

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

NOV 12 2013

Appeal from Richland County
R.Knox McMahon, Circuit Court Judge

Appeal Case No.2012-213330

RECEIVED

NOV 14 2013

S.C. SUPREME COURT

Keith Sims -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

**PETITIONER'S Pro-Se Johnson PETITION FOR
WRIT OF CERTIORARI**

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ISSUE(S) PRESENTED

ISSUE (A)

THE PCR COURT ERRED IN FAILING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL and PROSECUTORIAL MISCONDUCT.

ISSUE (B)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO TESTIMONY CONCERNING PETITIONER'S INVOCATION OF CONSTITUTIONAL RIGHTS.

ISSUE (C)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF AMMUNITION LATER REMOVED FROM EVIDENCE.

ISSUE (D)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO IMPROPER VOUCHING AND PITTING OF WITNESSES IN CLOSING.

ISSUE (E)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE IMPROPER JURY CHARGES ON THE INFERENCE OF MALICE.

ISSUE (F)

THE RICHLAND COUNTY COURT OF GENERAL SESSIONS LACKED SUBJECT MATTER JURISDICTION and PERSONAL JURISDICTION.

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Procedural history

Petitioner was indicted by the Richland County Grand Jury for murder, App.1015-1016. On March 20, 2006, Petitioner proceeded to trial by jury and the Honorable James Johnson, presiding, App.1.

Petitioner was represented by John Meadors and Will Bryant, App.1. Ultimately the jury returned a verdict of guilty as indicted., Tr.p.757, 11.1-4-; Tr.p.769, 11.1-5.

A timely notice of appeal was filed. Petitioner was represented by Joseph Savitz of the South Carolina Office of Indigent Defense. Ultimately the South Carolina Court of Appeals affirmed Petitioner's conviction in State v. Sims, 377 S.C. 598, 661 S.E.2d 122 (2008). Petitioner timely filed petition for writ of certiorari to the South Carolina Supreme Court. This Court affirmed, State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (2010).

Petitioner filed a timely application for post conviction relief ("PCR") alleging ineffective assistance of counsel. An evidentiary hearing was convened August 14, 2012 before the Honorable R.Knox McMahon. Petitioner was present and represented by Tynika Claxton and Charlie Johnson. The State was represented by Rob Corney. Judge McMahon denied relief by written order October 30, 2012. On November 15, 2012, Petitioner filed a Rule 59(e), SCRCF motion. The 59(e) motion motion was denied by written order February 6, 2013.

A timely notice of appeal was filed. Petitioner was appointed out-side counsel to represent him on the PCR appeal (Tristian Shaffer). Shaffer filed a Johnson petition for writ of

certiorari. Petitioner's pro-se Johnson petition is as follows:

Factual History

Petitioner adopts counsel's factual statement for the purposes of his brief.

ISSUE (A)

THE PCR COURT ERRED IN FAILING TO FIND
INEFFECTIVE ASSISTANCE OF COUNSEL and
PROSECUTORIAL MISCONDUCT.

Facts

During the PCR hearing Petitioner raised the issue of "ineffective assistance of counsel/prosecutorial misconduct, App.932, 11.6-21. Petitioner submitted exhibits from the Court Administration (a schedule/calender) showing the dates the Grand Jury convened, App.932, 11.24-25-p.933, 11.1-6; App.984-985.

During the PCR hearing the State objected and argued the Grand Jury doesn't meet according to General Sessions Calendar, App.933, 11.18-25-p.934, 11.1-3. The Court intervened and told the State that the problem is the State's (Attorney General's) statement is not evidence, App.934, 11.4-6. At which time the Attorney General said he would deal with the issue during cross-examination, App. 933, 11.17-25 -p.934, 11.1-6. PCR Counsel subsequently introduced the Calendar as Plaintiff's Exhibit No.1, App.934, 11.21-25.

During closing summation of the PCR hearing the State addressed the issue again, App.974, 11.23-25-p.975, 11.1-20. At that time the PCR Court told the State the Court was not tracking the issue at all, as the Court concluded that Petitioner's Exhibit 1 indicates that General Sessions was held in Richland County on the week of February 9, 04 and the indictment is true billed and signed by the Grand Jury foreperson February 12th of 04, which is within that term of court. So I -- I haven't been

tracking that., App.975, 11.21-25-p.976, 11.1-10. The PCR Court stated:

THE COURT: It looks like there was a term of court in Richland County, there was a term of court in Kershaw County also, and down at the bottom it's got -- it's got a date -- court date below indicated below and it's 2/9 through 2/13, App.976, 11.11-14.

Petitioner would submit the PCR Court has erroneously concluded "Richland County had a term of the Grand Jury on February 12, 2004. Petitioner presented testimony and exhibit 1, App.932, 11.24-25-p.933, 11.1-6; p.985. Petitioner submits the Court misinterpreted the calendar, as will be discussed, infra. At the close of the PCR hearing, PCR Counsel reminded the Court, "One additional thing. Mr. Sims would like to explain the calendar that he received from the Court Administration regarding the indictment." The Court stated: "The record is closed in that regard. I have the exhibit that was placed into evidence, App.980, 11.1-6.

In the written order the PCR concluded that Petitioner alleged his conviction was improper as it resulted from an indictment obtained through improper conduct of the Prosecutor, (PCR Order at p.6). The PCR Court found Petitioner's indictment cited the "February term 2004 meeting of the Grand Jury and reflects the indictment was returned "True Billed" on February 12, 2004, and that Petitioner argued that no Grand Jury term was held in the Fifth Circuit during the month of February, 2004. The PCR Court's order further found upon review of the record and exhibits introduced by the Applicant (Petitioner), the Court

found this allegation to be wholly without merit. Specifically, the PCR Court found:

Applicant's indictment plainly states the Grand Jurors met, "[a]t a Court of General Sessions" on "February 11, 2004." The calendar before the Court reflects three (3) different terms of Generals Session Court held the week of February 9 through 13, 2004, in the Fifth Judicial Circuit. Therefore, I find this allegation to be without merit, (PCR Order at p.6).

The PCR Court further found no resulting prejudice from any alleged ineffective assistance from counsel for failure to quash the indictment, because Counsel testified, quashing the indictment would have made no difference on the outcome of the charges as a motion would not have prevented the state from pursuing the charges at a later date, (PCR Court Order at p.6-7).

Petitioner would submit the indictment actually states: "At a Court of General Session convened on February 11, 2004, the Grand Jurors of Richland County present upon their oath" (Exhibit (1), App.387. The indictment is affixed with a true bill stamp, and signed by Solicitor Warren G. Giese (see exhibit 1, App.387), who was the State Judicial Official assigned the responsibility of preparing and processing the indictment. Petitioner attached letter from the Court Administration dated October 15, 2007, App.984, shows that in February the [Richland County] Grand Jury did not meet in February, they met in March 29, 2004, compare indictment, App.386-387, and then compare to the Court Administration's letter to Petitioner, App.984

Petitioner would submit a proper review of the calendar (Petitioner's exhibit 1), reveals the grand jury calendar roster shows that on the week of February 9, 2004, the Court of common please was held 2/9/04 in Richnad County under the Honorable James Barber. On 2/10/04 General Sessions was convened in Richland County before the Honorable Thomas G. Cooper. On 2/11/04 General Sessions was convened in Richland County before the Honorable James Williams. On 2/12/04 General Sessions was convened in Kershaw County for the Honorable L. Manning, and on 2/13/04 the Court of Common Pleas convened in Richland County before the Honorable Reginald, Lloyd.

As is seen through the preponderance of evidence submitted during the PCR hearing, Rule 71.1(e), Petitioner has carried his burden of proving this allegation and is entitled to relief on this issue. The Court Administration's Calendar is replete the "Richland County" Grand Jury did not meet as true billed on Petitioner's indictment on February 12, 2004, in Richland County. Petitioner submits his indictment was presented to the grand jury on the 11th of February, but it is impossible for the Richland County grand jury to true bill the indictment on 2/12/04 when the term of Court for 2/12/04 was convened in Kershaw County, not Richland County. (see exhibit 1). The Attorney General during the PCR hearing was admonished by the PCR Judge that the Attorney General's statement was merely an allegation and was not evidence for the purposes of the civil proceeding. However, Petitioner has succinctly carried his burden through the preponderance of the evidence, See Petitioner's testimony and Petitioner's exhibit 1.

The PCR Court's findings are objectively unreasonable in

light of the evidence presented during the PCR hearing. Furthermore, the PCR Court erred in concluding that Petitioner has not suffered any resulting prejudice from any alleged ineffective assistance of counsel for counsel failing to quash the indictment.

Trial counsel testified during the PCR hearing that she didn't object to the indictment simply because the State would have reindicted at a later time. Petitioner would submit what "may transpire" at a later date in the event Petitioner obtained a favorable ruling on this claim is irrelevant where structural errors are concerned. Otherwise, no issue presented would ever rise to the level of prejudice. Here the PCR Court has adduced prejudice in increments of prejudice and levels of certainty before a defendant is entitled to relief, this being that to be entitled to relief the Petitioner must show the State will not retry the Petitioner at a later date, thus this would reach an absurd result.

The purpose of the Fifth Amendment and South Carolina Constitution art. 1, §11 is so that "no man shall be held to answer for an infamous crime... "except upon an indictment by a grand jury", not merely an indictment rubber stamped and falsely presented by the Prosecution. The prejudice is easily seen here, as, Petitioner's liberty has been placed in jeopardy by that of a prosecutor, not a grand jury.

Petitioner raised this issue as multi-fauceted, ineffective assistance of counsel/prosecutorial misconduct. The purpose of the Sixth Amendment is to guarantee the Effective Assistance of

Counsel to ensure and protect all the fundamental rights comprised in the term liberty. Furthermore, The Sixth Amendment does not proscribe that Petitioner be treated as an unarmed gladiator thrown into the ring with an experienced Prosecutor, and left to defend himself. The purpose of effective representation is to ensure Petitioner's liberty is not thwarted by the actions of prosecutorial misconduct. Many of these prohibitions also appear in the standards of conduct the American Bar Association has established for prosecutors and defense counsel alike. See ABA Standards for Criminal Justice, Prosecutions Function & Defense Function, Standards 3-5.9 (prosecution); 4-7.4 to 4-7 (defense). Prosecutors as well as defense counsel, are aware of case law proscribing particular conduct as well as the standards of conduct prescribed by the ABA. Courts throughout the circuits have struggled with errors complained of in the instant case, and other circuits have struggled to effectively respond to the problems presented when prosecutors engage in off-limit conduct. The Illinois Supreme Court has referred to prosecutorial misconduct as "a problem that courts across the country have, for the most part, been unable or unwilling to control, *People v. Johnson*, 803 N.E.2d 405, 412 (Ill.2003). A Florida intermediate appellate court described a "veritable torrent of cases" involving significant prosecutorial improprieties, noted, that "this pattern of conduct cannot be tolerated", and expressed frustration that the court's "prior efforts to eliminate the practice have proven entirely inadequate", *Thornton v. State*, 852 So.2d 911, 914-915

(Fla. Dist. Ct. App. 2003) (citations omitted). The problem is not new, as nearly 60-years ago Judge Jerome Frank of the Second Circuit Court of Appeals expressed his frustration that denouncing serious misconduct, but not reversing shows an "attitude of helpless piety" and breeds a cynical attitude towards the judiciary", *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2nd Cir. 1946) (Frank J, dissenting).

Where the defendant as here has demonstrated that the prosecutor's conduct constitutes an error that [is] plain, the burden would then shift to the State to demonstrate lack of prejudice, that is, the misconduct did not affect the substantial rights of the defendant. Thus, placing the burden on the prosecution to show lack of prejudice, is not a novel approach, *Chapman v. California*, the case in which the U.S. Supreme Court held that the constitutional error can be harmless, the Court placed the burden on the government, stating... "certainly error, constitutional error * * * casts on someone other than the person prejudic[ed] by it, a burden to show that it was harmless. It is for that reason that the original common law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer reversal of the erroneously obtained judgement", 386 U.S. 18, 24 (1967). Similarly, at least two states, including Wisconsin follow Chapman and continue to place the burden of the prosecution to show lack of prejudice, See *Wilson v. State*, 874 So.2d 1155, 1159 (Ala. Crim App. 2003) (holding the state must establish that prosecutorial misconduct did not injuriously affect the defendant's substantial rights); *State v. King*, 555

N.W.2d 189, 194 (Wis.Ct.Ap..1996)(holding that under the state's plain-error rule, burden is on the prosecution to prove that plain error is harmless). Reduced to it's essential's the Attorney General never challenged Petitioner's testimony or exhibit's during the PCR hearing, either expressly or during cross-examination and therefore Petitioner is entitled to relief on this issue.

Here the PCR Court erred in not finding this to be structural error that requires reversal.

ISSUE (B)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO TESTIMONY CONCERNING PETITIONER'S INVOCATION OF CONSTITUTIONAL RIGHTS.

Facts

During PCR Petitioner testified that counsel was ineffective for failing to object when the Prosecution solicited testimony from Investigator McCraw regarding the questioning of Petitioner that resulted in McCraw commenting on Petitioner's right to remain silent. During trial McCraw testified that he asked Petitioner "why did you kill the victim" and at which time McCraw testified Petitioner became "agitated, very nervous, wouldn't look at McCraw, kept swallowing, crossing his arms and legs... and then stated he might need an attorney", App.421, 11.24-25 -p.422, 11.1-14. McCraw noted the interview was terminated thereafter. Petitioner asserted the interview did not end after Petitioner stated "he might need an attorney", App.422, 11.4-5. The record is replete, McCraw still questioned Petitioner, App.422, 11.5-14. As will be seen, McCraw asked Petitioner "who would be his attorney?". Petitioner then stated "he didn't know his name but that his dad was going to get him on that was in the Shriners with him from Charleston, App.422, 11.7-14. Petitioner then asked if that was all the questions he has had for him. McCraw then asked Petitioner is he could see his hands and take fingernail clippings, and Petitioner stated no.

Petitioner's assertion is that the very minute he stated "he might need to talk to an attorney", the interview must stop, but

instead McCraw "continued" to question Petitioner which was a direct violation of his post-arrest silence. The failure of counsel to lodge an objection placed Petitioner's actions before the jury in a highly prejudicial manner that allowed the jury to infer Petitioner had something to hide by "telling McCraw during the interview "maybe he needed to talk to a lawyer." Once Petitioner said he needed to talk to a lawyer the questioning should have stopped.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, the United States Supreme Court held: "a state prosecutor violates a defendant's due process rights by impeaching his exculpatory story, told for the first time during trial, through cross-examination regarding his post arrest silence, 426 U.S. at 611. The Court reasoned that because Miranda warnings implicitly assure the silence will carry no penalty "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial", 426 U.S. at 618. Relying on Doyle, supra, this Court held" "the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney, See *Edmond v. State*, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000).

Petitioner asserted that counsel should have objected to Investigator McCraw's testimony regarding Petitioner invocation of his right to silence during police interrogation. During trial McCraw testified to details regarding the interview with

Petitioner. McCraw testified that he questioned Petitioner, "Why did you kill the victim" at which time Petitioner "became agitated, very nervous, wouldn't look at McCraw, kept swallowing, crossing his arms and legs... and then stated that he might need to see an attorney, App.421, 11.225 -p.422, 11.1-14, but the interview did not end there. McCraw still proceeded to question Petitioner, App.422, 11.5-14. It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right, State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Such comments may not be made either directly or indirectly, State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), see also State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974).

The Fifth and Fourteenth Amendments forbid comment on an accused's silence or failure to testify, as well as instructions by the court that such silence is evidence of guilt, State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (holding that the State's direct reference to defendant's silence and indirect comments on a defendant's exercise of his rights to counsel and jury violated defendant's due process rights and was reversible error in murder and kidnapping trial); State v. Hawkins, 292 S.C. 418, 423, 357 S.E.2d 10, 13 (1987)(reversing conviction where the State improperly commented upon a defendant's failure to testify and explaining that such a comment essentially is a comment upon the defendant's right to remain silent, overruled on other grounds, State v. Torrence, supra; also see State v. Woods, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984)(reversing conviction where State

improperly introduced evidence that the defendant had exercised his right to remain silent), accord *State v. Holiday*, 333 S.C. 332, 509 S.E.2d 280 (Ct.App.1998)(reversing conviction because State's cross-examination of defendant as to why he had not told his version of events until the day of trial, was improper in that the question clearly referenced his Post-Miranda Silence).

The principles are rooted in Due Process, and the belief that justice is best served when a trial is fundamentally fair, See *Bretch v. Abrahamson*, 507 U.S. 619, 629, 113 S.Ct. 1710, 1717 (1993), *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 638 (1986); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602.

After Petitioner told McCraw he (Petitioner) needed to talk to a lawyer, McCraw continued to still question Petitioner, which violated Petitioner's Miranda rights. Also see *State v. Weston*, 625 S.E.2d 641 (2006). The rationale for Doyle, supra is that it is a violation of the due process clause to allow the State to comment on the silence which Miranda warning and silence will carry no punishment. Here, Investigator McCraw violated Petitioner's exercise of his right to remain silent when McCraw continued to question Petitioner [after] the invocation of his right to an attorney, and this was exploited to the max in McCraws testimony that was spread before the jury in a prejudicial manner.

The PCR Court's decision is objectively unreasonable on this issue.

ISSUE (C)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF AMMUNITION LATER REMOVED FROM EVIDENCE.

Facts

Petitioner asserts the PCR Court erred in failing to find counsel rendered ineffective assistance of counsel when counsel failed to lodge a "timely" objection to the State's introduction of ammunition into evidence that was [later] removed as irrelevant.

During the PCR hearing, Petitioner testified that counsel rendered ineffective assistance for failing to object to the erroneous admission of irrelevant evidence, App.948, 11.1-2. Petitioner testified that counsel had originally objected, but the objection was too late, App.948, 11.11-14, App.948, 11.21-23. Petitioner testified that counsel should have objected at first opportunity so the jury could never have heard about the irrelevant ammunition being placed before the jury, that unduly prejudiced Petitioner.

During the PCR hearing the State's cross examination on this issue consisted of "whether or not the ammunition went to the jury room during deliberations", App.949, 11.12-16. The PCR Court was concerned if there was a curative instruction given, App.949, 11.17-24. All the parties agreed that no curative instruction was given.

During trial Lt. James Berlin testified for the State. During

Berlin's testimony the State moved to introduce into evidence, (ammunition) that was obtained from Petitioner's house during the execution of a search warrant. Among those items was State's exhibit 79, which contained (11) eleven rounds of Wolfe ammunition, a Winchester twelve gauge shotgun shell, and another round of ammunition with an unknown caliber, App.366, 11.24-25 -p.367, 11.1-10. Counsel did initially object, arguing the ammunition was not relevant, as the firearm in question was a nine millimeter handgun which none of the ammunition in State's exhibit 79 match[ed]. Ultimately the trial court overruled the objection and allowed the items into evidence in front of the jury (emphasis supplied). After subsequent testimony of the State's firearm expert, the trial Judge "revisited" the introduction of State's exhibit 79, App.389, 1.8. The trial judge said "I'm thinking about changing my ruling and just ruling them out of evidence. But I need to know if the State has some -- other than the fact they were found at the scene or at the defendant's home, what's the relevance of those items, App.389, 11.8-25 -p.390, 11.1-20. Ultimately, the trial court took the initiative and removed the ammunition from evidence, App.490, 11.6-25-p.491, 11.1-25. Noting, no curative instruction was requested by counsel and none was given sue sponta by the Court, so the jury was left with impression of [all] the irrelevant ammunition being multi-calibers, only leaving the jury to infer, Petitioner is "a man of many guns", and therefore has the intent to kill, which was the basis of the State's theory.

Petitioner asserts the PCR Court erred in failing to find counsel rendered ineffective assistance when counsel failed to

"timely" object to the "testimony" to the introduction of the (ammunition) evidence that was later taken out by the trial judge due to irrelevancy, and that this deficient unduly prejudice Petitioner in the eyes of the jury. During trial the State introduced the ammunition through the testimony of Officer John Toole, App.362. Tool testified the ammunition was found beside the stand dresser in Petitioner's house. Counsel did not object until the State moved to introduce the ammunition as evidence. Here the prejudice is already incurred as the jury was subjected to Toole's testimony, and following directly after the Trial Court allowed the evidence. Noting that Counsel did object when the State moved to introduce the ammunition into evidence, but counsel failed to object to Toole's testimony regarding the irrelevant ammunition.

While counsel did object when the State moved the ammunition into evidence, the trial judge overruled the objection and allowed the evidence. Later the trial judge ["revisited"] his earlier ruling and the trial court took the initiative to "withdraw" the evidence due to it's irrevelavancy, App.389, 11.21-25 -p.390, 11.1-22. And it should further be noted that "no curative" instruction was requested by counsel, nor was one given sue sponte by the trial court, therefore it was too late to cure any prejudice incurred by this damaging evidence.

This evidence was very damaging to Petitioner in the eyes of the jury. Evidence is relevant when it logically tends to prove or disprove material facts in issue, State v. Galloway, 407 S.E.2d 662 (S.C.App.1991), evidence is unfairly prejudicial [if] it has tendency to suggest a decision on an improper basis, State

v. saltz, 551 S.E.2d 240 (S.C.2001); also see Rule 403, SCRE. Petitioner submits the PCR Court erred in failing to find counsel rendered ineffective assistance and that Petitioner was prejudiced by this deficiency.

ISSUE (D)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE STATE'S IMPROPER VOUCHING AND PITTING OF WITNESSES IN CLOSING.

Facts

Petitioner raised this issue during PCR as a multi-fauceted issue of the Prosecution's improper "vouching and pitting" during closing summation, and therefore to save the Court's time, Petitioner will argue these issues together since the facts of one encompass the other.

Petitioner asserts the PCR Court erred in failing to find counsel rendered ineffective assistance when counsel failed to object to the Prosecution's improper statements during closing summation that resulted in improper "vouching" for a State's witness during closing. The following was recorded:

Criminal intent. Don't tell the police. Don't tell the family. Don't tell your mother. Don't tell Derrick. Don't tell Nikki. Don't tell Natalie. You actually heard Natalie through Nikki, which is co-conspirator testimony which is allowed to come out under the rules, say "He murdered somebody". No truer words were spoken in this case". How many questions on cross to that? Where did you hear that, Nikki? Where were you when she said that? Are you sure she said that? Because that's the truth", App.707, 11.3-13.

As is seen in above underlined portions of the Prosecutor's closing it is easily seen the Prosecution has successfully "vouched" for the credibility of the State's key witness, when

FOR THE PURPOSES OF THE ACT, THE BOARD OF DIRECTORS OF THE COMPANY SHALL BE DEEMED TO BE THE BOARD OF DIRECTORS OF THE COMPANY.

Facts

On the 1st day of January 1954, the Board of Directors of the Company, consisting of the following members, viz: [names], met at the office of the Company and discussed the proposed amendments to the Charter of the Company. The Board of Directors then resolved to recommend to the stockholders of the Company the adoption of the proposed amendments to the Charter of the Company.

On the 1st day of January 1954, the Board of Directors of the Company, consisting of the following members, viz: [names], met at the office of the Company and discussed the proposed amendments to the Charter of the Company. The Board of Directors then resolved to recommend to the stockholders of the Company the adoption of the proposed amendments to the Charter of the Company.

The Board of Directors of the Company, consisting of the following members, viz: [names], met at the office of the Company and discussed the proposed amendments to the Charter of the Company. The Board of Directors then resolved to recommend to the stockholders of the Company the adoption of the proposed amendments to the Charter of the Company.

the Prosecutor told the jury "there are no truer words", "because it's the truth" (emphasis supplied).

The Prosecution then went on to improperly "pitt" Petitioner against the State's witness, as was recorded:

His demeanor, his emotion. What happened? You all heard it through several witnesses but you first heard it through Nikki. And almost, credibility, believability, you can look at Nikki and you can look at the defendant, App.711, 11.3-7.

I'm almost through. You can look at Nikki and Bernard for credibility versus the defendant, App.721, 11.23-25.

As is seen in the above underlined the Prosecution during closing has "pitted" Petitioner against a State witness, and the prejudice is seen as Petitioner could not rebut the statement and is only available remedy was for counsel to lodge an objection and at least ask for curative instruction.

During the PCR hearing Petitioner testified that counsel was ineffective for failing to object the State's improper vouching, App.929, 11.12-25-p.930, 11.23.

The Petitioner further testified that he was denied the effective assistance of counsel when counsel failed to object when the State improperly "pitted" Petitioner against the State's key witness during closing, App.930, 11.25-p.931, 11.1-25-p.932, 11.1-14.

[Vouching]

Petitioner asserts he was denied the effective assistance of counsel when counsel when counsel failed to object to the

Prosecution's improper "vouching" and "pitting" during closing summation. In trying to bolster the credibility of a prosecution witness the Prosecution may not overstep the bounds of fairness. It is well established that the prosecutor has a special obligation to avoid improper suggestions, insinuations and especially assertion of personal knowledge", *Berger v. United State*, 295 U.S. 78, 55 S.Ct. 629 (1935).

Vouching may occur in two ways: The prosecutor may place the prestige of the government behind the witness [or] may indicate that information not presented to the jury supports the witnesses testimony, *Lawn v. United State*, 355 U.S. 339, 359-60, n.15, 78 S.Ct. 311, n.15 (1958).

A prosecutor may argue inferences from the evidence that a witness has no motive to lie, but cannot express a personal opinion on the credibility of a witness, *ABA Criminal Justice Section Standards, Arguments to the jury, Standard 3-5.8*.

Our Fourth Circuit Court of Appeals in *United States v. Loayzo*, 107 F.3d 257, 267 (4th Cir.1997), held in accordance with *United States v. Moore*, 11 F.3d 475, 481 (4th Cir.1993), cert. denied 114 S.Ct. 1864 (1994), that it is improper for a prosecutor to directly express the personal opinion as to the veracity of a witness.

More plainly, any statement of personal belief jeopardizes the integrity of the trial process, *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir.1983), cert. denied 466 U.S. 972 (1984), also see *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

A solicitor cannot vouch for the credibility of a witness, either expressly, or by implying information not presented supports the testimony, *State v. Schuler*, 545 S.E.2d 805, 815 (S.C.2001).

Our Court's have consistently held in accordance with the Fourth Circuit, that a prosecutor cannot vouch for the veracity of a witness, because the jury must make it's own assessment on the credibility of witnesses and it's inappropriate for the State to assure the jury of a State's witness' credibility, *State v. Kelly*, 540 S.E.2d 851, 861 (S.C.2001), rev'd on other grounds, 543 U.S. 246 (2002). In *Matthews v. State*, 565 S.E.2d 766 (S.C.2002)(counsel found ineffective for failing to object to the prosecutor's improper vouching for a State's witness)

[Pitting]

Petitioner asserts he was denied the effective assistance of counsel when counsel failed to object to the Prosecution's improper statements during closing summation, when the Prosecution "pitted" Petitioner against a State witness. The statements made by the Prosecution were unduly prejudicial to Petitioner, since the entire defense of the case was based on the credibility of Petitioner. In *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988), our Supreme Court reversed Sapps' conviction because the assistant solicitor on cross-examination forced the defendant to attack the veracity of the State's witness. Since Sapps' credibility was a key element to his defense that he did not commit the rape, the Supreme Court found that the questioning

prejudiced Sapps' right to a fair trial. A similar result applied in *State v. Brown*, 297 S.C. 27, 374 S.E.2d 669 (1988).

In the instant case the Solicitor told the jury they could look at Nikki, whom and the State had just previously vouched for, and Bernard for credibility versus the defendant", (emphasis supplied).

The basic premise is no matter how a question is worded, any time a solicitor asks a defendant to comment on the truthfulness or explain testimony of an adverse witness, this is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper, *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994). The improper pitting in the instant matter was extremely prejudicial as the statements of the Prosecution were made during closing, and Petitioner could not rebut the improper pitting.

Petitioner asserts that counsel was ineffective for failing to object to the solicitor's improper statements, and as a result Petitioner was prejudiced because he did not receive a fair trial as a result of ineffective assistance of counsel.

ISSUE (E)

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE IMPROPER JURY CHARGES ON THE INFERENCE OF MALICE.

Facts

Petitioner asserts the PCR Court erred in failing to find counsel rendered ineffective assistance when counsel failed to object to the trial court's jury instructions on malice that impermissibly shifted the burden of proof in violation of the Fourteenth Amendment's due process clause.

During the trial court's jury instructions on malice the following was recorded:

On the other hand, malice may be inferred from showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. And of course, a pistol is a deadly weapon, App.735, 11.14-22.

As is seen in the above underlined portions of the judge's instructions he has instructed the jury that "malice can be inferred from the use of a deadly weapon", and further goes and charges the jury, "of course a pistol is deadly weapon."

Petitioner asserts this instruction resulted in a "mandatory burden shifting presumption." Especially when considering the trial Court never instructed the jury that the inference of malice from the use of a deadly weapon could be "accepted or reject" based on the jury consideration of the evidence.

It is well settled by case law that the charge of court must be taken in it's entirety when considering it's impact upon the jurors, *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974). Our Fourth Circuit also stated that to receive relief a petitioner must show the ailing instruction by itself so infected the trial that the resulting conviction violates due process, *Cooper v. North Carolina*, 702 F.2d 481, 483-84 (4th Cir.).

In a long line of cases culminating in *Yates v. Evatt*, 500 U.S. 391 (1991), the U.S. Supreme Court recognized that the prosecution must prove each and every element of the crime charged beyond a reasonable doubt, citing *In re Winship*, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense, because in doing so it decreases the State's burden of proving the crime beyond a reasonable doubt. As early as 1975 the Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden on any element of the crime to the defendant, finding the risk described to be intolerable, reversing the conviction, *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

The Court overturned a conviction in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury that, "the law presumes that a person intends the ordinary consequences of his voluntary acts,

Id at 512. After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove every element beyond a reasonable doubt and the defendant cannot be required to prove any elements of his defense or disprove any element of his crime, holding a "reasonable jurist might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional."

In *Francis v. Franklin*, 472 U.S. 307 (1985), the Court found that the use of a rebuttable presumption was also unconstitutional for the same reason set forth in *Sandstrom*.

Following, *Sandstrom v. Montana*, *Mullaney v. Wilbur*, and *Francis v. Franklin*, the case of *Yates v. Evatt*, 310 S.E.2d 805 (1982), 474 U.S. 896 (1985) (*Yates v. Aiken*), and 500 U.S. 391 (1991), wound it's way through the judicial system on identical issues. This matter is thus, solid stare decisis in South Carolina.

During the windfall of the Yate's case, in the case of *Elmore v. State*, 279 S.C. 417, 308 S.E.2d 781 (1983), the Court noted that "only slight deviations from the charge set forth will be tolerated", Id at 421, 308 S.E.2d at 784. The PCR Court noted that such was the legal standard for permissible inference of malice from the use of a deadly weapon in South Carolina until October 12, 2009, citing *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (PCR Order at 17).

When considering the holdings of Elmore, supra, the PCR Court overlooked two (2) critical factors: (1). the trial court at Petitioner's trial did not give the Elmore charge, which at heart is a direct correlation to that in State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985), where our Supreme Court held that trial judge "should make it clear that the jury can "accept or reject" the inference of malice based on their consideration of the evidence. In the instant case the trial judge "failed" to instruct the jury that they, the jury could "accept or reject" the inference of malice from the use of a deadly weapon based on their consideration of the evidence, and thus the failure to instruct the jury in this regard, rendered the trial court's malice instructions to be "mandatory" and "burdenshifting".

Clearly counsel was ineffective in failing to lodge a timely objection to preserve this issue for appellate review. In Tate v. State, 570 S.E.2d 522 (S.C.2002)("lawyer ineffective for not objecting to the jury charge given by the court"). Here the trial court's jury instructions shifted the burden of proof beyond a reasonable doubt and substantially relieved the State from proving the essential element of malice. Here the jury had to look no further than the trial Court's instructions that "malice is inferred from the use of a deadly weapon, "and of course, a pistol is a deadly weapon",Id. Here the trial Court merely directed a verdict for the State since the Court failed to instruct the jury on permissive inferences that can be accepted or rejected based on the jury's consideration of the evidence.

ISSUE (F)

THE RICHLAND COUNTY COURT OF GENERAL SESSIONS
LACKED SUBJECT MATTER JURISDICTION and
PERSONAL JURISDICTION.

Facts

The indictment in the instant matter reads as follows:

That Keith A. Sims did in Richland County on or about December 31, 2003, feloniously, wilfully and with malice aforethought, kill one Bryan A. Anderson by means of shooting the victim with a handgun and that the said victim dies as a proximate result thereof. All in violation of S.C.Code of Laws §16-3-10.

Petitioner asserts Richland County Court of Generals Sessions, lacked subject matter jurisdiction and personal jurisdiction since the place of death [is] uncertain. While the shooting happened at Petitioner's home in Richland County, the victim was still alive after the shooting. Petitioner's home is moments from the Fairfield County Line. Petitioner drove the victim across two (2) different County lines. First, Fairfield County, which is moments from Petitioner's home and then reaching his destination in Newberry County.

The Pathologist's autopsy report states the deceased, Bryan Anderson, the assault took place at "Molly Rock" and that "Molly Rock" was the place of death. Richland County indicted Petitioner stating the victim was shot and killed in Richland County without certainty. Petitioner would assert that Richland County has no jurisdiction, subject matter or personal jurisdiction to indict

Petitioner because the Pathologist said: "Anderson (victim) died in New Berry County. The victim was still alive when being transported to Newberry, therefore it is reasonable to believe based on the Pathogist Report the victim died in Newberry, South Carolina, not Richland County.

It is Petitioner's contention that the place of death is an essential element of the crime of murder. The Pathogists, Joel Sexton, MD., and Janice E. Ross, MD, said the death took place in Newberry County (emphasis supplied), therefore Richland County clearly lacked jurisdiction, both subject matter and personal jurisdiction to indict Petitioner. A victim cannot die in two (2) different places at the same time and the place of death is an essential element of the crime of murder, see State v. Blakeney, 11 S.E. 637.

The Autopsy Report reads in pertinent part: "Place of injury"--Molly Rock; "County of Death" Newberry, S.C., "Date of Death", 12-31-02.

Clearly with the naked-eye, Richland County had/has no Personal or Subject matter jurisdiction.

The subject matter jurisdiction of a court is fundamental. "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice by this Court.

It is well settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court, Brown v. State, 343, S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001)(citation omitted). The action of a court, regarding matter as to which it has no jurisdiction is void, State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520, 522 (1972).

South Carolina courts have held that the sufficiency of an indictment "must be viewed with a practical eye; all the surrounding circumstances must be weighed before an accurate determination of whether the defendant was or was not prejudiced can be reached, State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Here there was no personal jurisdiction or submatter jurisdiction for Richland County to indict Petitioner for a homicide that occurred in Newberry, South Carolina. The error complained of here is structural in nature that renders the conviction void and reversal is required.

Conclusion

WHEREFORE, based on the foregoing, certiorari should issue in the instant matter.

Respectfully Submitted,

/s/ Keith A. Sims

Keith Sims

Petitioner, pro-se

Submitted 11/12, 2013
Columbia, SC.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
R.Knox McMahon, Circuit Court Judge

Keith Sims -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

Appeal Case No.2012-213330

The undersigned does hereby certify he has served a true and correct copy of the enclosed pro-se Johnson petition for writ of certiorari on attorney for Respondent, Mr. Robert D. Corney, Assistant Attorney General, P.O. Box 11549, Columbia, SC. 29211, by placing the aforesaid copy in a properly addressed, first class postage affixed envelope and placed in the U.S. Mail this 12 day of, Nov, 2013.

Sworn to and Subscribed Before Me

This 12 Day Of Nov 12, 2013

Austen H. Dye
NOTARY PUBLIC

My Comm. Expires _____

Respectfully Submitted,

/s/ Keith Sims
Keith Sims

My Commission Expires

March 5, 2018

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Supreme Court of South Carolina
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