STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Honorable Thomas A. Russo, Circuit Court Judge
Case No. 2017-CP-42-2217

Appellate Case No. 2019-001319

Taiwan J. Hardy, 321387 . . . . . Petitioner

vs.

State of South Carolina . . . . . Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

July 24, 2020.

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ISSUES PRESENTED

I. Did the PCR court err in denying relief where trial counsel was ineffective for failing to properly advise client in relation to the plea offer.

II. Did the PCR court err in denying relief where trial counsel was ineffective for failing to present an effective defense by failing to properly impeach the state's key witness.

III. Did the PCR court err in denying relief where trail counsel failed to object to evidence of prior bad acts.

STATEMENT OF THE CASE

In 2014, Petitioner was indicted by a Spartanburg County grand jury for distribution of cocaine base. App 288 - 289. On July 22, 2015, he proceeded to trial before the Honorable Roger L. Couch and a jury. William Bean represented Petitioner; Hunter Blouin and Edward Hunter appeared on behalf of the state. The state served notice of a life sentence pursuant to S.C. Code Ann.§ 17-25-45(A) in March 2015. App. 611. 7- 13. At the conclusion of the two-day trial, the· jury returned a guilty verdict on the distribution of cocaine base charge. App. 185 1. 22 - App. 186 1. 4. Pursuant to S.C. Code Ann. § 17-25-45(A) the trial judge sentenced Hardy to life without parole. App. 19111. 11-16.

On June 26, 2017, Petitioner filed an application for post-conviction relief. App. 193-199. It contained allegations of ineffective assistance of counsel; including claims that counsel failed to perform an investigation. App. 195. The state filed a Return, Partial Motion to Dismiss, and Motion for More Definite Statement on December 29, 2017. App. 209 - 221. Through counsel, Petitioner's application was later amended to include numerous other contentions. App. 207- 208. An evidentiary hearing was held before the Honorable Thomas A.. Russo on March 7, 2019. App. 230. J. Falkner Wilkes represented Petitioner; Johnny E. James, Jr. appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. An Order of Dismissal was filed on July 12, 2019. Taylor D. Gilliam, Office of Indigent Defense filed a Petition for Writ of Certiorari on March 27, 2020. The Respondent filed a Return on May 6, 2020. On May 27, 2020 the case was transferred to the Court of Appeals. On July 21, 2020 the Petitioner engaged J. Falkner Wilkes to move the Court to allow the Petition filed by OID to be withdrawn and this Petition filed in its place.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE CLIENT IN RELATION TO THE PLEA OFFER.

The claim that a client rejected a guilty plea based on counsel's failure to properly advise is subject to a Strickland analysis. Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010). Hardy's trial counsel had been hired on all pending charges and a probation revocation. 288. Hardy first met trial counsel at the probation revocation hearing on other charges. 236. The probation matter was set for a full evidentiary hearing. 236. At their first meeting at the probation hearing trial counsel presented Hardy with a plea offer on the present charge. 236. They were in the courtroom waiting to proceed on the probation matter when trial counsel told him that there was an offer on the table from the solicitor. 237. The offer was 18 years on several charges with all other charges dismissed. 239. At that point the Hardy and trial counsel had not discussed the facts of this case. 237. There had been no discovery. 237. Hardy didn't want to accept a plea deal without discovery and seeing the evidence the state had against him. 240. Hardy testified at the PCR that it was around lunch time when trial counsel told Hardy of the plea offer. 241. Trial counsel made no effort to obtain the discovery on the pending charges or to reschedule the probation matter to allow him the opportunity to review discovery in considering the global plea offer. 242. When that plea offer was made trial counsel failed to explain that there was no viable defense to the present charge and conviction would expose Hardy to life without parole under the LWOP statute. 242. Hardy testified that if trial counsel would have gone over the evidence, the lack of defenses, and mandatory life sentence he would have taken the plea deal. 242.

Hardy received 30 months as a result of the revocation. 242. While serving the 30 months

Hardy was brought back to court several times. 243. Hardy was never told why he was repeatedly brought back. 243. He didn't see trial counsel until the third time he was brought up to court. 243. At that time trial counsel went over the discovery material with Hardy. 243. Trial counsel still did not have the undercover video. 245. Trial counsel conveyed an plea offer for 18 years but could not tell Hardy whether it would be considered a violent or non-violent offense. 244. Court ended and the plea offer expired before Hardy was told whether it would be violent or non-violent. 245. The week prior to trial in this case trial counsel conveyed a plea deal for 15 to 30. 246. Hardy was then able to view the undercover video. 247. Seeing that the video didn't show a hand to hand transaction Hardy asked trial counsel his opinion about the case. 247. Despite the overwhelming evidence of Hardy's guilt trial counsel advised Hardy that there was a 50/50 chance he would be convicted. 250. While trial counsel told Hardy at the last minute that he was going to die in prison if he was convicted, counsel never advised him that given overwhelming evidence and a lack of defenses left no reasonable doubt as to his guilt. 249. The discovery material showed overwhelming evidence of the Defendant's guilt. 250. A photograph taken from the CI's video showing Hardy with a large bag of crack in his hand during the transaction.250. Hardy testified that had trial counsel explained the overwhelming nature of the evidence and lack of defenses Hardy would have taken the plea deal. 251. Hardy's rejection of the various plea deals was uninformed. 248-249. Had Trial counsel advised Hardy that the likelihood of his being convicted was very high Hardy would have accepted the plea deal. 252.

It is well-settled that "[a] criminal defendant has a right to effective assistance of counsel in deciding whether to accept or reject a proposed plea agreement." Toro v. Fairman, 940 F.2d 1065, 1067 (7th Cir.1991) (*citations omitted*). Indeed, "the decision whether to plead guilty or

contest a criminal charge is ordinarily the most important single decision in a criminal case ... [and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision." United States v. Gordon, 156 F.3d 376, 380 (2d Cir.1998) (*citations and internal quotation marks omitted*).

Where, as here, a petitioner raises an ineffective assistance of counsel claim arising out of the plea negotiation process, "the first half of the Strickland v. Washington test is nothing more than a restatement of the standard of attorney competence" applicable to all felony cases. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). And, in this regard, it is well-settled that the Strickland attorney competence inquiry is measured in accordance with "prevailing professional norms," which require, *inter alia*, "that an attorney 'inform[ ] himself ... fully on the facts and the law' " applicable to his client's case. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. To be sure, the Fourth Circuit has recognized that "[w]e cannot expect criminal defense lawyers to be seers, but we must demand that they at least apprise themselves of the applicable law and provide their clients with a reasonably accurate description of it." Ostrander v. Green, 46 F.3d 347, 355 (4th Cir.1995), *overruled on other grounds*, O'Dell v. Netherland, 95 F.3d 1214 (4th Cir.1996).

Here, the record reflects that trial counsel's advice to Hardy during the plea negotiation and pretrial proceedings was insufficient to enable Hardy to make a knowing and voluntary decision whether to accept the government's plea offer rather than proceed to trial. Several aspects of trial counsel's lack of proper advice support this conclusion. First, Hardy had no viable defenses to the charged offense. Despite the lack of any viable defense, trial counsel never clearly advised Hardy of this fact during the plea negotiation process. This is evident as the first plea

offer was made at Hardy's probation hearing on other charges before counsel had obtained discovery in the case. The record shows that counsel failed to immediately request that the solicitor provide discovery to allow counsel to review the strength of the government's case before allowing Hardy to reject the offer. Nor did counsel advise Hardy that he was facing mandatory life on the distribution charge under the LWOP provision. Rather than obtain the information necessary to allow Hardy to evaluate the offer counsel allowed Hardy to reject the offer and proceed on with the probation hearing. Hardy's rejection of the state's offer was clearly not informed.

In subsequent plea negotiations after having obtained discovery trial counsel allowed Hardy to believe that he had some possibility of prevailing at trial on the basis of the video not showing the actual hand off of the drugs to the confidential informant. This was due to the camera shifting for a few seconds as the confidential informant reached for the drugs. Given the testimony of the confidential informant there could be no reasonable doubt that Hardy had actually distributed the drugs to the confidential informant. Photos from the video provided clearly showed Hardy with a bag in his hand during his conversation with the confidential informant. Unless the confidential informant could be adequately impeached, the evidence was simply overwhelming. Competent counsel would have recognized that Hardy had no viable defenses to the distribution charge and would have advised Hardy accordingly during the initial plea negotiations. Competent counsel would have also timely advised Hardy that he faced mandatory life under LWOP on the distribution charge.

In the absence of trial counsel's advice that the evidence was overwhelming, Hardy continued to reject the government's plea offers and instead proceeded to trial with the erroneous

belief that he could not be convicted if the undercover video failed to show him actually handing the drugs to the confidential informant. Simply put, allowing Hardy to proceed throughout these proceedings with the erroneous belief that he had a viable defense to the distribution charge was objectively unreasonable under the Strickland ineffective assistance of counsel standard. Strickland, 466 U.S. at 688, 104 S.Ct. 2052.

Put simply, therefore, trial counsel failed to timely advise Hardy that a conviction was essentially unavoidable in light of the testimony of the confidential informant and the lack of any viable defenses to the distribution charge. Trial counsel's incomplete legal advice to Hardy during the plea negotiation process was therefore objectively unreasonable. *See* Strickland, 466 U.S. at 688, 104 S.Ct. 2052 (noting that defense counsel must "inform[ ] himself ... fully on the facts and the law" applicable to his client's case). Trial counsel's incomplete advice prevented Hardy from making a knowing and voluntary decision whether to accept the government's plea offer rather than proceed to trial in this instance. The incorrect and incomplete legal advice trial counsel provided Hardy was not only material, it was central to Hardy's decision whether to accept the government's plea offer or instead proceed to trial. Hardy has therefore met the first prong of the Strickland/Hill analysis with respect to his claim that trial counsel rendered ineffective assistance during the plea negotiation and pretrial proceedings.

Prejudice

The record shows that Hardy was prejudiced by counsel's objectively unreasonable performance. In the plea context, the prejudice prong of the analysis "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. Thus, a petitioner can satisfy the prejudice requirement by

establishing, for example, "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. Conversely, a petitioner can establish the requisite prejudice by demonstrating that, but for counsel's deficient performance, there is a reasonable probability that he would have entered into a plea agreement rather than proceed to trial. *See, e.g.* Griffin v. United States, 330 F.3d 733, 736 (6th Cir.2003) (recognizing that "[t]he second element of the Strickland test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice"). 38 For purposes of this analysis, "a reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

The Fourth Circuit has recognized that "[a]lthough [the Hill prejudice analysis] focuses the inquiry on the subjective question, the answer to that question [in the plea context] must be reached through an objective analysis." Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir.1988); *see also* Ostrander, 46 F.3d at 355 n. 12 (noting that "[o]bjective analysis of the prejudice prong is probably the only workable means of applying Hill"). Thus, to meet the Strickland/Hill prejudice requirement, a petitioner "must establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea." Toro, 940 F.2d at 1068; *see also* Paters v. United States, 159 F.3d 1043, 1047 (7th Cir.1998) (stating that "[i]n order to establish prejudice, [petitioner] must show (1) through objective evidence that (2) there is a reasonable probability that, but for counsel's inadequate performance, he would have accepted the government's [plea] offer"); *compare* Griffin, 330 F.3d at 737 (stating that "[a]lthough some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined

to adopt such a requirement") (*citations omitted*).

Objective factors relevant to the prejudice analysis include, for example, "the potential strength of the [government's] case ..., as a reasonable defendant would surely take [that] into account in deciding whether to accept a plea offer or proceed to trial." Ostrander, 46 F.3d at 356. A petitioner's repeated protestations of innocence throughout trial, if applicable, are also relevant to the prejudice analysis in the plea context. *See* Smith v. United States, 348 F.3d 545, 552 (6th Cir.2003) (recognizing that "[p]rotestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing") (*citing* Cullen v. United States, 194 F.3d 401, 404–07 (2d Cir.1999)); *see also* Griffin, 330 F.3d at 738 (recognizing that a petitioner's repeated declarations of innocence throughout trial do not, by themselves, prove that the petitioner would not have accepted a guilty plea). Additionally—and most significant here—the disparity between the government's plea offer and a petitioner's sentencing exposure if convicted at trial has been recognized as "strong [objective] evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer, [even] despite earlier protestations of innocence." Smith, 348 F.3d at 552. 39

Here, there is ample objective evidence establishing a reasonable probability that Hardy would have accepted the government's initial offer at the probation hearing had he received complete and accurate advice from trial counsel. The government's evidence of guilt against Hardy was overwhelming. *See* Ostrander, 46 F.3d at 356 (recognizing that "the potential strength of the [government's] case" is an objective factor relevant to the prejudice analysis). Hardy was clearly interested in entering a plea as later in the negotiations he indicated to counsel that he

would enter a plea if he could get the state to go down to 15 years. Yet the most compelling objective evidence in the prejudice analysis is the extreme disparity between the state's plea offer and Hardy's sentencing exposure were he to be convicted at trial. *See* Smith, 348 F.3d at 552 (noting that a disparity in a petitioner's sentencing exposure is "strong [objective] evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer").

Here Hardy has met the two-part Strickland/Hill ineffective assistance of counsel standard by establishing (i) that trial counsel's advice during the plea negotiation process was objectively unreasonable and (ii) that there is a reasonable probability, based on ample objective evidence, that Hardy would have accepted the government's plea offer rather than proceed to trial had she received competent advice from trial counsel during the plea negotiation process. *See* Griffin, 330 F.3d at 736 (recognizing that "[t]he second element of the Strickland test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice"). Had trial counsel rendered clear and accurate advice to Hardy during the plea negotiation process—including specifically (i) that he had no viable defenses to the charged conduct, (ii) that a conviction on the distribution charge was inevitable were he to proceed to trial, and (iii) that he faced mandatory life sentence under the LWOP statute, that there is a reasonable probability that Hardy would have accepted the government's initial or later offer rather than proceed to trial in this instance. The decision of the PCR court should therefore be reversed.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT AN EFFECTIVE DEFENSE.

The testimony of the confidential informant was central to the state's case. Attacking her credibility was therefore essential in the defense of the case. In discovery the state provided the defense with the confidential informant's "Confidential Informant Agreement". App. 266. Initially the confidential informant agreement was used as a key part of the defense to attack the credibility of the confidential informant and offered into evidence as a defense exhibit. 266. Yet after the close of the defense's case the defense counsel realized that having entered evidence during he trial he lost last argument. App. 266. Despite it being the only foundation for the defense of the case counsel withdrew the "Confidential Informant Agreement" from evidence to re-claim last argument. App. 143-151. T. 267. In doing so counsel failed to consider the confusion that could create for the jury or the negative impact this could have on his impeachment of the confidential informant. A. 268. Trial counsel failed to request the court give the jury any explanation or instruction to the jury as to the disappearing evidence. A. 267. As a result counsel failed to effectively impeach the state's key witness.

The failure to effectively impeach a state's witness may support an ineffective assistance claim. For example, in Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), *cert. denied*, 485 U.S. 970, 108 S. Ct. 1247, 99 L. Ed. 2d 445 (1988), the court faulted counsel's failure to impeach the state's identification witness with "the one obvious and only logical means of diminishing her identification testimony -- procuring the transcript of [her] previous testimony in order to impeach her with prior inconsistent statements." *Id*. at 1184.

The Seventh Circuit has found unconstitutionally deficient performance when defense

counsel failed to present witnesses who might have cast serious doubt on the prosecution's main witnesses. In Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987), the Seventh Circuit affirmed the granting of habeas relief on the ground that counsel failed to reasonably attempt to interview five apparently unbiased identification witnesses who made statements that were exculpatory and inconsistent with the testimony of the prosecution's witnesses on several essential matters. The Court found prejudice in that the defendant's only other defense, an alibi, was relatively weak. *Id*. at 1391-92. Here, there was no legal defense to Hardy's charge, and unchallenged the confidential informant's testimony made the evidence of guilt overwhelming. Attacking the credibility of the confidential informant was the only viable strategy in the case.

Here defense counsel failed to represent Hardy to the satisfaction of the Sixth Amendment when counsel failed to fully pursue impeachment by withdrawing additional evidence that would in all reasonable probability have cast a reasonable doubt on the testimony of the state's key witness. *See* United States ex rel. McCall v. O'Grady, 714 F. Supp. 374, 379 (N.D. Ill. 1989). This was compounded by allowing the impeaching evidence to disappear without any explanation to the jury whatsoever. Thus allowing the jury to speculate on the reason and most likely discount the defense's entire attempt to impeach the confidential informant. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See* Powell v. Alabama, 287 U.S., at 68–69, 53 S.Ct., at 63–64. In withdrawing critical evidence necessary for the effective impeachment of the confidential informant trial counsel fell below the standard announced in Powell. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). The decision of the post conviction relief court should therefore be reversed.

III. THE PCR COURT ERRED IN DENYING RELIEF WHERE TRAIL COUNSEL FAILED TO OBJECT TO EVIDENCE OF PRIOR BAD ACTS.

Relevant facts

The evidence at Petitioner's two-day trial was elicited from four witnesses, including a confidential informant. The confidential informant worked regularly for the Spartanburg County Sheriff's Department. She had "cooperated with law enforcement" approximately three hundred times. App. 58, l. She admitted that she worked for pay and that she was paid fifty dollars to set Hardy up for an arrest. App. 55, l. 9-57, l. 25. 1-3; App. 69 ll. 20-24. Some of' the three hundred times she "cooperated" with law enforcement resulted in charges against her being dropped. App. 76 1. 16- App. 77 1. 2. She also had a lengthy criminal record, including five fraudulent check charges, driving under the influence, driving under suspension, forgery, shoplifting, and possession of crack. App. 56 ll. 4-15. The confidential informant testified that after sheriff's deputies provided her with money she traveled to a hotel and purchased twenty dollars worth of crack cocaine from Hardy. App. 62, l. 10- App. 63, l. 7.

In the state's case-in-chief the prosecution proffered testimony about Hardy's prior drug use. App. 59, ll. 20-22. Following the proffer, the same testimony was elicited by the state on direct examination. App. 61, ll. 14-17. Despite knowing that the testimony was coming and that it would be prejudicial, trial counsel made no objection to what is clearly evidence of other bad acts. App. 61, ll. 14-17. At the PCR hearing counsel recalled the confidential informant's testimony of purported drug use with Petitioner. App. 264 ll. 5.- 9. He remembered that it was proffered and then allowed in by the trial judge. App. 264 ll. 5- 15. Counsel remembered not objecting to preserve that matter for direct appeal. App. 264 11. 16 - 24. When asked why he did

not object, counsel offered the following explanation:

> My, my thinking was that the fact that this was clearly a drug case. They had a video with drugs, and testimony to that effect. I felt like it would be beneficial to the defense if the drug use by the informant was admitted because, obviously; they had evidence that Mr. Hardy was involved with drugs, and I felt like the credibility of the informant would be affected in a negative way if she indicated, · which she did, that she had used drugs multiple times I think - - I believe that was in there with Mr. Hardy.

App. 265 ll. 2 - 10.

Discussion

"There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness." Suber v. State; 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (*citing* Strickland v. Washington, 466 U.S. 668, 6~7, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991)). "Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the "result of the proceeding would have been different." *Id*. (*citing* Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541-42,402 S.E.2d at 485).

Under Rule 404(b), SCRE, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the ·character of a person in order to show action in conformity therewith." It is well settled that absent specific exceptions, evidence of other bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel's offered reason for not objecting cannot be justified as a valid trial strategy. If counsel wanted to impeach the confidential informant with her prior drug use, he could have sought a ruling in advance

limiting her response to exclude any reference to Hardy's prior use. He chose not to do that and the jury instead learned that Hardy had a history of drug use.

Clearly counsel knew well enough in advance that the testimony was coming to keep that testimony out by proper objection. App. 591. 11- App. 611. Even the solicitor recognized the objectionable nature of her testimony and requested to proffer the testimony first:

> Your Honor, I believe we are getting into the part where she's going to explain how her- - how her relationship with Mr. Hardy - - and we thought maybe the best thing to do would be to proffer because Mr. Bean had brought that up previously in chambers.

App. 5911. 11-15.

Even after raising the issue in chambers, hearing the proffered testimony, and being afforded a larger window to object during the proffer, trial counsel failed to make a timely objection on the record. If he had objected, it is likely that the trial judge would have excluded testimony about Hardy's prior drug use under Rule 404(b), SCRE. Even if the trial court found that the testimony of Hardy's prior drug use was admissible bad act evidence under Rule 404(b), it would still be inadmissible as it was not relevant to the present charge of distribution. *See* State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000) (there must be logical relevance between bad act and the crime for which defendant is accused); *see also* Rule 402, SCRE. Here the confidential informant testified that the Petitioner had used drugs before. She did not testify that he had sold drugs before as was the case in State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). The defendant's prior drug use of some unspecified drug at some unspecified time was not probative as to the present distribution charge. *See* State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000) (there must be logical relevance between bad act and the crime for which defendant is accused);

see also Rule 402, SCRE.

Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Brooks, *supra; see also* Rule 403, SCRE. The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case. State v. Brooks, *supra*. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). Trial counsel in evaluating the case as a whole testified that the testimony was prejudicial to the defense. Here, proving that the Petitioner used drugs could only cause prejudice as to the distribution charge. Given the prejudicial effect of Hardy's prior drug use in the present case, the decision of the post conviction court should be reversed and Hardy granted a new trial.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.

Respectfully submitted,

s/J. Falkner Wilkes

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July 24, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIFICATE OF SERVICE

I certify that on the 24th day of July, 2020, I served the Petitioner's Motion to allow substitution of counsel and to allow the Petitioner to file an Amended Petition for Writ of Certiorari on the Respondent and Petitioner's current counsel of record, and others if indicated, by AIS email only addressed as follows:

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Respectfully submitted,

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July 24, 2020.

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SC Court of Appeals

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CERTIFICATE OF SERVICE

On behalf and by the request of the Petitioner the undersigned hereby moves this Court to allow J. Falkner Wilkes to be substituted as counsel for the Petitioner in the above captioned case. Petitioner further moves this Court to allow the Petitioner to withdraw the Petition for Certiorari and file the attached Amended Petition for Writ of Certiorari. Petitioner seeks to add issues for this Court's consideration that were raised and ruled on by the PCR court but not included in the Petition filed by SCCID. Petitioner submits that he is entitled to raise all non-frivolous issues and that his indigent status and appointment of counsel should not prevent him from doing so. The undersigned was PCR counsel and is familiar with the case and has briefed the issues Petitioner seeks to have considered by this Court.

Wherefore Petitioner moves this Court to allow the filing of the Amended Petition for Writ of Certiorari and to substitute the undersigned as counsel of record in this case.

Respectfully submitted,

s/J. Falkner Wilkes

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July 24, 2020.