

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Beaufort County

Honorable R. Scott Sprouse, Circuit Court Judge

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KELVIN JACKSON,

ORIGINAL

RECEIVED

JUN 04 2018

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002115

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PETITION FOR WRIT OF CERTIORARI

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1.

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## **ISSUES PRESENTED**

1.

Whether the PCR court erred in finding Petitioner presented no evidence that trial counsel placed Petitioner's character at issue where trial counsel testified he admitted evidence Petitioner had charges of failure to pay child support and forgery, and these were irrelevant prior bad acts, and Petitioner correctly testified trial counsel put his character at issue by calling him a womanizer and allowing the jury to hear of his prior arrests, and where the solicitor exploited counsel's errors?

2.

Whether the PCR court erred in using "overwhelming evidence of guilt" as a categorical bar to post-conviction relief where the state failed to present conclusive proof of guilt?

## STATEMENT

Petitioner and Masako Miller (decedent) had two young sons together, and were in an intermittent romantic relationship. App. 244, l. 15 – 246, l. 2. The boys lived with the decedent and her fourteen-year-old daughter at the decedent's home in Hampton; Petitioner too lived there "off and on." App. 303, ll. 16-18. Petitioner also had a young daughter with Tara Roberts of Fairfax, and was employed in Columbia. App. 530, ll. 1-4; App. 552, ll. 9-18.

The decedent was at her home in Hampton at 12:30 a.m. May 26, 2011, but failed to appear for work at 7:00 a.m., and was reported missing by a coworker. App. 618, ll. 9-18; App. 255, l. 24 – 256, l. 4. A fisherman located the decedent's partially decomposed body on an oyster bed at the Broad River in Beaufort County on May 30, 2011. App. 421, ll. 14-20. An autopsy was unable to determine the cause of her death. App. 574, ll. 11-14. No eyewitnesses to the decedent's death or her placement in the river were found. App. 483, l. 23 – 484, l. 6.

On the night of May 25, 2011, the investigation placed three men at the decedent's home: Petitioner, Clarence Wrice, and Marvin Coker. Like Petitioner, Clarence Wrice was in an intermittent romantic relationship with the decedent; they had been dating on and off since 2010. App. 280, ll. 6-8. Wrice admitted being at the decedent's home on the night of May 25, but said he left around 10:00 – 10:45 p.m. App. 281, ll. 7-15. Wrice lived a mile and a half or two miles away from the decedent, and conceded that the decedent sometimes came to his house at night. App. 287, ll. 9-14; 290, ll. 14-15.

Marvin Coker, a repairman, was also at the decedent's home the night of May 25. The decedent's air conditioner was not working. App. 309, ll. 10-12. Marvin Coker said he was at the decedent's house from about 10:30 p.m. to 11:00 p.m. to look at her air conditioning unit, and that he drove there in his personal vehicle rather than his work truck. App. 527, ll. 14-21.

Petitioner was also at the decedent's home the night of May 25 and early morning of May 26. App. 472, ll. 10-12; App. 96, ll. 16-25. Petitioner parked in a nearby area, walked to the decedent's home, and the two talked and had relations. App. 97, ll. 2; App. 522, ll. 2-24; App. 473, ll. 12-13. Petitioner borrowed the decedent's bank card to get gas, returned the card, and went to Walterboro where he got a hotel room. App. 97, ll. 4-8; App. 474, ll. 14-16; App. 478, ll. 8-9. Petitioner and the decedent had possessed a joint bank account and he used her debit card frequently.<sup>1</sup> App. 277, ll. 15-25.

Tara Roberts and Petitioner had experienced relationship difficulties due to Petitioner being "back and forth" romantically between Roberts and the decedent. App. 532, ll. 3-8. At the time of the decedent's disappearance, Roberts worked as a bus driver and one of her routes took her past the decedent's home. App. 533, ll. 8-17. Roberts explained that if Petitioner was visiting the decedent, he might have parked his car elsewhere, because Roberts could see the decedent's driveway from her early morning bus route. App. 532, l. 25 – 533, l. 24.

Petitioner was identified as a suspect because of his attempted use of the decedent's bank card at the Shell gas station in the early morning hours of May 26, 2011. App. 377, l. 7 – 379, l. 12. The transaction was denied for insufficient funds. App. 369, ll. 10-12; App. 371, l. 24 – 372, l. 7. The gas station attendant testified Petitioner paid with cash after the card was declined, he did not seem nervous or in a hurry, and she did not see any marks or blood on him. App. 379, ll. 3-12; App. 382, ll. 2-13.

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<sup>1</sup> In May 2011, the decedent had three bank accounts: a joint account with Petitioner which she closed on May 24, an individual account she opened on May 24, and a third previously existing individual account. It was the third previously existing individual account that Petitioner attempted to draw on to purchase gas. App. 364, ll. 1-5; App. 366, ll. 2-7; App. 366, l. 22 – 367, l. 3; App. 369, ll. 5-12; App. 371, l. 5 – 372, l. 9.

On May 26, the decedent's daughter found a note on the counter that said: "I'll be right back. Get ready for school. Went with someone. Love you all guys." App. 312, ll. 19-22. The note was written in crayon. App. 765, l. 10. Several lay witnesses said the handwriting did not appear to be the decedent's. App. 332, ll. 4-6; App. 312, ll. 18-24. A handwriting analyst opined that the decedent did not write the note, and that it was probable but not certain that Petitioner wrote the note.<sup>2</sup> App. 715, l. 21 – 716, l. 17; App. 717, l. 21 – 719, l. 6.

The decedent and Petitioner had a tumultuous relationship and argued.<sup>3</sup> Law enforcement interviewed Petitioner on May 27, June 2, and June 7, 2011. The court rejected counsel's motion to suppress Petitioner's statements based on his audiotaped remarks to law enforcement: "I think I need a lawyer" several times during the interviews. App. 117 ll. 5-7; App. 170, ll. 10-18; App. 173, ll. 15-21. During the interrogations, Petitioner's response about his activities on the night in question changed, but he consistently denied killing the decedent. App. 470, l. 15 – 473, l. 17; App. 483, l. 23 – 484, l. 6.

When questioned on May 27, and asked his whereabouts, Petitioner said he was at his girlfriend Tara Roberts' house in Fairfax on the night of May 25 – 26. App. 357, ll. 2-4. When confronted with surveillance footage from the Shell station in Hampton, Petitioner said he went to Hampton to get gas. App. 357, ll. 20-23; App. 358, ll. 24-25.

When Petitioner was re-interviewed on June 2, he said that he went to Fairfax the night in question intending to see Tara Roberts, but went to a strip club instead and stopped to get gas in Hampton before going back to Columbia the next morning. App. 471, ll. 7-13. When asked the

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<sup>2</sup> The state did not attempt to obtain a handwriting sample from Clarence Wrice or Marvin Coker, the other men at the decedent's home that night. App. 709, ll. 1-4; App. 709, ll. 13-16.

<sup>3</sup> There was testimony Petitioner was jealous, and they had been in physical altercations. App. 323, ll. 17-22; App. 272, l. 12 – 273, l. 4.

last time he saw the decedent, Petitioner said it was in early May. App. 465, l. 20 – 466, l. 4. However, when confronted with information that someone had seen him in the area of the decedent’s home the night of May 25, Petitioner admitted he saw the decedent the night she disappeared, they had sexual relations, and he asked for her bank card. App. 467, ll. 13-18; App. 473, ll. 10-17.

A Beaufort County Grand Jury indicted Petitioner for murder July 21, 2011. App. 1009-1010. His case was called to trial on July 29, 2013, before the Honorable Maite Murphy, the Honorable Carmen T. Mullen, and a jury.<sup>4</sup> App. 2. Virgin Johnson, Jr., and Korey L. Williams represented Petitioner; Sean Thornton and Hunter Swanson Deysach represented the state. App. 3. In his opening statement, the solicitor conceded: “To be frank with you, this is a circumstantial case. There is not what you would call a smoking gun here.” App. 241, ll. 16-17.

An autopsy was unable to determine the decedent’s cause of death or time of death. App. 574, ll. 11-14; App. 579, ll. 3-5. “The cause of death in this case is undetermined.” App. 574, l. 14. “I could not determine for certain, even [after] the examination, exactly how she died.” App. 574, ll. 23-24. The pathologist classified the manner of death as a homicide based on the circumstances and information from law enforcement regarding the decedent’s disappearance. App. 576, l. 24 – 577, l. 6.

The state introduced a pillowcase from the decedent’s bedroom with a spot of the decedent’s blood on it and touch DNA from Petitioner and another (unknown) male into evidence.<sup>5</sup> App. 592, ll. 21-25; App. 593, l. 11 – 595, l.7. There was reason for Petitioner’s DNA

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<sup>4</sup> Judge Murphy had just been appointed to the bench, and was sitting with Judge Mullen while she tried her first case. App. 52, l. 17 – 53, l. 4.

<sup>5</sup> No DNA was obtained for comparison from Clarence Wrice or Marvin Coker, the other men placed at the decedent’s home that night. App. 709, ll. 5-6; App. 709, ll. 13-18.

to be on the pillowcase because he lived with the decedent off and on. App. 303, ll. 16-18. Although the pathologist said the autopsy could be consistent with suffocation or strangulation, there was no showing the pillow was the murder weapon. App. 577, l. 12 – 578, l. 12.

Joyce Loadholt was the decedent’s coworker, and reported her missing. App. 255, ll. 1-7. On cross-examination, trial counsel inexplicably asked if she knew whether Petitioner had ever been to jail.

**Q Had [Petitioner] gone to jail, she would have told you that, too; wouldn’t she?**

**A When he did go to jail, she did tell me.**

**Q And you talked about that. Okay. That was for child support; wasn’t it, for the other woman?**

**A It was for child support and for forgery check.**

**Q One moment, your Honor.**

App. 268, ll. 19-24 (emphasis added).

In fact, it appears Appellant had no prior record other than traffic tickets. At sentencing, the judge asked: “Solicitor, any prior record?” The solicitor responded: “None of any consequence, your Honor. I believe he had some traffic offenses, some other things, but nothing of any significance that I am aware of.” The solicitor’s co-counsel agreed: “That’s correct.” App. 824, ll. 13-18.

James Bolton of the Hampton Police Department interviewed Petitioner about his use of the decedent’s bank card at the Shell station. App. 349, ll. 2-4. Trial counsel objected to Bolton’s testimony, arguing that evidence of a pending charge was “prior bad act” character

evidence under Rule 404, SCRE and was “more prejudicial than probative under 403.”<sup>6</sup> App. 349, l. 5 – 350, l. 13. Bolton went on to testify that checking on the use of bank cards was standard procedure in a missing persons case, and he spoke with Petitioner “[a]bout a financial transaction card, a debit card that he used at the Shell Station in Hampton.” App. 353, ll. 3-4; App. 359, l. 24 – 360, l. 4. Critically, Bolton did not testify there was any criminal wrongdoing or fraud in connection with Petitioner’s use of the bank card.

Although trial counsel had objected to bad act testimony of alleged financial transaction fraud, and no such testimony was presented by the state, counsel elicited such testimony himself when he later cross-examined another officer.

**Q Okay. All right. Agent Johnson, let me ask you this. The first time you talked to Mr. Jackson, he was in the Hampton jail. Is that correct?**

**A That's correct.**

**Q And he was charged with fraudulent transaction. Is that correct?**

**A I think that was the charge. I wasn't certain of it.**

**Q That's right.**

**A But he was charged with something.**

**Q That's right. And he was charged with the fraudulent transaction, and you went in, and you talked with him. Is that correct?**

**A That's correct.**

App. 481, l. 17 – 482, l. 5 (emphasis added).

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<sup>6</sup> Trial counsel provided the court with a brief during pre-trial motions, moving to suppress among other things, “credit card fraud” regarding the charge pending against Petitioner in another county for his use of the decedent’s bank card as “unfairly prejudicial, irrelevant and inadmissible under Rule 404(b).” App. 973-974. While the court said: “my ruling from before still stands . . .” this matter was never ruled on by the trial court. App. 351, ll. 20-22;

Vicki Hallman, a witness from SLED’s crime scene unit, found “some DSS paperwork with [Petitioner’s] name on it” in Petitioner’s car. App. 455, ll. 9-10. Hallman said it was a notice of a lien with the decedent’s first name visible as the applicant.<sup>7</sup> App. 456, l. 22 – 457, l. 4. The state moved the item into evidence without objection from trial counsel. App. 455, ll. 9-22; App. 456, ll. 15-17.

In closing argument, trial counsel repeatedly referred to Petitioner as a “womanizer,” a “deadbeat dad,” and a “creep” around women. App. 776, l. 12; App. 776, ll. 18-19; App. 777, l. 11; App. 777, ll. 20-22; App. 778, ll. 17-18; App. 779, ll. 22-24; App. 784, ll. 2-3; App. 785, l. 24 – 786, l. 3; App. 788, ll. 14-15; App. 790, ll. 19-20. “He was creeping, yes. He’s a deadbeat dad, yeah.” App. 788, l. 14. Trial counsel told the jury Petitioner “had some prior bad acts,” and had a “different value system.” App. 790, ll. 18-22.

The solicitor also argued in closing: “Now, what do you know about [Petitioner], the defendant in this case? You know he’s a deadbeat daddy. There’s a DSS lien we’ve got photographs of. You know, he’s got locked up for forgery. That was testified to on the stand. Is a forger somebody whose story you should believe?” App. 752, ll. 4-9. “You know he’s a deadbeat dad. You know he’s a check forger. Been abusive to [the decedent] in the past. That was testified to. It’s uncontroverted.” App. 753, ll. 16-18. The solicitor said: “We have a deadbeat daddy, a check forger, and a liar. And all of those things are without any controversy. All of them are accurate, factual.” App. 771, ll. 10-15. He said the decedent was killed by “**deadbeat daddy, check forger, liar, and now murderer, [Petitioner].**” App. 775, ll. 3-4 (emphasis added). The

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<sup>7</sup> Hallman testified of the paperwork: “I can see part of what the title is, but not the whole title,” and that “[i]t’s a notice of a lien.” She said the first name of the applicant was visible, and that it was Masako. App. 456, l. 15 – 457, l. 4.

solicitor claimed Petitioner's motive was in part that "[t]here's an active DSS lien against him by her." App. 773, ll. 17-18.

Petitioner was convicted of murder and sentenced to forty-five years' imprisonment. App. 1011.

On February 12, 2016, after his conviction and sentence were affirmed on direct appeal, Petitioner filed an application for post-conviction relief (PCR). App. 889-901. In his application for PCR, Petitioner alleged his Sixth Amendment right to effective assistance of counsel was violated when trial counsel put Petitioner's character at issue in opening and closing argument, and in his cross-examination. App. 895. The state filed a return to this application dated July 7, 2016. App. 902-908. An evidentiary hearing was convened February 15, 2017, before the Honorable R. Scott Sprouse. App. 925. Assistant Attorney General Ruston Neely represented the state and James K. Falk represented Petitioner. App. 926.

Virgin Johnson, Jr., who represented Petitioner at trial, testified at the PCR hearing, as did Petitioner. Virgin Johnson, Jr., testified before the PCR judge that he admitted evidence Petitioner had been to jail for forgery and failure to pay child support. App. 932, l. 14 – 933, l. 15. Johnson acknowledged that the Record on Appeal page 230, lines 22-25, reflect his elicitation of testimony Petitioner went to jail for child support and forgery. (Page 230 of the Record on Appeal is page 268 of the Appendix.) Johnson acknowledged this prior bad act information did not have any relevance to the case. App. 933, ll. 16-21.

Petitioner testified at the PCR hearing trial counsel allowed the jury to hear of his arrest record. App. 955, ll. 9-13. Petitioner correctly noted that trial counsel put his character at issue, labeled him as a womanizer and liar, and mischaracterized his personality and reputation to the

jury. App. 955, ll. 1-17. Petitioner said counsel had never discussed this “tactic” with him. App. 955, ll. 14-22.

Petitioner’s PCR counsel explained in summation that “this was a very close case,” and “the fact that the jury was able to hear of his prior bad acts . . . might have been sufficient to tip the balance in favor of finding guilt.” App. 960, l. 24 – 961, l. 3. PCR counsel expressed his concern that trial counsel “characteriz[ed] [Petitioner] as a womanizer. And again, in a close case, we feel that’s a prejudicial remark, especially under these facts where it’s the death of a girlfriend.” App. 961, ll. 7-11. PCR counsel correctly explained that bad acts including Petitioner’s alleged criminal record should have been excluded under Rule 404(b), SCRE, but were admitted into evidence. App. 961, ll. 3-6. PCR counsel argued trial counsel was ineffective in his prejudicial “characterization of [Petitioner] in the closing argument.” App. 961, ll. 7-11; App. 962, ll. 14-15.

By order filed September 22, 2017, the PCR court denied Petitioner relief. App. 989-1008. As to the allegation that trial counsel placed Petitioner’s character at issue, the order states: “**Applicant did not present any evidence on this allegation at the PCR hearing. Further, Counsel did not place Applicant’s character at issue.**” App. 1004 (emphasis added).

The order of dismissal also concludes that overwhelming evidence of guilt barred Petitioner from showing prejudice. The order states: “The evidence of Applicant’s was overwhelming [sic],” because Petitioner had the motive, means, and opportunity to commit the crime, and lied to the police. App. 1005-1006.

This petition for writ of certiorari follows.

## ARGUMENT

1.

The PCR court erred in finding Petitioner presented no evidence on the allegation that trial counsel placed Petitioner's character at issue where trial counsel testified he admitted evidence Petitioner had charges of failure to pay child support and forgery, and these were irrelevant prior bad acts, and Petitioner correctly testified trial counsel put his character at issue by calling him a womanizer and allowing the jury to hear of his prior arrests, and where the solicitor exploited counsel's errors.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687. “Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Id.* at 695-96.

“In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue. Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.” *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Similarly, evidence of a defendant’s prior crimes or other bad acts to prove his guilt for the crime charged is prohibited, except to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); Rule 404(b), SCRE. “Evidence of other crimes must be

put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes.” *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

“If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). “Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” *Id.*

Trial counsel put Petitioner’s character in issue, eliciting testimony on cross-examination that Petitioner went to jail for failure to pay child support and for forgery. This unfairly prejudicial evidence was irrelevant and was not otherwise before the jury. Trial counsel further elicited that Petitioner was charged with financial transaction fraud in connection with his use of the decedent’s bank card—prior bad act evidence that was not otherwise before the jury—and that counsel had objected to being admitted by the state. Trial counsel’s damaging elicitation of testimony that Petitioner had been to jail for forgery, financial transaction fraud, and failure to pay child support was unreasonable and deficient.

There was no attempt by the state to show these prior bad acts were logically relevant to the case. Nor were they the subject of a conviction: the solicitor told the court Petitioner had no prior record other than traffic-type offenses. The state did not prove by clear and convincing evidence that Petitioner was found in contempt of court for violation of a family court order of support. It did not attempt to establish the circumstances surrounding the Department of Social Services (DSS) paperwork, to authenticate it, or to argue to the court that it was relevant. Similarly, there was no clear and convincing evidence that Petitioner was charged with forgery; the allegation Petitioner was a “forger” was based solely on hearsay by the decedent’s coworker.

“The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law **in his favor . . .**” *Herring v. New York*, 422 U.S. 853, 860 (1975) (internal quotations omitted) (emphasis added) (quoting *Yopps v. State*, 178 A.2d 879, 881 (1962)). Trial counsel labeled Petitioner as a “womanizer” seven times, a “deadbeat daddy” five times, someone who was “creeping” around women three times, as someone who operated on a “different value system,” and cast other aspersions on Petitioner in closing argument. Notably, trial counsel was referencing bad acts that would not be in front of the jury **but for** counsel’s deficient performance in eliciting them. Trial counsel did not provide any strategic reason for disparaging Petitioner in closing rather than making a proper argument on the evidence and applicable law in his favor.

“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Given that the state’s proof in the case consisted of circumstantial evidence and Petitioner’s inconsistent—but not incriminating—statements to police, trial counsel’s elicitation of testimony that Petitioner was a “forger” was incredibly damaging, as was his insistence that Petitioner was “charged with fraudulent transaction.” Crimes of dishonesty and false statement are central to an assessment of credibility. The stigma of lying and cheating bears directly on believability. *See State v. Peterson*, 35 S.C. 279, 14 S.E. 617, 618 (1892) (old, well-settled rule that one convicted of a crime belonging to the class known as the “*crimen falsi*” was said to be

infamous, and incompetent to testify). Likewise, trial counsel's characterizations of Petitioner as a womanizer and deadbeat father with a different value system were prejudicial. The references portrayed Petitioner as someone with no regard for his family, when the state's theory of the case was that he killed the mother of his children while they were asleep in the next room. These errors had a pervasive effect, and altered the evidentiary picture.

The solicitor, who admitted the case against Petitioner was circumstantial, fully exploited the unfair prejudice to Petitioner, again and again calling him a "deadbeat daddy" and "forger" in closing. A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices. *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004).

Counsel's deficient representation resulted in prejudice to Petitioner. The case against Petitioner was circumstantial. The state's heavy reliance on counsel's errors highlights both counsel's deficiency and the resulting prejudice. *See Ingle v. State*, 348 S.C. 467, 471-72, 560 S.E.2d 401, 403 (2002) (finding prejudice where damaging testimony was elicited by defense counsel and state capitalized on counsel's error); *Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) (state's heavy reliance on defense counsel's failure to challenge gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice).

The PCR court erred in using “overwhelming evidence of guilt” as a categorical bar to post-conviction relief where the state failed to present conclusive proof of guilt.

The PCR court’s order of dismissal concludes Petitioner’s guilt was overwhelming; guilt was the only rational conclusion that could be reached as Petitioner had the motive, opportunity, and means to commit the crime, and because he lied to police. The order states Petitioner was unable to demonstrate prejudice due to this overwhelming evidence of guilt. App. 1005-1006.

Recently, this Court provided a comprehensive explanation of the correct application of *Strickland*’s prejudice prong in *Smalls v. State*. “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). “In addition, the PCR court should consider the strength of the State’s case in light of all evidence presented to the jury.” *Id.* Generally, “the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.*

In *Thompson v. State*, Op. No. 27785 (S.C. Sup. Ct. filed March 21, 2018) (Davis Adv. Sh. No. 12 at 14, 22), this Court again explained that “overwhelming evidence” in the PCR setting is addressed “by balancing the individual impact of trial counsel’s error(s) against the strength of the properly admitted evidence of a PCR applicant’s guilt.” If “the overall strength of the properly admitted evidence of Petitioner’s guilt does not overcome the individual impact of each instance of trial counsel’s deficient performance,” then “there is a reasonable probability that, absent trial counsel’s deficiencies, the outcome of his trial would have been different.” *Id.*

Here, the overall strength of the evidence properly admitted against Petitioner did not overcome the specific impact of each instance of trial counsel's errors. Trial counsel was deficient when he failed to hold the state to its burden of establishing the foundation for the DSS paperwork introduced by the state. This strengthened the state's circumstantial case, by allowing it to claim Petitioner's motive was in part that "[t]here's an active DSS lien against [Petitioner] by [the decedent]." App. 773, ll. 17-18. It also allowed the state to characterize Petitioner as a "deadbeat daddy," without objection.

Counsel was deficient by putting Petitioner's character in issue. Counsel elicited testimony that Petitioner had been to jail for failure to pay child support and forgery, and that he had been charged with financial transaction card fraud in connection with his use of the decedent's bank card. This was unfairly prejudicial and irrelevant prior bad act evidence that the state did not attempt to enter—it was admitted due to trial counsel's errors.

The solicitor, who admitted the case against Petitioner was circumstantial, fully exploited the unfair prejudice to Petitioner, again and again calling him a "deadbeat daddy" and "forger" in closing. The solicitor told the jury the decedent was killed by "deadbeat daddy, check forger, liar, and now murderer, [Petitioner]." App. 775, ll. 3-4. The state capitalized on counsel's errors by arguing to the jury that since Petitioner had bad character, it followed that he murdered the decedent. A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices. *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004).

The state's heavy reliance on counsel's errors highlights both counsel's deficiency and the resulting prejudice. *See Ingle v. State*, 348 S.C. 467, 471-72, 560 S.E.2d 401, 403 (2002) (finding prejudice where damaging testimony was elicited by defense counsel and state

capitalized on counsel's error); *Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) (state's heavy reliance on defense counsel's failure to challenge gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice).

Trial counsel himself then repeatedly labeled Petitioner as a "deadbeat dad," "forger," and "womanizer" in his closing argument.

The specific impact of each of counsel's errors was devastating, and resulted in prejudice to Petitioner.

This Court has explained that for evidence to be so overwhelming it categorically precludes a finding of prejudice, "the evidence must include **something conclusive**, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong . . ." that there is no reasonable possibility counsel's error contributed in any way to the conviction. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (emphasis added).

In *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001), this Court discussed what constitutes "overwhelming evidence." In *Franklin*, overwhelming evidence of guilt existed where Franklin's bloody palm print was found on the murder weapon, his DNA was in the semen on the victim's body, and it was impossible to believe a reasonable juror could find the violent brutality of the murder was the result of consensual sex as Franklin claimed. *Id.* at 574, 552 S.E.2d at 724.

A fair reading of this record does not show overwhelming evidence of guilt. A cause of death was not determined. No eyewitnesses saw the decedent being killed or being put in the river. Two other men admitted being at the decedent's home that night, including the decedent's paramour Clarence Wrice, who lived only a mile and a half away. Although Petitioner's touch

DNA was found on a pillowcase in the decedent's bedroom, Petitioner lived there off and on, and the DNA of another male was also found on the pillowcase.

Petitioner repeatedly denied killing the decedent during multiple interrogations by law enforcement, despite being refused an attorney. Petitioner's exculpatory story was not totally implausible. Petitioner said he parked nearby, talked to and had relations with the decedent, borrowed and returned her bank card, then left. He had regularly used the decedent's bank card in the past, albeit on another account. He had reason to park nearby rather than in the decedent's driveway, because his girlfriend Tara Roberts could see the decedent's driveway from her early morning route as a bus driver. Roberts and Petitioner had a history of relationship problems due to Petitioner being "back and forth" with the two women, and he would not have wanted her to know he was there.

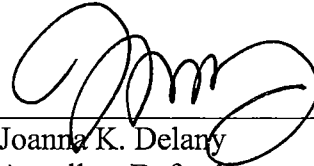
The PCR court erred in determining that overwhelming evidence against Petitioner barred him from showing prejudice. The evidence was not overwhelming: it was woven from circumstantial evidence. *Edmond v. State*, 341 S.C. 340, 349, 534 S.E.2d 682, 687 (2000) (evidence of guilt was not overwhelming where state's entire case was built on circumstantial evidence); *State v. Huggins*, 325 S.C. 103, 108, 481 S.E.2d 114, 116 (1997) (evidence showing guilt was far from overwhelming; it was based entirely on circumstantial evidence); *State v. King*, 334 S.C. 504, 514, 514 S.E.2d 578, 583 (1999) (while circumstantial evidence pointed to guilt, especially blood evidence, the evidence was not overwhelming).

Balancing the errors of trial counsel against the strength of the state's case, the errors significantly undermine confidence in the outcome of Petitioner's trial, and leave a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Petitioner respectfully

submits that the court erred in using “overwhelming evidence of guilt” as a categorical bar to post-conviction relief where the state did not present conclusive proof of Petitioner’s guilt. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845; *Franklin*, 346 S.C. at 574, 552 S.E.2d at 724-25.

**CONCLUSION**

Based on the foregoing arguments, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.

A handwritten signature in black ink, appearing to read 'Joanna K. Delany', is written over a horizontal line.

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Beaufort County

Honorable R. Scott Sprouse, Circuit Court Judge

\_\_\_\_\_  
KELVIN JACKSON,

PETITIONER

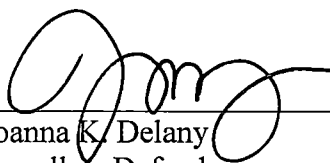
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

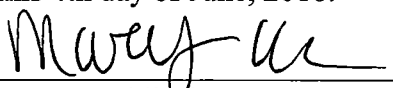
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kelvin Jackson, #356452, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of June, 2018.

  
\_\_\_\_\_  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 4th day of June, 2018.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: May 12, 2021.