

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Kershaw County

Honorable Jocelyn J. Newman, Circuit Court Judge

RECEIVED

JUL 13 2018

GREGORY VINCENT SMITH,

S.C. SUPREME COURT

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2017-001351

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

QUESTION PRESENTED1

STATEMENT OF THE CASE.....5

STANDARD OF REVIEW5

ARGUMENT

State’s Issue 1.

The State cannot prove overwhelming evidence of guilt because (1) the PCR court found trial counsel ineffective with respect to the key pieces of evidence against respondent and, without this evidence, this case does not contain overwhelming evidence, and (2) had trial counsel not been ineffective on even one of the multiple grounds on which the PCR court granted relief, there is a reasonable probability respondent would have been convicted of a lesser-included offense.....6

State’s Issues 2, 3, and 4.

Ample evidence supports a finding that, had trial counsel not performed deficiently, respondent’s videotaped statement would have been excluded (State’s Issues II, III, and IV).....8

State’s Issue 5

The PCR court’s finding that trial counsel’s failure to object to the solicitor’s opening statement prejudiced respondent is supported by the evidence.13

State’s Issue 6

The PCR court correctly held that trial counsel’s failure to object to highly inflammatory prior bad acts and irrelevant evidence prejudiced respondent.14

State’s Issue 7

The PCR Court correctly observed that Trial Counsel failed to object to leading questions.17

State’s Issue 8

The PCR court correctly held that trial counsel was ineffective for opening the door to an allegation of respondent’s involvement in contraband during his cross-examination of Steeprock.17

State’s Issue 9

The PCR court correctly observed that trial counsel failed to object to inadmissible victim impact evidence.19

State's Issue 10	
The PCR court correctly found that trial counsel's failure to cross-examine Dr. Janice Ross to show that Steeprock's version of the shooting was medically impossible prejudiced respondent.....	19
State's Issue 11	
The PCR court correctly found trial counsel ineffective for failing to object to unauthenticated handwritten notes.....	21
State's Issue 12	
The PCR court correctly observed that trial counsel performed deficiently by failing to object to statements that respondent's initials were on a gun holster.	21
State's Issue 13	
The PCR court correctly held that trial counsel's failure to cross-examine a police officer regarding an incorrect statement in a search warrant prejudiced respondent.....	22
State's Issue 14	
The PCR court correctly held that trial counsel's failure to cross-examine a jailhouse snitch about the solicitor's consent to a personal recognize bond constituted ineffective assistance.....	23
State's Issue 15	
This Court need not grant certiorari in this case to consider adoption of cumulative error because the PCR court found multiple errors that, standing alone, are sufficient to warrant a new trial.....	23
CONCLUSION.....	25

**STATE'S QUESTIONS PRESENTED AND RESPONDENT'S COUNTERSTATEMENT
OF THE QUESTIONS PRESENTED**

State's Question 1

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.

Respondent's Restatement of Question 1

The State cannot prove overwhelming evidence of guilt because (1) the PCR court found trial counsel ineffective with respect to the key pieces of evidence against respondent and, without this evidence, this case does not contain overwhelming evidence, and (2) had trial counsel not been ineffective on even one of the multiple grounds on which the PCR court granted relief, there is a reasonable probability respondent would have been convicted of a lesser-included offense.

State's Questions 2, 3, and 4

2. 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.

3. 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.

4. 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.

Respondent's Restatement of Questions 2, 3, and 4

Ample evidence supports a finding that, had trial counsel not performed deficiently, respondent's videotaped statement would have been excluded (State's Issues 2, 3, and 4).

State's Question 5

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.

Respondent's Restatement of Question 5

The PCR court's finding that trial counsel's failure to object to the solicitor's opening statement prejudiced respondent is supported by the evidence.

State's Question 6

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 Steeprock.

Respondent's Restatement of Question 6

The PCR court correctly held that trial counsel's failure to object to highly inflammatory prior bad acts and irrelevant evidence prejudiced respondent.

State's Question 7

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.

Respondent's Restatement of Question 7

The PCR Court correctly observed that Trial Counsel failed to object to leading questions.

State's Question 8

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.

Respondent's Restatement of Question 8

The PCR court correctly held that trial counsel was ineffective for opening the door to an allegation of respondent's involvement in contraband during his cross-examination of Steeprock.

State's Question 9

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.

Respondent's Restatement of Question 9

The PCR court correctly observed that trial counsel failed to object to inadmissible victim impact evidence.

State's Question 10

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 Steeprock in an attempt to discredit Steeprock's assertion that she saw the victim move after she was shot.

Respondent's Restatement of Question 10

The PCR court correctly found that trial counsel's failure to cross-examine Dr. Janice Ross to show that Steeprock's version of the shooting was medically impossible prejudiced respondent.

State's Questions 11

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

Respondent's Restatement of Question 11

The PCR court correctly found trial counsel ineffective for failing to object to unauthenticated handwritten notes.

State's Question 12

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.

Respondent's Restatement of Question 12

The PCR court correctly observed that trial counsel performed deficiently by failing to object to statements that respondent's initials were on a gun holster.

State's Question 13

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.

Respondent's Restatement of Question 13

The PCR court correctly held that trial counsel's failure to cross-examine a police officer regarding an incorrect statement in a search warrant prejudiced respondent.

State's Question 14

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.

Respondent's Restatement of Question 14

The PCR court correctly held that trial counsel's failure to cross-examine a jailhouse snitch about the solicitor's consent to a personal recognize bond constituted ineffective assistance.

State's Question 15

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

Respondent's Restatement of Question 15

This Court need not grant certiorari in this case to consider adoption of cumulative error because the PCR court found multiple errors that, standing alone, are sufficient to warrant a new trial.

STATEMENT OF THE CASE

Respondent agrees with petitioner's statement of the case with the following exceptions. In addition to the missing testimony of the witnesses listed by the State in footnote 5 of its petition, also missing is the testimony of Dr. Janice Ross and a portion of the direct-examination of Respondent.

On April 24, 2017, in a thirty-one (31) page Order, Judge Newman granted post-conviction relief to respondent on nine separate grounds and also on one additional alternative ground. App. 1277-1307. The State filed a Rule 59(e) motion which Judge Newman denied on May 17, 2017. App. 1308. App. 1332. The State filed a petition for certiorari and this return follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018). A PCR court's findings of fact will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo. Id.

ARGUMENT

State's Issue 1.

The State cannot prove overwhelming evidence of guilt because (1) the PCR court found trial counsel ineffective with respect to the key pieces of evidence against respondent and, without this evidence, this case does not contain overwhelming evidence, and (2) had trial counsel not been ineffective on even one of the multiple grounds on which the PCR court granted relief, there is a reasonable probability respondent would have been convicted of a lesser-included offense.

The State fails to properly apply Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Smalls requires an analysis of the specific prejudicial impact of an instance of ineffective assistance and its effect on the piece of evidence asserted as a bar to proving prejudice under Strickland v. Washington, 466 U.S. 668 (1984). The PCR court found trial counsel ineffective with respect to each piece of evidence the State asserts creates overwhelming evidence. Therefore, under Smalls, respondent's case is not the "rare case[]" where overwhelming evidence is "a categorical bar" precluding a finding of prejudice. Smalls at 190, 810 S.E.2d at 844.

The State asserts four pieces of evidence render the PCR court's finding of prejudice on multiple grounds error. First, the State asserts there was an eyewitness to the shooting, Samantha Steeprock. State's Pet. Cert. at 9. The PCR court ruled in respondent's favor on two grounds negatively affecting Steeprock's testimony. The PCR court ruled that trial counsel failed to elicit favorable testimony from the pathologist, Dr. Janice Ross, that Steeprock's third version of the shooting (and the first where she claimed she witnessed it) was medically impossible. App. 1294-95. The PCR court also ruled that trial counsel failed to prevent Steeprock from testifying

about two inflammatory and inadmissible pieces of evidence. App. 1288-90. Under Smalls, Steeprock's suspect testimony does not bar a prejudice finding.

Second, petitioner asserts respondent's statement admitting that he shot at the decedent to scare her, but missed, hitting her in the eye and killing her, bars relief. State's Pet. Cert. at 9. The PCR court, on two separate grounds, found that trial counsel's ineffectiveness affected the admissibility of his statement. App. 1281-85. Respondent asserts that, had trial counsel not been ineffective, respondent's statement would not have been admitted into evidence and therefore cannot bar a prejudice finding. Had respondent's statement not been admitted, the third and fourth pieces of evidence—the gun and the ballistics match—would have been fruit of the poisonous tree and not admitted. See Wong Sun v. United States, 371 U.S. 471 (1963). The State's argument on overwhelming evidence of guilt falls apart under the careful analysis of Smalls.

The State also ignores that respondent received jury charges on two lesser-included offenses: voluntary manslaughter and involuntary manslaughter. App. 693-96. The PCR court granted relief on several instances of ineffective assistance that resulted in substantial prejudice to respondent, including: failing to keep out prior bad acts, failure to impeach key witnesses, opening the door on an inadmissible pending charge, failing to object to the solicitor attributing statements to respondent in opening that were not based on fact, and failure to object to irrelevant, highly inflammatory evidence. App. 1281-1305. Had trial counsel not failed on any one of these grounds, the jury could have reasonably acquitted respondent or found him guilty of a lesser-included offense. The PCR court correctly found prejudice on multiple grounds and this Court need not grant certiorari based on the State's flawed overwhelming evidence of guilt argument.

State's Issues 2, 3, and 4.

Ample evidence supports a finding that, had trial counsel not performed deficiently, respondent's videotaped statement would have been excluded (State's Issues II, III, and IV).

This Court should begin its analysis of whether to grant certiorari in this case by watching the extraordinary video of respondent's statement during which an attorney sits by and allows respondent to give a highly incriminating statement to police at 10:30 PM on the day of his arrest. (Applicant's Ex. 3). The attorney, William Tetterton ("Tetterton"), then allows his client to lead the police to the gun and the video ends with the police and Tetterton discussing who will drive. (Applicant's Ex. 3). The PCR court's factual findings regarding this video are amply supported by both the video and the evidence at the PCR hearing. App. 1281-85.

The police arrested respondent at gunpoint at approximately 1:30 PM on the Saturday of Memorial Day weekend. App. 510, ll. 10 – 12. App. 421, ll. 18 – 20. App. 338, ll. 14 – 16. The police later took respondent to the emergency room where he was checked by a physician for exposure to chemicals from the meth lab on the Tylers' property. App. 98, l. 11 – 101, l. 15. The ER discharged respondent at 5:35 PM. App. 113, ll. 15 – 16. Respondent did not sign the rights waiver, which is captured on the video, until 10:53 PM. App. 456, ll. 1 – 2. (Applicant's Ex. 3). After the video ends, respondent and Tetterton take the police to where the gun is hidden in the woods even though it is approximately midnight. App. 423, l. 2 – 428, l. 20. App. 438, ll. 18 – 24.

In the video, respondent is bewildered by Tetterton's appearance late on the Saturday night of Memorial Day weekend. (Applicant's Ex. 3). He tells Tetterton he has no money and wants to know if, "You're my lawyer?" (Applicant's Ex. 3). Tetterton responds that he will be his lawyer during the questioning period if respondent so desires. (Applicant's Ex. 3).

Respondent then says, “But after today it’s...” and the audio briefly stops. (Applicant’s Ex. 3). Respondent repeats what he has been told—that he has the right to have an attorney with him during questioning, but then observes that it does not “really matter if you get a confession out of me. That means, you’re on your way back, no harm, you just got a confession out of me. Basically, bottom line.” (Applicant’s Ex. 3).

The police interrogator again goes through the rights waiver. (Applicant’s Ex. 3). When the interrogator makes no progress, Tetterton takes over explaining the rights. (Applicant’s Ex. 3). Tetterton asks respondent whether he goes by “Greg” or “Gregory.” (Applicant’s Ex. 3).

Respondent then asks what he can say that will help him. (Applicant’s Ex. 3). Tetterton responds, “Cooperating with them will help you.” (Applicant’s Ex. 3). As the PCR court found, with understatement, “This is not necessarily a legally accurate statement.” App. 1281. Respondent later asks if Tetterton will be with him “in front of a judge” and Tetterton responds, “No, right now.” (Applicant’s Ex. 3).

Respondent says he does not know whether, when he wakes up the next day, whether Tetterton will continue to be his lawyer. (Applicant’s Ex. 3). Tetterton tells him he will be his lawyer until he is relieved and that he is not going to abandon respondent. (Applicant’s Ex. 3). Tetterton tells respondent that he’s in jail and **then asks the officer if respondent had been charged.** (Applicant’s Ex. 3). The officer replies that respondent is being charged “right now” with drug charges and that they wanted to hear respondent’s “side” before they “do anything else.” (Applicant’s Ex. 3). Tetterton tells respondent that all the police have to do is give him his rights and then respondent must decide whether “to say anything or not” and later tells him he has the right not to say anything. (Applicant’s Ex. 3).

Respondent then says there are some “shaded areas.” (Applicant’s Ex. 3). Tetterton then tells respondent that if he has any doubt about shaded areas—then the audio cuts out—and it seems that he finishes by saying he needed to talk to Tetterton before saying anything. (Applicant’s Ex. 3). **Tetterton then asks, with the cameras rolling and two police officers in the room, “What shaded areas do you have?”** (Applicant’s Ex. 3). Respondent mutters something about it being used against him and the officer says they can talk to him “and see where this goes.” (Applicant’s Ex. 3). The officer tells him he knows what evidence he has, but it might not show “the whole picture.” (Applicant’s Ex. 3). Respondent says, “What have I got to lose,” signs the rights waiver, and gives a statement admitting he shot Tyler. (Applicant’s Ex. 3).

At approximately the 20:30 mark on the video, the officer asks if respondent will take them to the gun. (Applicant’s Ex. 3). Respondent turns to Tetterton and asks, “Do you think it’s right? Am I doing the right thing?” and Tetterton nods his assent. (Applicant’s Ex. 3). Tetterton says, “I would have stopped you,” and that they had talked for 30-45 minutes before entering the interrogation room. (Applicant’s Ex. 3). Near the end of the video, after respondent has given a comprehensive, incriminating statement, Tetterton tells respondent that once Tetterton leaves his presence, he advises respondent not to say anything else. (Applicant’s Ex. 3).

The trial court held a Jackson v. Denno hearing on whether the videotaped statement would be admitted. App. 72, l. 11 – App. 139, l. 15. During the hearing, Judge Cooper explained that he had already viewed the video and saw no reason to play it again during the hearing. App. 121, 9 – 24. Judge Cooper then said, “. . . the only person in this room that would like to see it is Mr. Tetterton, and he can see it at a later date.” App. 121, l. 25 – 122, l. 2. After the solicitor finished examining the officer who took respondent’s statement, he then indicated

that he wanted to call Tetterton as a witness at the Denno hearing, but was “kind of hesitant to make that call. . . .” App. 133, l. 18 – App. 134, l. 7. Trial counsel objected to the solicitor calling Tetterton. App. 134, ll. 8 – 9. The court said the only issue was the voluntariness of the statement and told the lawyers, “Forget about Tetterton at this point. That’s not in front of me.” App. 134, ll. 10 – 15.

Trial counsel Riley then made his argument that the video was not admissible on two points. App. 134, l. 18 – App. 135, l. 18. The first point was that respondent’s “will was somewhat overborne because it took considerable explanation for him to reach the point where he was willing to sign the Miranda rights.” App. 134, l. 18 – App. 135, l. 18. Riley’s second point was that respondent did not appear to be “a man in full possession of his mental faculties.” App. 134, l. 18 – App. 135, l. 18. Judge Cooper then asked whether respondent would testify at the Denno hearing; Riley said he had no witnesses and summarized his argument by saying respondent’s confession was “not a totally intelligently, voluntarily, and willingly uttered confession. That’s the defense position.” App. 135, ll. 4 – 18. After hearing from the solicitors, Judge Cooper ruled the video was admissible. App. 135, l. 19 – 139, l. 15.

The PCR court found trial counsel deficient in several aspects with regard to arguing the admissibility of the video at the Denno hearing. App. 1281-85. The court found trial counsel deficient for failing to argue that Tetterton’s implied promises of leniency and failure to provide effective, reliable advice at critical points rendered the statement inadmissible. App. 1281-85. The PCR court cited several instances in the video and testimony at the PCR hearing that Tetterton “appeared at the Sheriff’s Department at the request of someone with the State to assist Applicant in giving his statement.” App. 1281.

The PCR court's findings are supported by the video and the testimony at the PCR hearing. From the video, it is clear that respondent is confused about why Tetterton is there and Tetterton's role. At several key points, including telling respondent that cooperation will help him and asking him—in front of the police and the camera—what the questionable areas of his testimony are, Tetterton's presence results in respondent making a statement. Riley testified at the PCR hearing that law enforcement told him they called Tetterton to come to the station and interview respondent because they had “an open and shut case” and “maybe we can get this thing wrapped up quickly so we don't have to prepare it to go to trial. That was essentially law enforcement's view.” App. 1226, ll. 8 – 25. Riley said he did not argue coercion because he did not think that Tetterton “had coerced him,” but then admitted his should have called respondent to testify during the Denno hearing. App. 1227, l. 6 – 1228, l. 2. Riley testified he did not “know how I would have been able to go into the [Tetterton] aspects in detail.” App. 1227, l. 6 – 1228, l. 2.

The PCR court made a separate finding that trial counsel performed deficiently in not calling respondent to testify during the Denno hearing and the above testimony supports this finding. 1283-84. The court also discussed the State calling an “expert” on the effects of methamphetamine use to testify that respondent was unaffected, but made no specific finding on this ground. App. 1282-83. The court ultimately ruled that respondent was prejudiced “because it is unclear whether or not the statement should have deemed admissible before the jury” and, therefore, “the trial cannot be relied on as having produced a just result.” App. 1285.

While the PCR court is certainly correct in this finding, respondent further asserts that record amply demonstrates prejudice because the statement would not have been admitted had trial counsel presented the correct arguments. See I'On, L.L.C. v. Town of Mt. Pleasant, 338

S.C. 406, 420–21, 526 S.E.2d 716, 723 (2000) (observing that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal). Respondent's statement was extracted by express and implied promises of leniency and therefore was inadmissible. A "confession may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.'" State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246–47 (1990) quoting Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194, 197 (1976) (brackets in original). The promises of leniency, combined with the deficient and ineffective advice of Tetterton at the interrogation, rendered respondent's statement involuntary and inadmissible. Had trial counsel Riley made the proper argument, the statement would not have been admitted or, had the trial judge erred, resulted in reversal on appeal. This Court should deny certiorari on these issues.

State's Issue 5

The PCR court's finding that trial counsel's failure to object to the solicitor's opening statement prejudiced respondent is supported by the evidence.

The PCR court correctly found that trial counsel should have objected to two separate comments made by the solicitor in his opening statement that inaccurately attributed statements to respondent. App. 1285-87. The PCR court correctly held that the State "cannot attribute words to a defendant that were never said by him." App. 1286. The PCR court addressed the State's argument that Steeprook said respondent was going to blame Goat Man for the shooting, but still found prejudice because no one said the defendant planned to blame his statement on meth fumes. App 1286. Further, Officer Phillips did not testify that respondent ever said he was worried about going to jail for the rest of his life when he asked for water. App. 540, l. 17 – 542,

1. 17. The jury hearing that respondent was worried about going to jail for the rest of his life immediately upon encountering the police was highly prejudicial and the PCR court's ruling is supported by the evidence. The Court should deny certiorari on this ground.

State's Issue 6

The PCR court correctly held that trial counsel's failure to object to highly inflammatory prior bad acts and irrelevant evidence prejudiced respondent.

The record shows substantial prejudice from trial counsel's failure to object during Steeproch's testimony on two irrelevant points. App. 1288-91. Trial counsel failed to object when the solicitor elicited testimony from Steeproch that respondent (1) threatened to kill her mother in an unrelated incident, and (2) asked Steeproch to post pictures of Tyler's dead body on a website called "gore.com." App. 1288-91. The prejudice from these deficiencies is manifest.

At trial on direct-examination, Steeproch told the jury that when respondent lived in a trailer near her and her mother, that respondent was cooking methamphetamine and "throwing the trash in my mom's dumpster." App. 185, ll. 13 – 24. Steeproch told her mother, intending that her mother would evict respondent. App. 185, ll. 22 – 25. The solicitor then asked Steeproch, "Did he ever make any comments to you about your mom having thrown him out?" App. 186, ll. 4 – 5. Steeproch replied, "Yeah, he said he was going to kill my mom. He said if it wasn't for me, that he would shoot her, but I didn't think nothing of it." App. 186, ll. 6 – 8.

Trial counsel did not object to this testimony, which was inadmissible as irrelevant and a prior bad act used to show respondent's bad character. App. 186, ll. 4 – 11. Rules 401, 403, 404(b), SCRE. This testimony was highly prejudicial because of its close similarity to the State's theory of why respondent killed Tyler. Steeproch's mother threw petitioner off her property and he reacted by saying he would kill her and she her shoot her. App. 186, ll. 4 – 8.

This dovetailed with the State's theory that Tyler attempted to evict petitioner and he retaliated by shooting her. The solicitor emphasized this point again after Steeprock described the shooting by asking, "And Mr. Smith had previously told you that he would kill your mom; isn't that correct?" App. 193, l. 25 – 194, l. 2. The solicitor also asked Steeprock if she was afraid of what respondent "might do to you or your mom." App. 194, ll. 10 – 12. The PCR court's conclusion that respondent showed he was prejudiced because the State used this inadmissible testimony to help it prove malice is supported by substantial evidence in this record.

The testimony regarding posting pictures of Tyler's dead body is just as irrelevant and just as prejudicial. The solicitor saved for near the end of his direct-examination of Steeprock questions about a website called "gore.com." App. 206, l. 22 – 207, l. 18. The solicitor questioned Steeprock as follows:

Q. Sam, I just have one more thing I want to ask you about, just one more thing, and then I'm going to let Mr. Riley ask you some questions.

After Mr. Smith was taken into custody and was in jail, did you have occasion to go and visit him over at the Kershaw County Jail?

A. Yes, sir, I did.

Q. During the course of those visits, did he ever ask you to do anything for him?

A. Yes, sir.

Q. Did he ask you about any pictures?

A. He told me if I would post pictures of the scene on gore.com.

Q. Now, he had these pictures in the discovery that they had given to him?

A. He said he had pictures of Nicole.

Q. Are you talking about all types of photos?

A. Of her being dead.

Q. And he wanted you to do what?

A. Post them on gore.com.

Q. Is that a website?

A. Yes, sir.

Q. Did he say why he wanted you to post them?

A. No. He just asked me if I would.

Q. And did you do that?

A. No.

Q. Did you think that was the right thing to do?

A. No. That's when I knew that he wasn't sorry for what he did.

App. 206, l. 15 – 207, l. 18. Trial counsel not only failed to object, but went back over the same ground with Steeprock on cross-examination. App. 206, l. 15 – 207, l. 18. App. 230, 14 – 231, l. 22. At the PCR hearing, trial counsel said he “didn’t see any reason to object.” App. 1247, ll. 3 – 9. Trial counsel managed to elicit the additional fact that respondent had the pictures he wanted posted in his cell. App. 231, ll. 5 – 6. Then, in response to this ill-considered line of cross-examination, Steeprock said she first thought respondent “snapped,” but then told her in the jail that “he would blow her head off and do it again and again and again.” App. 231, ll. 16 – 22. On redirect, after the solicitor confirmed Steeprock’s testimony on cross-examination, Steeprock said of respondent, “he said he would take her head off and put it on a tree stump and shoot it over and over and over again.” App. 235, l. 23 – 236, l. 7.

None of this evidence about the photographs was relevant. Rule 401, SCRE. It had no probative value, but the damaging effect on the jury’s view of respondent’s character was

unfairly prejudicial. Rule 403, SCRE. The PCR court correctly held that evidence of a lack of remorse is “constitutionally impermissible on due process grounds.” App. 1291. “References to a defendant's lack of remorse are also improper as violative of a defendant's Fifth, Eighth, and Fourteenth Amendment rights.” State v. Reid, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002). Trial counsel’s failure to exclude this evidence prejudiced respondent and the PCR court’s ruling is correct. This Court should deny certiorari on this ground.

State’s Issue 7

The PCR Court correctly observed that Trial Counsel failed to object to leading questions.

No reason exists to grant certiorari on this ground. The PCR court correctly observed that trial counsel failed to object to leading questions to the extent that the trial judge had to do it for him. App. 1291-92. The PCR court used this as an example of trial counsel’s failure to act as a zealous and attentive advocate, but did not make a legal conclusion of prejudice on this ground. App. 1291-92. To the extent the PCR court used this deficiency, it did so in its cumulative error analysis. App. 1305-06. Therefore, this Court should not grant certiorari on this ground.

State’s Issue 8

The PCR court correctly held that trial counsel was ineffective for opening the door to an allegation of respondent’s involvement in contraband during his cross-examination of Steeprook.

Trial counsel inexplicably tried to impeach Steeprook on a pending charge for contraband that implicated his own client and the PCR court’s finding of deficient performance and prejudice is supported by the record. App. 1292-93. Trial counsel asked Steeprook, “Were you

not charged with bringing contraband?” App. 219, ll. 17 – 22. He confirmed that charge was still pending. App. 219, ll. 17 – 22. Steeprook then said she was sure “that incident of contraband to an inmate through the mail” was still pending. App. 220, ll. 7 – 9.

The solicitor capitalized on trial counsel’s error in opening the door during redirect. App. 234, l. 14 – 235, l. 11. The solicitor asked whether respondent asked Steeprook “to try to bring meth into him,” and Steeprook answered, “Yes, sir, he told me I had to do it and how to do it.” App. 235, ll. 2 – 4. The solicitor then confirmed that the idea was respondent’s. App. 235, ll. 5 – 11. Trial counsel again brought the contraband issue up as he cross-examined Officer Phillips which allowed the solicitor to again exploit it on re-direct. App. 570, l. 3 – 579, l. 20.

The PCR court correctly found that trial counsel’s claimed trial strategy was unreasonable. App. 1292-93. Trial counsel was asked whether he understood that Steeprook’s contraband charge involved his client and he responded that he did, and “I didn’t say that, did I?” App. 1252, ll. 9 – 14. He then tried to say that Steeprook “could have been doing it for someone else too.” App. 1252, ll. 13 – 16. Trial counsel continued to assert that he believed the contraband charge was damaging to Steeprook’s credibility. App. 1252, l. 1 – 1253, l. 22.

The PCR court correctly held this strategy was illogical. If involvement in bringing meth into the jail damaged Steeprook, then it must also have damaged respondent—especially after the State made it clear that the scheme was allegedly respondent’s idea. “It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.” State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). Had trial counsel not opened the door, the State could not have introduced this evidence. The PCR court’s holding that trial counsel’s deficient performance prejudiced respondent is supported by the record and this Court should deny certiorari.

State's Issue 9

The PCR court correctly observed that trial counsel failed to object to inadmissible victim impact evidence.

No reason exists to grant certiorari on this ground. The PCR court correctly observed that trial counsel failed to object to questions about how Steeprock felt about Tyler and Goat Man's deaths. App. 1293-94. The PCR court used this as an example of trial counsel's failure to act as a zealous and attentive advocate, but did not make a legal conclusion of Strickland prejudice on this ground. App. 1291-92. To the extent the PCR court used this deficiency, it did so in its cumulative error analysis. App. 1305-06. Therefore, this Court should not grant certiorari on this ground.

State's Issue 10

The PCR court correctly found that trial counsel's failure to cross-examine Dr. Janice Ross to show that Steeprock's version of the shooting was medically impossible prejudiced respondent.

Steeprock's version of events she used at trial, where she claimed to actually witness the shooting, was proved medically impossible by the testimony of Dr. Janice Ross at the PCR hearing.¹ In Steeprock's first 911 call, she told the police "that there might have been a domestic dispute" and that she heard a gunshot. App. 194, ll. 13 – 21. She did not tell them anything about respondent being involved in the shooting. App. 195, ll. 2 – 18. Steeprock's first call after calling 911 was to her sister. App. 195, l. 19 – 196, l. 14. She did not tell her sister anything about the shooting or being a witness. App. 196, ll. 11 – 14. Steeprock explained her

¹ Dr. Ross's testimony is missing from the PCR hearing transcript, but the State does not dispute the PCR court's recitation of her testimony, only its legal effect.

decision not to tell her sister: “I mean, I didn’t know if it really happened or not.” App. 196, ll. 11 – 14. She then testified that she told her sister’s husband that she thought respondent shot Tyler. App. 196, l. 21 – 197, l. 1.

Steepprock’s first two written statements do not contain Steepprock’s description at trial of the shooting. App. 1261-64. A memorandum dated July 19, 2012, does contain the version where she claims to witness the shooting. App. 1265-66. In this statement, Steepprock, “said that she saw [Tyler] grab or wipe her face as she ran out the door.” App. 1266. Dr. Ross testified at trial that Tyler died from “laceration of the brainstem.” App. 349, ll. 3 – 4. At the PCR hearing, Dr. Ross testified that this injury would have caused her to become unconscious almost immediately and “that it would not be medically possible for the victim to reach up and wipe or touch her face after being shot.” App. 1294. Trial counsel asked Dr. Ross no questions. App. 350, l. 2.

The PCR court correctly found that trial counsel did not understand this point and his purported trial strategy was unreasonable. App. 1294-96. Trial counsel’s claim that he wanted to limit Dr. Ross’s time on the stand is an admission that he failed to investigate the positive aspects of her testimony and discover this information. Second, it is inconsistent with his claim that he wanted to impeach Steepprock’s credibility when he was confronted with opening the door to the contraband charge. Had the jury heard that Steepprock’s description of the shooting was impossible from the State’s witness, a highly respected pathologist, it would have substantially damaged Steepprock’s credibility.

The PCR court also correctly found prejudice. The solicitor’s emphasis on the truthfulness of Steepprock’s testimony during his examination makes this point. On direct-examination, Steepprock claimed that the possibility that she might die from an illness (“full

blown AIDS”), made her want to clear her conscience. App. 204, l. 11 – 206, l. 9. App. 221, ll. 20 – 23. Steeprook said she “couldn’t live with myself anymore about not telling the truth.” App. 202, l. 23 – 203, l. 3. The PCR court’s holding is supported by substantial evidence and this Court should deny certiorari.

State’s Issue 11

The PCR court correctly found trial counsel ineffective for failing to object to unauthenticated handwritten notes.

The PCR court correctly held that the State presented no evidence that the note was written by Tyler other than it was found in her bedroom. App. 1297-98. App. 371, l. 7 – 372, l. 11. The police officer testified the note seemed like Tyler “was kind of venting like.” App. 372, ll. 9 – 11. The PCR court held trial counsel should have objected because the State lacked sufficient foundation to admit this note as purportedly written by Tyler. App. 1297-98. The PCR court’s conclusion is correct that the note was prejudicial because it showed a motive for respondent to kill Tyler. App. 1297-98. The note, if it was written by Tyler, also corroborated Steeprook’s testimony about the fight between Respondent and Tyler that led up to the shooting. Under this Court’s standard of review, the PCR court’s ruling is supported by probative evidence and no reason exists to grant certiorari.

State’s Issue 12

The PCR court correctly observed that trial counsel performed deficiently by failing to object to statements that respondent’s initials were on a gun holster.

No reason exists to grant certiorari on this ground. The PCR court correctly observed that trial counsel failed to object to statements that respondent’s initials were on a gun holster when the police lost the holster. App. 1298-99. The PCR court used this as an example of trial

counsel's failure to act as a zealous and attentive advocate, but did not make a legal conclusion of Strickland prejudice on this ground. App. 1291-92. To the extent the PCR court used this deficiency, it did so in its cumulative error analysis. App. 1305-06. Therefore, this Court should not grant certiorari on this ground.

State's Issue 13

The PCR court correctly held that trial counsel's failure to cross-examine a police officer regarding an incorrect statement in a search warrant prejudiced respondent.

Given the fact that trial counsel already performed deficiently in opening the door on the contraband charge, he failed to make the best use of this situation when he did not cross-examine Officer Phillips on an incorrect statement in a search warrant affidavit. As Officer Phillips' credibility was crucial—especially with respect to the admissibility of respondent's statements and the procurement of statements from the snitch and Steeprock, the PCR court correctly found prejudice.

Officer Phillips' affidavit told the magistrate judge that respondent tested positive on a random drug test for amphetamines. App. 760. The affidavit is dated August 15, 2011. App. 760. On the same day, the drug test results on respondent were negative for amphetamines (and all other drugs tested). App. 1090. At the PCR hearing, trial counsel admitted he should have cross-examined Officer Phillips about the contradiction between his assertion to the magistrate judge as justification for the search warrant for respondent's cell and the negative results. App. 1232, ll. 11 – 15. This evidence supports the PCR court's ruling and this Court should deny certiorari.

State's Issue 14

The PCR court correctly held that trial counsel's failure to cross-examine a jailhouse snitch about the solicitor's consent to a personal recognize bond constituted ineffective assistance.

The State's concedes in its petition that cross-examining the snitch, Morris Nixon, that the State consented to a personal recognizance bond shortly after he gave a favorable statement to the police "may have been helpful." Pet. Cert. 22-23. The State then concedes this evidence "may have further damaged Nixon's credibility," but then makes the extraordinary claim that no matter the case presented by the defense, the State's own witness would not have been strong or persuasive. Pet. Cert. 23. This argument begs the question of why solicitors would call such a suspect witness in the first place. Regardless, failing to cross-examine a witness about pending charges and the potential for favorable disposition by the State in exchange for testimony is deficient performance. See Smalls v. State, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840–41 (2018). The State's argument is insufficient to warrant a grant of certiorari and the PCR court's finding of prejudice is supported because Nixon's testimony helped the State establish malice and further damaged respondent's chances at an acquittal or conviction on a lesser-included offense.

State's Issue 15


This Court need not grant certiorari in this case to consider adoption of cumulative error because the PCR court found multiple errors that, standing alone, are sufficient to warrant a new trial.

Certiorari is not required in this case to consider the PCR court's final ground regarding cumulative error. As shown above, the PCR court found that trial counsel's ineffective assistance on multiple grounds warrants a new trial. Because the PCR court found ineffective assistance on multiple, stand-alone grounds, this Court should not grant certiorari to consider cumulative error.

Furthermore, this case does not present an adequate vehicle for this Court to consider the applicability of cumulative error. Cumulative error is a complex question. See Benjamin Dudek, Note, Rebutting the "Strong Presumption of Reliability" for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina, 65 S.C. L. Rev. 685 (Summer 2014) (advocating the adoption of cumulative error analysis in South Carolina). This Court should ultimately adopt cumulative error in PCR cases, but true cumulative error analysis concerns the "accumulation of multiple nondeficient errors." Id. See also Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008). This Court should wait for a case where a PCR judge found "death by a thousand cuts" without any stand-alone grounds to consider this issue.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.


for David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Honorable Jocelyn J. Newman, Circuit Court Judge

GREGORY VINCENT SMITH,

RESPONDENT


V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

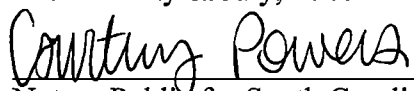
The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gregory V. Smith, #353524, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of July, 2018.

for 

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 13th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.