance of a canine unit. App. 40. At that time, Officer Vinesett also continued checking Morris' license while completing the initial purpose of the traffic stop. App. 37. Officer Vinesett frisked Morris with consent, allowed him to go to the restroom while accompanied by the state constable, and informed him that the traffic stop was not yet complete. App. 39-40.

Thereafter, the requested canine officer arrived on the scene. App. 19. In the rainy weather conditions, the police dog then walked around the exterior of the car. App. 20. After walking around the vehicle, the dog did not alert to the presence of drugs. App. 20. However, Officer Vinesett, who was familiar with the police dog and had previously observed it performing sniff searches on vehicles, noticed that the dog was not focusing on the vehicle, was shaking off rain water, and was looking around. App. 20. Based on his observations, the officer concluded that the dog did not appear to like being out in the rainy conditions. App. 20.

Subsequently, Officer Vinesett informed Nichols that he smelled marijuana in the car during the stop and looked into the trunk of the vehicle and, within less than thirty seconds, located a gift box with a sandwich bag inside containing 393 ecstasy pills. App. 21-22; 45-46. Following the discovery of the drugs, both men were quickly arrested. App. 22. Subsequently, approximately one-half pound of marijuana was discovered hidden under the spare tire during an inventory search of the vehicle. App. 142. The drugs recovered from the vehicle were analyzed and conclusively identified as ecstasy and marijuana. App. 211, 217.

Morris was indicted at the July 2008 term of the York County Grand Jury for trafficking ecstasy (MDMA) (2008-GS-46-02837) and possession with intent to distribute (PWID) marijuana (2008-GS-46-02834). App. 344-353. Irby Walker and Johnny Gardner, Esquires represented Applicant. On April, 15-17 2009, Morris proceeded to a jury trial before the Honorable John C. Hayes, III. He was found guilty as indicted for trafficking ecstasy and sentenced to imprisonment for thirty years. He was found guilty of the lesser included offense of simple possession of marijuana, third offense, and was sentenced to imprisonment for one year. Both sentences were to be served concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals and Mr. Gardner perfected the appeal. Morris raised the following issues:

- I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?
- II. Did the trial court err in finding the search of the trunk was supported by probable cause?

The Court of Appeals affirmed Morris's convictions and sentences by a published opinion on August 17, 2011. *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011). App. 544-553. Regarding the reasonableness of the detention, the Court of Appeals held that Officer Vinesett had reasonable suspicion to extend the length and scope of the traffic stop after the officer detected the odor of marijuana and observed hollowed-out cigars and loose tobacco in Morris' rental vehicle. *Id.* at 608, 720 S.E.2d at 471-472. In reaching that conclusion, the Court of Appeals specifically noted that the trial judge found Officer Vinesett's testimony regarding the smell of marijuana to be credible. *Id.* at 607-608, 720 S.E.2d at 471. Regarding the reasonableness of the search, the Court of Appeals instructed:

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car.

Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id. at 610, 720 S.E.2d at 473.

Morris filed a Petition for Writ of Certiorari to this Court, arguing the Court of Appeals erred in affirming Morris's convictions. The South Carolina Supreme Court granted certiorari and affirmed the decision of the Court of Appeals. *State v. Morris*, 411 S.C. 571, 769 S.E.2d 854, 856 (2015), *reh'g denied* (Apr. 9, 2015). App. 696-704. Respondent filed a Petition for Rehearing, which was denied by the Court on April 9, 2015. The Remittitur was sent on April 9, 2015.

Post-Conviction Relief Application

On September 21, 2015, Morris filed an application for post-conviction relief (2015-CP-46-2859) alleging ineffective assistance of counsel. On February 2, 2017, Morris filed an Amendment. His grounds are consolidated as follows:

1. Trial counsel was ineffective in preparing for trial
2. Trial counsel was ineffective in failing to effectively cross-examine the co-defendant
3. Trial Counsel was ineffective in not objecting to a burden shifting charge given by the trial judge. The charge also violated the Constitution of the State of South Carolina
4. Trial Counsel was ineffective in failing to request a charge of the lesser included offense of Possession of Ecstasy.
5. Trial Counsel was ineffective in failing introduce a prior inconsistent statement and to ask the trial judge to instruct the jury that the prior inconsistent statement of co-defendant Brandon Nichols could be considered by the jury as substantive evidence.
6. Trial Counsel at trial and in his brief on appeal failed to differentiate a "Philly Blunt" and a "Black and Mild" cigar which created confusion at the appellate level as the South Carolina Supreme Court affirmed the conviction on the factual error that a "Philly Blunt" was found in the automobile.

Petitioner made its Return on or about March 18, 2016. An evidentiary hearing into the

matter was convened on February 1, 2017, at the Moss Justice Center in York, South Carolina. Morris was present at the hearing and represented by Rauch Wise, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Petitioner. At the hearing, Morris testified on his own behalf. Morris's trial counsel, Johnny Gardner, Esquire, (hereinafter referred to as "Counsel") also testified.

By an order filed June 21, 2017, the PCR court granted relief. App. 806-822. The PCR court found (1) Counsel was ineffective for failing to effectively cross-examine Morris's codefendant concerning the punishment he faced prior to making a deal with the State to testify against Morris; (2) Counsel was ineffective for failing to request a charge of the lesser included offense of possession of ecstasy; (3) Counsel was ineffective for failing to introduce the codefendant's prior statement in evidence; (4) Counsel was ineffective for not objecting to the jury charge on constructive possession; (5) Counsel and Appellate Counsel were ineffective for failing to differentiate between a "Phillies Blunt" and a "Black and Mild"; and (6) cumulative error warranted a new trial. On July 12, 2017, Petitioner filed a Motion to Reconsider. The PCR court denied the motion on November 3, 2017.

Petitioner filed a timely notice of appeal. This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). 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). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations 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*, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, 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, 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*, 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.

ARGUMENT

- I. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to effectively cross-examine Nichols concerning the punishment he faced prior to making a deal with the State, where Counsel thoroughly impeached Nichols's credibility through other means.**

The PCR court erred in granting post-conviction relief on the basis that Counsel failed to effectively cross-examine the codefendant concerning the punishment he faced prior to making a deal with the State. Morris's codefendant, Brandon Nichols, pled guilty to a lesser included offense prior to Morris's trial and testified against Morris. Morris alleges that Counsel should have impeached Nichols to attack his credibility.

Relevant Background and Findings Before PCR Court

This issue was introduced on direct examination, where the State elicited testimony from Nichols that he pled guilty to being involved with the ecstasy and received a plea deal to a probationary sentence on the condition that he testify truthfully against Morris. App. 188, l. 22 – p. 189, l. 3.

During cross-examination, Counsel impeached Nichols with his guilty plea. Counsel asked:

Counsel: You didn't plead to trafficking in Ecstasy, did you?

Nichols: I don't think so, no.

Counsel: I don't think that you did either. All right. And you got, what probation, right?

Nichols: Yes, sir.

Counsel: Probation. Five years probation, correct?

Nichols: No sir.

Counsel: How long?

Nichols: Two years.

...

Counsel: And before you got probation, you had talked with the prosecutor, through your attorney or -- with your attorney or by yourself, had you not, about what you were going to do in return for getting probation, right?

...

Counsel: Before you went up and pled before whatever judge that you pled before,

you had already cut a deal with the prosecutor, had you not? Huh?
Nichols: Yes, sir.
Counsel: Okay. And that deal called for you to get probation in return for your truthful testimony against Mr. Morris, right?
Nichols: Yes, sir.

App. 194, l. 17 – 195, l. 24.

Prior to closing arguments, the State brought up the issue of Nichols’s plea deal, asking the Court to prohibit Counsel from mentioning Nichols’s sentence. App. 271, ll. 7-12. The trial court asked Counsel to “stay away from the penalty.” App. 271, ll. 18-19. Counsel then argued to the trial judge that the defense should be allowed to mention the Nichols’s plea deal, after which the trial judge again asked the defense to stay away from potential penalties, but stated “You can certainly argue that Mr. Nichols, rather than letting himself be exposed to a prison term. I mean, you can get there another way.” App. 272, ll. 16-24 (emphasis added).

The PCR court held Counsel was ineffective because the jury “could have rejected [Nichols’s] credibility” and “could have reasonably assumed that Morris would receive a somewhat similar sentence to Nichols.” App. 809.

Analysis

There is no evidence to support the PCR court’s ruling Counsel was ineffective for failing to cross-examine Nichols on the punishment he was facing prior to making the plea deal. This Court has held “the fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury.” *State v. Gracely*, 399 S.C. 363, 374–75, 731 S.E.2d 880, 886 (2012). The Court held

Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include the importance of the witness’s testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

Id., citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986).

Although Counsel did not cross-examine Nichols concerning the three-year mandatory minimum sentence he was facing prior to pleading guilty to the lesser included offense of possession with intent to distribute ecstasy, he effectively impeached his credibility in other ways. Counsel cross-examined Nichols concerning the fact that he made a plea deal with the State to testify against Morris and received a probationary sentence. App. 194, l. 17 – 195, l. 24. Counsel also impeached Nichols’s credibility by reading his entire prior inconsistent statement into evidence. App. 202 ll. 20-23; 203, ll. 1-17; 205 ll. 15-23. After pleading guilty, Nichols gave a notarized statement where he said he did not see Morris put marijuana in the vehicle and Morris was not aware of the ecstasy purchase. App. 205 ll. 15-23. Counsel attacked Nichols’s credibility by going over these statements, which Nichols testified at trial were not true. App. 191. Counsel also attacked Nichols’s credibility during his closing argument. During closing, Counsel argued Nichols lied by giving conflicting statements and read over every sentence of Nichols’s statement to the jury. App. 295, ll. 17-19; 305, ll. 8-19. Counsel brought up the fact Nichols pled guilty to the same charges Morris was facing and received probation. App. 305, ll. 20-22. Counsel again argued Nichols lied on the stand by stating, “[Nichols] testified that after that statement, that written statement, was made known to the prosecutor, they told him that if he didn’t testify, he would face substantial jail time.” App. 306, ll. 10-13.

Counsel’s failure to cross-examine Nichols concerning the exact sentence he was facing before he pled guilty did not prejudice Morris where such an error was harmless considering the *Van Arsdall* factors. Nichols’s testimony was corroborated by Morris’s own statement given to Commander Marvin Brown, where both Nichols and Morris indicated they were driving from Atlanta, they bought ecstasy pills which they were splitting down the middle, and the marijuana

belonged to Morris. App. 186-188; 226-227. The trial court allowed extensive cross-examination of Nichols, where Counsel thoroughly impeached Nichols about the inconsistencies between his current testimony and his prior statement. App. 200-205.

Furthermore, Counsel's failure to cross-examine Nichols concerning the exact sentence he was facing before he pled guilty did not prejudice Morris where Nichols's credibility was effectively impeached by Counsel in other ways. After impeaching Nichols with his probationary sentence and prior inconsistent statement, additional cross-examination that he faced a mandatory three-year sentence would not have any further meaningful impact on his credibility. This Court has held "[t]he exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility." *State v. Gunn*, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993). In *Gunn*, this Court held the exclusion of a State's witness's SLED file was harmless because it was merely cumulative to other impeaching evidence, including the witness's admission to being a drug user, prior convictions for drug charges, and admissions to bad acts she would do to support her drug habit. *Id.* In this case, the three-year minimum sentence Nichols faced would be cumulative to other impeachment evidence brought out by Counsel including Nichols's guilty plea and resulting probationary sentence, his admission to buying ecstasy in Atlanta, his admission to intending to sell the ecstasy, his prior statement recanting the statements made at his plea, and his admission to lying in his prior statement. See also *Duncan v. State*, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984) ("Thus, the additional impeaching evidence of the inconsistent statement would not have had a meaningful impact on Davis' credibility."); *State v. Cheeseboro*, 346 S.C. 526, 553 554, 552 S.E.2d 300, 314 315 (2001) (finding the nondisclosure of evidence did not deprive Cheeseboro of a fair trial where the witness was thoroughly impeached with other evidence); and *State v. Sims*, 348 S.C. 16, 26, 558

S.E.2d 518, 523 524 (2002) (finding any error resulting from the limitation of the scope of cross-examination was harmless because it could not have affected the result of the trial in light of other evidence presented).

In light of the impeachment that was conducted, Counsel was able to establish to the jury that Nichols was an admitted liar, an admitted criminal, swore to tell the truth and lied to the Notary, and swore to tell the truth before the trial jury and gave inconsistent statements. Thus, Morris was not prejudiced by Counsel's actions, where Counsel effectively impeached Nichols's credibility and any additional impeachment about the three year minimum sentence he faced would have been cumulative to prior impeachment and would not have changed the outcome of Morris's trial. As the PCR court erred in finding Counsel was ineffective, certiorari should be granted on this ground.

II. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to request a charge of the lesser included offense of possession of ecstasy with intent to distribute, as there was no evidence presented to the jury that would support the charge.

The PCR court erred in granting post-conviction relief on the basis that Counsel failed to request a charge of the lesser included offense of possession of ecstasy with intent to distribute, as there was no evidence presented to the jury that would support the charge.

Relevant Background and Findings Before PCR Court

Applicant was charged with trafficking 393 ecstasy pills, however because only 254 pills were tested, the State presented to the jury that he trafficked 254 pills. The testimony revealed from the State and from Morris's own statement only showed that the jury could find Applicant in possession of all of the pills, none of the pills, or half of the pills (127 pills, splitting 50/50 with codefendant Nichols). South Carolina Code § 44-53-370(b) provides "The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense

to the offenses of trafficking based upon possession described in this subsection.” At the end of the first day of trial, the trial judge asked both parties about any requests to charge the jury. The judge stated, “We do have an issue about lesser included. On the Ecstasy, this case seems to pretty well address that, but find anything else, I will be glad to look at it, and that’s *Sellers v. The State*.” App. 254, ll. 15-19. The trial judge later declined to give the lesser included jury charge.

Analysis

The PCR court incorrectly held the lesser included offense of PWID ecstasy was required to be charged. A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed. *Sellers v. State*, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (2005), *abrogated by Smalls v. State*, No. 2016-001079, 2018 WL 736339 (S.C. Feb. 7, 2018). As noted by the trial court, Morris’s case is exactly analogous to *Sellers* where the Court answered whether a lesser included offense should be charged to the jury, holding:

A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking. *State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991).

In the present case, there is no evidence in the record that would entitle Respondent to a charge on lesser-included offenses...Second, as to the trafficking charge, **Respondent did not present evidence that he possessed less than the minimum required for trafficking.** In fact, the only evidence before the jury was that the amount of methamphetamines in question would constitute trafficking. In addition, the State presented the only evidence as to the amount of drugs at issue, which included testimony that Respondent possessed enough methamphetamines to warrant a trafficking charge. As a result, Respondent was not entitled to a lesser-included charge, such as possession with intent to distribute, for the trafficking charge.

Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005) (emphasis added).

In Morris’s case, the PCR court erred as a matter of law in finding the lesser included

offense should have been given because there was no evidence whatsoever that would support the lesser included offense of PWID ecstasy. South Carolina Code § 44-53-370(e)(8) defines trafficking ecstasy as possessing one hundred or more tablets of MDMA. Just as in *Sellers*, the State presented the only evidence as to the amount of drugs at issue. The State presented to the jury that Morris trafficked two-hundred fifty-four MDMA tablets. App. 210-212. The testimony and evidence revealed from the State and from Morris's own statement only showed that the jury could find Morris was in possession of all of the tablets, none of the tablets, or half of the tablets.¹ App. 83; 186; 281-281. If the jury found Morris possessed no tablets, he would be acquitted. If the jury found Morris split the tablets evenly with Nichols, he would be in possession of more than one hundred tablets and, by law, guilty of trafficking. If the jury found Morris possessed all tablets, by law he would be guilty of trafficking. There is no evidence to support the conclusion that Counsel was ineffective for failing to request this charge when the only amounts presented to the jury exceeds the amount for trafficking. *See State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991) ("the amount of cocaine in appellant's possession exceeded the quantity required to invoke the trafficking statute. Therefore, this Court holds that the trial court did not err by declining to charge the lesser included offense.").

The PCR court further granted relief by finding "[n]othing in this record suggests that the jury would not have also given Morris the benefit of the doubt and convicted him of the lesser included." App. 810. This is not the proper standard of review for post-conviction relief, as the PCR court must find Counsel's actions were deficient, and the outcome of Morris's trial would have been different had Counsel requested the lesser included offense. Instead, the PCR court improperly found there was no evidence to suggest the jury would not have changed their

¹ According to Morris's statement to law enforcement, he was splitting the ecstasy "down the middle" with Nichols. App. 226. This amount would equal one-hundred twenty-seven tablets.

verdict. Ultimately, the PCR court erred because there is no evidence to support the conclusion that the outcome of Morris's trial would have been different had Counsel requested the lesser included offense, because there is no evidence to support the lesser offense and a conviction of PWID ecstasy would be inconsistent with the evidence. As the PCR court erred in finding Counsel was ineffective, certiorari should be granted on this ground.

III. There is no probative evidence to support the PCR court's finding that trial counsel was ineffective for failing to introduce the sworn statement of Respondent's codefendant because Rule 613, SCRE, prohibited Counsel from doing so.

The PCR court erred in granting post-conviction relief on the basis that Counsel failed to introduce Nichols's sworn statement because Rule 613 of the South Carolina Rules of Evidence would prohibit him from doing so and the statement was read into the record.

Relevant Background and Findings Before PCR Court

Evidence was presented at trial that Nichols, Morris's codefendant, made a written statement after his guilty plea where he denied his prior statements made at the plea that implicated Morris. When Nichols testified against Morris at trial, he admitted during direct examination he made the prior statement and he lied in making this prior statement because he was under pressure. App. 191. On cross-examination, Counsel asked Nichols about this statement. Again, Nichols admitted to making the statement. App. 197 ll. 10-13; 200 l. 20-22; 202 ll. 20-23; 203, ll. 1-17; 205 ll. 15-23. During cross-examination, Counsel read each sentence of the prior statement to Nichols and Nichols acknowledged that he wrote the following:

On March 12th, 2009, I was put under the most pressure of my life. I was scared and confused about my situation that was at hand. Some of the statements that I made concerning Kenneth Morris and myself were not true. I was not aware that Mr. Morris had purchased any marijuana or did not see him place any quantity in the vehicle. Mr. Morris was not aware of the purchase of the Ecstasy and had no knowledge of it.

App. 202 ll. 20-23; 203, ll. 1-17; 205 ll. 15-23. Nichols testified he gave this statement to a

Notary Public who Morris knew, and only gave the statement because Morris pressured him to change his story after the guilty plea.

During Counsel's closing argument, he again read every sentence of Nichols's statement to the jury. App. 305, ll. 8-19.

The PCR court found Counsel was ineffective for failing to introduce Nichols's statement, because if he had introduced the statement, the judge would be required to tell the jury they may use the statement as substantive evidence pursuant to *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982).

Analysis

The PCR court erred in finding Counsel was ineffective for failing to introduce Nichols's statement, because the statement would not be allowed in as a matter of law. Rule 613 of the South Carolina Rules of Evidence states in part, "if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." SCRE 613(b). In this case, Nichols admitted many times during direct and cross-examination to making the prior inconsistent statement. *See* App. 191; 197 ll. 10-13; 200 l. 20-22; 202 ll. 20-23; 205 ll. 15-23. Since Nichols was shown his statement and admitted that he made the statement, extrinsic evidence of the statement would be inadmissible according to the Rules of Evidence. Therefore, the PCR Court clearly erred in finding that Counsel was deficient for failing to introduce the statement as an exhibit.

Counsel was not deficient for failing to ask the trial judge to tell the jury that they could consider the contents of the inconsistent statement as substantive evidence. *State v. Copeland* holds that "testimony of prior inconsistent statements [can be] used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *Copeland*, 278 S.C. 572, 581,

300 S.E.2d 63, 69 (1982). All testimony can be considered by the jury as evidence, and this includes the entire content of Nichols's prior statement that was read into the record during Nichols's cross-examination and again during the Morris's closing argument. Morris's case is not inconsistent with *Copeland* because Nichols's testimony regarding his inconsistent statement was used as evidence. Additionally, in his standard introductory comments to the jury, the trial judge informed the jury that it is solely up to them to examine the evidence; to believe all, none, or part of witnesses' testimony; and to assess the credibility of any witnesses. The judge also reiterated this during jury charges. App. 312-313.

The PCR court erred in finding the result of Morris's case would have been different had the jury been able to physically see Nichols's statement. Aside from the fact that introducing the statement clearly violates Rule 613, SCRE, Nichols admitted to making the statement and was heavily cross-examined and impeached by Counsel regarding the circumstances around and contents of this statement. As stated above, the entire statement was read into evidence through Counsel during cross examination. See App. 202-205. The entire statement was also read by Counsel during his closing argument. App. 305, ll. 8-19. It is clear that the jury was able to learn of the contents of the statement and was able to consider the testimony regarding the statement as evidence. As there is no evidence to support the PCR court's conclusion, certiorari should be granted on this ground.

IV. The PCR court's finding Counsel was ineffective for failing to object to the constructive possession jury charge errs as a matter of law because the charge is directly from the current precedent found in *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987).

The PCR court erred in granting post-conviction relief on the basis that Counsel failed to object to the constructive possession jury charge. The PCR court's finding errs as a matter of law as the charge is the current precedent in South Carolina and is not in violation of the South

Carolina Constitution.

Relevant Background and Findings Before PCR Court

The trial court charged the jury, “A defendant’s knowledge and possession may be inferred when a substance is found on the property under the defendant’s control.” App. 317, ll. 8-10. The PCR Court found this charge improperly shifted the burden to Morris and constituted a charge on the facts in violation of Article V, Sec. 21 of the Constitution of the State of South Carolina.

Analysis

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). The PCR Court’s holding is in direct contravention with current South Carolina law. Furthermore, the charge that was given is directly from the South Carolina Judicial Department’s Circuit Court standard jury charge book and simply defines constructive possession. The charge is taken verbatim from current precedent, *State v. Adams*, which holds,

The proper charge on constructive possession is to instruct the jury that the defendant’s knowledge and possession may be inferred if the substance was found on premises under his control. *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981); *State v. Brown*, 267 S.C. 311, 227 S.E.2d 674 (1976). The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence.

State v. Adams, 291 S.C. 132, 135–36, 352 S.E.2d 483, 486 (1987) (emphasis added). Furthermore, the Court held in *State v. Heath*, “In order to prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control...The defendant’s knowledge and possession may be inferred if the substance was found on premises under his control.” 370 S.C. 326, 329–30, 635 S.E.2d 18, 19 (2006).

The trial judge in Morris’s case even went a step further to ensure the permissive

inference was properly charged, by telling the jury, “however this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and be given the weight you decide it should have.” App. 317, ll. 10-13. See *State v. Neva*, 300 S.C. 450, 452, 388 S.E.2d 791, 792 (1990) (“Evidentiary presumptions must be charged as permissive inferences with specific instructions that the jury may accept or reject them.”). Here, the trial judge defined constructive possession and gave the jury a permissive inference that is completely legal under the law.

Despite the PCR Court’s lengthy attempt to review the history of this issue by citing cases from Mississippi, Florida, Illinois, Pennsylvania, and Virginia, the bottom line is the South Carolina case of *State v. Adams* is the current law in South Carolina, and to hold otherwise is a clear error of law. There is no evidence to support the PCR court’s finding Counsel was ineffective, when the jury charge was not objectionable and contained current South Carolina law. Certiorari should be granted on this ground.

V. There is no probative evidence to support the PCR court’s finding that trial and appellate counsel were ineffective for failing to differentiate between a “Phillies Blunt” and a “Black and Mild” because this fact was one of many factors the trial court and appellate courts used in finding the officers had reasonable suspicion to extend the traffic stop.

The PCR court erred in granting post-conviction relief on the basis that Counsel and Appellate Counsel² failed to differentiate between a “Phillies Blunt” and a “Black and Mild” at trial and on appeal.

Relevant Background and Findings Before PCR Court

At the outset of trial Morris moved to suppress the drugs recovered in his car as the fruits of an illegal search and an unlawful detention, and the trial judge conducted a suppression

² Both Mr. Walker and Mr. Gardner represented Morris at trial. Only Mr. Gardner represented Morris on appeal.

hearing. During the suppression hearing, Officer Vinesett recounted the details of the traffic stop. App. 11. Specifically, Officer Vinesett testified that he noticed the smell of marijuana coming from the vehicle when he initially approached the vehicle. App. 15. After smelling the odor of marijuana, Officer Vinesett stated that he believed there was cause to extend the traffic stop and question Morris and Nichols. App. 37-38. Furthermore, Officer Vinesett testified he looked inside the car and saw “a lot of hollowed out Blunts, a lot of blunt tobacco in the car - the center console, on the floor area, and pretty much all over the vehicle.” App. 16, ll. 5-7. He testified in his experience as a narcotics officer, loose tobacco found in a car indicates someone is hollowing out a blunt cigar to put marijuana in it. App. 16, ll. 13-14. He testified this is an indicator that someone is smoking marijuana. App. 131, ll. 4-25; 133, ll. 4-23. Officer Vinesett testified he found a partially smoked blunt and the interior lining of blunts in the vehicle. App. 133.

The trial court denied the motion to suppress, finding that reasonable suspicion existed to extend the stop, and explained that the “main indicator” leading to its ruling was the smell of marijuana. App. 64, ll. 21-22. The trial court also found the officers had reasonable suspicion to extend the stop and probable cause to search the car based on the objects officers believed to be hollowed-out blunts and loose tobacco in the vehicle. App. 64, l. 21 – p. 65, l. 3.

On appeal, the Court of Appeals affirmed Morris’s convictions, finding the officers had reasonable suspicion to extend the stop based on Officer Vinesett smelling marijuana as he approached Morris’s vehicle, learning Morris was not an authorized driver of the rental vehicle, and observing the hollow blunts and loose tobacco, which in his experience indicated drug use. *State v. Morris*, 395 S.C. 600, 608, 720 S.E.2d 468, 472 (Ct. App. 2011), *aff’d*, 411 S.C. 571, 769 S.E.2d 854 (2015). The Court of Appeals included in a footnote “Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in

order to roll a marijuana cigar.” *Id.* 604, 720 S.E.2d at 469, n. 1.

This Court affirmed the Court of Appeals’ decision, finding the officers had reasonable suspicion to extend the stop and probable cause to search the car. The Court based its ruling on the smell of marijuana, hollowed out Phillies Blunt cigars, the inconsistent stories by Morris and Nichols, the Red Bull cans found in their vehicle, and rental vehicle. *State v. Morris*, 411 S.C. 571, 769 S.E.2d 854 (2015). This Court included a footnote, noting “Phillies Blunts are an inexpensive brand of cigar. Vinesett testified that people ‘hollow [the blunt] out and place the marijuana in there, so if you did see them riding down the road smoking anything, it would look like they were just smoking a [Phillies] blunt.’” *Id.* at 77, 769 S.E.2d at 857, n. 1.

The PCR court found Counsel and Appellate Counsel were ineffective for failing to differentiate a Phillies Blunt to a Black and Mild because no Phillies Blunt was found in the vehicle and thus no probable caused existed. App. 819-821.

Analysis

The PCR court erred in finding Counsel and Appellate Counsel were ineffective for failing to differentiate between these two types of cigarettes for several reasons. Nowhere did the trial court indicate that it was denying the motion based on the fact that the objects found were “Philly Blunts” and not “Black and Milds.” The trial court’s ruling was based on many factors, including the smell of marijuana (the trial court’s “main indicator”) and that the officers believed at the time of the stop that they saw hollowed-out cigar-shaped objects that had been emptied and were going to be used to smoke marijuana. The actual brand name or type of cigar or cigar-shaped object was never definitively specified at trial, nor was it pertinent in the trial court’s decision to find that probable cause existed to search the vehicle. Furthermore, reasonable suspicion is based on the officers’ observations, and the officer observing loose tobacco on the

floor and a hollowed-out cigar shape object can form reasonable suspicion in the officer's mind whether the cigar is called a Phillies Blunt, Black and Mild, or any other brand name.

Furthermore, the appellate courts found reasonable suspicion and probable cause existed based on many factors including the officers' observations of hollowed out blunts and loose tobacco. The footnotes in both opinions only serve to describe an uncommon word and did not contribute to either Court's rulings. The PCR court erred in finding Morris was prejudiced by Counsel's and Appellate Counsel's actions because reasonable suspicion and probable cause still existed based on other factors and would still exist even if the name of the cigar object was changed or removed from the record. Assuming *arguendo* Counsel and Appellate Counsel argued no "Phillies Blunts" were found in the vehicle and the objects were "Black and Milds," this would not change the officers' testimony that they saw hollowed-out cigar-shaped objects with loose tobacco on the floor. Such a differentiation would not have changed the outcome of the case as it was only one factor of reasonable suspicion and probable cause. Certiorari should be granted on this ground.

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

The PCR court erred in granting post-conviction relief on the basis that the cumulative errors committed denied Morris a fair trial. App. 821-822.

South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. *See e.g., Green v. State*, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) ("Although we recognize that whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina'

we do not believe the facts of this case present an opportunity to definitively decide this question.” (citations omitted)). The Fourth Circuit Court of Appeals 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) (“To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now”).

Because South Carolina Courts do not recognize a cumulative error analysis, the PCR court’s finding of error based on a combination of different alleged deficiencies is inappropriate. For the reasons above, the PCR court erred in granting relief on the basis of cumulative error and certiorari should be granted on this ground.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court’s ruling. Should this Court grant Certiorari, the Petitioner requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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JUSTIN J. HUNTER
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S.C. Bar # 101254

By: 
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April 4, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to York County
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2017-002355

KENNETH MORRIS,

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 of the Petition and one copy of the Appendix in the United States mail, postage prepaid:

**Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646**

This 4th day of April, 2018.



Caroline Collins, Administrative Coordinator

RECEIVED
APR 04 2018
S.C. SUPREME COURT



ALAN WILSON
ATTORNEY GENERAL

April 4, 2018

RECEIVED

APR 04 2018

S.C. SUPREME COURT

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

Re: Kenneth Morris v. State of South Carolina
Appellate Case No. 2017-002355
Lower Court Case No. 2015-CP-46-2859

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 referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/cc
Enclosures

cc: Clarence Rauch Wise, Esquire