STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County
The Honorable Frank R. Addy, Circuit Court Judge

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Appellate Case No. 2017-001273

Alfred Guy Henson,

Petitioner,

v.

State of South Carolina,

Respondent.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S QUESTION PRESENTED

I. Is there probative evidence in the record to support the PCR court's finding Counsel was not ineffective, despite Counsel's deficiency in failing to preserve the search and seizure issue for appellate review, because there was no prejudice to Petitioner where he was not reasonably likely prevail on the issue in a direct appeal?

II. Is there probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by Counsel's decision to recall Deputy Wilson, thus losing the last closing argument, because it is not reasonably likely to have changed the outcome at trial where nothing in the State's argument required rebuttal and there was overwhelming evidence of Petitioner's guilt?

III. Is there probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by Counsel's stipulation regarding his two prior burglary convictions when there is no evidence the prior convictions were unconstitutional and where the State also presented evidence Petitioner possessed a knife at the time of the burglary ?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In September 2011, the Spartanburg County Grand Jury indicted Petitioner for burglary – first degree (2011-GS-42-0351), and grand larceny – third or subsequent offense (2011-GS-42-0352). Max B. Singleton, Esquire, (Counsel) represented Petitioner. Assistant Solicitor Timi Poulos prosecuted the case. On October 11, 2011, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Petitioner guilty of both charges as indicted. Judge Couch sentenced Petitioner to concurrent terms of imprisonment of twenty years for burglary and ten years for larceny.

A timely notice of appeal was filed on Petitioner's behalf. Pursuant to Petitioner's request to withdraw, the South Carolina Court of Appeals dismissed the appeal by Order filed June 12, 2012. The Remittitur was returned on September 14, 2012.

Petitioner timely filed his application for post-conviction relief (PCR) on April 25, 2013. An evidentiary hearing was convened on November 9, 2016, at the Spartanburg County Courthouse before the Honorable Frank R. Addy. J. Faulkner Wilkes, Esquire, represented Petitioner. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel, Matthew Shealy, and Timi Poulos testified for the State. The PCR court found Petitioner received effective assistance of counsel and dismissed Petitioner's application in its entirety by order signed May 17, 2017, and filed May 23, 2017. Petitioner filed a Petition for a Writ of Certiorari to this Court on January 29, 2018. This Return to the Petition for a Writ of Certiorari follows.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE FACTS

On November 8, 2010, the victim, Leslie Ofori, was taking a shower when she felt vibrations in the floor, which indicated that someone was walking around downstairs in her home. App. p. 98. At first, she though it was her husband returning early from work, but she called out to him and did not hear a response, and while she was getting dressed, she heard the footsteps again and the chimes of the alarm system indicating a door had been opened. App. p. 99. She heard a motor crank up and then looked out the window and saw someone on a moped speeding out of her driveway. App. pp. 99-100.

Earlier that afternoon, officers came across Petitioner in front of a restaurant. App. pp. 132. Petitioner approached Deputy Jason Wilson, but then said he did not know the officers and he thought they were someone else. App. pp. 132-33. Wilson asked Petitioner's name, but Petitioner only said "Al" and would not provide his last name. App. p. 133. He then got on his moped and drove off. App. p. 133. Wilson went back inside, and he and the other officers were able to identify Petitioner as Alfred Henson. App. p. 133. They also determined Petitioner's driver's license was suspended, and he did not have a moped license. App. p. 133.

Later in the afternoon while on patrol with Deputy Brent Brown near Bennetts Bridge Road, Deputy Wilson looked in his rearview mirror and observed Petitioner driving the same moped and wearing the same clothing. App. pp. 134, 165. Wilson then turned around and began to initiate a traffic stop on Petitioner as he was pulling into his residence. App. pp. 134-35. Brown testified that he and Wilson followed Petitioner into his driveway, and Petitioner jumped off his moped and began throwing items under a car parked in the driveway. App. p. 165.

Brown testified he saw Petitioner throw "what seemed to be a large object and then a couple small objects under the car, but [he] couldn't tell what they were." App. p. 165. Wilson

testified he distinctly saw Petitioner throw a camera. App. p. 136. Deputy Nick Turner looked under the car where the camera was found and saw two credit cards, right next to the moped. App. p. 154. Brown testified he searched Petitioner and recovered a folding pocketknife with a blade about three or four inches long from Petitioner's front pocket. App. p. 166.

The officers were able to obtain the victim's address using the name on the credit cards, and they then went to her home to speak to her. App. p. 177-78. It was not until the officers arrived that the victim realized things had been taken from her home. App. p. 183. She identified the camera as belonging to her husband. App. pp. 178-79. Photographs of shoe prints on the floor in the victim's home were taken and introduced as evidence at trial. App. pp. 179-80. Deputy Kevin Murphy testified Petitioner was wearing size ten medium Timberland boots when he was arrested. App. p. 211. A photograph of the boots was also introduced into evidence. App. p. 212. The victim testified her husband owned size 13 Timberland boots. App. pp. 130-31.

At trial, Counsel moved to suppress the introduction of the camera and credit cards, arguing they were the fruits of an illegal search and seizure. App. p. 29. The Court denied the motion, finding the police were lawfully on Petitioner's property because of the traffic stop, the items they saw under the car were in plain view, and the viewing of those items would have indicated a possibility or potential for criminal activity which would require additional investigation. App. p. 76. The Court also stated because Petitioner tossed the items under a vehicle during a stop, the officers had the right, if nothing else, to look under the vehicle for officer safety. App. p. 76. Counsel did not contemporaneously object to the officer's testimony that they found the camera and cards. App. p. 102, 105-06.

## ARGUMENT

**I. There is probative evidence in the record to support the PCR court's finding Counsel was not ineffective, despite Counsel's deficiency in failing to preserve the search and seizure issue for appellate review, because there was no prejudice to Petitioner where he was not reasonably likely prevail on the issue in a direct appeal.**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, an applicant must prove counsel's performance was deficient. Id. 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." Id. at 117-18, 386 S.E.2d at 625.

When a PCR applicant claims ineffective assistance of trial counsel for failure to preserve an issue for appellate review, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. 465, 475-76, 746 S.E.2d 41, 47 (2013) ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a

Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and there was a reasonable probability that it would have resulted in reversal and a new trial on direct appeal.

Here, the PCR court found Counsel was deficient in failing to renew his objection to the admission of the camera and credit cards, but found Petitioner was not prejudiced because he would not have prevailed on appeal had the issue been preserved. App. p. 421. The State concedes Counsel was deficient for failing to contemporaneously object to the admission of the challenged evidence, rendering it unpreserved for direct appellate review. However, the PCR court correctly denied relief because Petitioner failed to prove the second prong – that his Fourth Amendment claim was meritorious and would have resulted in reversal on appeal.

"Evidence seized in violation of the Fourth Amendment must be excluded from trial. Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005) (internal citations omitted). However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (citing Katz v. United States, 389 U.S. 347, 357 (1967)). "These exceptions include: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view

doctrine; (6) consent; and (7) abandonment." Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (quoting State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012)).

The trial court denied Counsel's motion to suppress on the basis of the plain view exception to the warrant requirement, as well as the officer safety exception during a search incident to arrest. App. p. 76. Under the plain view doctrine, "objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects, are subject to seizure and may be introduced as evidence." Id. at 186, 754 S.E.2d at 870-71 (quoting State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011)). Therefore, if the State can show (1) the initial intrusion which afforded the police officers the plain view of the evidence was lawful; and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities, the evidence is lawfully seized under the plain view exception and may be admitted. Id. at 186, 754 S.E.2d at 871.

In Petitioner's case, the trial court found "the police were legally on the property of the defendant. . . because of the traffic stop and had a right to be there, [] the items that they saw under the car were in plain view once they were legally on the property. . ." and "a viewing of those items would have indicated that were was a possibility or potential for criminal activity that would require additional investigation. . . ." App. p. 76. The trial court additionally found the officers were justified in retrieving the items due to officer safety because "items being tossed under the vehicle during the stop would be such that police officers would have a right to look." App. p. 76. The State also argued Petitioner abandoned the items by throwing them under the car, though the trial court rejected that argument.[1] App. p. 72.

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[1] The State declines to address officer safety or the abandonment exception at this time, as the State believes this issue is resolved by the application of the plain view exception, or in the alternative, as a search incident to arrest. However, should this Court grant certiorari on this

At trial, Petitioner conceded the officers were lawfully on the property in order to effectuate the traffic stop and arrest for driving the moped without a license. App. p. 75. However, Petitioner's argument at trial and in his petition is that the incriminating nature of the items was not immediately apparent and could only be ascertained by additional investigation – i.e. getting down on a knee to pick up the credit cards and reading the name or turning on the camera and looking at the pictures – because at the time of the traffic stop, officers were not aware of the burglary of the victim's home, as she had not yet reported it. App. p. 48, 73; PWC p. 12.

During the suppression hearing, Deputy Wilson testified the car in question was no more than two or three feet from the moped, and the cards and camera were in the grass under the car. App. p. 44. The officers clearly testified upon looking at the cards, they could see the victim's name and a picture of a black female.[2] App. pp. 51-52. Although Wilson testified the officers could not determine whose name was on the cards without removing them from underneath the car, Wilson was not the officer who retrieved the camera and/or the cards. App. pp. 43-44. The officer who removed the credit cards from under the car testified at trial he was told where the camera had been recovered, so he did a second look and "as soon as [he] looked under there, [he] saw three credit cards." App. pp. 161-62.

Wilson further testified he could tell immediately that the camera Petitioner threw was a "a good size camera,. . . one of those larger. . . digital cameras" which raised his suspicions because "[he] knew it wasn't normal behavior for a person to jump off the moped and throw a camera underneath the car. . . . [He] didn't know if [they] had a car breaking or what had just

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issue, Respondent requests the opportunity to address abandonment and officer safety through further briefing.

[2] Petitioner is a white male. App. p. 388.

happened. . . so [they] were trying to determine. . . ownership of the camera." App. pp. 40, 45. Similarly, in making his ruling on the admission of the evidence, the trial judge clearly stated his reasoning that the act of throwing the items gave the officers reason to believe the items were incriminating. The judge stated, "[Counsel], had they pulled him over, and gotten out of the car and he stood there beside his moped, didn't do anything, I'm with you. But if they see somebody throw something under a vehicle when he's being stopped, that raises a suspicion in my mind." App. p. 69.

The United States Supreme Court explained the "immediately incriminating" prong in Texas v. Brown, equating it with probable cause. 460 U.S. 730, 742 (1983) ("We think this statement of the rule. . . requiring probable cause for seizure in the ordinary case, is consistent with the Fourth Amendment and we reaffirm it here."); see also Arizona v. Hicks, 480 U.S. 321, 326 (1987) (holding probable cause is required for a search to be valid under the plain-view doctrine). The Brown court explained, "'[p]lain view' is perhaps better understood. . . not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to the object' may be." Id. at 738-39. The plain-view doctrine "provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." Id. at 738. "In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that *if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately*." Id. at 739 (emphasis added).

In Brown, the officer stopped defendant's car at a driver's license checkpoint. Id. at 733. As the officer stood by Brown's driver's side door and shined his flashlight into the car, Brown reached across to the passenger's side to open the glove compartment, and removed a hand from

his pocket and dropped "an opaque, green party balloon, knotted about one half inch from the tip" onto the floor of the vehicle. Id. Because of his previous experience, the officer was aware that drugs were frequently packaged in balloons like the one he saw emerge from Brown's pocket. Id. at 734. Upon seeing the balloon, the officer "shifted his position in order to obtain a better view of the open glove compartment and saw several plastic vials, an open bag of party balloons, and a white powdery substance. Id. The officer then asked Brown to exit the vehicle and stand at the rear of the car. Id. Before following Brown, the officer reached into the car and picked up the green balloon. Id.

In Petitioner's case, as in Brown, there is no question as to the validity of the initial stop. Id. at 739. Petitioner conceded as much as trial. App. p. 75. Additionally, the officers in Petitioner's case clearly had probable cause to suspect the items thrown by Petitioner were contraband. "In dealing with probable cause... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." State v. Dupree, 319 S.C. 454, 458, 462 S.E. 2d 279, 282 (1995) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). "Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar, 338 U.S. at 175–76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

Further, "[t]he theory of [the plain view] doctrine consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places

of such objects as weapons and contraband." Hicks, 480 U.S. at 326–27. As the deputy in Petitioner's case explained, "it wasn't normal behavior" for a person, upon realizing he is being pursued by police officers, to throw a digital camera, clearly an object of some value, onto the ground underneath an adjacent parked car. App. pp. 40, 45. The clear implication of such behavior is that the item is being thrown in an attempt to conceal its existence because it is contraband. Additionally, although the officers did not specifically see the credit cards being thrown, one officer testified he saw Petitioner throw two smaller objects along with the camera, and the officer who found the credit cards knew the camera had been recovered from that spot moments earlier. App. pp. 154, 161-62. Any reasonable officer in a similar position would have retrieved the items from beneath the car. See State v. Wright, 416 S.C. 353, 369, 785 S.E.2d 479, 487 (Ct. App. 2016) ("In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action.") (citation omitted).

Finally, the search-incident-to-arrest exception is an additional sustaining ground upon which the appellate court could uphold the admission of the evidence. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.") As discussed above, a search incident to a lawful arrest is an exception to the Fourth Amendment warrant requirement. Robinson v. State, 407 S.C. at 185, 754 S.E.2d at 870. During a search incident to arrest, an officer may search "the arrestee's person and the area within his immediate control," which is defined as "the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). In United States v. Robinson, the Supreme Court held

searches of an arrestee's person, including his or her clothing and personal effects, require "no additional justification" beyond the validity of the initial arrest. 414 U.S. 218, 224 (1973). Petitioner conceded the validity of the arrest at trial, and the officers testified the credit cards and camera were recovered within a few feet of where Petitioner was standing when arrested. App. pp. 44, 75.

On appeal from a motion to suppress, appellate courts will only reverse the trial court if there is clear error and will affirm if there is any evidence to support the ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). The trial court correctly found the items were seized pursuant to the plain view exception to the warrant requirement as there was no dispute the officers were lawfully on Petitioner's property, and upon seeing him throw the camera, they had probable cause to believe Petitioner was attempting to hide contraband or other evidence of a crime. Further, the search-incident-to-arrest exception is an additional sustaining ground. Therefore, despite Counsel's deficient performance in failing to renew his objection at trial, the PCR court correctly denied relief because the trial court would have overruled the objection, and Petitioner is not reasonably likely to have prevailed on direct appeal. This Court should therefore deny the petition as to this ground.

## II. There is probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by Counsel's decision to recall Deputy Wilson, thus losing the last closing argument, because it is not reasonably likely to have changed the outcome at trial where nothing in the State's argument required rebuttal and there was strong evidence of Petitioner's guilt.

Petitioner argues he was prejudiced when trial counsel chose to recall Officer Wilson in the defense's case, thus losing the last closing argument, because trial counsel could have elicited the same testimony on cross-examination.[3] PWC p. 14. However, the PCR court correctly

[3] Petitioner also alleges Counsel improperly defined reasonable doubt and takes issue with the

found Petitioner was not prejudiced by Counsel's decision where the State did not introduce any new arguments which would have required a rebuttal, and where the order of argument is not reasonably likely to have had an effect on the outcome of the trial because there was overwhelming evidence of guilt. App. pp. 422-23.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 693. Therefore, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. See also State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) ("Although the right to open and close the argument to the jury has been described as 'a substantial right, the denial of which is reversible error,'. . . such an error is still subject harmless error analysis."). Counsel's decision to recall Deputy Wilson to the stand, even if deficient, had no effect on the outcome of the trial because, despite Petitioner's contention to the contrary, the State did not introduce any new theories or arguments during closing which Counsel was unable to address, and there was strong evidence of Petitioner's guilt. Therefore, Petitioner was not prejudiced by any deficiency.

In closing, Counsel focused on calling the timeline of the robbery into question and pointing out the weaknesses of the State's case in meeting all the elements of the first-degree burglary charge – specifically showing Petitioner had entered the house himself. App. pp. 237-

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content of the solicitor's closing argument. PWC pp. 17-18. These arguments are wholly irrelevant to the issue of whether Counsel was ineffective for giving up the last closing argument. Further, these issues are not preserved for this Court's review, as an allegation Counsel improperly defined reasonable doubt or should have objected to the content of the State's closing was never raised to the PCR court. See Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) ("Pursuant to S.C.Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues.").

56. Counsel pointed out the lack of direct evidence linking Petitioner to the home and noted that the victim's wallet was later found in the street, which could explain how Petitioner came to be in possession of the victim's property without having committed the robbery. App. pp. 245-46, 249. This argument directly answers the solicitor's "mystery man" defense, which Petitioner incorrectly contends Counsel was unable to address as a result of closing first. PWC p. 17. Further, Petitioner argues he was unable to respond to the State's argument he could have worn gloves to prevent fingerprints inside the home, and Counsel could have responded by pointing out the State's burden of proof. PWC pp. 17-18. However, Counsel specifically argued Petitioner's fingerprints were not found in the house and anticipated the State's argument that Petitioner must have worn gloves by emphasizing no gloves were found at the time of Petitioner's arrest and none were entered into evidence. App. p. 244. Counsel also emphasized the State's burden of proof and closed his argument by asking the jurors to, "[l]ook at what was placed into evidence and see if [they] believe beyond a reasonable doubt that [the State] can prove [Petitioner] entered that home. . . ." App. p. 257.

The State presented evidence showing Petitioner was arrested, driving a moped, with items taken from the victim's home in his possession, within an hour of the time the victim heard a person in her house and saw a strange man on a moped pulling out of her driveway. Although circumstantial, the evidence of Petitioner's guilt was strong, and Petitioner has presented no evidence of an argument Counsel was unable to make by closing first which would have sufficiently countered the State's case so as to call the outcome of the trial into question. Accordingly, Petitioner was not prejudiced by the loss of the last closing argument, and the petition should be denied as to this issue.

## III. **There is probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by Counsel's stipulation regarding his two prior burglary convictions when there is no evidence the prior convictions were unconstitutional and where the State also presented evidence Petitioner possessed a knife at the time of the burglary.**

Petitioner argues Counsel was deficient for failing to challenge Petitioner's two previous burglary convictions as uncounseled, and this failure led to the improper enhancement of Petitioner's conviction to first-degree burglary. PWC. p. 22. However, Petitioner misconstrues the rule regarding uncounseled convictions, and he has submitted no evidence the convictions were unconstitutional. Further, the State also presented evidence Petitioner was armed with a knife at the time of the robbery, which is sufficient on its own to satisfy the elements of a first-degree burglary charge.

As the United States Supreme Court has explained, "[t]he Gideon case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer *or had validly waived one*.' In Burgett we said that '(t)o permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case.'" United States v. Tucker, 404 U.S. 443, 449 (1972) (citing Burgett v. Texas, 389 U.S. 109, 114 (1967)) (emphasis added). However, "[a] prior uncounseled conviction is not constitutionally defective or invalid when the defendant knowingly, voluntarily, and intelligently waived his right to counsel." State v. Spratt, 383 S.C. 212, 213–14, 678 S.E.2d 266, 267 (Ct. App. 2009). Further, "the defendant bears the burden of proof when collaterally attacking a prior conviction the State seeks to use for sentence enhancement. . . . Once the State has proven the prior conviction, the defendant must prove it is constitutionally defective or otherwise invalid by a preponderance of the evidence." Id. at 213, 678 S.E.2d at 267.

Here, Petitioner has presented evidence through his testimony that his previous convictions were uncounseled, but there is no evidence the lack of counsel was unconstitutional in that Petitioner did not validly waive his right to an attorney as permitted by Faretta.[4] Petitioner's testimony at the PCR hearing was only that he did not have an attorney; he did not testify he requested one and was denied. App. pp. 321-23. He testified, at least as to the first conviction, he pleaded guilty voluntarily in order to receive a favorable resolution of the case. App. p. 322.

In any event, Petitioner's two prior convictions were not the only theory on which the State based the charge of first-degree burglary. As Petitioner concedes, the State also proceeded under the theory Petitioner possessed a knife during the burglary, and the solicitor argued both theories to the jury in her closing argument. App. pp. 263-64; PWC p. 21. Petitioner argues the knife theory should be discounted because of "the weakness of the evidence that [Petitioner], if found to be the burglar, was armed with a deadly weapon." PWC p. 21. However, at the PCR hearing, Petitioner acknowledged the knife was on his person and was discovered by one of the officers when he was searched after his arrest, thus confirming testimony offered by the State at trial as to the existence of the knife. App. p. 166-67, 170-71, 336. Therefore, it is undisputed that some evidence of Petitioner possessing a knife was introduced at trial, and it is pure speculation to assume the jury completely disregarded that evidence.[5]

Because Petitioner has not met his burden of showing his previous uncounseled convictions were unconstitutional, and thus inapplicable for sentence enhancement, and because,

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[4] Farretta v. California, 422 U.S. 806 (1975) (holding a defendant has a constitutional right to waive his right to counsel).

[5] Petitioner's argument as to the strength of the evidence is also improper under the Uniform Post-Conviction Relief Act which expressly states the Act "**shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction**." S.C. Code Ann. § 17-27-20 (emphasis added).

in any event, the State introduced evidence Petitioner was in possession of a knife at the time of the burglary, Petitioner was not prejudiced by Counsel's failure to challenge the use of his two previous burglary convictions. Accordingly, the Petition should be denied as to this issue.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Petitioner suffered no prejudice from any of Counsel's alleged deficiencies in the preservation of the Fourth Amendment issue, the loss of the last closing argument, or the failure to object to the use of Petitioner's two previous burglary convictions as an element of first-degree burglary. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,


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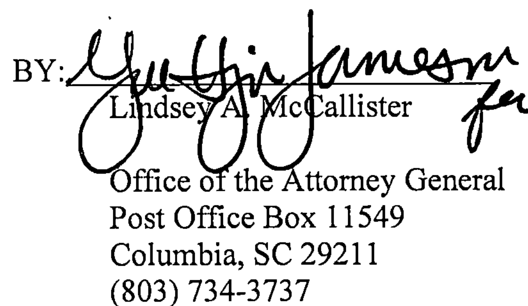
BY: 
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT


July 16, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

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Appellate Case No. 2017-001273

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Alfred Guy Henson, .......................................................................................... Petitioner,

v.

State of South Carolina, ........................................................................... Respondent.

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# CERTIFICATE OF SERVICE

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I, Lindsey A. McCallister, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Laura R. Baer, Esquire**
**South Carolina Commission on Indigent Defense**
**Division of Appellate Defense**
**Post Office Box 11589**
**Columbia, South Carolina 29211-1589**

This 16th day of July, 2018.

Lindsey A. McCallister
S.C. Bar # 79054
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 16 2018
S.C. SUPREME COURT

July 16, 2018

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

***Re:*** **Alfred Guy Henson, #242989 v. State of South Carolina**
**Appellate Case No.: 2017-001273**
**Lower Court Case: 2013-CP-42-1936**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar #79054

LAM/lm
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)