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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

ANTONIO EMERSON TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001753

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find prejudice resulting from trial counsel's failure to request a pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of identifications of Petitioner made by nine witnesses who were either co-defendants or connected with each other by drug deals.

2. Did the PCR judge err in refusing to find trial counsel ineffective for agreeing not to question eight witnesses about the mandatory minimum sentences they avoided by entering plea agreements with the State?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to argue that Petitioner's sentence exceeded the maximum sentence for conspiracy?

4. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to leading and improper questioning by the State, specifically asking a SLED agent to vouch for the credibility of the State's cooperating witnesses and asking the investigator about the length of and specific offenses listed on Petitioner's rap sheet when Petitioner did not testify at trial?

5. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the investigator testifying about comments the assistant attorney general made about Petitioner to the judge at a bond hearing?

6. Did the PCR judge err in refusing to find that the cumulative effect of five separate incidents of deficient performance by trial counsel established prejudice requiring a new trial?

STATEMENT

In December of 2011, the State Grand Jury of South Carolina, in count one of a multi-count indictment, indicted Petitioner, Antonio Emerson Tate, and eight other co-defendants for trafficking in methamphetamine (Conspiracy) (400 grams or more) in violation of S.C. Code §44-53-375(C)(5), indictment #2011-GS-47-07. (App. pp. 745-757). On May 28, 2013, Petitioner proceeded to jury trial before the Honorable Letitia H. Verdin. David J. Farnham, a member of the Georgia bar who was admitted *pro hac vice*, and R. Mills Ariail, Jr. represented Petitioner at trial. On May 31, 2013, the jury found Petitioner guilty. Judge Verdin sentenced Petitioner to twenty-five (25) years in prison. On June 14, 2013, Petitioner filed a motion for a new trial based on the failure to direct a verdict of acquittal. The motion was denied in an order signed June 27, 2013, and filed July 8, 2013.

A timely notice of intent to appeal was filed on July 8, 2013. Wendy J. Keefer and Joshua P. Stokes represented Petitioner on appeal. Megan B. Burchstead represented the State. After briefing and oral argument, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Antonio Emerson Tate, 2016-UP-291 (S.C.Ct.App. filed June 15, 2016).

On September 12, 2016, Petitioner filed a *pro se* application for post-conviction relief [PCR]. The State filed a return and motion for a more definite statement on August 23, 2017. Petitioner, represented by counsel, filed supplemental applications on March 27, 2018, and October 5, 2018. The State filed an amended return and partial motion to dismiss on June 4, 2019. On June 7, 2019, an evidentiary hearing was held before the Honorable Brian M. Gibbons. Susannah C. Ross represented Petitioner at the PCR hearing. Megan H. Jameson represented the State. In an order filed August 23, 2019, Judge Gibbons denied relief and dismissed the application. On September 4, 2019, Petitioner filed a motion to alter or amend.

Judge Gibbons denied the motion to alter or amend in an order filed October 1, 2019. A timely notice of intent to appeal was served on October 16, 2019. This petition for writ of certiorari follows.

ARGUMENTS

The jury found Petitioner guilty of conspiring to traffic in more than 400 grams of methamphetamine. The State's evidence was based solely on the testimony of witnesses and co-defendants most of whom were allowed to plead guilty to lesser offenses for reduced sentences. The State presented no physical evidence linking Petitioner to a conspiracy. Law enforcement did not find Petitioner in possession of methamphetamine. Law enforcement did not successfully complete a controlled buy with Petitioner. The State presented no evidence of marked money that would link Petitioner to a conspiracy. The State presented no video or audio recordings linking Petitioner to a conspiracy to traffic methamphetamine. The State presented no cellular phone records linking Petitioner to a conspiracy. The State presented no bank records linking Petitioner to a conspiracy to traffic more than 400 grams of methamphetamine. The State presented no receipts from restaurants, gas stations, motels or other establishments to corroborate the co-defendants' claims of purchasing methamphetamine from Petitioner. The majority of the State's evidence was based on the testimony of co-defendants who, after being charged, agreed to cooperate with law enforcement and identify Petitioner as a person from whom they purchased methamphetamine. Trial counsel's five separate acts of deficient performance each separately result in prejudice requiring a new trial. Alternatively, the cumulative effect of the combined five acts of deficient performance resulted in prejudice requiring a new trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the

applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

1. **The PCR judge erred in refusing to find prejudice resulting from trial counsel's failure to request a pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of identifications of Petitioner made by nine witnesses who were either co-defendants or connected with each other in drug deals.**

At trial nine witnesses, Wendy Christine Lollis, (App. p 76, line 2 – p. 77, lines 1-25), Gary Jason Griffin, (App. p. 155, line 21 – pp. 156-160, lines 1-4), Christopher Nolan Bishop, (App. p. 287, line 23 – p. 288, 289, lines 1-14), Charles Javin Adams, (App. p. 411, lines 21 – p. 412, 413, 414, lines 1-24), Albrie Nate Bashaw (App. p. 480, line 21 – p. 481, 482, lines 1-20), Charles Norman Trebuchon (App. p. 540, line 3 – p. 541lines 1-25), Larry Anthony Gambrell, (App. p. 589, line 5 – p. 590, lines 1-22), Norman Victor Bergholm, IV (App. p. 612, line 12 – p. 613, 614, lines 1-10), and Chad Dewayne Moore, (App. p. 640, line 11 – p. 641, 642, lines 1-23), all claimed to have identified Petitioner from a photo-lineup shown to them by law enforcement. Trial counsel did not object to either the out of court or the in-court identifications. Six of the

nine of the witnesses were also co-defendants and allowed to plead guilty to lesser offenses in exchange for their cooperation[1]. Trial counsel failed to move pre-trial for a hearing pursuant to Neil v. Biggers[2] to determine the admissibility of the identifications. Trial counsel's failure to request an identification hearing pre-trial constitutes deficient performance and is not a part of any purported valid trial strategy.

Another co-defendant witness, Rachel Elizabeth Eades, identified Petitioner in court as "Ant" without any reference to a prior photo lineup. (App. p. 206, line 24 – p. 207, lines 1-15). Trial counsel did not object to the in- court identification. Eades was allowed to plead guilty to a lesser offense in exchange for her cooperation. (App. p. 180, line 22 – p. 181, lines 1-17). Warren Brent Chastain, who was indicted with another group of people for conspiracy to traffic in methamphetamine, identified Petitioner in court as someone he met in Atlanta with Brian Stregall[3] when Stregall purchased methamphetamine. (App. p. 557, lines 2 – p. 558, lines 1-22; p. 559, line 15 – p. 560, 561, lines 1-10). Trial counsel did not object to the in-court identification. Chastain did not testify about a prior photo lineup. Chastain was allowed to plead guilty to a lesser offense. (App. p. 557, line 19 – p. 558, lines 1-22).

In the second supplemental application Petitioner alleged that trial counsel was ineffective for failing "to challenge the identification procedure." (App. p. 777). During the PCR hearing Petitioner testified that trial counsel failed to challenge the identifications. (App. p. 835, lines 16-25). Petitioner also testified at the PCR hearing that he had a twin brother named Anthony Tate and some witnesses could not tell the difference between the two twin brothers. (App. p. 835, lines 2-15; p. 865, line 16 – p. 866, lines 1-9). At trial co-defendant Griffin

[1] The extent of their plea agreements will be discussed further in issue two below.
[2] 409 U.S. 188 (1972).
[3] Stegall was also involved in the conspiracy addressed in State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), and discussed in issue two below.

testified that there was another person in the courtroom who looked like Petitioner. (App. p. 157, lines 3-15). Co-defendant Bergholm was cross-examined as follows:

> Q. Mr. Bergholm, when you did this photo lineup at 6/20/2011 did you know that Mr. Tate had a identical twin brother?
>
> A. No, sir.
>
> Q. Okay. Do you - - Have you ever met [sic] his identical twin brother?
>
> A. No, sir, not to my knowledge.
>
> Q. Okay, so you see the gentleman that's seated back at the courtroom in the black shirt - - -
>
> A. Yes, sir.
>
> Q. - - - it looks like - - that's his brother. Are you sittin' here today and at the time you did this can you say for one hundred percent certainty that that was the man you were dealin' with?
>
> A. I gotta tell the truth, I can't.
>
> Q. Okay
>
> A. But I can say the man in that picture right there is the man I bought methamphetamine from.
>
> Q. Okay, but you can't tell us for certain who it is?
>
> A. Between him - - -
>
> Q. The man sittin' next to me over here (indicating).
>
> A. (The witness nodded in the negative.)
>
> Q. Okay, that was a no?
>
> A. No, sir, I can't.

(App. p. 614, line 18 – p. 615, lines 1-16).

Trial counsel Mills Ariail confirmed during the PCR hearing that he did not move for a pre-trial hearing pursuant to Neil v. Biggers. (App. p. 897, lines 10 – 13). Ariail testified that he

saw no reason for a hearing. (App. p. 897, line 16 - p. 898, lines 1-12). Ariail confirmed that Petitioner had a twin brother and testified that Petitioner's photo appeared in the same position in each photo line-up. (App. p. 923, line 17- p. 924, 925, lines 1-10). Although counsel could not remember how the co-defendant witnesses who identified Petitioner were connected, the record reflects that many of the witnesses were involved with one another in the purchase of drugs.

Trial counsel David Farnham claimed to have had a strategic reason for not objecting to the identifications. (App. p. 937, lines 19-21). At the PCR hearing Farnham testified, "Mr. Mills and I looked through all of those photo lineups. We didn't see anything that was glaring that pointed out any prejudice or was suggestive that would make the witness identify Mr. Tate inappropriately. However, we really actually wanted a photo of him entered into evidence because of our misidentification defense [pertaining to the twin brother]. (App. p. 937, lines 11-18). The identifications did not help the misidentification defense.

The failure to challenge the identification procedure is not a valid trial strategy. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). The misidentification defense would have been made stronger if the identifications from the seven witnesses who testified about the photo lineup had been suppressed. In closing argument defense counsel Farnham was forced to address the identifications and argue that the procedure was suggestive and the identifications unreliable. (App. p. 705, line 8 – p. 706, lines 1-15). While the photo line-up may not have appeared suggestive to trial counsel, the procedure used by the officers in showing the line-up may have been suggestive. The issues surrounding when the witnesses viewed the photo line-ups, the suggestiveness of the procedure and the inherent

unreliability because Petitioner had an identical twin should have been fleshed out through a Neil v. Biggers hearing. Trial counsel was ineffective in failing to request an identification hearing.

In the order of dismissal the PCR judge did not find that the failure to challenge the identification procedure was part of some purported trial strategy. Instead, the PCR judge found no prejudice resulting from the failure writing:

> As a ninth allegation, Applicant asserts trial counsels were ineffective for failing to challenge the identification procedure. At the evidentiary hearing, Respondent acknowledged a pre-trial hearing to determine the admissibility of the lineup should have been conducted pursuant to Neil v. Biggers, 409 U.S.188, 196 (1972) and counsel's failure to request such a pre-trial hearing could be construed as deficient performance. However, Respondent argued Applicant still cannot prevail on this claim, as there is nothing to establish the identifications would have been excluded had a pre-trial hearing been conducted, and, therefore, Applicant cannot establish any requisite prejudice. This Court agrees.

(App. pp. 980 – 981). Trial counsel was ineffective in failing to challenge the identification procedures in a pre-trial hearing pursuant to Neil v. Biggers. The PCR judge erred in finding no prejudice resulted from the deficient performance.

Rule 104(c), SCRE provides, "Hearings on the admissibility of confessions or statements by an accused, and ***pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.*** Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." (emphasis added). If counsel had requested the pretrial hearing on identification, the trial judge would have erred in failing to conduct the hearing.

In State v. Liverman, 398 S.C. 130, 138–39, 727 S.E.2d 422, 425–26 (2012), the South Carolina Supreme Court wrote:

> "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d

> 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.
>
> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).
>
> Our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); *see also* Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

Pre-trial and outside of the presence of the jury trial counsel should have questioned the co-defendants and law enforcement about the circumstances surrounding the identification procedures. Applying the test from Biggers, counsel should have argued pretrial and outside the presence of the jury, as he did in closing argument, that the placement of Petitioner's photo in the same position in the lineup shown to the nine witnesses combined with the ability of the co-defendants to communicate with one another rendered the identification procedure suggestive.

Counsel then could have focused on the Biggers factors and argued that those factors combined with the fact that Petitioner had an identical twin rendered the identifications inherently unreliable resulting in a substantial likelihood of misidentification.

In Liverman the South Carolina Supreme Court found that any error in failing to conduct a full identification hearing was harmless. One of the factors considered by the Court in Liverman in finding any error harmless was the fact that the trial judge thoroughly instructed the jury on identification. 398 S.C. at 144, 727 S.E.2d at 429 n. 7. The trial judge in the present case failed to give the jury an identification instruction. Counsel was ineffective in failing to challenge the identification procedure pretrial and outside of the presence of the jury. The deficient performance was not harmless and resulted in prejudice to Petitioner.

In the order of dismissal the PCR judge found that the identifications were admissible writing, "Accordingly, the identifications made by the various co-conspirators would have been admissible at trial and trial counsel's failure to move for a pre-trial hearing to determine admissibility of the identifications pursuant to Neil v. Biggers had no result on the outcome of the trial. Accordingly, this Court finds Applicant cannot establish the result of his proceeding would have been different but for counsel's failure to challenge the identifications. Accordingly, this allegation must be denied and dismissed with prejudice." (App. p. 984). The PCR judge erred in finding that prejudice did not result from counsels' deficient performance.

"Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id." State v. Liverman, 398 S.C. 130, 137–38, 727 S.E.2d 422, 425 (2012). In Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)(n. 2

omitted), the South Carolina Supreme Court wrote, "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them 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) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." This Court should review the PCR court's finding that the identification procedure was reliable de novo, find that the procedure was unreliable and the failure to challenge resulted in prejudice.

In Smalls the Court wrote:

> 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. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

422 S.C. at 188, 810 S.E.2d at 843.

The State's evidence in the present case was based primarily on the uncorroborated testimony of co-defendants. Identity was a critical factor for determination by the jury. At the PCR hearing trial counsel stated, "I thought the strongest grounds, which was the theory of our case from the beginning, was couldn't identify him, he didn't do it. Those were - - that was my strongest argument, I felt." (App. p. 886, lines 1-4). Trial counsel failed to challenge the

identification procedure and no identification instruction was given to the jury. Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The PCR judge erred in refusing to grant relief in the form of a new trial.

2. The PCR judge erred in refusing to find trial counsel ineffective for agreeing not to question eight witnesses about the mandatory minimum sentences they avoided by entering plea agreements with the State.

Prior to trial the State sought to limit counsel from questioning that would indicate that Petitioner faced a mandatory minimum sentence of twenty-five years. (App. pp. 45-51). Trial counsel agreed to not discuss the mandatory minimum sentence of twenty five years the co-defendants faced on the original charge of trafficking 400 grams or more of methamphetamine stating, "Right, and, I mean, I might say what I was getting' into potentially is that they were charged originally as everybody was with trafficking 400 grams or more, but not go into the specifics of what the mandatory minimum, mandatory maximum were then say they are now down to 10-28 grams which carries a mandatory minimum 3 to and go into that and say your sentence range is this and this is what your recommendation us, that's the way I envision, I'm not going to say they infer back that he's lookin' at 25 mandatory minimum." (App. p. 50, line 19 – p. 51, lines 1-2). The State was, not surprisingly, "fine with that." (App. p. 51, line 3).

In the second supplemental application for relief Petitioner alleged that trial counsel was ineffective for, "conceding that he would not cross examine co-defendant witnesses who were originally charged with trafficking 400 grams or more avoiding twenty-five year mandatory minimum when he had every right to do so under State v. Gracely, 731 S.E.2d 880 (2012);" (App. p. 776). During the PCR hearing Petitioner testified that trial counsel conceded that he

would not cross examine the witnesses about the mandatory minimums. (App. p. 832, lines 6-13).

During the PCR hearing trial counsel was asked about the Gracely case and he testified, "I – I didn't – if it's not in the transcript, I didn't bring up State v. Gracely." (App. p. 917, line 7 – p. 918, lines 1-23). When further questioned about the Gracely case trial counsel testified, "Okay. And I guess my - - I don't know. I haven't read the decision, but I tried to do what I could to prevent the motion in limine by them [the State] to be able to get that in. I think that was – and I hope that was an appellate issue that, you know, was raised if I was precluded from doing that." (App. p. 919, lines 6-11).

The broad issue raised on direct appeal was, "Whether the trial court erred by prohibiting trial counsel from cross-examining co-defendants about their potential sentences in violation of the Confrontation Clause of the United States Constitution?" (App. p. 1001). The specific issue of not questioning the witnesses about the mandatory minimum sentences they avoided by agreeing to cooperate raised in the PCR application was not raised on direct appeal because trial counsel agreed not to question the witnesses about the twenty five year mandatory minimum sentence they avoided. With regard to the broad issue raised on direct appeal, the South Carolina Court of Appeals found no reversible error writing:

> We find no reversible error by the trial court in prohibiting defense counsel from cross-examining co-defendants regarding their potential sentences under their original charges because of the numerous co-defendants that testified regarding their reduced sentences, the mandatory minimum sentences or the sentencing ranges of their original charges compared to their plea recommendations, and the substantially greater sentences they would have faced. Therefore, we find no prejudice to Tate, and any error was harmless. See State v. Gracely, 399 S.C. 363, 373-74, 731 S.E.2d 880, 885 (2012) (finding error where the trial court excluded evidence regarding the mandatory minimum sentences faced by testifying codefendants); id. at 375, 731 S.E.2d at 886 (acknowledging "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis"); State v. Whatley, 407 S.C. 460, 469, 756 S.E.2d 393, 397 (Ct. App.

> 2014) (finding no prejudice where the trial court excluded the defendant from questioning a witness concerning the sentences the witness faced for reduced charges because the limitation did not prevent a full picture of her possible bias).

State v. Antonio Emerson Tate, 2016-UP-291 (S.C.Ct.App. filed June 15, 2016). The Court found no reversible error in the trial court prohibiting defense counsel from cross-examining co-defendants regarding their potential sentences under their original charges because they were questioned about the reduced sentences with reduced mandatory minimums. The Court of Appeals did not address the failure to question witnesses about the mandatory minimum sentence of twenty-five years they avoided.

Count one of the indictment charging conspiracy to traffic in methamphetamine 400 grams or more names nine co-defendants including Petitioner. (App. p. 746). Seven of the other eight co-defendants testified against Petitioner at trial; Wendy Christine Lollis, Charles Javin Adams, Albrie Nate Bashaw, Chad Dewayne Moore, Norman Victor Bergholm, IV, Gary Jason Griffin, and Rachel Elizabeth Eades. All seven of these co-defendants originally faced a mandatory minimum sentence of twenty-five years but were allowed to plead guilty to lesser offenses carrying reduced sentences. It appears that at the time of Petitioner's trial the witnesses had not yet been sentenced. In additional to the seven co-defendants, the State called another witness, Warren Brent Chastain, to testify against Petitioner. Chastain was allowed to plead guilty to a lesser offense carrying a reduced sentence and at the time of Petitioner's trial had not yet been sentenced. (App. p. 557, line 19 – p. 558, lines 1-22).

Lollis testified at trial that she was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence of twelve to fifteen years. (App. p. 99, line 20 – p. 100, 101, lines 1-9). Trial counsel asked, "Twelve to fifteen years. Uh, you know what your, what you, what you

could get, what the mandatory minimum, mandatory maximum are for those?" (App. p. 100, lines 14-16). Lollis answered, "Uh, twenty-five." (App. p. 100, line 17). Counsel did not make it clear to the jury that Lollis avoided a mandatory minimum sentence of twenty- five years by cooperating.

Adams testified that he was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence of three to six years. (App. p. 426, line 18 – p. 427, 428, lines 1-23). Trial counsel did not ask Lollis about the mandatory minimum sentence of twenty- five years he avoided.

Bashaw testified that she was originally charged with trafficking 400 grams or more but was allowed to plead to a reduced charge with a recommended sentence of three to six years. (App. p. 493, line 21 – p. 494, lines 1-18). Trial counsel did not ask Bashaw about the mandatory minimum sentence of twenty- five years she avoided.

Moore testified that he was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence of eighteen years. (App. p. 649, line 14 – p. 650, lines 1-17). Moore agreed that he was facing seven to thirty years on the reduced charge. (App. p. 649, line 25 – p. 650, lines 1-5). Trial counsel did not ask Moore about the mandatory minimum sentence of twenty- five years he avoided.

Bergholm testified that he was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence fifteen to eighteen years. (App. p. 599, line 5 – p. 600, lines 1-13). Trial counsel did not ask Bergholm about the mandatory minimum sentence of twenty- five years he avoided.

Griffin testified that he was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge for a recommended sentence fifteen to twenty years. (App. p. 171, line 23 – p. 172, 173, lines 1-9). The following took place on cross examination between trial counsel and Griffin:

> Q. Okay, and you know what - - you've pled guilty to I think you said it was between you're getting' a negotiated sentence of 15-20 years - - -
>
> A. Yes, sir.
>
> Q. - - - okay, do you know, uh, what the range was on that charge that you coulda gotten?
>
> A. Uh, on the one charge?
>
> Q. Yeah.
>
> A. No, sir. Uh, - - -
>
> Q. Okay.
>
> A. - - -is it 25-30 - - -

(App. p. 172, lines 6-16). Counsel did not make it clear to the jury that Griffin avoided a mandatory minimum sentence of twenty- five years by cooperating.

Eades testified at trial that she was originally charged with trafficking 400 grams or more but was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence of seven to ten years. (App. p. 222, line 19 – p. 223, 224, lines 1-10). Eades did not dispute that the sentencing range for the reduced charge was seven to twenty-five years. (App. p. 223, lines 12-20). Trial counsel did not ask Eades about the mandatory minimum sentence of twenty- five years she avoided.

Chastain was not a co-defendant but was indicted for a methamphetamine trafficking conspiracy with another group of people. (App. p. 557, lines 2-15). Chastain testified that he

was allowed to plead to the reduced charge of trafficking 28 to 100 grams for a recommended sentence of twelve to fifteen years. (App. p. 558, lines 3-5). Trial counsel did not ask Chastain about any mandatory minimum sentence he may have avoided as a result of his cooperation.

In the order of dismissal the PCR judge wrote:

> The record establishes the State moved *in limine* to prevent the defense from eliciting any testimony from State's witnesses and co-conspirators about the potential sentences for trafficking in methamphetamine up to 400 grams because the State did not want the jury to know Applicant's potential sentencing range, as sentencing is an issue outside the province of the jury[4]. Trial counsels argued that they should be able to cross-examine the co-conspirators on the substantial benefit they received by cooperating. The trial court agreed to allow the defense to cross-examine the co-conspirators on the sentencing ranges/exposure for the offenses to which they pled guilty **as well as** question them about the substantial benefit they received by pleading guilty to lesser-included offenses, thereby significantly reducing their sentence exposure. When cross-examining the various co-conspirators, trial counsels did just that – eliciting testimony that each had received a substantial benefit by cooperating with the State and testifying against Applicant. In fact, during the testimony of co-conspirator Gary Jason Griffin, Mills was able to elicit the specific range for the original offense. See Trial Tr. p. 172.
>
> This very issue was raised on appeal and the Court of Appeals found any possible error in the trial court limiting the defense's cross-examination was harmless beyond a reasonable doubt, noting "the numerous co-defendants that testified regarding their reduced sentences, the mandatory minimum sentences or the sentencing ranges of their original charges compared to their plea recommendations, and the substantially greater sentence they would have faced" State v. Antonio Emerson Tate, 2016-UP-291 (S.C.Ct.App. filed June 15, 2016).

(App. pp. 973-974). The PCR judge erred.

Trial counsel was ineffective for agreeing not to question eight witnesses about the mandatory minimum sentences they avoided by entering plea agreements and cooperating with the State. The specific issue raised here in PCR, as discussed above, was not addressed on direct appeal. The general questioning about the about the plea agreements, reduced

[4] The State made the motion well aware of the Gracely opinion and it was the State, **not** defense counsel, who brought the case to the trial judge's attention. (App. p. 46, line 24 – p. 47, lines 1-5).

charges carrying reduced sentences and the benefits the witnesses received is not the equivalent of questioning the witnesses about the mandatory minimum sentences they avoided. The error is not harmless.

In State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), the South Carolina Supreme Court held that the trial court's error in improperly limiting the scope of defense counsel's cross-examination of state's witnesses, in violation of Confrontation Clause, was not harmless. "The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." 399 S.C. at 374-75, 731 S.E.2d at 886. The facts in Gracely are strikingly similar to the facts of the present case. Both cases were "historical" cases based primarily on the testimony of co-defendants. As in Gracely the co-defendant witnesses in the present case were questioned about plea agreements and reduced sentences with reduced mandatory minimums. In both cases the witnesses were questioned generally about the substantial benefit they received by pleading guilty and agreeing to cooperate and testify against Petitioner. In both cases the witnesses were **not** asked about the mandatory minimum sentences they avoided by cooperating with the State. The difference is that in Gracely the judge prohibited the cross-examination about mandatory minimums avoided and that potential bias. In the present case trial counsel, in contradiction of the holding in Gracely, inexplicably agreed not to question the witnesses about mandatory minimums avoided and that potential bias. If counsel for Petitioner had instead moved to question the witnesses about the mandatory minimum sentences they avoided pursuant to Gracely, the trial judge would have committed reversible error in not allowing the line of questioning.

Addressing the fact that the error in Gracely was not harmless the Court wrote:

> In the instant case, the State presented cumulative testimony regarding Appellant's involvement in trafficking four hundred or more grams of methamphetamine.

> However, the testimony presented only corroborated other testimony, and the State chose not to present any physical evidence tying Appellant to the activities charged. This strategic decision enhanced the importance of that testimony, and the necessity that Appellant be permitted to demonstrate any bias on the part of the State's witnesses. The strength of the State's case relied on credibility determinations uniformly applicable to the witnesses presented. Thus, if the jury found the mandatory minimum issue affected one witness's credibility, that determination could have likely affected the believability as to all of the State's witnesses facing the same mandatory minimum sentence. Moreover, there was no other evidence to link Appellant to the indicted offense.

399 S.C. at 376, 731 S.E.2d at 887.

Like in Gracely, the error in the present case can not be harmless. The fact that eight cooperating witnesses avoided mandatory minimum sentences of twenty-five years was critical information the jury should have had in order to make important credibility determinations. Trial counsel was ineffective in agreeing not to question the cooperating witnesses about the mandatory minimum sentences they avoided. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to argue that Petitioner's sentence exceeded the maximum sentence for conspiracy.

In the second supplemental application Petitioner alleged that counsel was ineffective for, "failing to argue the sentence exceeded the maximum sentence for conspiracy." (App. p. 777). During the PCR hearing Petitioner testified that he should have been sentenced pursuant to S.C. Code §44-53-420 and received a twelve and a half year sentence rather than the twenty five year sentence imposed. (App. p. 851, lines 10-16). In the order of dismissal the PCR judge wrote, "As an eleventh allegation, Applicant asserts trial counsels were ineffective for failing to argue his sentence exceeded the maximum sentence for conspiracy. This Court finds this allegation is

patently without merit, as Applicant's sentence of twenty-five years' imprisonment is the mandatory minimum sentence he could have received upon conviction." (App. p. 987).

In the motion to alter or amend Petitioner distinguished S.C. Code §44-53-375(c)(e), the code section at issue in the present case, from S.C. Code §44-53-370(e), the code section discussed in State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (S.C. Ct. App. 2000). (App. pp. 992-993). The PCR judge denied the motion to alter or amend. (App. p. 995). The PCR judge erred.

Count one of the indictment alleges trafficking in methamphetamine (conspiracy), 400 grams or more in violation of S.C. Code Ann. § 44-53-375 (C)(5). (App. p. 746). S.C. Code §44-53-375 (C) provides:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is: . . .

S.C. Code §44-53-375 (C)(5) provides punishment for, "four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars."

S.C. Code §44-53-370(e), the statute discussed in Castineira, provides that, "Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual

or constructive possession or who knowingly attempts to become in actual or constructive possession of:. . .” Importantly, S.C. Code §44-53-370 contains the following language that is **not** found in S.C. Code §44-53-375:

> A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710. **Notwithstanding Section 44-53-420, a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section with a full sentence or punishment and not one-half of the sentence or punishment prescribed for the offense.**

(emphasis added).

S.C. Code §44-53-420 provides that, “Except as provided in subsection (B), a person who attempts or conspires to commit an offense made unlawful by the provisions of this article, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted; but the fine or imprisonment shall not exceed one half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

In State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), the jury found Castineira guilty of conspiracy to traffic in 400 or more grams of cocaine pursuant to S.C. Code §44-53-370(e). Despite the exclusionary language found in S.C. Code §44-53-370, Castineira argued that he should be sentenced pursuant to the conspiracy statute, S.C. Code §44-53-420. The Court of Appeals disagreed writing:

> A plain reading of the language of section 44–53–370 establishes that the legislature intended to include conspiracy within the substantive framework of the offense of trafficking. The trafficking statute delineates conspiracy to sell, manufacture, deliver, or bring into the State more than ten grams of cocaine as a violation. Violations of this statutory offense are known as “trafficking in cocaine.” State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 867 (1993). Specifically, the language exempting trafficking convictions from the conspiracy

> penalty provision states that "a person convicted of conspiracy *pursuant to this subsection* must be sentenced as provided in this section." S.C.Code Ann. § 44–53–370(e) (Supp.1999) (emphasis added).

341 S.C. at 626, 535 S.E.2d at 453.

In State v. Harris, 351 S.C. 643, 647, 572 S.E.2d 267, 270 (2002), the South Carolina Supreme Court wrote:

> The Court of Appeals held in Castineira, supra, that section 44–53–420 did not apply; it found the language of section 44–53–370(e), under which the defendant was indicted, incorporates conspiracy within the substantive offense. 341 S.C. at 625–26, 535 S.E.2d at 452–53. We agree. Clearly, the plain and unambiguous language of section 44–53–370(e) reflects a legislative intent that those guilty of conspiring to traffic drugs thereunder are subject to the full sentence for the offense, rather than the one-half sentence provided in section 44–53–420.
>
> Recently, in Harris v. State, 349 S.C. 46, 48, 562 S.E.2d 311, 312 (2002), this Court noted that "as defined in [section 44–53–370(e)(2)], there is no distinction between conspiracy to traffick and the substantive offense of trafficking.... The legislature clearly intended that conspiracy to traffic be treated as trafficking under § 44–53–370(e)."

Both Castineira and Harris involved offenses pursuant to S.C. Code §44-53-370 which included the language specifically excluding S.C. Code §44-53-420. Petitioner, however, was indicted pursuant to S.C. Code §44-53-375 which does not include the language excluding S.C. Code §44-53-420. Both cases specifically reference the exclusionary language. There is nothing in the language of S.C. Code §44-53-375 which excludes the application of sentencing pursuant to S.C. Code §44-53-420.

In State v. Leopard, 349 S.C. 467, 470–71, 563 S.E.2d 342, 344 (Ct. App. 2002), the South Carolina Court of Appeals wrote:

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the

> statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.
>
> State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); see also Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001); State v. Johnson, 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct.App.2001); accord Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

S.C. Code §44-53-375 must be construed strictly against the State and in favor of Petitioner. By omitting the exclusionary reference to S.C. Code §44-53-420 from the body of S.C. Code §44-53-375, the legislature intended to allow sentencing pursuant to S.C. Code §44-53-420. "The canon of construction '*expressio unius est exclusio alterius'* or '*inclusio unius est exclusio alterius'* holds that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999)." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). Trial counsel was ineffective for failing to argue that Petitioner's twenty five year sentence exceeded the maximum sentence for conspiracy. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different and Petitioner would have been sentenced pursuant to S.C. Code §44-53-420 providing that the sentence shall not exceed one half of the punishment prescribed for the offense or twelve and a half years.

4. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object to leading and improper questioning by the State, specifically asking a SLED agent to vouch for the credibility of the State's cooperating witnesses and asking an investigator about the length of and specific offenses listed on Petitioner's rap sheet when Petitioner did not testify at trial.**

In the second supplemental application Petitioner alleged that trial counsel was ineffective for "consistently failing to object to leading and improper questions by the State." (App. p. 777). At trial the prosecutor, on re-direct examination, asked SLED Agent Asbill, "Do you have any reason to not believe the individuals who provided information that they got their methamphetamine from Antonio Tate?" (App. p. 666, lines 15-18). Trial counsel failed to object. The agent answered, "I don't have any reason not to believe it." (App. p. 666, line 19). During the PCR hearing Petitioner testified that the agent's testimony affected the case because it bolstered the credibility of the State's suspect witnesses. (App. p. 840, lines 1-22). When asked about the failure to object to the improper questioning, trial counsel testified, "If the transcript says I didn't, then I didn't and I probably should have because he's vouching for credibility of witnesses, and that's improper, police in Georgia, and that's improper." (App. p. 941, lines 15-18).

At trial the prosecutor, on re-direct examination, asked Investigator Barwick with the Pickens County Sheriff's Office, "Now, Agent Barwick, that you were asked[5] about Mr. Tate not having any prior convictions other than a traffic ticket, I'm now handing you copy of Mr. Tate's rap sheet, you take a moment and review that - - -" (App. p. 364, lines 1-4). The prosecutor then commented about the rap sheet, " - - - and it's several, several pages." (App. p. 364, line 6). Trial counsel failed to object to the question and comment. The prosecutor then asked the agent, "Okay, in addition to driving under suspension charge, was he also convicted of violating his probation?" (App. p. 364, lines 9-10). Trial counsel failed to object. The agent answered, "Uh, yes, he was." (App. p. 364, line 11). The prosecutor then asked the agent, " - - -

[5] Trial counsel cross-examined the agent about Petitioner's lack of criminal history and lack of felony convictions. (App. p. 344, line 22 – p. 345, lines 1-24). If trial counsel's cross-examination opened the door to the prosecutor's redirect, this is yet another instance of ineffective assistance of counsel.

under cycle 3, what was Antonio Tate convicted of?" (App. p. 364, line 14). Trial counsel failed to object. The agent answered, "Uh, giving false name, address, birthday to law enforcement, false information to police." (App. p. 3364, lines 15-16). On re-cross examination trial counsel tried to clarify that Petitioner had no felony convictions and no drug convictions. (App. p. 364, line 21 – p. 365, lines 1-12). The prosecutor then asked, "Is it fair to say that everybody has to get arrested for something the first time before they can have a record?" (App. p. 365, lines 14-15). Trial counsel failed to object. The agent answered, "Is very true." (App. p. 365, line 16). Petitioner did not testify at trial.

During the PCR hearing Petitioner testified that trial counsel failed to object to the questioning about the rap sheet and testified that his record was not relevant because he did not testify at trial. (App. p. 842, line18 – p. 843, lines 1-11). In the order of dismissal the PCR judge wrote:

> When questioned about their failures to object, trial counsels testified they routinely and consistently objected at trial when they believed an objection was warranted based on their years of trial experience. As to the various instances listed by Applicant, counsels testified they do not believe these particular exchanges warranted an objection nor did they have any impact on Applicant's trial.
>
> This Court agrees with counsels and finds Applicant has failed to establish his burden of proof as to this allegation. The record shows trial counsel routinely objected to leading questions and other objectionable issues during trial and some of these objections were sustained while others were overruled. Applicant failed to establish any objectionable instances where counsels should have objected that had any impact on the outcome of his trial. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

(App. pp. 977-978). The PCR judge erred.

Trial counsel admitted that he should have objected to the prosecutor asking the investigator to vouch for the credibility of or bolster the testimony of the co-defendant witnesses

who were testifying in exchange for plea deals. In State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) the South Carolina Court of Appeals wrote:

> The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness ... of an adverse witness"); State v. Sapps, 295 S.C. 484, 485–86, 369 S.E.2d 145, 145–46 (1988) (holding it was improper for solicitor to "ask[ ] appellant if each of the other three witnesses was lying"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's ... opinion testimony improperly bolstered the Victim's credibility").

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476–77 (2016), the South Carolina Supreme Court wrote:

> Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony"); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Trial counsel was ineffective in failing to object to the prosecutor's improper questioning of Agent Asbill. Additionally, trial counsel was ineffective in failing object to the prosecutor's improper questioning of Investigator Barwick about Petitioner's rap sheet. "Evidence of other crimes or bad acts is inadmissible to show propensity to commit a crime. Rule 404(b), SCRE. The PCR court ruled counsel was ineffective in failing to act to protect his client's interests when Detective Stanfield referred to Respondent's 'rap sheet' and 'some type of violation.'" Caprood

v. State, 338 S.C. 103, 112, 525 S.E.2d 514, 518 (2000), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Trial counsel was ineffective for failing to object to leading and improper questioning by the State, specifically asking a SLED agent to vouch for the credibility of the State's cooperating witnesses and asking an investigator about the length of and specific offenses listed on Petitioner's rap sheet when Petitioner did not testify at trial. The State's case was based solely on the testimony of the cooperating witnesses and credibility was a critical factor. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

5. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the investigator testifying about comments the assistant attorney general made about Petitioner to the judge at a bond hearing.

During the trial the prosecutor asked Investigator Barwick about a conversation he overheard between co-defendants Eades and Lollis when he transported them back from a bond hearing. (App. p. 33, lines 12-14). The investigator testified:

> Uh, there was discussion about their bonds not being reduced and and and and and not bein happy about that and then the discussion I think that they were alluding to earlier 'bout Mr. Tate was that they learned at the bond hearing, uh. When Mr. Underwood was presenting information to Judge Cooper that, uh, Mr. Tate had a twin brother, that it was at that point in time my understanding that they learned this. Uh, Mr. Underwood went on to explain that, uh, he had a twin brother and Mr. Tate attempted to use his brother's identity to elude police when he was, uh, when they approached him in in Georgia on our charges because one our indictments were issued we issued charges for him and he, uh, tried to use his brother's ID to stop being arrested, well Mr. Underwood was explaining this to the judge and during that conversation, uh, Ms. Eades and them heard this and they were talkin about that on the way back to the LEC.

(App. p. 339, line 15 – p. 340, lines 1-5). Trial counsel failed to object.

In the second supplemental application Petitioner alleged that trial counsel was ineffective by, "failing to object to Agent Barwick's recital of statements made at the bond hearing by the Attorney General that the Applicant had a twin and attempted to use his identity to allude police and other improper comments made by testifying agents. (R. p. 339, l.22)." (App. p. 777). When asked about the failure to object to Agent Barwick's testimony, trial counsel testified that, "It probably should have been." (App. p. 941, lines 19-25).

In the order of dismissal the PCR judge wrote:

> At this point during Applicant's trial, the jury had already been advised that Applicant had an identical twin brother. The defense team had questioned several witnesses about Applicant's identical twin brother and had also elicited testimony or challenged the witnesses as to whether they had discussed that Applicant had an identical twin brother with other co-conspirators in an attempt to make sure their testimonies would be consistent – a valid trial strategy to attack these witness' credibility. Accordingly, the State was merely responding to this line of inquiry as posed by the defense, which was part of a reasonable trial strategy by the defense to paint the co-conspirators as untruthful and to attack their identification of Applicant as the mastermind of this methamphetamine ring. Accordingly, Applicant cannot meet his requisite burden of proof as to this allegation, which this Court denies and dismissed with prejudice/

(App. p. 979). The PCR judge erred.

Attacking the credibility of the co-defendants is a valid trial strategy. Failing to object to prejudicial hearsay testimony about what the prosecutor told the judge at a bond hearing about Petitioner using his identical twin brother's identification to allude police is not a valid trial strategy. Trial counsel admitted that he probably should have objected to the testimony. Trial counsel was ineffective for failing to object to the testimony. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

6. The PCR judge erred in refusing to find that the cumulative effect of five separate incidents of deficient performance by trial counsel established prejudice requiring a new trial.

In the second supplemental application Petitioner alleged that, "Due Process violations are alleged based on Mr. Tate's failure to get a fair trial due to cumulative error, a total breakdown of the adversarial process, and lack of constitutionality and enforceability of Section 44-53-375 SC Code Ann." (App. p. 778). In Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002), the Court wrote, "While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors." In Green the Court found that multiple errors did not exist to support cumulative prejudice. In contrast, trial counsel in the present case committed multiple errors. Each of the five instances of deficient performance discussed above result in prejudice individually and require a new trial. Alternatively, the cumulative effect of these individual errors results in prejudice requiring a new trial.

As noted in Green v. State, id., South Carolina Appellate Courts have recognized cumulative error analysis of trial errors on direct appeal. See Also *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 (2014) (Benjamin Dudek). In State v. Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801(1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court reversed the death sentences imposed upon Peterson and his co-defendant, Stubbs, and remanded the cases for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court . . ." This Court found that, "Some, if not all, of these arguments have some merit. The combination of numerous errors committed by the trial

court in this death penalty case compels us to reverse and remand for a new trial." Peterson, 287 S.C. at 246, 335 S.E.2d at 801.

In State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995), the South Carolina Court of Appeals found that numerous unsolicited comments by the trial judge and the limitation of cross-examination unduly prejudiced the defendant. In Freeman the court wrote:

> Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. See Myers v. Moffett, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); see also Ryan v. United Parcel Service, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do). We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

319 S.C. at 123–24, 459 S.E.2d at 875.

In State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), the South Carolina Supreme Court wrote:

> In our opinion, the facts of this case do not support a finding cumulative errors warranted reversal. While the admission of the search warrant was prejudicial error, the error of refusing to admit the prior shoplifting conviction for impeachment purposes was not prejudicial and the inadvertent mention of the polygraph examination was not error. Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial. See Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995) (cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial). Here, respondent has failed to show he suffered prejudice warranting a new trial based on cumulative trial error. Compare with State v. Peterson, 287 S.C. 244,

> 335 S.E.2d 800 (1985) (although Court held cumulation of errors warranted reversal, each error caused prejudice against appellant); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding the cumulative effect of the trial conduct, not trial errors, warranted reversal).

This Court in Johnson recognized a cumulative error analysis in the direct appeal but found no prejudice. This Court should apply a cumulative error analysis in this post-conviction relief action and find prejudice pursuant to Strickland. In contrast to Johnson, the facts of the present case support a finding that cumulative errors warrant reversal. In the present case trial counsel failed to request a pre-trial identification hearing, agreed not to questions witnesses about the mandatory minimums they avoided by cooperating with the State and testifying against Petitioner, failed to challenge the sentence as exceeding the statutory maximum for conspiracy, failed to object when the State asked the SLED agent to vouch for the credibility of the State's cooperating witnesses and failed to object when the investigator testified about the length of and specific offenses listed on Petitioner's rap sheet, and failed to object when the investigator testified about statements the assistant attorney general made to the judge during a bond hearing indicating that Petitioner attempted to use his twin brother's identification in order to allude police. Each of the five instances of deficient performance result in prejudice on their own. Alternatively, the cumulative effect of all five errors creates prejudice requiring a new trial.

A majority of state courts have recognized some form of cumulative error analysis in reviewing ineffective assistance of counsel claims. Id. 65 S.C. L. Rev. 685 fn. #52. In Cirincione v. State, 119 Md. App. 471, 506, 705 A.2d 96, 112–13 (1998), the Maryland Court of Special Appeals wrote:

> Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance. Apparently, this cumulative effect may be applied to either prong of the Strickland test. That is, numerous non-deficient errors may cumulatively

> amount to a deficiency, Bowers v. State, 320 Md. 416, 436, 578 A.2d 734, 744 (1990), or numerous non-prejudicial deficiencies may cumulatively cause prejudice. Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir.1995).

Petitioner does not need to rely on a cumulative error analysis to demonstrate deficient performance as discussed by the Maryland Court of Special Appeals in Cirincione. Petitioner demonstrated five separate instances of deficient performance on the part of trial counsel. As an alternative theory, however, if this Court finds that prejudice did not result from the five instances of deficient performance individually, this Court should find that the cumulative effect of the deficient performances resulted in prejudice.

While establishing Strickland prejudice from the cumulative effect of several instances of deficient performance by trial counsel in the context of habeas relief pursuant to 28 U.S.C § 2254 is not yet "clearly established federal law as determined by the Supreme Court of the United States," a majority of federal courts of appeals (the First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits) have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. See Ruth A. Moyer, To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors, 61 Drake L. Rev. 447, 451 (2013).

In Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (fn #9 omitted), the Fourth Circuit Court of Appeals wrote, "To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue." The position taken by the Fourth Circuit in Fisher in regard to cumulative error, however, is no longer the majority taken by the

other federal circuit courts of appeal. While the Eighth and the Sixth Circuit Courts of Appeals have specifically rejected a cumulative error analysis to establish prejudice in a § 2254 action[6] (Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006); Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir.2002) and the Eleventh Circuit has not yet answered the question of whether cumulative errors by trial counsel will establish Strickland for § 2254 review (Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011), as noted above, a majority of federal courts of appeals have held that in reviewing state post- conviction relief actions pursuant to § 2254, the federal court may cumulate attorney errors as part of the Strickland prejudice analysis. More recently in Oken v. Corcoran, 220 F.3d 259, 271 (4th Cir. 2000), the Fourth Circuit Court of Appeals wrote, "Finally, even were we to find one or more of these purported instances of objectively unreasonable performance by counsel to be such, either individually or cumulatively, we still could not say that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694, 104 S.Ct. 2052."

This Court should follow the majority of other state courts as well as the majority of federal circuit courts of appeal and apply cumulative error analysis in reviewing post-conviction relief cases. The cumulative effect of trial counsel's five separate instances of deficient performance resulted in prejudice requiring a new trial.

[6] The reasoning for the Eighth and Sixth Circuits rejecting the cumulative error analysis in § 2254 review appears to be based on the fact that such analysis is not yet clearly established federal law as determined by the Supreme Court of the United States.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2020.