VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Oct 20 2023

S.C. SUPREME COURT

Certiorari to Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

APPENDIX

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true that not rue, such as by the greater weight or preponderance of the evidence. In criminal cases however, the State's proof must be more powerful that that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find the defendant guilty. If on the other hand , you think there is a real possibility that the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty. Ladies and gentlemen an issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant. Identification testimony is

an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had the chance to see or know the person in the past. Once again, I instruct you that the burden of proof on the State extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime. If, afer examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. Ladies and gentlemen the defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought. Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent. Malice aforethought does not require that

malice exists for any particular time before that act is committed, but malice must exist in the mind of the defendant just before and at the time of the act is committed. Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be express or inferred. These terms, "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and the circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished; for example, lying in wait for a person or any other acts or preparation going to show that the deed was within the defendant's mind would be express malice. Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may be shown to 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 upon the facts and circumstances of each case. A pistol or a revolver are examples of instruments which may be deadly weapons. A gun may be a deadly weapon even if it is not operating. Ladies and gentlemen the defendant is also

charged with possession of a weapon during the commission of a violent crime. The state must prove beyond a reasonable doubt that the defendant was in possession of a firearm or visibly displayed what appeared to be a firearm during the commission of a violent crime. A firearm means any weapon which will, is designed to, or may be readily converted to expel a projectile. This would include a pistol or revolver. In order to find the defendant guilty of possession a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a violent crime or attempting to commit a violent crime. Murder is a violent crime. Ladies and gentlemen there are two possible verdicts which you may find in this case on the charge of indictment No. 2011-GS-45-095 count one: Murder. Not guilty or guilty and likewise, there are two possible verdicts which you may find in this case on the charge of indictment count 2: Possession of a firearm during commission of a violent crime. Not guilty or guilty. Ladies and gentlemen there is no significance whatsoever in the order in which I state these possible verdicts; it is simply that one must be state first. Ladies and gentlemen, your verdict must be a unanimous. All twelve of you must agree on the verdict. Your decision must not be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case. Madam forelady, when the jury agrees

on the verdict, you will write your verdict on this verdict form as I stated what the verdicts are. You will sign your name and date it and then you will knock on the jury room door to inform the bailiff that you have reached a verdict. At that time, you will be received back her in the courtroom for publication of your verdict. I ask that you in just a moment return to your jury room but please do not begin deliberations until you are told to do so by the clerk or the bailiff to do so. There's some matter that we still need to take here in court. Now ladies and gentlemen I hope you don't mind but I have taken the liberty due to the time of ordering you lunch. Ladies and gentlemen thank you very much and we will instruct you as to when you begin you deliberations.

(Jury excused for deliberation)

The Court: Are there any objections from the State or the defendant concerning the charge given.

Ms. Barr: Not from the State.

Mr. Ballinger: No sir Your Honor.

The Court: Thank you, you all would gather the evidence and I am going to send a copy of the charge that I just read to them, along with the verdict form. Court will be at ease pending the call of the court.

(Jury in)

The Court: Alright madam forelady I understand the

jury has reached a verdict.

Forelady: Yes we have.

The Court: Is it unanimous?

Forelady: Yes it is.

The Court: Please pass it to Mr. Frasier. Madam clerk please publish the verdict. The defendant will please stand.

Clerk: As to indictment No. 2011-GS-45-095 the State of South Carolina vs Marc Anthony Palmer, as to the charge of murder we the jury unanimously find the defendant guilty. As to the charge of possession of a weapon during the commission of a violent crime we the jury unanimously find the defendant guilty. Dated this 14th day of March 2013 by foreperson Mrs. Phoebe Hilton. Ladies and gentlemen of the jury is this your verdict?

Jury: Yes.

The Court: Please raise your right hand if it's your verdict. Thank you. Is the defense request polling of the jury?

Mr. Ballinger: Yes sir.

The Court: Please poll the jury.

Clerk: Juror number 173, Charles A. Taylor. Is this your verdict?

Taylor: Yes ma'am.

The Court: Is it still your verdict?

Taylor: Yes.

Clerk: Juror number 192, Abraham Williams. Is this your verdict?

Williams: Yes it is.

Clerk: Is this still your verdict?

Williams: Yes.

Clerk: Juror number 179, Davenick Tisdale. Is this your verdict?

Tisdale: Yeah.

Clerk: Is this still your verdict?

Tisdale: Yes.

Clerk: Juror number 87, Christie Hughes. Is this your verdict?

Hughes: Yes ma'am.

Clerk: Is this still your verdict?

Hughes: Yes ma'am.

Clerk: Juror number 112, Rachel McFadden. Is this your verdict ma'am?

McFadden: Yes ma'am.

Clerk: Is this still your verdict?

McFadden: Yes ma'am.

Clerk: Juror number 39, Mrs. Ever Cooper. Is this your verdict?

Cooper: Yes ma'am.

Clerk: Is this still your verdict?

Cooper: Yes ma'am.

Clerk: Juror number 6, Rodney Baxley. Is this your verdict sir?

Baxley: Yes.

Clerk: Is this still your verdict?

Baxley: Yes.

Clerk: Juror number 94, Shemeka Kennedy. Is this your verdict?

Kennedy: Yes ma'am.

Clerk: Is this still your verdict?

Kennedy: Yes ma'am.

Clerk: Juror number 82, Mrs. Phoebe Hilton. Is this your verdict?

Hilton: Yes.

Clerk: Is this still your verdict?

Hilton: Yes.

Clerk: Juror number 160, Lincoln Singletary. Is this your verdict?

Singletary: Yes.

Clerk: Is this still your verdict?

Singletary: Yes.

Clerk: Juror number 65, Louis Gamble. Is this your verdict?

Gamble: Yes.

Clerk: Is this still your verdict?

Gamble: Yes ma'am.

Clerk: Juror number 84, Anthony Hucks. Is this your verdict sir?

Hucks: Yes ma'am.

Clerk: Is this still your verdict?

Hucks: Yes ma'am.

The Court: Alright the jury has been polled, the verdict stands. Ladies and gentlemen of the jury let me take this opportunity to thank you for your work this week. I do understand it's taking time out of your day and it's an inconvenience for you. There's a lot of important things going in Williamsburg county, but I can assure you this, there was nothing more important going on in this county than what you were doing in here. In making sure that fellow citizens got a fair trial and that the victims of this town are protected as well. Ladies and gentlemen as I told you, you were not to speak to anyone about the case. That's now over with, you can speak to anyone you want to for as long as you want to or as little as you want to. So ladies and gentlemen if somebody persist in talking to you about the case and you don't want to talk to them just let one of the bailiffs know and they'll let me know and I'll make sure that stops. Ladies and gentlemen let me remind you this counts as your trial so you don't have to serve as a juror for the next three years and if you can't serve for the next year. Ladies and gentlemen what you had to do is never easy

it really isn't. You had to hold and judge a fellow citizen and it's not easy but you had the courage to do it. You know a lot of people try to get out of jury duty, but it is as I said a civic and a patriotic obligation to which Williamsburg County and the State of South Carolina owes a lot to you. You know in this country we're always trying to figure out what makes America great and people have different ideas. In my opinion it's people like you all who left their homes, left their jobs and whatever they were doing and came in here and resolved this situation. I just want to thank you very much now I'm going to give the defense attorney an opportunity to talk to his client some and then I'm going to sentence at 3 o'clock. I'll be sentencing at that point and time. You've been here all the way if you'd like to after I release you come back and sit in the audience and see the sentencing you may do so you're welcome to do that.

(Jury excused for the week)

Mr. Ballinger: Judge we move for a new trial for the reasons set forth at the directed verdict stage. Judge there was a motion for mistrial based on the polygraph reference. Judge our position would be the jury could infer that if that particular witness took a polygraph passed it and was no longer a suspect. That Mr. Palmer did not take the polygraph because he could not pass one and we would proffer

that that's improper burden shifting Your Honor. Judge we would renew the motions that were also made in limine. As to the dismissal of the case on the speedy trial motion and renew the motion made in limine to suppress Mr. Palmer's statement. The only other issue before the court at that time was a redaction which the court granted so that's not an issue, but in essences I would move for a new trial for the reasons all ready on the record and the additional reason for the polygraph.

The Court: Thank you, Ms. Barr.

Ms. Barr: Judge we of course just reiterate the previous arguments made to the court obviously this case boiled down to issue of credibility. The witnesses were thoroughly cross examined by the defense regarding what they saw, what there memory, and any prior statements that were made in connection with the case and it was up to the jury who they believed and how much of what was testified to was believable. Again we believe that there was substantial evidence in record for which this jury could conclude that the defendant was guilty on both counts. The reference made to a polygraph was not in reference to anything with the defendant. It was in reference to a witness.

The Court: Actually of that had be redacted out earlier.

Ms. Barr: That's absolutely correct Your Honor and we

would just simply renew the previous arguments that we made and ask that the post trial motions be denied.

The Court: I find that it certainly appeared that he received a fair trial. I am going to deny your motion for a new trial and I don't believe that, by the witness concerning the polygraph and quite frankly I think that was one of your weaknesses that was called at that time. I am going to deny I will sentence the defendant you all can take him back. Have him properly ready I will sentence at 3 o'clock.

The Court: Alright Ms. Barr.

Ms. Barr: Thank you Judge I please the court. Your Honor I wanted to thank the court, thank the members of the jury for their service. Judge this is as you've heard it's been a difficult case. We are glad that we were able to bring this matter to a conclusion the right way, the legal way, the peaceful way. I'm hoping that this will bring some peace and some rest to Therris's mother Evelyn Keels. She is standing next to me on my left. Judge she has a plaque of a picture of her son and she would like to address the court prior to sentencing.

The Court: Yes ma'am.

Mrs. Keels: To the Judge, all of the officer, to Ms. Kimberly Barr which done a wonderful job. Mrs. Linda Woods you done a wonderful job. All of the SLED Officers,

everyone, this is my son Therris Keels. Who is really - Judge when Therris got killed a part of me went with him, a part of me went with him. It just I've never been the same person since he was killed. I'm going back and forth to a doctor constantly and I hope everyone in this building will keep me in their prayer. Like I said I want to thank each and everyone for everything that you all have done for me on this case. Without this it wouldn't have been what it is. Thank you Ms. Kimberly Barr for a wonderful, thank you Mrs. Linda Woods for a wonderful job. Thank you my family for sticking by me through all of this and to Mrs. Mackavine and all of the police officers and to the jury thank you all for being justice because I needed justice with all of this that I'm going through thank you all.

Ms. Barr: Judge if I may also echo the sentiments of Mrs. Keels as it relates to the Williamsburg County Sheriff's Office. This was a case where the facts mandated just good ol'fashion police work. How they were trained in the academy and I was very impressed in terms of the follow up and all of the work that they did, and I also want to extend much gratitude to the Sheriff's Department for their hard work. I believe there may have been one other member of the family who wished to address the court.

The Court: Come forward please.

Ms. Barr: State your full name and spell your first

name.

Ms. Sheka: S-H-E-K-A

The Court: Yes ma'am.

Ms. Sheka: Thank you so much for today, for just being served. My little brother died at a young age, his life was taken away from him at a young age and I just need justice to be, I'm glad it was served today. I appreciate all your hard work, everything everybody has done I appreciate it, thank you.

Ms. Barr: Judge that's all we offer.

The Court: Mr. Ballinger I'm sure your client would like to come forward.

Mr. Ballinger: Thank you Your Honor. Judge obviously this is a little different because you've heard a lot about Mr. Palmer throughout the trial Your Honor. He was born in New York City, came to Lane in South Carolina in 2002. Judge as he stands before you today he's 29 years old. Your Honor is probably aware from the testimony that he has the benefit of some college education he was going to Williamsburg Tech when this occurred and studying to be a mechanic Your Honor. His family has been with him throughout the entire trial supporting him. Your Honor I think the most important thing that I can bring to the Court's attention is his lack of record. He's got one prior conviction for a drug conviction Judge. He's not shown a violent history. He's not shown a

violent propensities you know until this incident Your Honor. Based upon that I would submit that hopefully Judge he could be rehabilitated in the Department of Corrections. He obviously has to do 35 years, it's 30 to life as he is aware an additional five for the possession of a weapon. As Your Honor knows a 35 sentence or anything short of life would be day for day. It's not a 85 type sentence certainly not a 65% type thing anytime that the court gives him short of life is going to be absolutely day for day and Judge based on the lack of record and that any sentence will be day for day we just ask the court to show whatever the mercy the court can in hopes of rehabilitating.

The Court: Would your client like to say anything or anybody in his family would like to say anything to the Court. Come forward sir please. State your name please sir.

Mr. James Palmer: My name is James Palmer. I would like to say I'm hurt because my feelings my son is innocent but the jury came to a decision but in God's eye he's innocent and only he knows and my son know, I know it and my wife know it. We didn't raise a child like that but you all had to do a job. And I say to the mother of the victim I'm sorry what happened but my son did not kill your son but justice will prevail, but I'm afraid the killer's still out there. So I say to Mr. Ballinger you did a beautiful job and God bless for that.

The Court: Yes ma'am. Please come forward. Yes ma'am please state your name for the record.

Mr. Palmer: Your Honor my name is Mary Ann Palmer I am the mother of Marc Anthony Palmer. Marc is my son, at ten years old Marc was a newspaper carrier and from then he went he was going to school and during his school he got a job with Goodwill. Marc is a lifetime membership with Goodwill and from then on he was in the boy scouts. Marc has not is not a violent person and Marc is a Christian person and so because he was raised up in a Christian home. Marc know who Jesus is, he might of left Jesus for a while but Marc has found Jesus since he has been incarcerated and he know who God is and I'm saying I'm telling you and I'm telling Marc, God's will, will be done and Marc did not kill anyone. That's all I have to say.

The Court: Thank you.

Mr. Palmer: First off I'd like to say I'm sorry for your loss, I'm sorry for you all loss I really am. I didn't do this. I don't know what else to say I'm sorry for their loss you know but I really didn't have anything to do with this.

The Court: Anything further from the defense. Just so I'm sure what his record is. He had just the conviction, marijuana convection Georgia was it.

Mr. Ballinger: Nothing further Your Honor thank you.

(Sentencing by Judge Young)

The Court: The defendant and his attorney will stand. You know I listened to the testimony in this case, and it certainly appeared in my opinion based upon the evidence, the jury had a very strong bases for their determination. In every opportunity Mr. Palmer tried to cover his tracks. He tried to do everything, I think he's deceitful, he admitted on the stand the truth isn't in him. This was an extremely cold blooded murder. If it had just been a shooting on the street it would have been horrible, but he intended for him to die. What told me he intended upon him to die is when he went up and put the last bullet in his head. He wasn't going to take a chance that he, that Therris wasn't going to come out of this alive. He made that decision, again he's going to get the benefit that he didn't give Therris. He's going to the benefit of having a jury trial. Had twelve people from the community to listen to him and his, what were patent lies, I don't think that anybody in the room believes what he had to say. Mr. Ballinger I will say this, I think you did as much as you could possibly do as a defense attorney in representing him. I really do I think you did all that you could, but he I could see he was trying to control this thing. Every time something, he told us that he had obsessed about this and he was trying to do everything that he could to cover it up, to get away

with it and again he admitted on the stand. I'm sure that .45 caliber pistol that was in his hand before probably in the Black River Swamp some place, it ain't no question in my mind that he disposed of it. Again I do think he tried to out think everybody. He just out thought himself and you can't out think the truth, because the truth will always bring your evil deeds to life. This was a cold blooded murder. The sentencing range is from 30 to life. As cold blooded as this is I see no reason to give him anything less than the maximum sentence allowable by me. On the charge of murder, under indictment 2011-GS-45-095 count one murder the sentence is, that Marc Anthony Palmer that you be incarcerated, be committed to the State Department of Corrections for the balance of your natural life. As to the possession of a weapon I find that you will be sentenced to five years, they are to run consecutive. I hope and I am an earthly Judge, our heavenly Judge will make a resolution of this for your return, but for your days on earth it is my sentence that you be committed to the State Department of Corrections, good luck.

Mr. Ballinger: Your Honor one thing just for record keeping purposes. I'm going to review the statue but it's my understanding he gets life then additional five.

The Court: I don't think it's going to make any difference.

Mr. Ballinger: Right I agree I just want it noted for the record I've objected.

The Court: It's concurrent so the five will run concurrent with his life.

CERTIFICATE

This is to certify that the transcript in the matter of Marc Palmer vs. State of South Carolina, consisting of Five Hundred Nineteen (519) pages ages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 23rd day of August, 2013.

Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

WITNESSES

Vincent Staggers
Williamsburg County Sheriff

ARREST WARRANT NUMBER

M685318

ACTION OF GRAND JURY

Nancy McBride
Foreperson of Grand Jury
Date: 5/5/11

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS-45-0095

The State of South Carolina

County of WILLIAMSBURG

COURT OF GENERAL SESSIONS

MAY TERM 2011

THE STATE

vs.

MARC ANTHONY PALMER

Indictment for

MURDER AND
POSSESSION OF A WEAPON DURING
VIOLENT CRIME

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

INDICTMENT FOR
MURDER AND POSSESSION OF A WEAPON DURING VIOLENT CRIME

At a Court of General Sessions, convened on May 5, 2011 the Grand Jurors of WILLIAMSBURG County present upon their oath:

COUNT ONE - MURDER

That **MARC ANTHONY PALMER** did in Williamsburg County on or about October 27, 2010, feloniously, wilfully and with malice aforethought, kill one **Therris Keels** by means of shooting the victim, and that the said **Therris Keels** died as a proximate result thereof, in violation of Section 16-03-0010, South Carolina Code of Laws (1976), as amended.

COUNT TWO - POSSESSION OF A WEAPON DURING VIOLENT CRIME

That **MARC ANTHONY PALMER** did in Williamsburg County on or about October 27, 2010, possess or visibly display a firearm during the commission or attempted commission of a violent crime, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Solicitor

Ernest A. Finney III

STATE OF SOUTH CAROLINA)
COUNTY OF Williamsburg)
STATE VS.)
Marc Anthony Palmer)
AKA:)
Race: 2 Sex: M Age: 27)
DOB: [redacted] SS#: [redacted])
Address: [redacted] Seaboard Road)
City,State,Zip: Lane, SC 29564)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011-GS-45-0095
A/W#: M685318
Date of Offense: 10/27/2010
S.C. Code § : 16-03-0010
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder
in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature]

Narvin, Doward Keith	8443			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of Life ~~days/months/years~~ or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: To Count 2
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5%)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____

A CERTIFIED TRUE COPY
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Sharon W. Staggers
Court Reporter: Melissa Singletary
Presiding Judge: [signature]
Judge Code: 3156
Sentence Date: March 14, 2013

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
Apr. 8. 2013 3:48PM No. 1930 P. 3

COUNTY OF Williamsburg)
STATE VS.)
Marc Anthony Palmer)
AKA:)
Race: 2 Sex: M Age: 27)
DOB: [redacted] SS#: [redacted])
Address: [redacted] Seaboard Road)
City,State,Zip: Lane, SC 29564)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐)

INDICTMENT/CASE#: 2011-GS-45-0095
A/W#: ~~M685918~~ No Warrant KMD
Date of Offense: 10/27/2010
S.C. Code § : 16-23-0490
CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Possession of a Weapon
in violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Howard V. Parr 8453
Haryln, Doward Keith | SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed ___ years
and/or to pay a fine of $ ___; provided that upon the service of ___ days/months/years and/or payment
of $ ___; plus costs and assessments as applicable*; the balance is suspended with probation for ___
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☒ CONSECUTIVE to sentence on: Count 1
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

A CERTIFIED TRUE COPY
Sharon W. Staggers
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Sharon W. Staggers
Court Reporter: Melissa Singletary
Presiding Judge: [signature]
Judge Code: 215C
Sentence Date: March 19, 2013

SCCA/217 (03/2011)

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Williamsburg)

Marc Anthony Palmer, #354634) 2018-CP-45-488
Full name and prison number (if any) of Applicant.)

v.) APPLICATION FOR

State of South Carolina) POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, 136 Wilborn Ave, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Williamsburg County Courthouse, Kingstree, SC 29556
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2011-GS-45-00095
   (b) ____
   (c) ____
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) March 14, 2013, Sentenced to life without parole
   (b) ____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty √

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. ~~Affirm~~ Affirmed in part, and vacated in part

ii. _____

iii. _____

(c) the date of each such result:

i. February 24, 2016

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. South Carolina Court of Appeals Opinion No. 5382

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) "See Attached"

(b) " "

(c) " "

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) "See Attached"

(b) " "

(c) " "

12. Prior to this application have you filed with respect to this conviction:

(a) *any petition in a State Court under South Carolina Law?* Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. A petition for a writ of certiorari

ii. ____

iii. ____

iv. ____

(b) the name and location of the Court in which each was filed:

i. The Supreme Court of South Carolina

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. Petition denied

ii. ____

iii. ____

iv. _____

(d) the date of each such disposition:

i. December 13, 2017

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) "See Attached"

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. _____

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:
I, MarcAnthony Palmer, request that the conviction and sentence attacked in this application be vacated.

20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)
)
County of Williamsburg)

VERIFICATION

I, Marc Palmer, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Marc L. Palmer

SWORN to and subscribed before me this 24nd day of October, 2018.

Ludreen Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Marc Palmer, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

M d. P
Applicant

SWORN or affirmed to and subscribed before me this 24nd day of October, 2018.

Lucresa Bryant
Notary Public

My Commission Expires: May 26, 2020

CLERK OF COURT KINGSTREE, S.C.

FILED
2018 OCT 29 AM 10:47
CLERK OF COURT KINGSTREE, S.C.

Revised 1-2003

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The State committed prosecutorial misconduct by failing to fully disclose the nature of its relationship with State's witness, Maurice Smith, and his plea agreement violating the Petitioner's Fourteenth Amendment right of the United States Constitation to due process of the law pursuant to Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

(b) Counsel was ineffective for failing to object to the State violating the petitioner's Fourteenth Amendment right of the United States Constitation to due process of the law numerous times by violating the State's obligation to disclose evidence pursuant to Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194 (1963), failing to motion to bar prosecution due to the Brady violations pursuant to California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984), and preserving the issues for direct review.

(c) Counsel was ineffective for failing to suppress the admission of tainted unreliable identification evidence resulting from impermissibly suggestive procedure violating petitioner's Fourteenth Amendment right of the United States Constitation to due process of the law, failing to preserving

(10)(2)

the issue for direct review.

(d) Counsel was ineffective for failing to make proper objections and motions at trial, preserving the issues for direct review.

(e) Counsel was ineffective for failing to object to the solicitor's numerous improper comments and misconduct in the State's closing and reply closing argument essentially testifying during the trial pitting her own testimony against witnesses in the process, fabricating evidence, presenting false evidence to a tribunal, and threatening to quit her job if the jury didn't convict, and counsel failing to file a motion for a mistrial with prejudice due to the numerous intentional misconduct of the prosecution.

(f) Counsel was ineffective for failing to adequately investigate and present a defense, for refusing to put WCSO investigator Lail and Petitioner's private investigator, Phillip Grimsley, on the stand to present evidence helpful to the defense, failing to have side bars on record, for misrepresenting the petitioner by fabricating reasons for striking jurors during the Baston v. Kentucky hearing, and for making harmful arguments contradictory to the petitioner's and Brittany Croskey's testimony violating the petitioner's Sixth and Fourteenth Amendment rights.

(11)(a.) The State committed prosecutorial misconduct by failing to fully disclose the nature of its relationship with State's witness, Maurice Smith, and his plea agreement violating the Petitioner's Fourteenth Amendment right of the United States Constitution to due process of the law pursuant to Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

On July 8, 2010 State's witness Maurice Smith received 3 indictments in Clarendon County. The first indictment no. 2010-GS-14-00323 for "Distribution of cocaine base" (S.C. Codes of Law § 44-53-375(B)) and "Distribution of cocaine base in close proximity to school or park" (S.C. Codes of law § 44-53-445) on October 29, 2008. The next was indictment no. 2010-GS-14-00324 for "Trafficking cocaine base more than 10 grams, less than 28 grams" (S.C. Codes of Law § 44-53-375(c)) on November 2, 2008, and the third, indictment no. 2010-GS-14-00325 for "Trafficking cocaine base more than 10 grams, less than 28 grams" on November 7, 2008. On November 1, 2010 Smith was interviewed by Williamsburg County Sheriff's Office (WCSO) investigators Wayne Mcfadden and Vincent Staggers in reference to the October 27, 2010 murder of Therris Keels. At this point in time Smith had 2 pending offenses for trafficking cocaine base. Smith did not identify the suspect in this interview. On July 7, 2011 Smith received indictment no. 2011-GS-14-00289 for "Distribution of of cocaine base" on March 19, 2008. On December 15, 2011 Smith was in an arguement with the petitioner at the Williamsburg

(11)(2)

County Detention Center. On December 30, 2011 Smith arrested again for 2 more offenses of "Trafficking cocaine base more than 10 grams, less than 28 grams", indictments no. 2012-GS-14-00257 and 2012-GS-14-00258. On January 26, 2012 Smith received indictments no. 2012-GS-45-00025 and 2012-GS-45-00026, both for "Trafficking cocaine base more than 28 grams, less than 100 grams" on September 10, 2011 in Williamsburg County. On Febraary 13, 2012, 18 days after receiving his third indictment for trafficking cocaine base, and two more indictments on the way, that by law carries a mandatory minimum of 25 years imprisonment, a $50,000 fine, no parole, no probation, and no part of which may be suspended, Smith offers a second statement about the murder of Therris Keels, in this statement to S.L.E.D. Agents Mark Creech and Rhett Holden, Smith identifies the petitioner as the suspect by his walk. On September 13, 2012, seven months after the Febraary 13, 2012 statement positively identifying a suspect in a murder to which no one had been able to give a positive identification, Smith entered a secret plea agreement with the Williamsburg County Solicitor's Office. Smith plead guilty to both distribution of crack cocaine from Clarendon County and 5 seperate offenses of trafficking cocaine base (4 from Clarendon County and 1 from Williamsburg County), all counted illegally as first offenses without the mandatory fine of $25,000 for the first offense to run 10 years concurrently. Also Williamsburg County indictment no. 2012-GS-45-00025 was reduced to a lesser charge,

"Trafficking cocaine base more than 10 grams, less than 28 grams", and indictment no. 2012-GS-45-00026 was dismissed along with the Clarendon County charge, "distribution of cocaine base in the close proximity to school or park", in this secret plea agreement. On August 23, 2012 the petitioner's counsel filed a "Motion for Brady and other favorable material and incorporated memorandum of law". In the fifteenth ground of this motion he specifically requested, "Any and all plea bargains, promises, rewards, reductions, dismissals, agreements not to bring criminal charges or any other inducements made to any witness herein". When the March 11-14, 2013 trial started, all the State provided was the South Carolina Department of Corrections (SCDC) inmate search results for Maurice Smith. No plea agreement or even his NCIC report was disclosed. At trial Maurice Smith testified that he pled to a 10 year non-violent sentence (3/11-14/13 Tr. pg. 100). Even though Maurice Smith's sentencing sheet states that he is supposed to be serving a ten year violent sentence, the assistance solicitor neglected to correct this "false testimony". In the assistant solicitor's reply closing arguement she stated, "Testimony from Maurice Smith, I prosecuted Maurice Smith" and, "So this notion that some how he was trying to curry favor with the State by reducing his charge I would submit to you that's not true. The man did his wrong, he pled guilty straight up and he's serving his sentence he is paying his debt to society and I'm going to tell you folks, whether Mr. Palmer walks out this courtroom a free man or

(11)(4)

whether he's sentenced in a cell right next to Maurice Palmer, Maurice Palmer, I mean Maurice Smith is going to serve his time. He doesn't have at this point anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't.". (3/11-14/13 Tr. pg. 488-489).

What is not fully disclosed is, why would 8 charges from Clarendon County, all committed seperately throughout a four year time spand, be handled in Williamsburg County when Smith only had 2 charges in Williamsburg County, one of which was dismissed and the other reduced. The State kept this plea agreement disclosed and hide the fact that Smith had all these numerous offenses, and ran all these numerous offense concurrent without the mandatory fine. The State also falsely presented to the jury that Smith's charges weren't reduced and he is going to serve his time. In April 2014, Maurice Smith was released from SCDC on probation and somehow completed, or "maxed out" his sentence. The State refuses to disclose the plea agreement to this day. Only through the due diligence of numerous Freedom of Information Act (FOIA) request did proof of a plea agreement turn up in a "General Sessions Tracking Sheet". "the PCR court found that Washington was entitled to a new trial because of the State's misconduct in failing to fully disclose the nature of its relationship with a witness." Washington v. State, 478 S.E.2d 833, 834 (S.C. 1996)

(11)(5)

"An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson, supra. If a Brady violation is found to have occured, PCR must be granted." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (S.C. 2006). The plea agreement was favorable to the accused, because it exposed the fact that the State not only lied about reducing his charge, but also that the assistant solicitor Kimberly Barr lied about prosecuting Maurice Smith. The mere fact that Smith had 5 seperate offenses of trafficking cocaine base through out a 4 year criminal carrear and the State plead all 5 offenses a first offenses, even though the mandatory minimum by law for a third or subsequent offense is 25 years imprisonment and a $50,000 fine raises question to what is in the plea agreement and why the secrecy by the State. "Even had a true open file policy existed, the existence of such a policy does not negate the solicitor's Brady obligation. Porter v. State, 2006 S.C. LEXIS 72 (S.C. Sup. Ct. filed March 6, 2006).", Riddle v. Ozmint, 369 S.C. 39, 46-47, 631 S.E.2d 70, 74 (S.C. 2006). Therefore due to the State's misconduct in violating its Brady obligation to disclose Smith's plea agreement, which also proves the State made a false statement to the jury,

(11)(6)

violating Rule 407 of the South Carolina Appellate Court Rules, Rules of Professional Conduct, Rules 3.3(a)(1), 3.4(a), and 8.4(e), and the petitioner's Fourteenth Amendment of the United States Constitution, Post-Conviction Relief should be granted.

(11)(7)

(11)(b) Counsel was ineffective for failing to object to the State violating the petitioner's Fourteenth Amendment right of the United States Constitution to due process of the law numerous times by violating the State's obligation to disclose evidence pursuant to Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), failing to motion to bar prosecution due to the Brady violations pursuant to California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984), and preserving the issues for direct review.

The State failed to allow the petitioner to inspect the white sheet that was placed over the victim after the shooting by witnesses.

On October 27, 2010 after the victim, Therris Keels, was shot Deandre Chatfield placed a white sheet, given to him by, Wesley Walker, over Keel's body (3/11-14/13 Tr. pg. 146). When Juan Ballard of the Williamsburg County Sheriff's Office (WCSO) arrived, first on the scene, he noted in his incident report (WCSO Incident Reports case no. 1009482 and 1009554). WCSO officer Jeffery Scott testified that the sheet was taken off the victim at the crime scene and the scene was rephotographed (3/11-14/13 Tr. pg. 245), but there is no mention of this sheet in any evidence log, forensic, or trace evidence report. Being that this sheet was placed over the victim immediately after the shooting, theres a strong possibility that hair or any type of DNA or trace evidence from the suspect could have

(11)(8)

transfered from the victim's body or around the victim to the sheet, since the suspect stood over the victim and shot him. The State denied petitioner's counsel the opportunity to inspect and analyze this evidence. This prejudiced the petitioner because this extremely important crime scene evidence could have possibley possessed excalpatory evidence.

The State also failed to provide the petitioner access to inspect the Young's/Sunoco gas station surveilance video in Greelyville, SC on Highway 521.

There were two gas stations in the town in Greelyville, SC on Highway 521. The "521 MoneySaver", which is to the left of the gravel road, where the suspect ran. Then there is "Young's/Sunoco", which is to the right of the gravel road, where the suspect ran. WCSO investigator Wayne Mcfadden intentionally didn't copy the Young's/Sunoco surveilance video (3/11-14/13 Tr. pg. 326-327). The petitioner testified that he drove by the Young's/Sunoco gas station twice (3/11-14/13 Tr. pg. 350; pg. 352-353; and pg. 359). This prejudiced the petitioner because that surveilance video would have shown the petitioner driving past Young's/Sunoco leaving C.E. Murry Blvd., and passing back by Young's/Sunoco around the same time he passed by the 521 MoneySaver, which would've proved the petitioner was not parked on the gravel road and couldn't be the suspect. The fact is the evidence was

inspected by the State, but not made availible for the defense to inspect and use.

The State failed to provide the petitioner access to Brittany Croskey's first recorded statement.

On November 4, 2010 State's witness Brittany Croskey gave a recorded statement to the WCSO. At the begining of the second statement that was disclosed to the petitioner, WCSO investigator Lail states on page 1, "We had technical difficulties. We had started another tape, is that correct, Ms. Croskey?". Croskey replied, "Yes.". Then on page 3 Lail states, "And I think before the recorder went out we were asking who was there when you got there that you recall?". The first recorded statement was never disclosed to the petitioner. This evidence is very vital impeachment evidence and possible governmental misconduct evidence, because not only was it Croskey's first statement of the crime, but she has given numeroas inconsistant statements and was being coached throughout the second recorded statement.

The State also failed to provide the petitioner access to Joseph Sabb's October 30, 2010 statement to Greelyville Chief Cyrus.

In Joseph Sabb's November 1, 2010 statement to WCSO Sabb stated on page 3, "I told you all Thursday and like I told Mr. Cyrus Saturday morning, I couldn't even tell anything.". That October 30, 2010

(11)(10)

interview should have been disclosed to the petitioner, and it was the State's obligation to do so. This prejudiced the petitioner because Sabb was the only witness that was with the victim when he was shot, and actually saw the suspect up close. Being that Sabb knew who the petitioner was and didn't identify him as the suspect, any and all statements from Sabb corroberating his story is favorable to the petitioner.

The State also failed to provide the petitioner with the name of the confidential informant who provided WCSO Wayne Mcfadden with information about the alleged murder weapon.

In WCSO investigator Wayne Mcfadden's November 2, 2010 Incident Report Supplemental, Mcfadden talked to a confidential informant, who led investigators to believe that Detrel Matthews gave the petitioner a .45 caliber handgun. This informant created this speculation of the alleged murder weapon, and that speculation was used all through trial as a fact without objection from the petitioner's counsel, which also prejudiced the petitioner.

The missing white sheet and the Young's/Sunoco surveilance video were so vital in this case because they could have actually proved the petitioner's innocence, which clearly proves prejudice. There is no way to tell what could have possibley transfered to the white sheet. Out of all of the cars on the 521 Money Saver video there is a possibility that one of those cars wasn't on the

(11)(11)

Young's/Sunoco video, which could mean that car could have possibley came from the gravel road. Most importantly the petitioner testified that he drove past the Young's/Sunoco, and the video showing him passing by the 521 Money Saver would have been proof of the petitioner's innocence if the Young's/Sunoco video matched the time that the petitioner was driving down Highway 521. "On habeas review, we follow the established rule that the State's obligation under Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Kyles v. Whitley, 514 U.S. 419, 421, 115 S. Ct. 1555, 1560 (1995).

The missing statements from Croskey and Sabb were also favorable to the petitioner, so he could have either impeached or corroberated there stories and piece together all the facts to prepare an adequate defense.

The undisclosed confidential informant is very important because for one his speculation was used throughout the whole trial and no murder weapon was ever recovered. Who knows why this confidential informant incinuated this spectulation? No one knows because the State with held the informant's identity and hindered the defense's opportunity to investigate. "An individual asserting a

(11) (12)

Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995); Gibson, supra. If a Brady violation is found to have occured, PCR must be granted." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E. 2d 70, 73 (S.C. 2006).

Once petitioner's counsel reviewed the entire case file he received from the State, it was his obligation to investigate and make sure that he objected to the numerous Brady violations, motion to bar prosecution, properly preserving the issues for direct review. Petitioner's counsel was clearly ineffective for failing to do so. Petitioner was denied his opportunity to present a complete defense before the trial and his arrest. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. 'To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence.' United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed. 2d 1193 (1982)." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984). " when evidence has been destroyed in violation of the Constitution, the must choose between barring further prosecution or suppressing - as the California Court of Appeal did in this case - the State's most probative evidence...

(11)(13)

To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S., at 487-489, 104 S.Ct., at 2533-2534. Due to the fact that the Young's/Sunoco can not be replaced, nor the white sheet, the petitioner's counsel should have filed a motion to bar further prosecution. By counsel's failure to do so the petitioner was tried and found guilty without having "a meaningful opportunity to present a complete defense". Petitioner's counsel was ineffective for these failures and Post-Conviction Relief should be granted.

(14)(C) Counsel was ineffective for failing to suppress the admission of tainted unreliable identification evidence resulting from impermissibly suggestive procedure violating petitioner's Fourteenth Amendment right of the United States Constitution to due process of the law, failing to preserve the issue for direct review.

"The Supreme Court has established a two-step process to determine whether identification testimony is admissible. See Manson v. Brathwaite, 432 U.S. 98, 110, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Satcher v. Pruett, 126 F.3d 561, 566 (4th Cir. 1997)." First, the court must consider whether the identification procedure is unnecessarily suggestive." Satcher, 126 F.3d at 566. "Second, if the procedure was unnecessarily suggestive, a court must look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances." Id. Those factors were set out by the Supreme Court in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)." United States v. Greene, 704 F.3d 298, 305 (4th Cir. 2013).

On November 4, 2010 State's witness Brittany Croskey was interviewed by Williamsburg County Sheriff's Office (WCSO) investigators Lail and Mcfadden. At the begining of the recorded statement that the defense was allowed access to, WCSO investigators admit that there was a previous recorded statement (See Croskey's 11/4/10 statement pg.1, ln.5-8 and pg.3, ln.19-21). In this statement the petitioner is first suggested by WCSO investigator Lail by the name "Driver" on

(11)(15)

page 7. On page 8 of the statement Croskey admits that she did not see the petitioner arrive at the club and that she did not pay attention. On page 10 of this statement WCSO investigator Lail led Croskey in the line of questioning like she knew Croskey was going to say she saw someone under the light at the garage, instead of just asking Croskey what she saw and let her tell her own story. On line 15, page 10, Croskey stated that she saw, "A person", under the light. On page 11, Croskey stated that the person was walking fast, pacing, taking 3 to 4 steps one way then another, but stayed under the light at the garage. At the bottom of page 13 through page 14, Croskey stated that she didn't see anything in the suspect's hands, she just heard a shot and Therris was still standing. Croskey never mentioned the petitioner as the suspect. Croskey even refered to the suspect as a person, not knowing who the suspect is at this point in the questioning. On page 15, WCSO investigator Lail impermissibly suggested to Croskey, "Did he have like a funny little walk to him?", refering to the petitioner. This was the first initial suggestion of a walk and the petitioner by law enforcement that tainted the identification procedure protected by the Due Process Clause of the Fourteenth Amendment. "The Due Process Clause of the Fourteenth Amendment protects individuals from unreliable identifications that result from impermissibly suggestive procedures. See Manson, 432 U.S. at 113. We have stated, "A procedure is unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime." Satcher, 126 F.3d at 566. We have

also noted that the phrasing of a question may suggest a desired response. Smith v. Paderick, 519 F.2d 70, 75 n.6 (4th Cir. 1975)... Without question, we are well aware of the danger of erroneous eye witness identifications.

> Positive identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness is far more introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all of the influences that result in his say, "That is the man."

Id. at 75. We added, "Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically." Id." United States v. Greene, 704 F.3d at 305-306. Then WCSO investigator Tail asked, "What did you notice about the guy under the light when he was pacing? Think really hard because you could see his silhouette." and then, "Did you notice anything about this person's walk?" on page 16. Croskey answered, "No, ma'am" to these questions, but Tail pushed on, asking, "Was there anything that put you in the mind frame that this was

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Driver?", Croskey answered, "yes, ma'am", and WCSO investigator Lail then impermissibly suggested, after Croskey stated she did not notice anything about this person's walk, "And that was because of his walk?". Then Lail pushed further and asked, "And if you think back really serious about just the person under the light, and forget everything else, who was the first person to come to your mind when you looked under that light?", Croskey answered, "I didn't have a feeling.". Lail next suggested, "At what point did you start thinking that it could be Driver?", Croskey replied, "When people started talking. It started being around Greeleyville with people talking about it.". Lail then asks, "Then you started putting this person with what you know about Driver?", Croskey replied, "Yes ma'am.". Lail again suggests, "His walk or his stance or whatever?", Croskey answered, "Yes, ma'am. I really don't know him well.". Investigator Lail pushed further stating, "But it was just because of the walk.", Croskey then stated, "I assumed that. I didn't know that.". Then Croskey established that she could not see the suspect. The whole interview was basically the WCSO impermissibly suggesting a way for Croskey to name the petitioner as the suspect. Two days before this interview on, November 2, 2010, WCSO investigators Lail, Lambert, and Collins interviewed Detrel Matthews. On page 44 and 45 of the transcribed copy of this interview WCSO investigator Collins stated, "The two females we talked to said the person was prancing back and forth under that light right that at the road where you turn to go on the little gravel road." and, "This is the light, the females we talked to yesterday, said the person was prancing between where

the light is shining and you could see him back and forth here", but there is no statement or interview from any witnesses before Brittany Croskey's November 4, 2010 interview stating a person was prancing back and forth under the light at the garage. This is proof that the WCSO fabricated this story to impermissibly suggest a way to obtain an unreliable identification of the petitioner as the saspect. Right before trial Brittany Croskey was interviewed by the petitioner's private investigator Phillip Grimsley on January 10, 2013 and she told Grimsley after she reviewed her November 4, 2010 statement that she didn't really remember a funny walk, and Grimsley asked her about when the WCSO questioned her on page 17 of her November 4, 2010 statement they asked about the walk, if thats what made her think it was the petitioner, and she answered, "Yes, ma'am." and "I don't know him well", and "I assumed that.", Grimsley asked, she sounded confused or the police had her confused. Croskey told Grimsley, "Yes, I was scared, just trying to help.". Grimsley also asked her, "do you know who shot Therris Keels?", and Croskey told him, "No, it was dark and I couldn't see his face.". On February 4, 2013, Croskey met with Grimsley again after she talked to the WCSO again and remembered her statement about the funny walk. Now the fact to pin point is not about Croskey remembering the statement about the funny walk, but about what she saw. In the first interview with Grimsley, Croskey told him what she remembered seeing after him and her reviewed her November 4, 2010 statement to law enforcement. If she saw a person with a funny walk then she would have told Grimsley that,

even after he reminded her. Croskey specifically told Grimsley that she didn't really remember a funny walk. It was only after she spoke with the WCSO that Croskey added the impermissibly suggested form of the unreliable identification of a "funny walk". Now on November 1, 2010 WCSO investigators Staggers and Mcfadden interviewed Maurice Smith, and Smith stated the "unknown" subject walked toward Keels, shot Keels, Keels fell and the "unknown" subject stood over him and fired again. No where in this statement did Smith identify the petitioner as the suspect. On December 15, 2011, a year and a month after the petitioner was incarcerated awaiting trial for the murder of Therris Keels, with Brittany Croskey's impermissibly suggested unreliable identification from the WCSO being the only evidence the State had at that time, the petitioner and Maurice Smith had an arguement in the Williamsburg County Detention Center. At that time Smith was awaiting bail for two offenses for, "Trafficking cocaine base more than 28 grams, less than 100 grams", with two offenses for, "Trafficking cocaine bass more than 10 grams, less than 28 grams" pending in Clarendon County. Fifteen days later on December 30, 2011 Smith was arrested again in Clarendon County for his third and fourth offense for "Trafficking cocaine base more than 10 grams, less than 28 grams". On January 26, 2012 Smith was indicted for the two Williamsburg County offenses. Eighteen days after that indictment, forty-five days after his third and fourth offense in Clarendon County, and two months after Smith's arguement with petitioner, Smith made a second statement to S.L.E.D. Agents Mark Creech and

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Rhett Holden on February 13, 2012. In this statement Smith claims that he did not see the man's (suspect) face, but "thinks" it was the petitioner because of the way he walked. Smith stated the man (not the petitioner) shot Keels in the road, after Keels fell the man shot him again, "then" the man ran toward the dirt road. Seven months after the February 13, 2012 interview, on September 13, 2012, Smith entered a secret plea agreement with the Williamsburg County Solicitor's Office and pled guilty to the four seperate offenses for "Trafficking cocaine base more than 10 grams, less than 28 grams" from Clarendon County, ran concurrent as first offenses, along with two seperate offenses for "distribution of cocaine base" from Clarendon County, and the State dismissed one of the "Trafficking cocaine base more than 28 grams, less than 100 grams" offenses and reduced the other to "Trafficking cocaine base more than 10 grams, less than 28 grams" from Williamsburg County, and the State also dismissed the "Distribution of cocaine base in close proximity to school or park" indictment from Clarendon County. On January 30, 2013 Smith was interviewed again by WCSO investigator Pamela Jean Wrenn. In this interview he states that Wesley Walker was walking by the Masonic Lodge and Shop when the petitioner came over and spoke to everyone and told Keels, "I'll see you later" (Maurice Smith's 1/30/13 WCSO statement page 7). On page 4 of this statement Smith stated Keels walked in the Shop, and when he came back out "T.T." (Joseph Sabb) said somebody needed some booster cables to boost a car, and T.T. and Keels walked to Wayne's house

(11)(21)

(Wesley Walker's house). On page 5 of this statement Smith stated that he heard Keels and T.T. coming out of Walker's yard laughing walking there way. This time he stated the petitioner shot Keels twice, walked off, then came back and shot Keels again. Smith stated on page 7 of the interview that when the petitioner was at the Shop Smith did not know where the petitioner went, bat was told he was standing down the road in the dark walking on the sidewalk, but Smith never saw him. Smith stated that when he saw the suspect he knew it was the petitioner, because the petitioner walks by his house just about everyday, he knows the petitioner's walk. Maurice Smith never mentioned he knew the petitioner was the suspect until after law enforcement tainted the case with their unnecessary suggestive procedure with Brittany Croskey (Smith's friend) to obtain an unreliable identification. On page 12 of Smith's January 30, 2013 statement he stated the petitioner had the same hoodie on when he talked to the petitioner earlier that night, the petitioner just didn't have it over his head, but Smith didn't know what color the hoodie was. At the petitioner's March 11-14, 2013 trial Maurice Smith testified that the petitioner had a dark hoodie on, bat Smith didn't know if it was grey, black, or blue, and he didn't know if the petitioner had on jeans or slacks (3/11-14/13 Tr. pg. 117). Smith also testified that the suspect had a hood over his head and "it was just a dark image", but he knew it was the petitioner "he knew it was a person", and claims he knows the petitioner's walk thats why he was sure

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it was him. Smith testified that T.T. and Keels went into the Shop then walked to Wesley Walker's house together (3/11-14/13 Tr. pg. 114). Smith testified that he didn't see the petitioner until Keels stopped walking. Smith then testified, that once Keels was shot and fell, the petitioner walked away then came back and shot Keels again (3/11-14/13 Tr. pg. 115). When Brittany Croskey took the stand at the March 11-14, 2013 trial, she testified that she saw the petitioner out there that night (3/11-14/13 Tr. pg. 186), and then testifies that she never saw the petitioner that day (3/11-14/13 Tr. pg. 195). Croskey also testified that the suspect was pacing for a couple of seconds, and that she couldn't describe anything else other than his dark clothes (3/11-14/13 Tr. pg. 196). Croskey even testified that she spoke with family and friends about the murder, and "thinks" that the petitioner committed the murder (3/11-14/13 Tr. pg. 192). Croskey also testified that she assumes it was the petitioner because of his walk (3/11-14/13 Tr. pg. 198). The petitioner's counsel pointed out that when WCSO investigator Lail asked Croskey, "did you notice anything about this person's walk?", during Croskey's November 4, 2010 interview with the WCSO she replied, "No ma'am not really". Then investigator Lail impermissibly suggested, "is there anything that put you in the mind frame that it was Driver", Croskey answered, "yes ma'am", and then investigator Lail unnecessarily suggested, "and that was because of his walk.", and Croskey replied, "yes ma'am" (3/11-14/13 Tr. pg. 203-204). The WCSO's impermissibly suggested form of the unreliable identification of a so

called "funny walk", so tainted the case that a witness, Maurice Smith, who gave a statement claiming that he did not know who the suspect was, gave two S.L.E.D. Agents another statement using the impermissibly suggested form of identification, after receiving numerous offenses for trafficking and distribution of cocaine base over 3 years and mysteriously avoided a mandatory 25 year sentence and $50,000 fine, and received a 10 year sentence without the mandatory $25,000 fine. Smith also mysteriously maxed out his 10 year violent sentence in the South Carolina Department of Corrections on probation after serving only 2 years for offenses that prohibits probation, parole, or suspension of any part of the sentence. Joseph Sabb (T.T.) who was closest to the victim and suspect stated before trial and testified at trial that he didn't know who the suspect was; that the suspect wasn't no where near the garage; that the suspect was coming from the Shop; and that the suspect had a mask on (See Joseph Sabb's 11/1/2010 WCSO statement; and 3/11-14/13 Tr. pg. 421-433). Sabb also testified that he had seen the petitioner before. On page 423 of the March 11-14, 2013 trial transcript Sabb testified that he was never at the Shop before the shooting, but Smith testified that Sabb was at the Shop with Keels before the shooting and Sabb and Keels walked to Wesley Walker's house together, on page 114 of the trial transcript. Sabb testified that he didn't walk to the Shop looking for jumper cables until after the shooting (3/11-14/13 Tr. pg. 434), but Smith stated that Sabb was at the Shop

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looking for jumper cables with Keels, before the shooting on page 4 of his January 30, 2013 statement to the WCSO. Smith testified that the suspect had a hood over his head (3/11-14/13 Tr. pg. 117), but Wesley Walker, who was closer to the suspect, testified that the suspect didn't have a hood over his head and the suspect had his hair in a puffed up ponytail (3/11-14/13 Tr. pg. 139 and pg. 154-155). Wesley Walker also testified that the suspect came from the Shop (3/11-14/13 Tr. pg. 152). Smith testified that the petitioner had his hair in dreadlocks the night of the shooting (3/11-14/13 Tr. pg. 102), but Detrel Matthews testified petitioner normally kept his hair in cornrow braids and not dreadlocks, the petitioner testified that he had the same cornrow braids on the night of the shooting that he had in his November 15, 2010 mug shot, and WCSO investigator Wayne Mcfadden also testified the petitioner had his hair in cornrow braids and not dreadlocks on October 29, 2010." Even if an impermissibly suggestive procedure is used to obtain an in-court identification, admission of the identification evidence is not error if the evidence was "nevertheless reliable under the totality of the circumstances." Satcher, 126 F.3d at 566; see also United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996). "The factors the court may consider in measuring reliability include: (1) the witness' opportunity to view the perpetrator at the time of the crime; (2) the witness' degree of attention at the time of the offense; (3) the accuracy of the witness' prior description of the perpetrator;

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(4) the witness' level of certainty when identifying the defendant as the perpetrator at the time of the confrontation; and (5) the length of time between the crime and the confrontation." Wilkerson, 84 F.3d at 695 (citing Biggers, 409 U.S. at 199-200)." Greene, 704 F.3d at 308. Applying those factors to the instant case, the unreliability of the in-court identification was clear. First, note that Maurice Smith and Brittany Croskey's opportunity to view the perpetrator was limited. Smith states that he did not see the perpetrator until Therris Keels stopped walking, then the perpetrator shot Keels. Smith testified that the perpetrator walked away then came back and shot Keels again and "ran away". Smith and Croskey were standing a block away at 10:30 at night. Smith's only opportunity to see the perpetrator "walk" is when he states the perpetrator shot Keels, walked away then came back. Where the victim was shot, the street light was out. All the witnesses described the perpetrator as wearing dark clothes. Croskey stated the perpetrator was "pacing" back and forth under the street light at the garage, but the location of the victim's body was no where near the garage, and Joseph Sabb's testimony that the perpetrator came from the Shop way and was no where near the garage corroberates with the location of the victim's body. In Croskey's statement to WCSO she stated she couldn't identify the saspect, that it was dark and he had on dark clothes. Both Croskey and Smith could not view the perpetrator's face nor identify the exact clothing he had on.

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The distance from 4 Williams Ln, where the victim was shot, to 128 C.E. Murray Blvd., the Masonic Lodge where Smith and Croskey was standing, is 250 feet away from each other. On January 17, 2013, Phillip Grimsley, the private investigator for the petitioner, took pictures of the area where the incident occured and determined that you could not identify who was standing under the light from that distance. At 250 feet away at 10:30 at night for a couple of seconds it was impossible for Smith or Croskey to identify the petitioner as the suspect. United States v. Eltayib, 88. F.3d 157 (1996) (Van Salisbury's opportunity to make a genuine identification of the bushy haired man (factor 1) was small. Van Salisbury stood on the deck of a bobbing ship in the middle of the night, nervous ... he was in position to see the man in question ... at a distance of 35 to 40 feet for fifteen (or perhaps only a few) minutes, but he did not look directly at the man's face for more than a few moments. What little he could say about the man can hardly be called an "accurate description" of a suspect (factor 3), and suggests that he really did not get "a good look" at the bushy-haired man.). Counsel's failure to object to the admission of this unreliable identification allowed the tainted identification evidence to go to the jury and failed to preserve this issue for direct review, violating the petitioner's Fourteenth Amendment right to due process. Counsel was clearly ineffective for this failure and Post-Conviction Relief should be granted.

(11)(d) Counsel was ineffective for failing to make proper objections and motions at trial, preserving the issues for direct review.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Counsel failed to object to the cumulative hearsay evidence admitted by Wayne Mcfadden and bringing up Oneal Matthews, which violated the petitioner's Sixth Amendment right of the United States Constitution to confront witnesses against him.

During the direct testimony of Wayne Mcfadden, the prosecutor asked Mcfadden, "Tell me what caused you to interview Detrel and what information were you trying to get from Detrel?". Mcfadden replied, "During while we was in the Greeleyville area we was talking to several individuals. Mr. Matthews name came about in the sense that he had information regarding the murder weapon." (3/11-14/13 Tr. pg. 309). This was clearly hearsay evidence and should have been objected to. The petitioner never had the opportunity to confront the confidential

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informant or Shanequa Ravenel, the only "several individuals" that led Mcfadden to talk with Detrel (See Wayne Mcfadden's November 2, 2010 Williamsburg County Sheriff's Office (WCSO) Incident Report Supplemental; and Shanequa Ravenel's November 2, 2010 Statement).

The prosecutor asked Mcfadden about the details of his conversation with Detrel Matthew's probation officer. In this line of questioning he testified that Matthews's probation officer told Mcfadden that she would violate Matthews's probation if Matthews said he picked up a gun and gave it back to the petitioner (3/11-14/13 Tr. pg. 314). This is clearly hearsay evidence and should have been objected to. This is also proof of a Brady violation that should have been raised, because the interview with Detrel Matthews's probation officer was not disclosed to the defense. The fact is that the petitioner did not have the opportunity to confront Matthews's probation officer.

During cross examination petitioner's counsel asked Mcfadden, "Then you've got another report that says that Oneal Matthews actually had the gun, correct?" (3/11-14/13 Tr. pg. 332). When the petitioner's counsel opened the door to evidence involving what Oneal Matthews told Mcfadden, the prosecutor questioned Mcfadden about what was said and Mcfadden testified, "Oneal attempted to give me a statement, claiming ownership of the gun said he was the one that passed the gun back to Mr. Palmer." The prosecutor also asked, "Regardless of who took the gun

from Marc and gave it back to Marc before the shooting of Therris. One of them or should I say both of them are claiming that at the time before Therris Keels was murdered Mr. Palmer got his gun back?", and Mcfadden replied, "Yes ma'am". Counsel was ineffective for opening the door to this door to this hearsay evidence and for not objecting to this hearsay evidence.

The petitioner's inability to confront the confidential informant, Shanequa Ravenel, Detrel Matthews's probation officer, and Oneal Matthews about what was actually said to Mcfadden and investigate why, prejudiced the plaintiff because he could not defend himself adequately from what Mcfadden said they said, which left the jury to take Mcfadden's testimony as facts. For example, Detrel Matthews testified that he did not pick a gun up and give it back to the petitioner nor did he tell Mcfadden he did (3/11-14/13 Tr. pg. 216), but Mcfadden testified that Detrel told him he did (3/11-14/13 Tr. pg. 311-315), even though Mcfadden's November 2, 2010 WCSO Incident Report Supplemental corroborated what Detrel testified to and that Mcfadden committed perjury (S.C. Codes of Law §16-9-10(A)(1)). Counsel was clearly ineffective for failing to object to this hearsay evidence which violated the Confrontation Clause of the petitioner's Sixth Amendment right of the United States Constitution, and failed to preserve these issues for direct review." The Confrontation Clause's... history supports two principles. First, the principle evil at which the Clause was directed

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was the civil-law mode of criminal procedure, particularly the use of ex parte examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second the Framers would not have allowed admission of testimonial statement of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 124 S. Ct. 1354, 1355 (2004).

Counsel failed to file a motion to suppress all evidence obtained by the State from WCSO deputies improperly seizing the petitioner, his driver's license, the vehicle he was driving, and his mother's cellphone that was in his possession, on October 29, 2010, and failing to object to the State withholding the in car camera surveilance video(s) of the improper seizure.

On October 29, 2010 the petitioner was pulled over by WCSO investigator Lt. Debra Collins. Lt. Collins told the petitioner that he was under arrest for marder and seized the petitioner's mother cell phone when he attempted to call attorney Charles Barr, and then seized his driver's license and had him hand cuffed. Another WCSO deputy told the petitioner that he had to give her the keys to the vehicle he was driving or they (the WCSO) will have the car towed to the Sheriff's office anyway. Then WCSO deputy Alex Edwards took the

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petitioner to the WCSO. When the petitioner arrived at the WCSO the vehicle he was driving was being searched. The petitioner was offered a lespi while being improperly seized. After some time South Carolina Law Enforcement Divison (SLED) Agent Mark Creech showed up at the WCSO to interrigate the petitioner. Agent Creech told the petitioner that he was not under arrest, but the petitioner was not returned his improperly seized driver's license, his mother's cell phone, nor was he allowed to leave the WCSO at the moment. Agent Creech gave a Miranda waiver to the petitioner to sign at 4:40 p.m, dated October 29, 2010. After the vehicle the petitioner was driving was searched, the petitioner was given a copy of the search warrant and affidavit. "An individual is "seized" when an officer restrains his freedom, even if the detention is brief and falls short of arrest. The scope and duration of seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper... The detention... of the petitioner was unlawful; therefore, the evidence... would have been inadmissible as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)." Sikes v. State, 448 S.E.2d 560, 562 (S.C. 1994). Counsel for the petitioner was ineffective for failing to file a motion to suppress all the evidence obtained from that encounter with law enforcement including the statement from the petitioner, clothes, pictures, and ammuniton found in the vehicle due to the fact that WCSO Lt. Debra Collins initially told the petitioner that he was under arrest for murder

(11)(32)

and had the petitioner hand cuffed and transported, which made the seizure improper to begin with. The petitioner testified that WCSO Lt. Collins told the petitioner that he was under arrest for murder (3/11-14/13 Tr. pg. 64-68), that was direct evidence that the State had the opportunity to contest but did not, which also makes this direct evidence a statement of fact. Even after the search of the vehicle was completed the petitioner still had to wait for WCSO Lt. Collins to return the petitioner's improperly seized driver's license and his mother's cell phone. After a while another WCSO deputy arrived at the WCSO with the petitioner's driver's license, but not the cell phone. The petitioner left the WCSO, and his mother went to the WCSO to retrive her improperly seized cell phone the next day, October 30, 2010. The petitioner's counsel was told by the petitioner to obtain the in-car camera from the WCSO of this improper seizure, but counsel's request to the WCSO contained the wrong information eventhough the petitioner told his counsel the exact date and WCSO Lt. that pulled him over. There was also the WCSO Incident Report Supplemental by Wayne Mcfadden, case no. 1009554, dated 10/29/2010, containing the right date and deputy that pulled the petitioner over. The in-car camera video was never disclosed to the petitioner. At trial the petitioner's counsel filed a motion to suppress the statement the petitioner gave to SLED Agent Mark Creech, because the petitioner asked for attorney Charles Barr before the interrigation. The States only arguement about the in-car

camera video was, "How does the petitioner know that WCSO Lt. Debra Collins had a camera in her patrol vehicle". The State nor petitioner's counsel made sure a video existed or did not exist. The petitioner never requested that the existance of the in-car camera video be disclosed to the defense. If a video does or did exist then the State is in clear violation of Brady v. Maryland, 373 U.S. 83 (1963). Regardless of what proper procedures were taken after the petitioner was already improperly seized by law enforcement, everything that took place was because of the improper seizure and is inadmissible as fruit of the poisonous tree. Counsel was clearly ineffective for failing to file a motion to suppress all evidence from the improper seizure as fruit of the poisonous tree. This prejudiced the petitioner because the State used evidence obtained from this improper seizure against him. The petitioner would never have took the stand to testify if the State did not admit his statement to law enforcement. The State would not have pictures of the vehicle, the clothes inside, or the ammunition inside to present to the jury, because of the improper seizure. See State's exhibits no. 1, 2, 12, 13, 14, 15, 36, and 37. The suppression of all the evidence obtained from the improper seizure would have changed the outcome of the trial, and the petitioner's counsel was ineffective for failing to request the suppression of this evidence. The State clearly violated the petitioner's Fourth and Fourteenth Amendments of the United State's Constitution.

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Counsel failed to challenge the false statements sworn by WCSO investigator Vincent Staggers in the October 29, 2010 Search Warrant Affidavit and in the November 10, 2010 Arrest Warrant Affidavit, and failing to challenge the May 5, 2011 Grand Jury Indictment that derived from this perjury and governmental misconduct by Vincent Staggers, violating the petitioner's Fourth and Fourteenth Amendment rights of the United States Constitution.

"A defendant has the right to challenge misstatements in a search warrant affidavit. See Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). A defendant is entitled to an evidentiary hearing if the following criteria are met: (1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement. Further, if the foregoing criteria have been met, and the remaining content is insufficient to find probable cause after the allegedly false or reckless material has been set aside, the defendant is entitled to his hearing, under the Fourth and Fourteenth Amendments. Franks, 438 U.S. at 171, 98 S.Ct. at 2684, 57 L.Ed.2d at 677" State v. Jones, 342 S.C. 121, 126-127 (S.C. 2000). Immediately after the petitioner and the vehicle he was driving was improperly seized WCSO

investigator Vincent Staggers obtained a Search Warrant at 4:39 p.m. dated October 29, 2010. On the Search Warrant Affidavit signed by Magistrate Judge Delores F. Williams, Vincent Staggers stated, "That upon further investigation it was revealed that the noted vehicle was in the immediate vicinity to which the suspect approached from and thereupon fled towards, after the shooting occured. The vehicle was described as a green or blue color Plymouth Neon, bearing temporary paper tags and was thought to be driven by one Mark Anthony Palmer.". There was no witness statement that stated this. WCSO investigator Vincent Staggers lied in "bad faith" to obtain a search warrant after improperly seizing the vehicle just minutes before. The vehicle and the petitioner were improperly seized at around 4:00 pm to 4:30 pm. The petitioner was held at the WCSO until SLED Agent Mark Creech arrived. Agent Creech testified that WCSO Lt. Debra Collins called him and told him that the petitioner was at the Sheriff's Office, and they wanted Agent Creech to come in and help interview the petitioner (3/11-14/13 Tr. pg. 45). The SLED Miranda waiver form dated October 29, 2010 was signed by the petitioner and Agent Creech at 4:40 p.m., and proves that the petitioner and the vehicle was improperly seized before the search warrant, dated October 29, 2010 at 4:39 pm., was obtained. Counsel was clearly ineffective for failing to challenge the false statements in the October 29, 2010 Search Warrant Affidavit revealing that WCSO investigator Vincent Staggers commited the crime of perjury (§ 16-9-10(2)).

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Counsel also failed to challenge the November 10, 2010 Arrest Warrant Affidavit, also sworn by WCSO investigator Vincent Staggers and signed by Magistrate Judge Delores F. Williams. WCSO Vincent Staggers swore on the November 10, 2010 Arrest Warrant Affidavit that, the petitioner did in "fact" shoot and fatally injure the victim. There was no witness statement or any other evidence corroberating this accusation as a "fact for probable cause" for an arrest. WCSO Vincent Staggers lied in bad faith to improperly arrest the petitioner. Counsel was clearly ineffective for failing to challenge the November 10, 2010 Arrest Warrant. Both Search and Arrest Warrant Affidavits show that the State did not demonstrate probable cause for the issuance of warrants and lied about important facts. Probable cause must be based on factual evidence and not just suspicion. The Fourth Amendment of the United States Constitution specifically states, "The right of the people to be secure in their "persons", houses, papers, and effects, "against unreasonable searches and seizures", "shall not be violated", and "no Warrants shall issue, but upon probable cause", supported by Oath or affirmation...". Due to the States violation of the petitioner's Fourth Amendment rights, the petitioner was illegally arrested and imprisoned. Counsel also failed to challenge the May 5, 2011 Grand Jury Indictment that derived from the evidence and testimony obtained from Vincent Staggers and his illegal warrants. Due to WCSO investigator Vincent Staggers's misconduct and perjury, it

calls to question the legality of the indictment. WCSO investigator Vincent Staggers commited two seperate counts of Perjury and was the only witness to present testimony to the Grand Jury which indicted the petitioner. If WCSO investigator Staggers presented the same false statements to the Grand Jury that he swore to Magistrate Judge Delores F. Williams to obtain an indictment, then the indictment is just as illegal as the warrants and should be dismissed. This showing of deliberate falsehood and reckless disregard for the truth tainted the entire judicial process and denied the petitioner the fundamental fairness of a criminal prosecution and created a miscarriage of justice, violating the petitioner's Fourth and Fourteenth Amendment rights guaranteed by the United States Constitution. Counsel was clearly ineffective for failing to challenge the May 5, 2010 Grand Jury Indictment, and this prejudiced the petitioner because he was tried and convicted to life in prision that derived from, false statements and illegally obtained evidence, and an illegal arrest all of which is part of fruit of the poisonous tree." First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. People of State of Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959); "The principle that a State may not knowingly use false evidence, including false testimony, to

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obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interests of the witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. at 272.

Counsel failed to object to the State admitting irrelevant character evidence of a fight between the petitioner and Dominique Mc Bride, and fabricating evidence of a murder weapon in possession of the petitioner when no murder weapon was ever recovered, violating Rule 404(b) of South Carolina Rules of Evidence (SCRE), Rule 602 of SCRE, and the petitioner's Fourteenth Amendment right of the United States Constitution.

At trial assistant solicitor Kimberly Barr asked State's witness Maurice Smith, "Prior to the night of the shooting had you observed and altercation between the defendant Marc Palmer and a fellow by the name of Dominique Mc Bride?" (3/11-14/13 Tr. pg. 108). Counsel failed to object to this question, because the State was in violation of Rule 404(b) of SCRE. Rule 404(b) of SCRE specifically

states, "Evidence of other crimes, wrongs, or acts is not admissible to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.". This fight had no relevance to the murder of Therris Keels, and was inadmissible character evidence. The State further questioned Smith about a gun that fell from the petitioner's waist during this fight (3/11-14/13 Tr. pg. 109). During the direct examination of State's witness Detrel Matthews, the State questioned Matthews about the same fight with Dominique McBride (3/11-14/13 Tr. pg. 213). Counsel also failed to object to this admittance of the fight to the jury. The State further questioned Matthews about what kind of gun it was that fell and did Matthews give the gun back to the petitioner (3/11-14/13 Tr. pg. 214-216). Matthews testified that he did not know what kind of gun it was and that he did not give a gun back to the petitioner (3/11-14/13 Tr. pg. 216). WCSO Lt. Jeffery Scott testified that no murder weapon was recovered (3/11-14/13 Tr. pg. 250). During Wayne Mcfadden's direct examination the State illicted testimonial evidence that Detrel Matthew's gave the petitioner back a handgun and that handgun was the murder weapon (3/11-14/13 Tr. pg. 309-315). Throughout this examination the State kept reffering to this handgun as "the murder weapon". The weapon in question was never found and compared to the shell casings found at the crime scene

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to be identified as the murder weapon. Counsel failed to object to the State admitting false testimonial evidence of a murder weapon in possession of the petitioner. First the petitioner testified that he never owned a .45 caliber handgun (3/11-14/13 Tr. pg. 362-363) and he had a .38 special that fell during a fight. Detrel Matthews testified that he did not pick up a gun nor did he know what kind of gun it was. Matthews's testimony corroberates Wayne Mcfadden's November 2, 2010 Incident Report Seupplemental, but Mcfadden's testimony contradicts his own report. Wayne Mcfadden clearly perjured himself just to place a gun in the petitioner's possession. The State used this admitted false specalative evidence throughout the rest of the trial and in their reply closing (3/11-14/13 Tr. pg. 483-486). This story of a fight and mention of a gun was used against the petitioner to sway the jury to convict him, and that prejadiced the petitioner. The State was in clear violation of Rule 602 of SCRE by admitting Mcfadden's testimonial evidence of a murder weapon, and Counsel was ineffective for failing to object to this evidence. Rule 602 of SCRE specifically states, "A witness may not testify to a matter unless evidence is introduced satficient to support a finding that the witness has personal knowledge may, but need not, consist of the witness' own testimony." Mcfadden nor the State had any personal knowledge that the gun the petitioner lost in a fight, was

the murder weapon. Therefore any mention of any specific gun as the murder weapon without a ballistic's match was inadmissible. This prejudiced the petitioner because the solicitor misled the jury to believe that the petitioner not only possessed a gun at the time of the shooting, but that that gun was the murder weapon. The mentioning of a gun that was never compared and linked to the shell casings found, and this story about a fight that actually took place on September 3, 2010, the night of the C.E. Murray v. Kingstree Senior High football game, has no legal ground on being allowed into evidence, and counsel was clearly ineffective for not objecting to the admission of this evidence by the State. None of the witnesses could actually say they knew the exact date of this alleged fight, so the solicitor suggested her own date to try to attach the gun to the murder without actual proof. The State violated Rules 402, 403, and 602 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (2), Rule 3.4(b), and Rule 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Fourteenth Amendment right to due process of the law.

Counsel was clearly ineffective by not making proper objections and motions, failing to preserve these issues for direct review, denying the petitioner due process of the law guaranteed by the Fourteenth Amendment of the United States Constitution, and Post-Conviction Relief should be granted.

(11)(42)

(11)(e) Counsel was ineffective for failing to object to the solicitor's numerous improper comments and misconduct in the State's closing and reply closing argument essentially testifying during the trial pitting her own testimony against witnesses in the process, fabricating evidence, presenting false evidence to a tribunal, and threatening to quit her job if the jury didn't convict, and counsel failing to file a motion for a mistrial with prejudice due to the numerous intentional misconduct of the prosecution.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (S.C. 1996). "The argument must not be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In the State's closing argument the solicitor commented, "I want you to think about how the level of planning would have taken for an individual, the defendant in this case, park his vehicle in that little pathway across the street from where Therris Keels was coming from and I want you to think about the level of planning it took for somebody to back of the vehicle out because they know when I

kill this guy I've got to be able to haul tail and get out of there. All of those facts we would submit to you are evidence of a malice or forethought." (3/11-14/13 Tr. pg. 460). This comment was improper and contained fabricated evidence created by the solicitor, and counsel failed to object to this misconduct. The first mention of how a vehicle could get into the gravel road ("that little pathway") was suggested by the solicitor during the direct examination of State's witness Maurice Smith, the solicitor stated, "I'm curious about this little area here that's before the garage. How does one get in that area?", Smith replied, "It's a road it almost like a four way so dirt road that runs up beside the shop. It goes out to 521." (3/11-14/13 Tr. pg. 120-121), the solicitor questioned their witness about, "How a vehicle could get on this gravel road?", who never saw a vehicle to suggest or corrobarate anything as a fact. Counsel was ineffective for failing to object to these suggestions as well. The next improper suggestion was admitted during State's witness Wesley Walker's direct examination the solicitor said, "So from that are you telling us that the vehicle would have been backed up in here with the front of the vehicle headed this way?" (3/11-14/13 Tr. pg. 142-143 and pg. 151-153). The next suggestion was admitted during State's witness Detrel Matthews direct examination (3/11-14/13 Tr. pg. 226-227). No witness stated they saw a vehicle

back into the gravel road where the suspect ran. The solicitor fabricated this evidence and presented it to the jury (tribunal) as factual evidence violating Rule 407 of SCACR, Rules 3.3(a)(1), 3.4(b), 8.4(a)(c)(d)(e) and (f), and the petitioner's Fourteenth Amendment right to due process.

The next improper comment by the solicitor was, "You all have children and you're sitting down stairs and you hear this noise and you run up stairs and you see your kid standing there in the room with a ball in his hand and you see where there's a hole in the wall. Well did you see your kid take the ball and hit the wall to create the hole no. Is there anybody else there, the circumstances by which he has the ball in the hand that's circumstances that could lead you to determine whether or not the child did that in that incident. When you're child comes in and you're talking and your talking well did you throw the ball and your child says no. When you making a decision based on what to believe your judging a persons credibility." (3/11-14/13 Tr. pg. 461). This comment improperly shifted the burden from the State proving the petitioner was guilty beyond a reasonable doubt, to the petitioner having to prove that "anybody else" committed the crime. This comment was completely outside the record and had no relevance to the case. Counsel failed to object to this comment on the grounds

that the State violated Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 8.4(e) and (f), and the petitioner's Fifth and Fourteenth Amendment right to due process of the law. See U.S. v. Gentles, 619 F.3d 75, 82-83 (1st Cir. 2010) (prosecutor's reference to studies done on television show CSI improper because not supported by evidence). The Due Process Clause places on the prosecution the burden of persuasion for every element of the crime charged, and only in rare circumstances does the burden shift to the defendant. Any shifting of the burden of persuasion must withstand constitutional scrutiny. See In re Winship, 397 U.S. 358, 363-364 (1970).

The next improper comment by the solicitor that counsel failed to object to was, "Ladies and gentlemen I whenever I prosecute a case particularly a murder case. It ways on me because there is so much at stake and it's inevitably you have tragedy on both sides. You've got the family of a victim who has lost a loved one in the most tragic way. Not in a way where they've lived a long life and they just die of natural causes and old age like we all hope and pray that God blesses us to do. It's not in some kind of accident or illness or anything along that line. It's that somebody decided to play God and take the life of a loved one and when you add on the fact that Therris Keels had just reached his 30th birthday it makes it even more

(11)(46)

tragic. It's tragic for Mr. Palmer's family too. My heart goes out to his family as well just as Therris had a mom and dad, Mr. Palmer has a mom and a dad and I made a conscientious decision not to ask Mr. Palmer any question because I think quite frankly his family as the Keel's family have lost a lot. The only thing that I can say about that is regardless of how this case comes out Marc Palmer's family will get to see him again. Therris Keels's family will not, will never see him again and you know told you all that Therris was not a perfect person that nobody's perfect I meant that. I knew all the testimony would come out but you know at the end of the day, Mr. Keels was a human being and nobody deserved to die that way. Nobody deserved to be gun down like an animal in the middle of the road and that's exactly what happend to him." (3/11-14/13 Tr. pg. 477-478). These comments were clearly inappropriate and was intended arouse the emotions and passions of the jury. These comments held no relevance as to the facts in evidence to prove guilt. Counsel failed to object to these comments on the grounds that the State violated Rule 402 and 403 of SCRE, aroused the emotions and passions of the jary, and violated the petitioner's Fourteenth Amendment right to due process of the law. See U.S. v. Galloway, 316 F. 3d 624, 632-33 (6th Cir. 2003) (prosecutor's comment about his personal experience trying other cases involving drug mules

improper); U.S. v. Wright, 625 F.3d 583, 610-11 (9th Cir. 2010) (prosecutor's comments about similar cases he tried improper because reflected prosecutor's impression of the evidence and introduced prosecutor's personal experience).

The next improper comment the solicitor presented to the jury was, "And folks when I talked about the defendant cutting his hair, I wasn't talking about it because I thought he was trying to conceal evidence on his hair. I was talking about it because he is trying to present an image to you of a person he is not. You know he comes into this courtroom he wants to portray himself as conscientious, studies, and you know he hits all the high marks. Young man not married check, no children check, college student check, clean cut check, nice suit check, nice tie check, shiny shoes check. He wants to create the best possible impression on this jury but it's a lie. The image that you saw in this courtroom this week folks that's a lie and just like he told me when I'm asking him questions, don't get it twisted. Ladies and gentlemen you all cannot get it twisted because this is not the person that you see in the courtroom is not the same individual who in his private life back on October 27, 2010 took a .45 caliber pistol and loaded to bullets into the victims body." (3/11-14/13 Tr. pg. 478-479). The solicitor was inappropriate for telling the jury that the petitioner was intentionally trying to decive the jury with his physical

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appearance, marital status, the fact that he does not have any children, the fact that he was a college student, and lied and fabricated evidence about the petitioner trying to portray himself as conscientious and studies, and fabricated evidence and essentially testifying telling the jury the petitioner was trying to create the best possible impression on the jury but it's a lie, when the comments were not supported by evidence. Counsel failed to object to these comments on the grounds that the State violated Rules 402, 403, 404(a)(1) and (2), and 602 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and the petitioner's Fourteenth Amendment right to due process of the law.

The next improper comments by the solicitor that should have been objected to were," You see this individual and you all saw some parts of it during cross examination, you know my boss Mr. Sabb always tells me Kim when you're cross examining the witness or defendant make sure you press them for details. He said because most of them will have a story to tell you know they've been sitting around since whatever the crime happend and they've had time to think and for them they're on trial this is the most important day in their life so they're preparing for it. And he tells me that when you have a defendant who's charged with a crime. He would have thought about that crime and that and everything

surrounding that day a whole lot more than you would of. So he will prepare a story and what you have to do to get the truth is press him for details. He tells me the devil is in the details because when they prepare the script they don't think about what if somebody ask me about this because if I'm telling a lie, a person telling a lie is not going to remember all the details and the facets of their lie." (3/11-14/13 Tr. pg. 479). Counsel failed to object to these comments on the grounds that its hearsay and pits the petitioner's credibility against politician and former solicitor Ronnie Sabb's, infering the petitioner was telling a lie if he didn't remember a detail, violates Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violates the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and due process of the law.

The next improper comments the solicitor presented to the jury were, "When I was preparing for this case and I'm thinking about the evidence that'll be presented. I always get knots in my stomach, and I didn't understand and I couldn't understand. Godly how could somebody be so braze and just to come up and shot somebody with all these people around, what in the world who does that, who does that. How can somebody just be cold blooded like that and I was talking about the case with a friend of mine and she

(11)(50)

told me well Kim he wanted an audience and it's like the light went off, the light bulb went off your right. He was that bold and he was that brazen and that bad and that cold blooded because he wanted an audience and folks he didn't just want any audience. He wanted particular audience... You know back in the day when I was a little girl my mother had a saying and her saying was wherever you show out is where you get whore out, and from what she was telling me is if you go and you embarrass me by showing behind at school well I'm go and I'm going to cut your behind at school. Essentially that was her message to me and for the defendant he could not have this 135 pound man who has a crack addiction and who he called fool show him up in front of all these people." (3/11-14/13 Tr. pg. 480-481). Counsel failed to object to these improper comments on the grounds that they contain hearsay evidence, fabricated evidence, personal opinions and testimony from the solicitor, not supported by evidence, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violates the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses and to due process of the law. See Cargill v. Turpin, 120 F.3d 1366, 1383 (11th Cir. 1997) (prosecutor's statement that "so seldom do we see crimes so cold-blooded and not [1] but [2] bullets fired into the heads" improper).

The next improper comment the solicitor made was, "When he went there that night and started shaking all these hands he wanted them to know I'm the man. See that little and you all saw he was when I was asking him questions. Got that little cockiness that little New York arrogance that I heard people talk about." (3/11-14/13 Tr. pg. 482). Counsel failed to object to these comments on the grounds that they arouse the passions of the jury and create bias and prejudice, contain fabricated evidence, the solicitor essentially testifies violating the Confrontation Clause of the Sixth Amendment, violates Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violates the petitioner's Fourteenth Amendment right to due process of the law.

The next improper comment the solicitor made was, "He didn't realize they had on surveillance camera and you honestly believe we didn't have that footage in here do you really think he would have got on that stand and said well yeah I was really in the area, because all before now when he was talking to SLED I wasn't no where near Greeleyville, I wasn't no where near C.E. Murray Boulevard when that happend." (3/11-14/13 Tr. pg. 482). Counsel failed to object to the solicitor's improper comments on the grounds that the solicitor fabricated evidence on why the petitioner took the stand and what the petitioner said, violated

(11)(52)

Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and to due process of the law.

The next improper comment the solicitor made was, "Mr. Keels was murdered October 27, 2010 on October 13, 2010 the defendant gets into his second fight with this Dominique McBride fella and when he testified, what was interesting about that he said well see you know Dominique this my second fight with him and Dominique hurt me in the first fight and hurt my leg and now I got pins in my leg, thought that was interesting." (3/11-14/13 Tr. pg. 483). Counsel failed to object to these comments on the grounds that the solicitor fabricated evidence of when the fight between Dominique Mcbride and the petitioner took place, and fabricated evidence of the petitioner stating Dominique Mcbride hurt him and he had to get pins in his leg, and the solicitor offered her opinion about the testimonial evidence she fabricated of the petitioner, it violated Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and the petitioner's Sixth and Fourteenth Amendment rights.

(11)(53)

The next improper comments the solicitor said was," Now Detrel Matthews got on the witness stand and says well yeah I saw the fight and I saw something fall from Marc Palmer's waist band but I don't know what it was I assume it was a gun but I don't know I couldn't sure and I heard something hit the ground but I don't know if it was a gun, no I ain't told him that. Did you tell him it was a .45 caliber pistol, no. Did you tell him you kept it for a couple of days, no. Did you tell him that Palmer kept calling you asking for it back, no. Did you tell him that a few days before the murder you gave the .45 pistol back to him, no I didn't tell him that I ain't tell him that. So when we call Investigator Mcfadden to the stand I asked him about that and he said yes ma'am I had that conversation with Mr. Matthews because at that time he said he wasn't going to go on record now, because he was on federal parole and it would be a violation of his parole to have a firearm... So Detrel likes no Mr. Mcfadden I know Therris is my cousin and all but I'm not going there I'm sorry you got to do the best that you can. Now let me tell you this here's how you know that Detrel Matthews had that gun. If it's true when he testified that he never had a gun from Mr. Palmer, why in the world would Wayne Mcfadden be talking to his parole officer. I mean if the only thing he told Wayne because we have to assume at this point that Wayn Mcfadden just pulled that back out the sky

(11)(54)

somewhere, but if he never told Wayne Mcfadden that he took .45 caliber pistol from the defendant and gave it back to him a couple of days before the victim was murdered why in the world would his parole even come up. Why would the officer have a need to even go and talk to his parole officer. That's how you know in fact the statement that Detrel Matthews made Wayne Mcfadden were in fact true and you know folks at the end of day Detrel Matthews is going to have to live with the fact that he gave the same gun to the defendant that was used to take out the life of his cousin. He's going to have to live with that, regardless of how this comes out he's going to have to live with that for the rest of his life." (3/11-14/13 Tr. pg. 484-485). Counsel failed to object to these improper comments by the solicitor on the grounds that the solicitor vouched for a state witness, admitted fabricated evidence of a murder weapon, inflamed the passions and emotions of the jury, expressed personal opinion about the defendant's guilt, violated Rules 403 and 602 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment. There is no evidence of a murder weapon. Detrel Matthews testified that he did not give the petitioner a gun and the solicitor is stating her personal opinion, based on the fabricated evidence she created, that Detrel Matthews

is going to have to live with the fact that he gave the same gun to the defendant that was used to kill his cousin. U.S. v. Brown, 508 F.3d 1066, 1076 (D.C. Cir. 2007) (prosecutor's expression of personal belief regarding defendant's guilt improper); U.S. v. Loayza, 107 F.3d 257, 261 (4th Cir. 1997) (prosecutor's comment during closing argument that he believed government witness was telling truth improper).

The next improper comment the solicitor made was, "There was also testimony that a week or two before the killing, the defendant and the victim get into a fight at the shop and again we talking about the same little area on C.E. Murray Boulevard. The victim gets the better of the defendant, the defendant don't have a gun at this time. This fight occurs in front of a crowd of people including Big Moe. The defendant tells the victim this ain't over. Now we also know that some where between October 16, 2010 and October 29, 2010 Detrel Matthews returns that .45 caliber pistol to the defendant. Now what I would submit to you is that whenever the defendant had that fight with Therris he hadn't gotten his gun back yet." (3/11-14/13 Tr. pg. 485-486). Counsel failed to object to these comments on the grounds that the solicitor submitted her own fabricated testimonial evidence about when the petitioner did or did not have a gun as factual evidence, violating Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and

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violates the petitioner's Sixth and Fourteenth Amendment rights.

The next improper comment made by the solicitor was, "... Mr. Palmer says in that case no I ain't worried about you robbing me and he wasn't worried because he was packing." (3/11-14/13 Tr. pg. 486). Counsel failed to object to this comment on the grounds that the solicitor submitted her own fabricated evidence about the petitioner "packing", violating Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights.

The next improper comments made by the solicitor was, "He's during the trial he's changed that time line a little bit because see now he's got to change the time line to account for why his car was on 521 at the time line the time that 911 call came in, but see when you look at his statement to SLED he said he wasn't nowhere in the area when the shooting happened. So now he's set in court he's recognized all they got my car so I'm going to have to modify my time line just a little bit. Where as before when he was talking to SLED he said that he arrived at the shop at 10' oclock now in his statement to you, he said he leaves home at 10' oclock he says it takes him about 10 to 15 minutes to get from his home in Lane to the shop on C. E. Murray Boulevard. So that would put him arriving at

shop somewhere between 10:10 and 10:15 p.m. . . . He testified he stayed there 5-10 minutes would essentially have him leaving the shop somewhere between 10:10 and 10:20 p.m. he leaves. Now here's what we know, at 10:37 p.m. the Honey Saver which is between a quarter mile and a half a mile down from the crime scene captures an image of the defendant's vehicle passing by." (3/11-14/13 Tr. pg. 486-487). Counsel failed to object to these comments on the grounds that the solicitor accused the petitioner of lying and altering the time he left his home to account for why his car was on 521, and the solicitor submitted her own fabricated time line that is unsupported by the evidence, and violates Rules 403 and 602 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4 (b), and 8.4(a)(b)(c)(d)(e) and (f), and violates the petitioner's Sixth and Fourteenth Amendments rights. See U.S. v. Philpot, 733 F.3d 734, 745-46 (7th Cir. 2013) (prosecutor's description of timeline of events, which suggested a cover-up, improper because not supported by evidence); Marshall v. Hendricks, 307 F.3d 36, 65 (3d Cir. 2002) (prosecutor's mischaracterization of testimony by defense witness improper because unsupported by any evidence in record).

The next improper comment the solicitor made was, "So you leave the place where you got the most opportunity to sell your product and make some money and according to him he would have you believe he then drives around from house to

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(3), 3.4(b), 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and to due process of the law.

The next improper comment that was made to the jury was," I mean Maurice Smith is going to serve his time. He doesn't have at this point anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't. Now way back when, when he was out and he was doing his dirt oh he had a lot or reason not to put anything in it.... He said listen at that time I know I had my thing going on I know I wasn't try to see the police and I wasn't trying to have the police see me and it's tragic to say but he wasn't the only person out there that night that felt that way. Detrel Matthews felt that way, he felt that way and it's kind of like a lot people just said I don't want to be a part of it and that's part quite frankly that's part of the tragedy in this case as well, but I would submit to you that there is something incredibly liberating about prison and I know that sounds ironic and it doesn't make --- but when you go to prison and you're doing your time. I would submit to you that it kind of allows you to get it off your chest..." (3/11-14/13 Tr. pg. 484). Counsel failed to object to these improper comments on the grounds that the solicitor vouched for State's witness Maurice Smith, fabricated evidence of

house, door to door trying to find people in the middle of the night to seel dope to and he wants you to believe that. Now its been a long time since people come to my house soliciting business but I declare I ain't never had nobody come at 12, 1, 2, and 3 o'clock in the morning now, but that's his story so he wants you to buy that." (3/11-14/13 Tr. pg. 488). Counsel failed to object to this comment on the grounds that the solicitor expressed her opinion about a matter that required personal knowledge and experience, essentially testifying pitting her own testimony against the petitioner's, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 8.4(a)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights.

The next improper comments made by the solicitor was, "Testimony from Maurice Smith, I prosecuted Maurice Smith. Maurice Smith came in this court room he plead guilty and I was standing basically in the same position I'm standing right now and as I recollect his testimony when Mr. Ballinger asked him what were you convicted of he said distribution and trafficking." Counsel failed to object to the solicitor presenting false evidence to the jury (tribunal), when Maurice Smith's sentencing sheet show assistant solicitor Christopher Ryan Durant as the prosecuting attorney for all his charges he was convicted of, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rule 3.3(a)(1) and

(11)(60)

state's witness Detrel Matthew's opinion on him testifying, and expressed her personal opinion about doing time in prison and how liberating it feels without having any personal experience or knowledge, expressed opinion of how other witnesses felt who are not involved, and aroused the passions of the jury essentially pitting her own testimony against the petitioner's, and violating Rule 402 and 403 of SCRE, and Rule 407 of SCACR Rule 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights. See, U.S. v. Modica, 663 F.2d 1173, 1179-80 (2d Cir. 1981) (prosecutor's statement characterizing witnesses as "scared" improper); Hodge v. Hurley, 426 F.3d 368, 382-83 (6th Cir. 2005) (prosecutor's statement suggesting defense witness acting wrongfully or unethically or was perjuring himself improper); U.S. v. Wright, 625 F.3d 583, 610-11 (9th Cir. 2010) (prosecutor's comments about similar cases he tried improper because reflected prosecutor's impression of the evidence and introduced prosecutor's personal experience); Douglas v. Workman, 560 F.3d 1156, 1179 (10th Cir. 2009) (prosecutor's statement that government's witness had nothing to hide and that witness's testimony was "the truth" improper vouching).

The next improper comment by the solicitor was, "Here is where I think it's so important and why I would submit to you that he is believable." (3/11-14/13 Tr. pg. 490). Counsel

(11)(61)

failed to object to this comment on the grounds that the solicitor vouched for state's witness Maurice Smith, violating the petitioner's Sixth and Fourteenth Amendment rights. See, U.S. v. Loayza, 107 F.3d 257, 261 (4th Cir. 1997) (prosecutor's comment during closing argument that he believed government witness was telling truth improper).

"The next improper comments the solicitor made was, "Now as it relates to this issue about whether or not the shooter had the mask. Here's what I would tell you about that, to this day TT, Mr. Sabb, is traumatized... When he gave his statement to the police he says he sees the person come towards Therris... Now in terms of this issue about the white mask. What I would suggest to you is that when somebody points a gun at an individual and what we know is that, when Mr. Keels was struck in the stomach he and the shooter were face to face. So the gun is likely held by Mr. Palmer like this against Therris and so when he fires the pistol there's a flash or light that comes from the muzzle of the gun I mean that's just what a gun does. Now Mr. Palmer was wearing glasses at the time. What I would suggest to you was that perhaps with the flash of the muzzle that that created a light that created a reflection on his glasses and I would submit to you that TT probably thought the person had a white mask on..."

(11)(62)

(3/11-14/13 Tr. pg. 492). Counsel failed to object to these comments on the grounds that the solicitor fabricated evidence that the suspect had glasses and submitted that Joseph Sabb saw a light that reflected off the petitioner's glasses instead of a white mask essentially testifying and fabricating her own testimony in detail of how the shooting took place and that a flash came from the muzzle of the gun when unsupported by the evidence, and the solicitor expresses her own opinion of the petitioner's guilt, and violated Rule 402 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and to due process of the law. Joseph Sabb said he saw the suspect with a mask before the shooting started. No witness stated the suspect had glasses on or that they saw a flash from the muzzle.

The next improper comment the solicitor made was, "So I would just tell you that because quite frankly I don't think the defendant would've worn a mask because he wanted people to know that it was him. So everybody in that group of the people he sold drugs to would essentially know don't cross me. I'm not one to be played with I'm not one to messed with. That was the message that he wanted to send clearly and quite frankly if you're coming out at 10:30 at night to shoot somebody you're probably not going to want to stand

out with a white mask." (3/11-14/13 Tr. pg. 492-493). Counsel failed to object to these comments on the grounds that the solicitor fabricated her opinion that the suspect didn't wear a mask, that the petitioner is guilty, what he was thinking, and fabricated a message that he supposedly was trying to send to the crowd to the jury (tribunal), violating Rule 402 and 403 of SCRE, and Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and to due process of the law.

The next improper comment the solicitor made was, "All of the evidence was corroborated. We had the defendant's own witness to testify that he wore his hair in a ponytail. We had Wes to talk about the shooter having, he said a little scruffy hair with a ponytail. We had people corroborate the defendant was wearing glasses we had all of those things corroborated in this case." (3/11-14/13 Tr. pg. 493). Counsel failed to object to these comments on the grounds that the solicitor presented false statements to the jury and presented to different identifications of the suspect as facts when one is clearly false, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Fourteenth Amendment right to due process of the law. The solicitor just vouched for state's witness Maurice Smith's identification of the petitioner as the suspect, but Smith

(11)(69)

testified the petitioner had dreadlocks which contradicts this presentation of identification of the suspect having a ponytail, and the only statement given that the suspect had glasses on to corroborate with the defense witness stating the petitioner wearing glasses was fabricated by the solicitor, proving all of the evidence wasn't corroborated and the solicitor presented false evidence to the jury(tribunal).

The next improper comment the solicitor made was, "Is how clever the defendant was after. The defendant goes, he puts .38 caliber ammunition in his trunk... He knows that Therris was killed with a .45 so to throw the police off his trail he puts ammunition of .38 in his trunk and you know sometimes during trials God gives us gifts and for me the gift, the coup gra in this case if you will is when the defendant told you, I knew that the police would be looking for me and I did certain things so that the evidence would not come back to me and every now and then when God gives you this gift. God loops his tongue and let him get out there and say no it wasn't really evidence because Therris wasn't killed with no .38, I said you know what you're right. He said well and then he had to clean it up a little bit." (3/11-14/13 Tr. pg. 493-494). Counsel failed to object to these comments on the grounds that the solicitor presented her own fabricated evidence that the petitioner put .38 caliber ammunition in his trunk to throw the police off his tral, that the petitioner knew Therris was killed with a .45 caliber

gun, and the solicitor fabricated that God gave her a gift that the petitioner did certain things so that the evidence would not come back to him, violating Rule 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (2), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights. The petitioner testified that he put the .38 caliber ammunition in his car to get it out of his parents house in case the victim was killed with the .38 caliber gun he lost. The petitioner testified that he did not know what Therris was killed with until he received his copy of the discovery in this case. None of these comments are supported by the evidence.

The next improper comments the solicitor made was, "The defendant essentially in this case confessed, he essentially confessed to this crime... So he tells you he did it, he won't come out and say I'm guilty I did it, but folks if you all put those pieces of that puzzle together you'll get the complete picture. You'll see his confession and all of the evidence in this case folks when you put pieces of that puzzle together and when you look at the entire picture you all will have no doubts, no reasonable doubts in your mind that the defendant in fact committed this crime." (3/11-14/13 Tr. pg. 494-495). Counsel failed to object to these comments on the grounds that the solicitor fabricated evidence that the defendant (petitioner) confessed when

(11)(66)

the petitioner did not confess and there is no evidence to support that comment, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights.

The last improper comments the solicitor made was," He committed a cold blooded, ruthless murder and at some point if we're going to just lie down and surrender our community to this type of street justice then it's time for all of us to hand our hats up. We mine as well go home. Judge Young mine as well retire his robe. I mine as well quit this job and just do only private practice and we mine as well quit blowing our money away destroy that courthouse across the street because we don't need it. If the defendant can come in here and kill somebody in cold blood and walk away with because he had the presence of mind to throw away the evidence. Then we mine as well and we all say that we're done. I employ you all not to do that and I employ you all to return a guilty verdict, thank you." (3/11-14/13 Tr. pg. 495). Counsel failed to object to these improper comments on the grounds that the solicitor expressed her personal opinion about the petitioner's guilt, appealed to jurors to act as conscience for the community, and comments that inflamed the passions of the jurors intended to lead to a conviction or the solicitor and judge should quit the jurors might as well quit, and they might as well quit blowing our

money away destroy the courthouse because they wouldn't need it, and the solicitor presented fabricated evidence that the petitioner threw away evidence that she created, violating Rules 402 and 403 of SCRE, Rule 407 of SCACR Rules 3.3(a)(1) and (3), 3.4(b), and 8.4(a)(b)(c)(d)(e) and (f), and violated the petitioner's Sixth and Fourteenth Amendment rights to confront witnesses against him and to due process of the law. See, U.S. v. Brown, 508 F.3d 1066, 1076 (D.C. Cir. 2007) (prosecutor's expression of personal belief regarding defendant's guilt improper); U.S. v. Auch, 187 F.3d 125, 131 (1st Cir. 1999) (prosecutor's statement, "the only way I can even imagine ever acquitting this man..." improper because it conveyed personal opinion); U.S. v. Frederick, 78 F.3d 1370, 1380 (9th Cir. 1996) (prosecutor's comments portraying himself as ally of court improper); U.S. v. Sanchez, 659 F.3d 1252, 1256 (9th Cir. 2011) (prosecutor's statement that an acquittal would "send a memo" to other drug couriers to use same defense improper because asked jury to consider social implications of verdict rather than guilt or innocence of defendant).

Counsel failed to file a motion for a mistrial with prejudice due to the numerous intentional misconduct by the prosecution. The solicitor solicited over twenty improper comments in her closing arguments to the jury in bad faith and the petitioner's counsel failed to request a mistrial afterwards. After these numerous improper comments infected the trial with unfairness

(11)(68)

Counsel's only option was to request for a mistrial with prejudice. The petitioner already made his counsel request for a mistrial after the solicitor mentioned a suspect took a polygraph, and then the solicitor intentionally engages in misconduct risking a mistrial or to reduce chances of an acquittal. The fact that constant intentional governmental misconduct would've forced the mistrial, the Double Jeopardy Clause protects the petitioner from being faced with the burdens and risks of a second trial solely because the Government deliberately undermined the integrity and fairness of the first proceeding. See, U.S. v. Berrios, 676 F.3d 118, 135 (3d Cir. 2012) (prosecutorial misconduct is a ground for reversal only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); Green v. U.S., 451 U.S. 929, 931-933 (1981) (The Double Jeopardy Clause protects a criminal defendant's interest in a single fair adjudication of his guilt or innocence... This constitutional interest is implicated whenever intentional governmental misconduct results in a mistrial. Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of an acquittal, the net effect on the defendant is the same: he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding. Indeed, in United States v. Jorn, 400 U.S. 470, 91 S.Ct.

547, 27 L. Ed. 2d 543 (1971), the central decision relied on in Dinitz, this Court concluded that "where a defendant's motion is necessitated by... prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." 400 U.S., at 485, n. 12, 91 S. Ct., at 557, n. 12 (emphasis added). This language strongly suggest that a general government intent to affect the trial in a manner that objectively might be viewed as risking a mistrial, rather than a specific, subjective intent on the part of the prosecution to achieve that precise result, is sufficient to invoke the double jeopardy concerns discussed in Dintz).

Counsel's failure to object to these improper comments and motion for a mistrial prejudiced the petitioner because his counsel's failure allowed the solicitor to infect the jury with her personal opinions on the petitioner's guilt and witnesses credibility, fabricated evidence and essentially testifying without the petitioner's opportunity to confront her, to mislead the jury to wrongfully convict the petitioner for reasons other than guilt or innocence based on evidence supported by the record, and failed to preserve the issues for direct review violating the petitioner's Sixth and Fourteenth Amendment rights. Counsel was clearly ineffective and Post-Conviction Relief should be granted.

(11)(70)

(11)(f) Counsel was ineffective for failing to adequately investigate and present a defense, for refusing to put WCSO investigator Lail and Petitioner's private investigator, Phillip Grimsley, on the stand to present evidence helpful to the defense, failing to have side bars on record, for misrepresenting the petitioner by fabricating reasons for striking jurors during the Baston v. Kentucky hearing, and for making harmful arguments contradictory to the petitioner's and Brittany Croskey's testimony, violating the petitioner's Sixth and Fourteenth Amendment rights.

Counsel intentionally refused to question SLED Agent Mark Creech on what State's witness Maurice Smith said in his February 12, 2012 interview (3/11-14/13 Tr. pg. 283). Investigating what Maurice Smith told Agent Creech was very vital to the defense because Smith was the only witness to give a positive identification the petitioner was the suspect, and in that interview Smith first changed his statement identifying the petitioner. If Smith requested a plea deal for his pending charges and Agent Creech testified to that then that would not only show motive for Smith's change in his original statement to identifying the petitioner, but also impeachment evidence against the State's main witness.

Counsel also refused to put the private investigator, Phillip Grimsley, he hired on the stand to present to the jury that he

went to the area where the incident occured and took pictures looking from the garage to the Masonic Lodge and from the Masonic Lodge to the garage by the gravel road, and to impeach State's witness Brittany Croskey for lying about not hearing or reading her November 4, 2010 statement before the trial and her first time seeing it when she was on the stand (3/11-14/13 Tr. pg. 200-201), when Grimsley just reviewed the statement with her on January 10, 2013. In this statement Croskey told Grimsley that she didn't remember a funny walk resembling the petitioner, she didn't know who killed Therris, and that she was pressured by the police and just wanted to help. All of the evidence Phillip Grimsley gathered should have been presented to the jury and would've had an effect on the jury's assessment of Brittany Croskey's testimony, and assisted with the jury's determination if anyone could get a good look at anyone from the Masonic Lodge to the garage by the gravel road. Counsel also refused to put WCSO investigator Lail on the stand to present Brittany Croskey's November 4, 2010 statement to further impeach Croskey at the petitioner's request.

Counsel also failed to have numerous side bar meetings with the judge and solicitor recorded on the record, failing to preserve the entire record for review, See 3/11-14/13 Tr. pg. 310-311; and 326. This failure denied the petitioner his due process right to perfect his appeal.

(11)(72)

Counsel also misrepresented the petitioner by fabricating reasons for striking jurors during the Baston v. Kentucky hearing. The petitioner never told counsel that he wanted to strike a juror because he was from Hemmingway and because they had knowledge of being an electrician and knowledge in mechanics (3/11-14/13 Tr. pg. 23-24; and pg. 27-28). Counsel fabricated these reasons himself and made the petitioner seem like he was trying to hide a fact or facts about the vehicle he was driving, infering guilt.

Counsel also constitated deficient preformance by making harmful arguments contradictory to the petitioner's and Brittany Croskey's testimony. During the direct examination of the petitioner, counsel asked, "So him, anybody else besides Big Moe and Ms. Croskey identified you to your knowledge as to the shooter in this case." (3/11-14/13 Tr. pg. 365). Croskey never positively identified the petitioner as the suspect and counsel should have never asked that question and presented that to the jury. Croskey testified that, "I assume it was him because of his walk." (3/11-14/13 Tr. pg. 198). In counsel's closing argument he commented, "Folks the other way the state has tried to identify Mr. Palmer in this case is by his vehicle and specifically by the sound of his vehicle and there's conflicting testimony all throughout the case as to whether or not the car made noise. Detrel Matthews I believe said it made noise,

Maurice Smith said it made noise, Wes Walker said it did not make noise, and he'd of been the closes one to the vehicle when it left out... Mr. Walker would have been in the best position to hear a vehicle if it was in fact loud. Mr. Palmer said my car is not loud it's a small little Neon, doesn't have a fan belt problem and it doesn't have a maffler, Wes Walker corroborates that. So if you believe Mr. Walker about the vehicle there was no loud associated with it and therefore the person that drove that vehicle down the road, drove a vehicle who didn't make noise and I think there's evidence before you in the regarding." (3/11-14/13 Tr. pg. 468-469). Counsel misrepresented the petitioner by infering that the defendant's car was the car on the gravel road, infering the petitioner, his client, is guilty. See, Louds v. State, 670 S.E.2d 646, 651 (S.C. 2008) (Newell's comments were not improper as he was "simply presenting to the jury an alternate explanation of events that was implied from [petitioner's] own testimony." ... While Newell's comments were not an out right admission... they significantly departed from petitioner's own testimony... This form of argument did not advocate in petitioner's favor, but rather tended to support the State's theory... Therefore, we hold Newell's closing argument comments were improper and constituted deficient performance.).

The numerous failures by petitioner's counsel clearly

prove he was ineffective and denied the petitioner his Sixth Amendment right to counsel and Fourteenth Amendment right to due process of the law, and therefore Post Conviction Relief should be granted.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ground (10)(a), because the discovery of this ground wasn't until after trial.

(b) Ground (10)(b), because this was not objected to at trial.

(c) Ground (10)(c), because this issue was not objected to at trial.

(d) Ground (10)(d), because counsel failed to raise issues at trial.

(e) Ground (10)(e), because counsel failed to raise the issues at trial.

(f) Ground (10)(f), because the issues were not eligible to be presented in a direct appeal.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Ryan Beasley, 650 East Washington Street, Greenville, SC 29601
ii. E. Gary Ballenger, 205 North Irby Street, P.O. Box #107, Florence, SC 29503
iii. William Barr, 108 North Academy Street, Kingstree, SC 29556
iv. James Hoffmeyer, 125 Warley Street, Florence, SC 29501
v. William LeGrand Carraway, 124 S. Academy Street, P.O. Box #814, Kingstree, SC 29556

(b) the proceedings at which each attorney represented you:

i. The Direct Appeal in the Court of Appeal, and the Petition of Writ of Certiorari in the South Carolina State Supreme Court
ii. The March 11-14 Trial
iii. Filed March 26, 2012 motion for speedy trial and July 30, 2012 relief of counsel hearing
iv. July 22, 2011 Bond hearing and the December 15, 2011 relief of counsel hearing
v. December 2010 Bond hearing, March 31, 2011 Speed Trial hearing, and Preliminary hearing

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Marc Anthony Palmer, SCDC #354634, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-45-0488 **RETURN**

In response to the post-conviction relief application filed October 29, 2018[1], by Applicant Marc Anthony Palmer, Respondent (the State) would show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was indicted by the Williamsburg County Grand Jury for murder and possession of a weapon during the commission of a violent crime (2011-GS-45-0095) for the murder of Therris Keels. Guy Ballinger, represented Applicant. Assistant Solicitor Kimberly V. Barr of the Third Circuit Solicitor's Office prosecuted the case.

On March 11, 2013, Applicant proceeded to a jury trial in the Williamsburg County Court of General Sessions before the Honorable W. Jeffrey Young. On March 14, 2013, the jury convicted Applicant as indicted. Judge Young sentenced Applicant to life imprisonment for the murder conviction and five years confinement for the possession of a firearm during the commission of a violent crime conviction, to be served concurrently.

[1] Respondent did not receive a copy of this application until December 4, 2018.

Applicant timely filed a notice of appeal. He was represented on appeal by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense and Ryan L. Beasely of the private bar. In his brief to the South Carolina Court of Appeals, Applicant argued he was entitled to a new trial based on the following:

> 1. Did the trial court error in granting the State's Batson v. Kentucky motion and quashing the original jury?
>
> 2. Did the trial court error in denying the Appellant's motion for a mistrial and new trial after the admission of a witness taking and successfully passing a polygraph examination?
>
> 3. Did the trial court error in refusing to dismiss the case after the State violated the Appellant's right to a speedy trial?
>
> 4. Did the trial court error in admitting the Appellant's statement after he unambiguously invoked his right to counsel?
>
> 5. Did the trial court error in imposing a five-year sentence on the possession of a weapon during the commission of a violent crime after sentencing the Appellant to life without parole on the murder?

After full briefing and oral argument, the South Carolina Court of Appeals issued a published opinion affirming Applicant's convictions but vacating the weapons sentence in light of his life sentence for murder. State v. Palmer, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016).

Applicant filed a Petition for Rehearing on March 8, 2016. Respondent filed a Return to Petition for Rehearing on April 4, 2016. The Court of Appeals denied the petition on April 21, 2016.

Applicant then sought certiorari to the South Carolina Supreme Court. On December 13, 2017, the Supreme Court denied certiorari. The Remittitur was issued January 4, 2018.

II. Factual Summary

On October 28, 2010, Applicant shot and killed Therris Keels in Greeleyville, SC. Keels was shot twice; once in the head and once in the abdomen. (Tr. 165). The shot to the victim's head passed through his left cheek, the left side of his skull, both sides of his brain, and exited the right side of his skull. (Tr. 169). The shot to the victim's abdomen entered from the front, passed through his liver and part of his spine, and exited through his back. (Tr. 171-72). Both gunshot wounds would have been fatal. (Tr. 173).

Applicant and the victim were not on good terms on the night of the shooting

Maurice Smith testified he had witnessed animosity between Applicant and Keels. (Tr. 106). A week or two before the murder, Smith saw Keels on top of Applicant. Roger Williams separated the two, and Smith heard Applicant say that it was not over. (Tr. 107). Detrel Matthews also recalled observing Applicant in an argument with Keels approximately one month before the murder. (Tr. 211-12). Even Applicant admitted there was some animosity between him and the victim around the date of the shooting. In his statement to law enforcement, Applicant indicated the victim had threatened to rob Applicant. (State's Exhibit 3, p. 3). At trial, Applicant noted he and the victim had gotten into a confrontation before. (Tr. 370-71). He also indicated Applicant had threatened to rob him earlier on the day of the shooting. (Tr. 347-49).

Applicant had access to a pistol on the night of the shooting.

Smith also testified that saw an altercation between Applicant and another individual named Dominique a few weeks before the murder. (Tr. 108). During that altercation, Smith saw Applicant drop a gun. (Tr. 109). Smith also noted that he saw Applicant ask Dominique to return the gun to him. (Tr. 109). Matthews also recalled seeing Applicant with what appeared to be a pistol during another confrontation Applicant had with a second individual named

Dominique. (Tr. 212-14). Matthews noted that he saw the gun fall from Applicant's waist during that confrontation. (Tr. 214). Investigator McFadden of the Williamsburg County Sheriff's Office also testified that he learned from Matthews that Matthews' brother returned a .45 caliber handgun to Applicant before the shooting. (Tr. 312-15).

Witnesses placed Applicant at the scene of the shooting shortly prior to the shooting.

On the night of the shooting, Smith saw Keels outside the Lodge. (Tr. 109-10). Smith also saw Applicant; Smith noted Applicant spoke to everyone and then went back to Keels and told him "I'll see you later." (Tr. 112, ll 23-5). Smith indicated Applicant left. (Tr. 114). Britney Croskey, another eyewitness to the shooting, Smith, Keels, and Applicant that night out near where the shooting occurred. (Tr. 185-86). McFadden also recovered surveillance video from a business close to the shooting location from the time near the shooting. On the video, a vehicle missing its front left hubcap could be seen.[2] (Tr. 317-25).

The Shooting

Smith also testified he later saw Keels go into the shop with a man nicknamed TT. (Tr. 113-14). Smith testified as the two came out of the shop and started heading towards Wes's house, Smith saw Applicant coming across the side of the road. (Tr. 114). Applicant walked up to Keels, and Keels put his hands up. (Tr. 115). Smith saw Applicant had a gun pointing out, and he saw Applicant shoot Keels. (Tr. 115). Keels fell to the ground, and Applicant shot him again. (Tr. 115). Applicant walked across the road, then turned around and shot Keels a third time. (Tr. 116). After the third shot, Applicant ran off another way. (Tr. 116). Smith noted he did not see Applicant's Dodge Neon that night; however, he did recall hearing it squealing shortly after the shooting. (Tr. 119-20).

[2] Applicant later admitted it was his car in the video. (Tr. 354-55).

Wesley Walker testified he saw Keels on the night of the shooting. (Tr. 135, 137). He recalled the shooting occurred between 10 and 10:30 that evening. (Tr. 137). He testified Keels and Sapp ("TT") were at Walker's house to get jumper cables. (Tr. 137). Walker and Sapp went to get the cables. (Tr. 137). Walker had not seen Keels with a gun that night. (Tr. 139). He saw the shooter reach into his pants pocket, pull out a gun, and shoot Keels two times. (Tr. 139). Walker ran after he saw the two shots. (Tr. 139).

Croskey testified she saw Keels with his hands up when she heard a gunshot. (Tr. 188). She then heard a second shot before Keels fell to the ground. (Tr. 188-89). Then Croskey observed the person who shot Keels stand over Keels and shoot him again. (Tr. 188-89). Prior to the shooting, she saw seeing someone pacing back and forth under a light on the street. (Tr. 187). Croskey noted the person walked in a way that appeared to be similar to how she had seen Applicant walk on a prior occasion. (Tr. 187-88). After seeing that, Croskey got in her car and left the scene. (Tr. 189-90).

Matthews testified while he was in the general vicinity of the shooting when it occurred, he did not observe the shooting. (Tr. 218-23). After the shooting, Matthews and others walked down the road to where Keels was located. Matthews indicated he heard a car crank up, and the car left the scene. (Tr. 223-24).

Witnesses indicated that the shooter had characteristics similar to Applicant's

Maurice Smith testified Applicant had dreadlocks on the night of the shooting. (Tr. 102, 127). Smith recalled when he saw Applicant earlier, he was wearing pants and a dark hoodie. (Tr. 117, 129). He also stated he was able to identify Applicant by his walk. (Tr. 117). Croskey testified Applicant had hair that was long enough to be in a ponytail back when the shooting occurred. (Tr. 183). Walker could only say the man who shot Keels had a ponytail and puffed

hair. (Tr. 140). Walker also noted when he saw Applicant at times before October 2010, he wore his hair in a ponytail puffed out. (Tr. 140).

Law Enforcement Investigation

Three .45 caliber shell casings were recovered from the scene. (Tr. 247-52, 255). SLED Agent Mark Creech testified he and two investigators from the Williamsburg County Sheriff's Office interviewed Applicant. (Tr. 262-65). He further testified about Applicant's statement to law enforcement, and he noted that no one could corroborate Applicant's whereabouts from 10:10 p.m. and 3:00 a.m. (Tr. 266-75). No blood was found on the items analyzed from Applicant's vehicle, no gunshot residue was found, and no fingerprints were found on the shell casings or a soda can from the scene. (Tr. 275-79). Further, the only DNA that could be analyzed belonged to the victim. (Tr. 279).

Investigator Wayne McFadden testified he attempted to verify Applicant's alibi for the evening of the shooting. (Tr. 305-08). McFadden noted he did not see Applicant's vehicle on surveillance video at a gas station where Applicant had claimed to be for part of the night of the shooting. (Tr. 308-09).

Glenn Kennedy testified some time after the shooting, he received a phone call from his cousin, Elijah (now deceased). (Tr. 287-89). Kennedy indicated that he saw the Dodge Neon parked at Elijah's house behind a shed barn where horses and tractors were kept. (Tr. 292-94). Kennedy noted that the Sheriff's Department came out to the house that day. (Tr. 294-96).

III. Allegations Raised and Relief Sought in Application

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Prosecutorial Misconduct: The State failed to fully disclose the nature of its relationship with State's witness Maurice Smith and the terms of his plea agreement.

2. Ineffective Assistance of Counsel

-Counsel failed to object to the State's Brady violations
-Counsel failed to suppress the admission of tainted, unreliable identification evidence resulting from impermissibly suggestive procedures
-Counsel failed to make proper objections and motions at trial
-Counsel failed to object to the solicitor's improper comments and misconduct in closing and reply arguments, which included witness pitting, fabricating and presenting false evidence, threatening to quit if the jury did not convict, and failing to move for a mistrial in response to these arguments
-Counsel failed to adequately investigate and present a defense, including refusal to put WCSO Investigator Lail and Applicant's private investigator, Phillip Grimsley, on the stand to present evidence helpful to the defense
-Counsel failed to place all sidebar discussions on the record
-Counsel fabricated reasons for striking jurors during the Batson hearing
-Counsel made harmful arguments against his and Brittany Cronskey's testimony

As requested relief, Applicant states he requests his convictions be vacated.

Attached herewith and incorporated herein by reference are the records of the Williamsburg County Clerk of Court regarding the subject convictions, the trial transcript, Applicant's appellate records (including the direct appeal), and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

IV. Response to Allegations of Prosecutorial Misconduct

Applicant asserts the State committed prosecutorial misconduct by failing to fully disclose the nature of its relationship with State's witness, Maurice Smith. Applicant asserts the State made an illegal, secret plea agreement with Smith for a litany of drug charges out of Clarendon and Williamsburg Counties in exchange for his cooperation with the prosecution of

Applicant. Applicant asserts Smith was allowed to plead down to first-offense drug convictions for an aggregate ten year sentence, which he asserts is illegal because the offenses were third-offense, twenty-five year mandatory minimum crimes. Applicant asserts he did not learn of this plea agreement until trial, when his counsel was provide with his SCDC information indicating Smith was serving a ten year sentence and when Smith testified during trial, which he asserts amounted to false testimony that the State failed to correct. Applicant also asserts the State acted improperly when it vouched for Smith's credibility during its closing argument and asserted there was no plea agreement with Smith. Applicant claims he has proof of this plea agreement through a General Sessions tracking sheet, which he did not attach or otherwise include with his application.

Initially, Respondent notes it appears Applicant knew of these purported Brady violations at the time of his trial, and accordingly, should have raised these issues on direct appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless of the propriety of raising this claim now on post-conviction relief, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the

possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006)

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Gulledge, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id. The definition of "material" for purposes of Rule 5 is the same as the definition used in the Brady context. Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997). In order for Applicant to prevail on a Rule 5 claim, he must show not only an actual violation, but also that he suffered prejudice as a result. State v.Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992); State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

Respondent submits this ground for relief is without merit. However, the allegations concerning Brady and Rule 5 violations probably raise questions of fact that are not conclusively

refuted by the record. Respondent requests an evidentiary hearing on this ground for relief. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Response to Allegations of Ineffective Assistance of Counsel

Applicant asserts his trial counsel was constitutionally ineffective for failing: to object to the State's Brady violations; to suppress the admission of tainted, unreliable identification evidence resulting from impermissibly suggestive procedures; to make proper objections and motions at trial; to object to the solicitor's improper comments and misconduct in closing and reply arguments, which included witness pitting, fabricating and presenting false evidence, threatening to quit if the jury did not convict, and failing to move for a mistrial in response to these arguments; to adequately investigate and present a defense, including refusal to put WCSO Investigator Lail and Applicant's private investigator, Phillip Grimsley, on the stand to present evidence helpful to the defense; and to place all sidebar discussions on the record. He also asserts counsel fabricated reasons for striking jurors during the Batson hearing and made harmful arguments against his and Brittany Cronskey's testimony.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the

identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test as to any of his allegations of ineffective assistance of counsel. However, allegations regarding ineffective assistance of counsel may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on these allegations. Sharper v. State, 305 S.E.2d 247.

VI. Any Future Amendments and Invocation of Discovery Process

Applicant must specify any claims he intends to raise at the evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to

request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII. Response to Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. Request for an Evidentiary Hearing

WHEREFORE, having made its return, the State requests an evidentiary hearing be held on the issues of prosecutorial misconduct and ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

2/19, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG	)	
	)	
	)	2018-CP-45-0488
	)	
MARC ANTHONY PALMER, #354634,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC.
Post Office Box 1058
Charleston, South Carolina 29402

DATED this the 20th day of February 2019.

Kaitlyn A Slice

Kaitlyn S. Slice, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

COURT OF COMMON PLEAS

MARC ANTHONY PALMER)
354634

APPLICANT,)

v.)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

TRANSCRIPT OF RECORD
18-CP-45-345
18-CP-45-488

November 01, 2022
Sumter, South Carolina

B E F O R E :

THE HONORABLE EDWARD W. MILLER, JUDGE

A P P E A R A N C E S:

JAMES F. FALK, ESQ.
Attorney for the Applicant

DANIELLE E. DIXON, ESQ.
Attorney for Respondent

FRANCES B. RAY, RPR
Circuit Court Reporter

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MS. DIXON: May it please the Court. This is Danielle Dixon, Assistant Attorney General for the State of South Carolina. This is the case of Marc Anthony Palmer v. State, docket number 2018-CP-345, 488. Mr. Palmer is currently serving a life sentence. In May of 2011 the Williamsburg grand jury indicted him for murder and possession of a weapon during a violent crime. That's indictment number 2011-GS-45-95. Those charges arose from the fatal shooting of Therris Keels on October 27th, 2010. On March 11th through 14th, 2013, Mr. Palmer had a jury trial before the Honorable William Jeffrey Young. Guy Ballenger represented Mr. Palmer and Kimberly Barr represented the State. Mr. Palmer was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for the weapon charge.

He filed a direct appeal. On appeal he was represented by Ryan L. Beasley of Ryan L. Beasley, PA, as well as Chief Appellate Defender Robert Dudek. They filed a brief arguing that the trial court erred in granting the State's Batson motion, denying a motion for a mistrial/motion for a new trial, denying his motion for a speedy trial, admitting his statement to law enforcement after he

invoked the right to counsel, and sentencing him for possession of a weapon after sentencing him to life. The Court of Appeals vacated the five-year weapon sentence based on Section 16-23-490(a) of the South Caroline Code, but affirmed all other issues on the merits. He did file a petition for cert with the Supreme Court, state supreme court, and they denied the petition. The remittitur was sent January 4th, 2018.

He filed this PCR application timely on October 29th, 2018. The State filed a return requesting an evidentiary hearing. This has been continued before in November 2019, November 2021, and February 2022. At this time the State understands his allegations to be prosecutorial misconduct in that there was a secret deal with the witness Maurice Smith, as well as some Brady issues. He's also raising several claims of ineffective assistance of counsel to include: Counsel failed to object to Brady violations, failed to move to suppress admission of unreliable identification evidence, failed to make proper objections and motions, failed to object to solicitor's improper comments during closing argument, failed to place all sidebar discussions on the record and made

harmful arguments against his and Brittany Croskey's testimony. At this time I turn it over to Mr. Palmer.

THE COURT: All right.

MR. FALK: Your Honor, with respect to the Brady violations, it's either that the -- and I don't know how this is going to play out. It's either that the information was never turned over to defense counsel or defense counsel never went and got the information, so we would see that -- and I'll explain this more as these issues come up. But it's either that defense counsel in due diligence should have gone and gotten this information, or the State failed to provide it.

THE COURT: Okay.

MR. FALK: So at this time I'd like to call Mr. Palmer to the stand.

THE COURT: Okay. Come on around.

THE CLERK: Place your hand on the Bible, raise your right hand. State your full name.

THE WITNESS: Marc Anthony Palmer.

WHEREUPON,

MARC A. PALMER,

having been duly sworn by the clerk, testified as follows:

THE CLERK: Step around, sir. Be careful coming up. State your full name and spell your last name for the record please, sir.

THE WITNESS: Marc Anthony Palmer, P-A-L-M-E-R.

DIRECT EXAMINATION

BY MR. FALK:

Q Mr. Palmer, who represented you in this case?

A E. Guy Ballenger.

Q And how did -- did you retain him or was he appointed or was he ---

A He was appointed by the court.

Q Okay.

A By William Jeffrey Young.

Q Okay. And let me sort of start talking about some of the issues regarding information that you never saw prior to trial in this -- an allegation that possibly this is a Brady violation in that it was never turned over to Mr. Ballenger or maybe Mr. Ballenger should have gone and found the information; but regardless, these are things that you never saw. Is that correct?

A Correct.

Q All right. So example, there's some

discussion about a videotape from Young's vid-- from the Young's gas station. So can you sort of explain what we're talking about. There were two gas stations in this case?

A There were two gas stations in this case. There was a gas station to the left that was a 521 Money Saver. Then there's a gas station to the right. That's a Young's, a Young's gas station. There was a gravel road in between the two. Now they're saying that the suspect ---

Q Okay, let me just -- let me just back up for a minute. So now, the one from the Money Saver, that was actually introduced in evidence; is that correct?

A Yes.

Q Did you ever see that prior to the trial?

A Right before trial they showed it to me.

Q What do you mean "right before trial"?

A I mean, like, when they brought me in to go to trial the day, the day before, they showed me the Money Saver tape with three car -- three other cars on -- on the video.

Q Okay. But that's the first time you saw it was the day of the trial?

A Yes, sir.

Q Okay. And then you said there is the Young's, a Young's gas station right on the other side of the gravel road; is that correct?

A Yes, sir.

Q What's the significance of the -- in your mind, what's the significance of the gravel road between the two?

A Well, they're saying that the suspect, whoever shot and killed Mr. Keels, ran to that gravel road and now they're saying that there was a car on the gravel road and the suspect got into the car and drove and left. Now, they're saying around the time I'm ---

Q Now let me just -- let me just take this in little pieces here. All right. So you're -- so they're saying, in effect, that the killer traveled down the gravel road?

A Right.

Q And therefore, never would have driv-- never would have gone past the Young's gas station; is that correct?

A No. They would have never gone past the Young's gas station.

Q Okay, all right. And we're gonna circle back around to that video, but I just wanted to go

through some things. Now there was also some testimony about a video at a Citgo station. Do you remember that, the Citgo station on 521?

A Yes, sir.

Q And did you ever see a video from that station?

A No, sir.

Q And you never saw a video from the Young's gas station; is that correct?

A No, sir.

Q Do you know whether or not a video was ever turned over to your lawyer on the Young's?

A No video was ever turned over. My own invest-- well, former Investigator McFadden said that he watched the videos, but ---

Q Okay, we'll get to ---

A ---he never turned them over.

Q All right, we'll get there. But as far as you know, it was never turned over to your lawyer?

A No, sir.

Q Okay. Now you also have some concerns about some missing statements.

A Yes, sir.

Q You have some concerns about a missing statement that was never provided to you that

Ms. Brittany Croskey made; is that correct?

A Yes, sir.

Q And what was the significance of Ms. Croskey's testimony in this case?

A Well, Ms. Croskey, Ms. Croskey stated that -- well, the police led her ---

Q Now don't -- just ---

A --- to the former questioning ---

Q I just want ---

A Okay. Well, she, she said ---

Q What was -- what was the significance of her trial testimony?

A Her trial testimony was she thinks it could have been me because of my walk.

Q Okay. So she was part of the case that identified you?

A That -- at -- at first, yes, when the first case ---

Q Okay, all right.

A Yes.

Q Now why do you think there was a missing statement?

A Because she was being coached throughout her second statement, and the ---

Q Well, what ---

A In the beginning of the second statement they said we -- they said they had a first statement, and they said we wanna -- they was trying to remind her of where, where they were at in their first statement, whatnot.

Q Did they say that there was -- they had technical problems with the recording?

A Yes. They said they had technical problems ---

Q Okay.

A ---the first statement.

Q So did you ever see a summary, the investigator summary of that first statement?

A No.

Q Now you also had some concerns about a statement from a Mr. Sabb?

A Yes. Mr. Sabb was the only -- was the only witness that was walking with the victim at the time of the shooting.

Q Okay.

A And Mr. Sabb clearly stated he did not know who killed Therris Keels. He says he knows me, he's seen me around, but he did not know who killed Therris Keels.

Q Now why do you think there was an earlier

-- 'cause you got some copies of some statements in your discovery; is that correct?

A Yes, sir.

Q And you got, actually, transcripts of a statement that Ms. Croskey made, right, ---

A Yes, sir.

Q ---Mr. Sapp made and Mr. Smith made, right?

A Yes, sir.

Q And that was provided to you in your discovery?

A Yes, sir.

Q So why do you think Mr. Sabb made a statement that was not included in your discovery?

A Honestly, he was the only person that actually was telling the truth about what happened that night and what he seen, you know. He didn't make anything up. He said ---

Q Let me just -- let me see if this might refresh your recollection 'cause it's obviously been a while. Did you have a chance to look at these statements?

A Of -- from Mr. Sabb?

Q Yeah.

A Not the one from Cyrus, from Officer Cyrus

of Greeleyville Police Department; but every statement corroborates his story, his statement.

Q No, I know. I'm just -- I'm trying to get to the point of why we think or why you assert there's missing statements. So I'm gonna show you a copy -- and you said that you read these statements, right?

A Yes.

MS. DIXON: Your Honor, I have an objection. I'm not sure he can use a recorded statement that he was not a part of to refresh his recollection.

MR. FALK: It's refreshing his allegation, I mean.

THE COURT: Yeah, I'm gonna let him do it. That's...

BY MR. FALK:

Q Don't read that into the -- just look at the beginning of that statement.

A It says ---

Q No, don't read it. I want -- read it to yourself. I'm just hoping that's gonna remind you why you think there was a earlier statement.

A Well, because when I was going through my paperwork, in Joseph Sabb's interview he said, like,

I told you all ---

MS. DIXON: Object to hearsay.

MR. FALK: I don't think he's offering it -- no, this is ---

THE COURT: This goes to his state of mind. I'm gonna let him talk, testify to it.

THE WITNESS: "Like I told you all this morning, I told Cyrus Saturday morning the same thing."

BY MR. FALK:

Q So, so to summarize, I mean, he was giving a statement to police?

A Yes.

Q And then he -- and part of that statement was that, I told y'all earlier or what I told you a couple of days ago, right?

A Right.

Q Okay. And so you got the copy of the one statement, but you never got a copy of any statement made prior to that; is that correct?

A That's correct.

Q And that's why you think that there was missing discovery in this case; is that correct?

A That's correct.

Q Why do you think you might have been

prejudiced by the lack of Mr. Sabb's -- by not seeing his prior statement?

A Well, ---

MS. DIXON: Object to speculation.

THE COURT: Well, he -- he can testify to his state of mind with respect to why he's asserting these things. Is there a former statement from Sabb?

MR. FALK: We've never been turned over one.

THE COURT: Okay, all right. So this is just in his mind that there is a former statement, correct?

MR. FALK: That's correct, Your Honor.

THE COURT: Okay, all right.

MR. FALK: Now you want us to...

THE WITNESS: In Joseph's statement ---

MR. FALK: Wait, wait. Excuse me. Let me -- may I speak with my client before -- I think he's gonna utter something. No, I can't do that. All right.

BY MR. FALK:

Q Just respond to my questions here.

A I got you.

Q Why do you think there was a prior -- and

you think there was a prior statement from Mr. Sabb; is that correct?

A Yes.

Q And why do you think you were prejudiced by not seeing that statement?

A I think I was prejudiced by not getting, having a copy of that statement, because everyone in this, everyone throughout this whole trial, every witness, every witness in this whole case gave different statements, gave different testimony; but Joseph Sabb gave the same testimony, gave the same statement time after time. So every single statement that he gave that corroborates what he said, is -- is -- is vital to me. It's important to me, to me, to complete a complete defense. It's vital for the jury to hear one witness give the same statement constantly over and over again instead of this witness or that witness changing their statements up.

Q Okay.

A That's why that prejudiced me.

MS. DIXON: Your Honor ---

THE WITNESS: I needed that statement, everything from every witness.

MS. DIXON: Respectfully, for the record,

I know you overruled my objection, but I would like to just preserve on the record the reason for that was all pure speculation. He has no way to know this statement that he's never even seen if it'd be consistent or ---

THE COURT: Correct, no --

MS. DIXON: ---or not consistent.

THE COURT: That's all right. I'm gonna -- same ruling, but there is no -- well, we'll just go forward with it.

MS. DIXON: Thank you, Your Honor.

THE COURT: Yeah.

THE WITNESS: Please.

THE COURT: Mr. Palmer.

THE WITNESS: Please.

THE COURT: You -- you respond to questions, okay. That's -- that's how this system works, okay. Go ahead.

BY MR. FALK:

Q Okay, so you -- so Mr. -- so your point being that you believe that in his recorded statement he said, "Just like I told you the day before." So you -- so in that recorded statement that you have, he said, "My statement that I gave you four days ago, four days earlier, was the same

thing"; is that right?
A Right.
Q And so that would have been a consistency ---
A That's proof that there was a statement.
Q And that it was the same statement?
A Right.
Q That it was consistent?
A Right.
Q And he testified that -- did he testify at trial?
A Yes.
Q And was the statement at trial consistent?
A Consistent with every other statement he gave, he gave the authorities.
Q Now I think you were saying that you -- you believe that you were prejudiced by not seeing the earlier recording of Brittany Croskey's statement; is that correct?
A Yes, sir.
Q And is that because you think that -- and you said something about because she, she was coached. I think that's what your testimony was.
A Yes, sir.
Q So what facts do you think we have here

that would support your allegation that law enforcement was coaching her?

A Well, it -- it was clear during the interview law enforcement asked Ms. Croskey, is there anything that you can help us with that will remind you of what the suspect looked like? Ms. Croskey said, no. Then they asked her again and asked her again. Hold on.

Q All right, here ---

A In ---

Q Do you have the statements there?

A Yeah. Ms. Croskey, Ms. Croskey had said ---

Q And, again, you are reading from a statement that was provided in your discovery; is that correct?

A Yes. That's the one ---

Q And that's the statement that was made -- present at the interview. This was a statement given on November 4th, 2010. Does it say that on the front page?

A Yes, sir.

Q And ---

A Okay. Ms. Croskey had state -- she said, do you know -- Investigator Wrenn, that's her name.

Says, "What did you notice about the guy under the light when he was pacing? Think really hard because you can see his silhouette." And then she said, "Did you notice anything about this person's walk?" Croskey, answer, "No, ma'am," to these questions. But Investigator Lail kept pushing on asking, "Was there anything that put you in the mind frame that this was Driver." Mind you, my name is not Driver.

Q But there was testimony at the trial that was your street name?

A No.

Q No?

A It's not my street name. That was something that she called me and they just came up with.

Q Okay.

A And then Brittany Croskey answered, "Yes, ma'am." And Investigator Lail then impermissibly suggested after Brittany Croskey said that she didn't notice anything about this person's walk and that was because of his walk.

Q Okay.

A And she ---

Q So in her -- in that statement there she never identified, she never said, yeah, I saw the

guy ---

A No.

Q ---and I saw his face, right?

A No.

Q She -- at that then, her statement there was that she identified her -- identified you by the walk?

A Yes, sir.

Q And that was only after ---

A Investi---

Q ---it was suggested to her a couple of times?

A Right.

Q But this was actually recorded in a second statement?

A Yes, this was recorded in a second statement.

Q Okay. I'm just try-- I'm trying to circle back around to why you think you were prejudiced by not getting that portion of her statement that occurred prior to them having technical problems.

A I feel like I'm prejudiced because they led her throughout that whole, that whole second interview, and there's no telling what was said during that first interview.

Q Okay.

A The police impermiss-- impermissibly suggested a form of identification; and Ms. Croskey, and Ms. Croskey ran with it, but she wasn't -- she wasn't fully on with it. She said she didn't really know. And then a year and some change later after her -- what her now her husband, gets locked up on crack charges, she ---

Q All right. I'm ---

MS. DIXON: Object, Your Honor.

BY MR. FALK:

Q ---gonna walk you through this all, we'll get there. Mr. Palmer, I just need you to sort of stay right on my ---

A All right.

Q ---answers.

A That's, that's how it prejudiced me.

Q Now -- okay. You had some concerns that there was some bad acts testimony that came into this case?

A Yes, sir.

Q And what was that?

A Oh, it was, it was a lot. It was from Wayne McFadden.

Q What did it ---

A Maurice Smith.
Q What did it cent-- what did it center on?
A Wayne McFadden brought in testimony of an alleged murder weapon. Wayne McFadden kept -- said that he -- a confidential informant ---
Q Now let me back you up.
A They ---
Q What was this -- what was the bad act, you know? You were saying that they brought in prejudicial information ---
A Of me and -- of me and a -- of me having a fight with another guy in the neighborhood.
Q And how much before this -- the incident at trial? How much before was that? Was that the night before or was that ---
A The -- of the ---
Q What's the time frame between this fight that you're talking about here and the shooting?
A The fight actually happened in, I wanna say September, September. It was the night of the Greeleyville, Williamsburg County, Williamsburg County game.
Q Okay, so -- all right. So it was a couple of months before or at least ---
A Probably about a month, a month before,

maybe longer. I'm think-- no, probably about, I wanna say September 3rd if I'm not mistaken. I wanna say September 3rd. You know, no one really knew when the fight, like, you know what I'm saying, like, the actual date, ---

Q Okay, all right. I just want ---

A ---but we have to go back in football records ---

Q I just wanted to get to that.

A ---and schedules. All right.

Q All right. And you have some concerns about whether or not there was a plea deal that was never disclosed to you between the State and Maurice Smith; is that correct?

A Yes.

Q Okay. And I have a list of his charges, and on -- let me just read these to you. On April 25th, 2009, he was arrested under warrant MO82687 and that was for, in effect, PWID drugs, cocaine base first offense. Does that sound right to you?

A Yes, sir.

Q And then he at that same time he had another arrest for PWID under a different warrant; and this is, again, on April 25th, 2009, and that's

warrant MO82688. And then he had a third arrest on -- on that same day for a similar drug charge. All right, and so then the -- Therris Keels is killed on November 27th, 2010. Now did you have -- at any time did you have an altercation with Mr. Smith while y'all were in the detention center, or an argument?

A December 15th, 2011.

Q Okay. And what -- and where did that take place?

A At Williamsburg County Detention Center.

Q And what was that discussion about?

A He -- I was just speaking to him and he said don't talk to me and, you know, it -- we just got into it and that, that was it, you know, wasn't no more words said.

Q And that prior September you were in Williamsburg County jail. So was he in charge -- was he in the jail at that time because of charges he got on September 10th, do you think, a couple of months earlier? Was he in there on drug charges?

A Yes, he was in there on drug charges.

Q Okay. And based on your review of the discovery, you believe that Mr. Smith gave a statement to McFadden sometime around November 1st,

2010; is that right?

A Yes, sir.

Q And your recollection was that he was -- that you were not identified in that statement; is that correct?

A That's correct.

Q All right. And then so we have a couple of more arrests for Mr. Palmer and then y'all have this fight on December 15th. On December 30th Mr. Smith picks up two more drug charges. December 30th, 2011, he picks up two more drug charges. Is that your understanding?

A Yes, sir.

Q Okay. And then so a couple of months later on February 13th, 2012, do you have information that another statement was given?

A Yeah. After he got his indictment, he -- he gave a statement to a Rhett Holden, SLED agent Rhett Holden, and he said -- he said the same thing his wife saying, you know, I know it was him by his walk; but this time he saying I know it was him by his walk. And, you know, he just making up a whole bunch of stuff.

Q Okay. So he ---

A He saying the guy had a fight and ---

Q So he had several charges on him before -- he had three charges on him, three drug charges on him before he gave a statement, the November 1st, 2010 statement, where he doesn't identify you. He picks up some more, he picks up some more charges. He -- y'all have an altercation in the jail, and then he changes his testimony; is that correct?

A Correct.

Q And then all his charges were disposed on November 13th, 2012; is that right?

MS. DIXON: Your Honor, I'm gonna object to leading.

THE COURT: No, this will -- it speeds things up. I'm gonna let him do it. Thank you.

THE WITNESS: On September 12th ---

BY MR. FALK:

Q Let me just say this. His charges were all disposed of?

A His charges were all ran concurrently as a first offense.

Q Okay. And so that all happened prior to the trial; is that right?

A Right.

Q Okay. And then there was the trial and that's in March 2013?

A Right.

Q Now did you ever come across anything after that that sort of -- about any other actions between the solicitor and Mr. Smith?

A After trial?

Q Yeah.

A When I was in the county jail they called Mr. Smith back to the courthouse after trial. I don't know nothing about what happened at that courthouse; I don't know anything. All I know is due to the Freedom of Information Act I was able to get information that Maurice Smith was released from his prison -- from his imprisonment and on probation after he was only serving 2-years of a mandatory 10-year 85 sentence.

Q And you had shown me something.

A Yeah, I don't even know what that means, or---

Q So you looked on the ---

A Order of downward departure.

Q ---tracking sheet.

A Right.

Q So what ---

THE COURT: Hang on. Wait till -- only one person can talk at a time, okay. All right, go

ahead. Finish your question.
BY MR. FALK:
Q Okay. So what -- that piece of paper, that's a tracking sheet for Clarendon County?
A Yes, sir.
Q And that's -- that's describing charges against ---
A Yes, sir. My -- in my yellow envelope I have the general sessions tracking sheet where it shows that ---
Q Well, it shows it right there.
A No, it shows a charge was dismissed ---
Q Well, I'll get there. I'll get there.
A ---due to a plea agreement.
Q We'll get there. But that shows that there was a -- there's a mention on that sheet that says there was a downward departure?
A Yes, sir.
Q Okay. What was the date of that?
A That was 5/22/2013. That's May 22nd, 2013.
Q So that's after the trial. That's after he testified?
A Yeah.
Q Okay. And so that is -- is that why you

believe there was some type of deal between the prosecutor and Mr. Smith?

A No. I be-- I know ---

Q Does that support your argument?

A No, that's not why. Why I believe that there was a deal is because I have a copy of the general sessions tracking sheet that says that one of his charges was dismissed as part of a plea agreement. I couldn't get it from Williamsburg County. I had to get it from Clarendon County.

Q Okay. So there was a plea deal ---

A Yes.

Q ---in your understanding. And that was never made -- and you were never made aware that there was some kind of deal in place, right?

A We didn't even get a NCIC report.

Q On Mr. Smith?

A On Mr. Smith.

MR. FALK: Your Honor, we obviously have other things to talk about in this case, but I think that's all that I want to bring in through Mr. Palmer at this time.

THE COURT: Okay. Cross-examination.

CROSS-EXAMINATION

BY MS. DIXON:

Q How are you?
A I'm alive.
Q You're alive, great. I just have a few questions for you today. Now you talked about a missing statement from Ms. Croskey, correct?
A Yes, ma'am.
Q And you believe there's a missing statement because law enforcement indicated they were having technical difficulties when they started recording a different statement, correct?
A Yes.
Q And you are saying so that statement was the same day or a different day, what are you alleging here?
A I don't know. Whatever it says in your recorded statement. In the recorded statement it says that we had to do this over and we left off here in such and such spot.
Q So what are you alleging? What day are you alleging that this other recorded statement occurred?
A They might have record on the same day. I know it recorded before the second one.
Q Okay. So you don't know is what you're saying?

A No.
Q So this is speculation?
A It's not speculation. I mean, the officer said it theirselves in the statement.
Q Do you have that statement?
A Yes.
Q You have the statement, the first statement that you're alleging is missing?
A No, the second statement where the officer said we had to start this over 'cause we had technical difficulties.
Q Okay. And you also talked about a missing statement from Mr. Sabb. Do you have that?
A No, I don't.
Q You don't have that either, okay. So you don't have either of those things so we don't even really know if any of those things exist, correct?
A Well, I mean, the officer said it does so -- I mean, you're admitting that your officers be lying?
THE COURT: Mr. Palmer, you don't ask questions ---
THE DEFENDANT: Right.
THE COURT: ---in your role as a witness. Okay.

BY MS. DIXON:

Q Now you also talked about there's a gravel road, there was a gas station that the person who did this shooting and sped off in a car never would have passed this Young's gas station so tell me why did you want that video?

A Because it would have shown me passing the Young's gas station like I told them I was that night. If they would have showed me passing that Young's gas station around the same time, they would have showed me passing that 521 Money Saver gas station. That was proof. That was proof of my actual innocence that I was not on that gravel road that night, that ---

Q How far ---

A ---I was not the person who killed Therris Keels.

Q How far away is that gas station from where the shooting occurred?

A It's -- I mean, I, you know, it's -- it's all in the same town, one gas station to the left of the gravel road, one gas station to the right. I can't tell you.

Q And from ---

A Either way it goes, either way it goes, a

car cannot just go from a gravel road in between two gas stations to pass one gas station and, you know what I'm saying? It just doesn't make sense. It, it ---

Q So how ---

A It really prove -- it really, it really would have proved my innocence.

Q How far away was that gas station from where the shooting occurred? Would you say it was a mile, less than a mile?

A No. It was less than a mile.

Q Less than a mile?

A Less than half a mile.

Q Less than a half a mile. So a block or two. So you're saying that a video showing your car driving by a block or two from where the shooting occurred around the time the shooting occurred would have proved your innocence?

A I'm saying that a video showing me passing by a gas station that was before the gravel road would have -- would have proved my innocence because they're trying to say my car was parked on that gravel road. So if I shot Therris Keels, I would not be driving past Young's gas station. I would have been on that gravel road. And, yeah, you

probably would have seen a car with that Money Saver, yeah, but you also would have seen me on that Young's gas station too.

Q Okay. So they did see your car on ---

A That would have proved my innocence. They seen the video, but they didn't obtain it and they didn't allow me to see it.

Q Okay. Did they see your car on -- was your car on the other video?

A On what video?

Q The video that was entered into evidence in court?

A Yeah, me and three others.

Q You and three others. So your car, that was, in fact, your car on that video ---

A Yes.

Q ---that was depicted right around the time of the shooting less than a half a mile from the shooting?

A Yeah.

Q Yeah, okay. So you agree with that.

A Yeah.

Q All right. And let's talk about Ms. Croskey's statement. I think you were asserting that she was coached by law enforcement. Do you

have any -- do you have a pin in your leg by chance?
A In my folder, not on me.
Q What -- say that again, I'm sorry.
A You said I have a pen?
Q I'm asking do you have a pin in your leg?
A A pen in my life?
Q In your leg?
THE COURT: A pin.
THE WITNESS: Oh, not anymore. I got -- I got 'em all removed.
BY MS. DIXON:
Q You got 'em all removed. But at one time you did have a pin in your leg, correct?
A Yeah.
Q At the time of the shooting, in fact, you had a pin in your leg, correct?
A Yeah.
Q And did it ever affect the way you walked?
A Not really, no.
Q Not really. Do you remember testifying ----
A Only when I get tired.
Q Only when you get tired. Do you remember testifying at trial?
A Yes.

Q Do you remember what you testified to in terms of the way it affected how you walk?

A Yeah.

Q What was your testimony?

A Well, I -- not, not -- I know I said the same thing, only when I get tired.

Q Let's see, would you agree if I said that you said, "I mean, I really doubt that. I don't walk the same all the time. It kind of depends. Sometimes I might walk -- sometimes I might be hunched over and walk on the tip of my toes or something. Sometimes I might walk straight up and I might just be strutting or something." Would you agree that was your testimony at trial?

A Yeah, sounds like it.

Q So it sounds like maybe you were acknowledging at that time that you did maybe walk a little bit differently?

A Ma'am, the police suggested that because they knew I had a pin in my leg. I came to South Carolina with a leg injury. It's a small town. So the police suggested that to that girl. She said no at first and then they did it again and then she said, I don't know, maybe, yeah. And then she changed it and said, I don't know him like that.

All right. You people came up with the story and took 12-years of my life from me for something I didn't do, and now you're trying to cover it up or you're trying to make it seem -- seem bad like, like, it's -- it's sad, man. And you -- I don't get it, I don't get it. Y'all know y'all wrong 'cause you looked at the paperwork.

MS. DIXON: Your Honor, I'm gonna object. This is nonresponsive.

THE COURT: Yeah, this is a narrative. You need to just respond to the questions.

THE WITNESS: Oh.

MS. DIXON: I have nothing further.

THE WITNESS: I know that's right.

THE COURT: All right, any redirect?

MR. FALK: Yeah, let me just clarify something.

REDIRECT EXAMINATION

BY MR. FALK:

Q About this video, all right, so there's the Money Saver and your car is driving past it along with the other cars, right?

A Correct.

Q And then it passes this dirt road or gravel road, right? No, I mean, excuse me, there's

a gravel road between the Money Saver and the Young's, right?

A Yes, sir.

Q And the State believes that something happened on the gravel road that related to the murder, right?

A The State believes that -- the State said the suspect ran to the gravel road and a car sped from the gravel road.

Q Okay. So the gravel -- the -- this gravel road in between the two things was important to the State?

A Yes.

Q And then what you're saying is that had they seen video from the Young's, they would have seen your car driving past the Young's gas station?

A That's correct.

Q And so that would have sort of -- I mean, the State was relying on the fact that they saw your car on the one from the Money Saver?

A That's correct.

Q No further questions.

THE COURT: Okay. Anything in response to that? Okay.

Thanks. You can step down. Thank you.

(Mr. Falk confers with Mr. Palmer.)

MR. FALK: So it's my understanding trial counsel is going to be here after lunch?

MS. DIXON: Uh-huh.

MR. FALK: You want to go out of order and have Ms. Barr testify now? I mean, just...

(Attorneys confer.)

MR. FALK: Can we call Ms. Barr to the stand?

THE COURT: Sure.

THE CLERK: Place your left hand on the Bible, raise your right hand. State your full name.

THE WITNESS: Kimberly Barr.

WHEREUPON,

KIMBERLY BARR,

having been duly sworn by the clerk, testified as follows:

THE CLERK: Thank you, ma'am. Step around please, ma'am. State your full name and spell your last name for the record please, ma'am.

THE WITNESS: My name is Kimberly V. Barr. My last name is spelled B-A-R-R.

DIRECT EXAMINATION

BY MR. FALK:

Q Ms. Barr, where were you -- where were you

employed in two thousand and, I guess 11?

A I was employed with the Sabb Law Group. Law offices with Ronnie Sabb then is what it was named, and I also worked as a contract assistant solicitor in Williamsburg County.

Q Okay. And so did -- there was some testimony from Mr. Palmer about charges against Maurice Smith. Were you -- did you hear that?

A Yes.

Q And all of those charges got resolved on September 13th, 2012. Does that sound right?

A That sounds about right, yes, sir.

Q Were you the solicitor in court when his charges were resolved?

A I believe so.

Q Okay. And so you would acknowledge that on April 25th, 2009, he -- Mr. Smith picked up three drug charges in Clarendon County. Does that sound right?

A I'm not sure when he picked them up, but I do know that he had drug charges in Clarendon County and Williamsburg County.

Q And your plea wrapped up the Williamsburg County charges and the Clarendon County charges; is that right?

A Correct.

Q Okay. And was it your understanding that sometime in late September of 2011 he picked up these charges in Williamsburg County? I can show you -- would it help you if I give you the ---

A Please.

Q ---sentencing sheets?

A. Yes.

Q Sure. I can just hand you all of them.

A Okay.

MR. FALK: May I approach the witness?

THE COURT: Yes.

BY MR. FALK:

Q I'm gonna refer to them by that number.

A Okay.

Q So what I've handed you are the -- I mean, you've seen those kinds of sheets before; have you not?

A I have, yes.

Q And those are from the -- those are on the SC Court's website?

A Correct.

Q Okay. And so are -- can you find one -- I think I have them in alphabetical order, I mean, chronological order.

A Okay.
Q So you see the three charges from 2009, do you? They're ---
A Yes.
Q Okay. And he was charged with sort of a PWID. On that -- if you look at M082687, you see that one?
A I do.
Q All right. So what was he charged with? What was the original charge?
A Trafficking in ice, crank, or crack 10-grams or more but less than 28-grams.
Q And what did he plead to? What do you have there?
A Possession with intent to distribute cocaine base.
Q All right.
MR. FALK: May I approach, Your Honor?
THE COURT: Sure.
BY MR. FALK:
Q May I see it for a minute.
A This is the original charge here.
Q I know, but it's under that block there. Original charge code, original charge.
A The original charge was for trafficking.

He pled to a lesser included ---

Q Okay.

A ---offense of PWID or possession with intent to distribute.

Q So that sheet may have them backwards?

A No. The sheet ---

Q Is it ---

A Well, it may have it backwards, correct.

Q Right. 'Cause usually when I've looked at those sheets the box on the right shows the original charge and ---

A That's right.

Q ---the box on the left shows what he pled to.

A Correct.

Q Okay. And so you see 268808, 2688?

A 2688, I do.

Q Yeah. And what was he charged with there?

A Possession with intent to distribute cocaine base or crack cocaine first offense.

Q Okay. Do you know what the sentencing range on that is?

A I believe 0 to 15.

Q And what is the sentencing range on the trafficking charge to start? On traffic-- on what

he was originally charged with in 2009? Is that 2 to 10? Trafficking first 10 to 28-grams?

A I think for trafficking it's, it's 10. It's a minimum of 10.

Q Okay.

THE COURT: Depends on the weight.

THE WITNESS: I don't know the higher range though.

THE COURT: Depends on the weight. It depends on the weight, correct?

THE WITNESS: Correct, sir.

THE COURT: Okay.

THE WITNESS: And it's more than 10, less than 28-grams.

BY MR. FALK:

Q And he also has another arrest and that's the one that's 82690.

A Right.

Q And that's -- what is that one for?

A Trafficking in ice, crank, or crack cocaine first offense, more than 10-grams, less than 28-grams.

Q What did he plead to?

A Possession with intent to distribute or distribution.

Q Okay.
A It's the same.
Q PWID?
A Penalty, yes. PWID or distribution is the same penalty.
Q All right. So then do you see the charges there from Williamsburg County? They're the ones on September 10th, 2011.
A Yes.
Q And what was he charged with?
A Under warrant number M686460 he was charged with trafficking in ice, crank or crack, 28-grams or more but less than 100-grams and ---
Q And -- oh, I'm sorry. And what did he -- and what's the disposition on that?
A It appears that that was nol prossed.
Q Did you have a role in that charge being nol prossed?
A Yes. Well, I presume that I was the solicitor handling it, but, yes.
Q And he had another charge on the warrant that ends in 461?
A Correct.
Q And what was that?
A He was charged with trafficking in crack

cocaine 10-grams or more but less than 28-grams. He ---

Q Was he charged with 28 to 100 and then ---

A Yeah, they've got it reversed again so. I'm sorry, he was originally charged with trafficking in crack cocaine 28-grams or more but less than 100-grams. He pled to a lesser included offense of trafficking in crack cocaine 10-grams or more but less than 28-grams.

Q Okay. And then he picked up yet some more charges in December of 2011, and those are back in Clarendon County. He's got another -- is that up there?

A No, sir.

Q I'm sorry.

A That's okay.

(Attorneys confer.)

BY MR. FALK:

Q Just a refresher there.

A All right.

Q Let me grab those back from you.

A All right.

Q Have you seen sheets like that before?

A Yes.

Q And what are those?

A These are sentencing sheets.
Q Okay.
A General sessions court sentencing sheets.
Q And so what charges are those sentencing sheets for?
A All right. So there are three sentencing sheets. They appear to all be from Clarendon County so my name does not appear on here as a solicitor, as a prosecutor. There is a sentencing sheet for warrant number M082687. There is a guilty plea for trafficking crack cocaine more than 10, less than 28-grams. There is another -- well, it appears to be an am-- it says amended sentencing sheet, arrest warrant number M08269. The guilty plea is for distribution of crack cocaine first offense. In parentheses it says that -- I'm assuming it's a sentencing range of 0 to 15. It appears to be signed by solicitor Chris Durant in Clarendon County. And the third sentencing sheet is, again, it's an amended sentencing sheet, arrest warrant number M082688, and that's for distribution of crack cocaine first offense, sentencing range of 0 to 15. Again, that's signed by assistant solicitor Chris Durant.
Q Okay. And so that's for that first group

of charges that he picked up in April of 2009. Does that sound right?

A Yes. And I wasn't sure whether these were separate offenses than what you showed me from the public index or these are the sen-- are these the sentencing sheets from those?

Q I believe so. Okay.

A You mentioned that he picked up additional charges ---

Q Yeah.

A ---and so I didn't know whether or not these reflect additional charges or the previous ones we spoke about.

Q These are the...

A So I'm looking at three public index forms from Clarendon County and one or two of the warrant numbers seem to correspond to the sentencing sheets.

Q Okay.

A But another appears to be an unrelated warrant.

Q Okay. This is what I wanted to show you here. Here's two more from the public index ---

A Okay.

Q ---from Clarendon County.

A All right.

Q Can you tell me what those are?
A One is from Williamsburg County that you handed me and the other is from Clarendon County. Which one do you want me to talk about?
Q They all look the same.
A I believe I talked about that warrant number already.
Q It's the two Williamsburg ones.
A Okay. And I'm sorry, what was your question?
Q If you can just sort of identify those.
A Certainly. These are public index forms from Williamsburg County reflecting charges against Maurice Smith. The first is warrant No. M686460. It looks like he was charged with trafficking in crack cocaine. It reflects a disposition of nol pros on September 13th, 2012. The second one is a public index form State v. Maurice Smith, warrant No. M686461. It shows that he was initially charged with trafficking in crack cocaine 28-grams or more but less than 100-grams; and he pled guilty on September 13th, 2012, to trafficking in crack cocaine 10-grams or more but less than 28-grams as a lesser included offense.
Q And then is there something further down

there showing a date about a downward departure on the one where he received the sentence?

A On the public index form?

Q I'm gonna show you this Clarendon County one.

A Okay.

Q And what is that -- what was that Clarendon County charge?

A The one you just handed me?

Q Yes.

A Trafficking in crack cocaine.

Q Okay. And what did he -- what was his -- what did he plead to in that case?

A All right. So this is for arrest warrant No. M086101. He pled guilty to trafficking in crack cocaine 10-grams or more but less than 28-grams.

Q And he got a 10-year sentence? Is there a box right under there that shows charges that show sentence?

A Yes. Yes, ten years.

Q All right. Then further down do you see a box where it says that there was a downward departure?

A Order, yes.

Q What is that?

A A downward departure is when the court, my understanding, is when the court after having sentenced an individual for a criminal offense then later reduces that, that imposition of that sentence.

Q Did you have a role in that?

A Sort of.

Q Can you explain what your role was?

A Sure. After Mr. Smith testified in connection with Mr. Palmer's murder trial, his attorney either contacted me or the Clarendon County solicitor's office and asked that he -- that he intended to file a motion for a downward departure. I can't remember the name of the statute -- it escapes me right now -- but it allows an individual who is serving an active sentence to request that the sentence be reduced if they provide substantial assistance to the State and the prosecution of another offense.

Q Did you have a conversation with his attorney prior to his sentencing that he could go in and file a downward departure?

A No.

Q And what is the sentencing on a -- he did plead guilty to trafficking; is that correct?

A Correct, yes.
Q And that's a 10-year sentence; is that correct?
A Correct, yes.
Q And that's a 85-percent sentence; is that correct?
A Correct.
Q So the minimum he would have to serve on that sentence is eight-and-a-half years?
A Correct.
Q So did any of the investigators in this case, do you know if the investigators in this case talking to Maurice Smith that encouraged or -- do you know of any conversations between November 1st, 2010, and February 13th, 2012, where investigators talked to Maurice Smith about changing his statement?
A No.
Q So it's your testimony that he did not -- that he -- that you had no conversations with Mr. Smith about changing his testimony?
A Did I have conversations with Mr. Smith ---
Q Yeah.
A ---about changing his testimony with

regard to Mr. Palmer's case?
Q Yes.
A No.
Q Did you -- were you responsible for getting all the discovery in this case?
A Yes.
Q Did you get the videotapes from the Young's gas station?
A The investigators in the case obtained the tapes, and I was able to view them.
Q Okay.
A Or the tape. I shouldn't say tapes, the tape.
Q Okay. When you're saying tape, are you referring to the one that was introduced into evidence?
A Correct.
Q All right. That's from, I think, the Safe -- Super Saver or whatever?
A And I can't remember ---
Q Money Saver.
A Money Saver, Super Saver. I, I think it's the Money Saver.
Q But Investigator McFadden also went to the Young's gas station which is right on the other side

of that dirt road.

A I'm not sure where it is; but it's my understanding, my recollection that he did.

Q Okay. And did you turn over the tape from that?

A I don't recall there being a tape that was obtained. My recollection of his testimony was that he went there, he reviewed the tapes. It didn't show anything is my recollection of what he said, and therefore, he didn't obtain a videotape.

Q So we have to rely on what Mr. McFadden said he saw?

A In that instance, yes.

Q And how about the videotape from the -- how about the videotape from the Citgo station on 521? Let me back it up.

A Yeah.

Q How many videotapes from gas stations did you see, did you see?

A One.

Q One.

A Yes.

Q And that's the one that was introduced from this Super Saver or whatever it was called, right?

A The one that was introduced at trial, yes, sir.

Q Okay. Did you direct Mr. McFadden to go to the Citgo station to look at the videotape?

A No.

Q Had Mr. -- had you been made aware of any type of alibi testimony or alibi assertion from Mr. Palmer in this case?

A I don't have a specific recollection of it because it's been so long ago. I read his application for PCR and in it he -- he made reference to Investigator Wayne McFadden saying that he attempted to confirm his alibi and was unable to do so.

Q Okay.

A That's the extent of my recollection about an alibi.

Q Okay. And so why did you not get the videotapes from the Young's?

A If the Young's is the store that Investigator McFadden purportedly went to ---

Q No, this is the other store. This is the one -- this is the one on the other side of the dirt, of the gravel road.

A And please forgive me, I don't -- I don't

know where these stores are in relation to each other.

Q Right. Mr. Palmer testified that there was, I guess, the Super Saver one, the one that his car was shown up on.

A Uh-huh.

Q Then there's a gravel road. And then there's a Young's gas station right on the other side of the gravel road. Is that similar to your recollection?

A I don't have a recollection of what is -- I know that the gas stations that he referred to are within a very short proximity of each other. He testified it's half a mile; I think it's less than that. But to say where they are beyond them being that distance apart, I can't tell you.

Q He -- Mr. Palmer testified why he thought the gravel road was significant.

A Yes.

Q Do you remember?

A Yes.

Q Do you remember why he thought it was significant?

A Yes. It was the State's theory that he had taken his car and parked it on the gravel road,

got out of the vehicle, went up to Mr. Keels, the victim, shot him twice, and then ran back to the car. There was testimony that his vehicle had a distinctive color and it had a distinctive noise. I don't know if it was the muffler or something about the sound of his car that was pretty distinctive.

Q And the car was on the gravel road?

A That's my recollection.

Q Okay.

A And that there were witnesses who heard the vehicle and saw the vehicle and then obviously one of the things that was important in the State's case was that at the time Mr. Palmer's vehicle past the Money Saver, the gas station that the surveillance tape was entered in evidence, that it clearly shows that Mr. Palmer's vehicle was missing a hubcap which was a unique feature because I believe it was on the driver's front tire, and obviously, he had a very unique colored car. And so that time that it past the gas station was around the same time as 9-1-1 calls were being placed to report the shooting.

Q And do you recall that Mr. Palmer said that around the time of the shooting he was actually coming into town on 521 and his -- that's why the

Citgo station on 521 came into play?

A I don't recall his testimony.

Q Now there was some testimony about a statement from Ms. Croskey?

A Yes.

Q And Ms. Croskey, she had given a statement that apparently there was a malfunction in the -- on the recording device. Is that ---

A That's my understanding, yes, sir.

Q Okay. And so it's your understanding that there -- they talked and then there was a malfunction in the recording device and then the rest of the statement was recorded. Is that somewhat your understanding?

A Yes, sir.

Q Were any notes from that prior, from what was said before the malfunction provided to the ---

A My recollection is that Investigator Lail had interviewed Ms. Croskey and in her supplemental report -- and obviously I have to defer to that 'cause I haven't seen this file since I prosecuted in 2013 and I'm no longer with the Solicitor's Office. But it was my recollection that she made reference to what Ms. Croskey said in a supplemental report.

Q Do you know if that was ever turned over to the defendant?

A I turned over all the reports to defense counsel.

Q Would your office have organized getting that statement transcribed?

A No.

Q So if my client said that was part of his discovery, would that not have ---

A The Sheriff's Office would have contacted a court reporter to transcribe the state---

Q I gotcha.

A ---as opposed to the Solicitor's Office.

Q I'm sorry.

A No, no, you're fine.

Q Did you ever have a chance to review that prior to the trial?

A Yes.

Q Okay. And did you see in Mr. Sabb's testimony, and I can show that to you because...

A This is a statement of Joseph Sabb?

Q Yeah.

A Okay.

Q If I can just...

A Yes.

Q Let me see in that highlighted section on Page 2.

A And I'm sorry, what was your question?

Q I don't think I'd asked you.

A Okay. I'm sorry.

Q So you had -- so you were aware of Mr. Sabb's statement?

A Yes.

Q And you see where he -- he says that "As I told you guys on Thursday or two days before whatever," you see that there; is that correct? It's the highlighted part. "As I told you a couple of days ago" is his exact quote.

A Yes. I do see that, yes.

Q All right. So do you know of any statement that was given to law enforcement prior to that statement?

A I don't know of any written or recorded statement. The practice of the Sheriff's Office is when they're doing recorded statements, that's usually done in the Sheriff's Office; and if they're talking with witnesses on the scene, then they may not necessarily be recorded.

Q Did you -- what is your understanding of the practice when somebody from the Sheriff's Office

is interviewing a suspect or a witness? Do they take notes?

A Some investigators do; some don't. And I think the more seasoned investigators do, but if you've got a patrol officer who comes to a murder scene or a crime scene, they may not take -- the investigators, it's been my experience with the Sheriff's Office that the investigators do. They'll carry a little notepad on them and they'll take notes. I saw that mentioned in Mr. Sabb's statement that he spoke with a Mr. Cyrus, an Officer Cyrus. And I'm assuming that that officer worked perhaps with the Greeleyville Police Department. I don't know him. I don't have -- I didn't have a lot of association with Greeleyville Police Department while I was with the Solicitor's Office, but it depends on the officer.

Q Well, are you aware of any memo or supplemental report that was provided that discussed Mr. Sabb's statement prior -- the statement that he gave prior to the one that is recorded right there?

A I don't have any independent recollection at all of any notes or written or recorded statements of Mr. Sabb prior to this one dated November, this recorded one dated November 1st of

2010.

Q I'll grab that back from you.

A Okay.

Q Were you aware of a confidential informant that was used in this case?

A I don't remember a confidential informant, but I did see on Mr. Palmer's application that he maintained that Investigator Wayne McFadden told or said that a confidential informant had information about a fight between Mr. Palmer and Mr. Dominique McBride where a weapon was -- was used or presented in some form or fashion.

Q Is it fair to character this as that after the shooting the Sheriff's Office was having a difficult time finding an ID witness? At least initially?

A I think it would be fair to say people were reluctant to come forward. I think that's a fair assessment.

MR. FALK: Your Honor, I have no further questions. Well, wait, Your Honor. Your Honor, if I may have a moment.

THE COURT: Yes.

(Mr. Falk confers with Mr. Palmer.)

BY MR. FALK:

Q Are you aware of a -- which witness testified that they saw Mr. Palmer's car? You can describe them?

A I believe Mr. Smith, Maurice Smith, may have testified to that. I think Glen Kennedy testified that -- I don't know if Glen Kennedy actually said it was Mr. Palmer's car; but my recollection of Mr. Kennedy's testimony was that it was a bluish-green Nissan and that it made a loud noise similar to the defendant's vehicle.

Q If you'd have a moment to just look over Mr. Smith's testimony. It starts on Page 99.

A Just a moment to look over?

Q Well, let's just -- at least his direct. And, again, see if there's a mention of his car.

A And I'm sorry, sir, I'm on Page 99. This is the trial transcript?

Q I might have the wrong pages here. Let me get it for you. I'll get it.

THE COURT: It starts at the bottom and goes...

THE WITNESS: Thank you, Your Honor. And I'm sorry ---

BY MR. FALK:

Q We're looking for the -- 'cause you had

made a statement about that ---

A What was your question? I'm sorry.

Q You were saying that a witness saw his vehicle at the scene.

THE COURT: To save time, if you know where you're referring to you can refer her to it.

MR. FALK: I don't see it.

THE COURT: Okay. Well, I think her testimony was she couldn't remember, but she thought maybe Maurice Smith said that.

MR. FALK: She said that Glen Kennedy -- I'm just saying on the record. I mean, the record will reflect that it's neither.

THE COURT: Okay. So she's mistaken today nine years later.

THE WITNESS: Do you not want me to continue the ---

BY MR. FALK:

Q No, please do. 'Cause it refers to parts of your closing argument.

A I'm sorry? I'm sorry, I didn't hear you.

Q 'Cause I think it relates to part of your closing argument.

A And I'm not sure where in time I might have been referring to this. During my direct

examination on Page 108 of the transcript I believe I asked -- if this is Mr. Smith's direct I believe I asked, "I'm gonna hand you what's been admitted as State's Exhibits 12, 13, 14, and 15 are these photographs of the vehicle which the defendant was driving at the time he and Therris had a fight." The answer is, "That's the car."

MR. FALK: Your Honor, I can move on. I don't know if this ---

THE COURT: Well, I was just looking at 107, Line 24, the witness identifies the vehicle as the Neon. Is that what you're looking for?

MR. FALK: I'm looking for somebody that says that they saw the car on the gravel road. I mean...

THE COURT: Okay.

MR. FALK: Other than people identifying a car with Mr. McFadden, I mean, with Mr. Palmer, as whether or not anybody actually testified that they saw the car on the road.

THE COURT: Okay. Well, you...

THE WITNESS: And, again, I'm unclear as to the time I was referring to during my direct examination, but I do see that I asked him about the car. "Do you recognize the car on Page 107, and is

that the car in terms of the vehicle the defendant was driving that day?" I'm not sure now as I testify, whether I meant that day, the day of the shooting or some other day; but he does answer in response, "The Neon." And Mr. Palmer was alleged to have been driving a Dodge Neon at the time of the shooting.

BY MR. FALK:

Q I can move on.

A Okay.

(Mr. Falk confers with Mr. Palmer.)

MR. FALK: Your Honor, I have no further questions.

THE COURT: Okay. Cross.

CROSS-EXAMINATION

BY MS. DIXON:

Q Ms. Barr, how are you doing today?

A I'm good. How are you?

Q Good, thank you. Before we get started, how many years have you been a solicitor or were you a solicitor?

A Ten years.

Q Ten years. Okay. You ---

A Twelve years, I'm sorry.

Q Twelve years, okay. And in your 12 years

as a solicitor did you ever engage in plea negotiations?

A Absolutely.

Q Okay. And as part of your practicing engaging in plea negotiations, did you ever agree to allow pleas to reduce charges or to dismiss charges or anything of that nature?

A Sure, you have to.

Q Okay.

A We can't try every case so you have to.

Q Right. So as part of that process it was common for you, would you agree, to allow defendants to plead to lighter sentences or dismiss sentences?

A Absolutely.

Q Okay. And have you ever had a situation with co-defendants where one was going to testify against the other and you entered into some sort of plea agreement?

A Sure. As a part of testifying in a case, oh, sure. Sure.

Q Is there a thing that you normally do when that's a situation so that you can insure that the testimony will be -- say the co-defendant pleads guilty, is there anything you ever do to make sure they're gonna actually keep up their end of the

bargaining?

A Yes. If I've got a co-defendant who is testifying against another defendant in their case and I'm reducing a charge or I'm engaging in plea negotiations as a part of the testimony, then I would typically ask the court that accepts the plea, if you will, to withhold sentencing until after the trial of the co-defendant so that I would get the benefit of my bargain and some assurances that they don't get the benefit of a plea deal and then get on the stand and say something that's not truthful. Or if I've had cases where they're not co-defendants but an individual has a separate charge and is seeking a reduction of his or her sentence in exchange for providing assistance to the prosecution, again, I would ask the court to accept the plea but withhold sentence until after the case I'm trying has been concluded. That happens quite a bit. in this case, I didn't have a plea deal with Maurice Smith at the time he entered his guilty pleas in September, which was probably about six months before the trial of this case. That plea arrangement or his guilty plea came about because he had multiple charges in two different counties. Clarendon County and Williamsburg County are all

obviously within the same circuit. His attorney contacted the solicitor in Clarendon County who was prosecuting his drug offenses there and contacted me and basically said, listen, my guy wants to get everything wrapped up, he knows he has this -- these bunch of charges, and he'd like to get everything done and out the way. And so that's why you see on sentencing sheets that Chris Durant, who was the Clarendon County solicitor, signed off on some of those things. But it wasn't in connection at all with Mr. Palmer's case, it was just a matter of trying to dispose of six or seven warrants, whatever the number was ---

Q Right.

A ---at that time.

Q Absolutely. And if you had had some sort of a deal with Maurice Smith would you have handled the plea itself differently?

A Absolutely. He -- I would not have asked him -- I would have either not presented the plea to the court to accept; or if I did and the court did accept the plea, I'd ask the judge to withhold sentencing.

Q And in this case can you clarify when did the lawyer contact you or Maurice Smith contact you

about requesting a downward modification, or I guess he was going to request it. But when did he reach out to you about that?

A I would say maybe a week or two after the trial was concluded.

Q After the trial.

A If not, if not longer.

Q Okay. But it was not before the trial?

A Correct.

Q It was after, okay. And moving on to the issues regarding Brady violations. Do you recall the evidence that the State had in this case?

A Generally, yes.

Q Do you remember what some -- what was some of the more compelling evidence?

A There were many eyewitnesses to the shooting. Some did not come forward. We know that there were more people at the scene who did not testify and did not make their knowledge of what happened known to law enforcement, for various reasons.

Q Is that a thing that sometimes happens in criminal ---

A Nobody wants to be a snitch. Greeleyville is a very small town. Everyone knows everyone there

so that's not unusual at all. But essentially, the persons who were willing to come forward and give some information to law enforcement, they were consistent in their description of the shooter. Mr. Palmer at the time of trial was very clean cut; but on the night the shooting happened, he had very long draids -- dreads in his hair, and he had his hair pulled back in a ponytail is how the witnesses described the shooter.

Mr. Palmer had, according to witnesses, a .45 caliber handgun in an incident that happened about a month or so before the shooting of Therris Keels. Law enforcement recovered .45 caliber shell casings from the scene of the murder of Mr. Keels. There was overwhelming evidence in the record that there was bad blood between the victim and Mr. Palmer prior to the murder. There was testimony that during a physical fight between the victim and the defendant on a prior occasion, the victim got the better of the defendant and he -- his ego or whatever was bruised as a result of that; and he said, you know, this is not the end of it.

There was testimony about the defendant having a very unique colored vehicle, that the vehicle had a missing hubcap on the driver's side,

that -- and the vehicle had a distinctive sound when it was running. And obviously, we had the testimony of Mr. Smith who said that Mr. Palmer, who he knew very well, went up and shot Therris Keels who he knew very well. For some reason I want to say that there was another witness at trial, a male witness, who identified the defendant as the shooter. So it was not only direct evidence, but there was substantial circumstantial evidence that the defendant committed this offense.

Q And how many videos do you recall seeing as part of your invest-- well, as part of your preparation for this trial?

A As I sit here now, I just remember the one that was entered in evidence.

Q Okay. And is it common for law enforcement to go out and look at videos and if they're not really probative to not take a copy of them?

A Very common.

Q Okay. And do you recall anything about the video that was entered into evidence that could have, I guess, been circumstantial evidence for the State's case?

A Yes. And I believe Mr. Palmer even

conceded this at trial. That videotape that was entered showed a bluish-green Dodge Neon with a hubcap missing on the driver's side, fly by the convenience store within seconds of a 9-1-1 call being placed to law enforcement that Mr. The-- Mr. Therris Keels had been shot.

Q Okay. Within seconds you said?

A Yes. And it was -- and the store that had the surveillance footage was less than a mile from the shooting site.

Q Gotcha, okay. And going back to the issue about Croskey's statement, do you recall watching a recording of her statement?

A I don't recall watching it. I think I recall listening to it.

Q Listening to it, okay.

A Yes.

Q And was there any indication of any technical issues?

A I, I don't remember. I would just say this. I know Investigator Lail. She's been in law enforcement at that time probably 25 years. She's one of the more seasoned investigators there. My -- in reading Ms. Croskey's transcript what appears happened is perhaps someone thought that they had

their recorder or something. There was a problem. I trust her. I've never had any issue with her, and if she had a problem -- she testified that she had a problem with the equipment or whatever the case may have been, I'd bet money on it that that's what happened.

Q And let's see. I'm going back real quickly to some of the State's evidence. Do you recall any testimony about any distinctive noises that that car might have made?

A Yes. I believe Mr. Kennedy testified about that and perhaps one other witness; but I, I can't remember who. But there was more than one person talking about the distinct sound that the vehicle made.

Q And did any of them -- anybody recall hearing that sound around the time of the shooting?

A My recollection is yes.

Q Okay. And I guess my final question, did you give the defense everything that you had or make it available for them?

A Yes. And I recall that Mr. Ballenger and I watched the surveillance footage together prior to trial.

Q Okay.

MS. DIXON: Just one moment, Your Honor. Nothing further, Your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. FALK:

Q Now, Ms. Barr, you had testified that you thought somebody -- that you recollect that somebody else identified Mr. Palmer as the shooter. Is that just your testimony?

A Yes.

Q Do you recall who that was?

A As best I can remember it was a young male.

Q But you would allow the record, whatever testimony was in the record?

A Absolutely.

Q Okay. And do you have -- so it's your testimony that there was no discussion between you and the investigators on this case about trying to see if Mr. Smith wanted to change his statement or wanted to help?

A Was there -- are you asking me was there conversation between myself and the investigator or the ---

Q Yes.

A ---investigator and Mr. Smith?
Q Between yourself and the investigators?
A No.
Q Do you know of any -- do you know of any conversations that the investigators may have had with Mr. Smith suggesting that if you help?
A Suggesting that if he helped? What?
Q Yeah. 'Cause, I mean, he made a turnaround in his statement. He gave a statement. I mean, you're aware that on November 1st, 2010, he gave a statement and did not identify Mr. Palmer? And then he came back in later and gave a second statement. On February 13th, 2012, I guess a year-and-a-half later, all of a sudden now he does remember Mr. Palmer?
A Yes, that happens quite often.
Q And you're saying that there was no -- there was no discussion with Mr. -- with Mr. Smith about him changing his statement?
A I've never had a discussion with Mr. Smith about changing his statement. Mr. Smith, while -- I mean, he was a convicted drug dealer. And in that profession it's almost worse to be a snitch than it is to be a murderer so that does not surprise me that he would have initially been vague about what

he observed that night.

Q No further questions.

THE COURT: Okay. Anything else?

MS. DIXON: Just real quick just to clarify.

RECROSS-EXAMINATION

BY MS. DIXON:

Q So in your experience as a prosecutor it is common, or you have experienced witnesses initially maybe not identifying someone and later down the road coming back and ---

A And this case is a prime example. After Mr. Palmer was convicted, everybody in Greeleyville said they saw it and they knew it was happening, but no one wanted to come to court and say that. But, yeah, that happens all the time.

Q Okay. No further questions.

THE COURT: All right.

MR. FALK: Your Honor, if I may, my client has one question that I should have asked. If I could just ask one question.

THE COURT: One question.

FURTHER DIRECT EXAMINATION

BY MR. FALK:

Q You are aware that there was a -- of any

relationship between Mr. Smith and Brittany Croskey prior to them giving testimony in the trial?

MS. DIXON: I'm going to object to that.

THE COURT: That's all right. I'm gonna let him ask it. Thank you.

THE WITNESS: I'm sorry, was I aware?

BY MR. FALK:

Q Yes.

A I don't know if I was aware or not.

Q Thank you.

THE COURT: Okay. Thank you. You can step down.

THE WITNESS: Thank you, sir.

THE COURT: The next witness is not here?

MS. DIXON: Correct, Your Honor. He is in a DSS hearing in Florence and is supposed to text me when he's leaving the courthouse.

THE COURT: Okay.

MS. DIXON: So it's about an hour drive. I suspect he will be here hopefully by 11:30.

THE COURT: All right. You have anything else to put up at this time?

MR. FALK: No, Your Honor.

THE COURT: All right. Well, why don't we just plan to be back around 1:15 in case he shows

up. Okay, all right. Thank you.

(Whereupon, a lunch break was taken.)

THE COURT: Okay. Y'all ready?

MS. DIXON: Yes, Your Honor.

MR. FALK: We'll call Mr. -- we call his trial counsel to the stand.

THE CLERK: Place your left hand on the Bible and raise your right hand and state your full name.

THE WITNESS: Everett Guy Ballenger.

WHEREUPON,

E. GUY BALLENGER,

having been duly sworn by the clerk, testified as follows:

THE CLERK: Thank you much, sir. Step around please. State your name for the record and spell your last name please.

THE WITNESS: Everett Guy Ballenger, B-A-L-L-E-N-G-E-R.

DIRECT EXAMINATION

BY MR. FALK:

Q Hello, Mr. Ballenger.

A Good afternoon.

Q Do you have a copy of the trial transcript?

A Yes, sir.
Q I'm gonna be asking you some questions `out of there so if you can pull that out I'd appreciate it. And so were you retained on this case or were you appointed? How did you get to represent Mr. Palmer?
A I was appointed.
Q It was a conflict case and ---
A I believe so. I'm from Florence County. I primarily practice in Florence, but at the time I believe there was kind of a rollover list from Williamsburg County to Florence County so I was appointed in that regard.
Q I gotcha. What is your practice in general?
A I have a general litigation practice, criminal defense, family court law, personal injury, probably.
Q When you started looking at this case, were you -- was this a case that you were trying to get a plea on or did you always know this was going to be a trial?
A It was certainly had its challenges from the State's perspective, it was a defensible case. Marc told me from the outset that he wanted a trial.

I mean, I don't think an offer was ever made for less than 30 years; and Marc made it clear that he wasn't interested, that he was innocent, and so I was preparing for trial pretty much from our initial meeting.

Q Okay. Now there was some testimony earlier this morning when you weren't here, but I wanna talk to you about three of the gas stations that sort of made it -- that we talked about this morning. There's a ---

MR. FALK: What's it? A Savgo? It's a ---

MR. PALMER: Citgo.

MR. FALK: That was a ---

MR. PALMER: Money Saver?

BY MR. FALK:

Q All right. So there's the Money Saver gas station, and that's the one that State's Exhibit 45 was on. That's the video that got introduced, all right?

A That sounds correct, yes, sir.

Q And then it's my understanding that there's also a Young's gas station which is a little bit down the road from the Money Saver. And in between there, there's a -- there was a gravel road.

Is this sort of your recollection of what ---

A That sounds accurate, yes, sir.

Q Okay. And there was something about the -- and the State was testifying that the shooter in this case was on that gravel road in between. At some point maybe got out of his car, got in his car, something like that.

A I think the State's position was he committed the alleged crime and then retreated to his car on the gravel road and then sped off the gravel road and down by the Money Saver. Yeah, that was -- that was the State's position.

Q Okay. And then there was one other gas station that was involved in here. There was a Citgo station that was where Mr. Palmer said he was getting gas at the time?

A I think so. I can't argue with that.

Q Okay. So did you ever try and get the video recordings from the Young's gas station and the Citgo gas station?

A I did not personally go to the Young's or the Citgo. I was told by the State that they -- there was no video from there. I had no reason to dispute that. I mean, frankly, just as a general rule I'm not, you know, chasing the State down for

evidence to help prove their case. I mean, I -- if it was exculpatory, then it's the State's burden to provide that to me. And I guess that's what Marc's getting at that it was exculpatory in some fashion. And if I thought that it was or if I thought there was a video there, I would have done everything in my power to obtain that. I ---

Q Well, how far -- when you said the State told you that there was no vid-- and I'm just gonna here talk about the Young's and then the Citgo. How far into the case was it that the State told you that there weren't any videos from these two locations?

A I don't want to ---

Q Let me back up.

A I don't want to misrepresent when that was ---

Q Let me back up for a minute here. I know I get conflict appointments in cases. A lot of times it's pretty far down the road before they realize there was a conflict. When did you get into this case?

A I was appointed by -- I believe the court order was filed with the Clerk's office 8/16/12. I noted in my, in my personal file, that I opened the

file on 8/23/12 so.

Q And the incident was?

A 10/27/10.

Q Yeah. So you were ---

A Tried it in March of '13.

Q Right. Right.

A So I had it about six months.

Q Okay. So Mr. McFadden, I mean, Mr. Palmer was testifying that had you gotten the Young's video, it would have shown the same car that was in the video 45 still continuing down that same road? That's what ---

A I mean, I don't think there's any evidence saying, I mean, conflicting that I don't think. I mean, I, you know, I don't want to mis-- misrepresent the facts, but I don't, I mean, the car -- the video that's in evidence shows the Neon proceeding in a particular direction. If he's saying the Citgo or the Young's would have showed that, then yeah, it would have. I mean, that was the evidence presented. I don't ---

Q Well, no, here's the thing. So the one that got admitted, there's the video of Exhibit 45, that showed the Neon passing ---

A Correct.

Q It showed three cars passing.

A Correct.

Q And then since there's this gravel road in between, I guess the presumption is the car turned down the gravel road, never got a chance to go past the Young's. And so had you gone to -- if there were video with that, that certainly would have been exculpatory that that car that was seen in Exhibit 45 was still traveling down that same road seconds later?

A Again, I -- and I'm not arguing with you and I'm ---

Q Okay.

A ---just trying to be clear on the facts. I mean, I -- my understanding the State's position was that was Mr. -- the Neon shown on the video was, was Mr. Palmer fleeing the scene.

Q Uh-huh.

A The State's position was he committed this alleged murder, ran off, jumped in his car, his car squealed, he, you know, spins out of there and is flying down the road in his Neon escaping the crime scene. So whether he turned off immediately fleeing the crime scene, I don't -- I don't see how that's exculpatory or not but, again, I...

Q Let me move on to one of the other ones that we had talked about.

A But let me just speak to that point. I mean, I -- I went to great lengths to show on the video that Mr. Palmer was not speeding by the Money Saver. The video showed just a Neon kind of cruising down the road, I mean, and I may -- I thought, you know, a significant point by -- and that was another reason why I didn't want anymore videos to refute that. I don't know what the videos had or didn't have and so the video I had showed a Neon. It looked like just proceeding in the normal fashion down the road and that was in direct contravention with the State's position that, you know, Marc jumped in his car, peeled out, and you know, sped down the road to get away. I mean, the video I had I thought was, frankly, favorable to Marc.

Q Okay. Let me ask you, I'm gonna show you something that Mr. Palmer testified was in the discovery.

A Yes, sir. This appears to be a statement from Joseph Sabb. I believe he's referred to as TT in all the ---

Q Okay.

A ---trial testimony.
Q All right. And so you had -- you acknowledge having received that? I mean, that looks familiar to you?
A Yes, sir. Yes, sir.
Q Okay. Let me just go to one page of it here. So if we're on Page 3, Page 3 of Mr. Sabb's statement, he refers to a statement that he had made earlier; is that correct? "Like I told you all earlier."
A Yes, sir.
Q Did you ever get that statement?
A No. No. I, I mean, him saying I told you all earlier, I didn't know if that was a, you know, recorded statement or when that was taken or, I mean, that -- the short answer to your question, sir, no, I did not, I didn't get that statement.
Q And did you request it from the solicitor's office?
A I sent Brady and Rule 5 requests.
Q Okay.
A And I can't look for evidence that I don't know exists. I mean, you know, and that's just ---
Q Fair enough.
A That's just the simple fact of any claim

that I couldn't produce or should have produced or should have looked for evidence. I mean, again, I, I can't look for what I don't know is there.

Q Fair enough.

A And, again, yes, there is a reference to another statement and I acknowledge that and so; but, no, I did no independent further investigation on whether or not there was another statement somewhere. And I told you all -- what's this, Thursday so. Presumably, yeah, there should be, I guess, some statement from Thursday. Again, whether it was recorded or not, I mean, I think the evidence is pretty clear from some of these investigators that they took statements that weren't recorded, either audio recorded or certainly not transcribed, but. I mean, again, the problem with a lot of these statements was they're so conflicting. One day they would be favorable to Marc; the next day they would not be favorable to Marc so. The problem in general with continuing to look for things was it always tend to turn up just more conflicting statements, which is helpful to Marc; but at the same time, they would -- these witness would then kind of double down on a incriminating statement so I -- in my professional opinion, the State had a difficult time

proving the case with the evidence that was presented so that's what we end up with.

Q And you were never made aware of any type of plea deal that was between the State and Mr. Smith, right?

A No. No, sir. No, I ---

Q I mean, you cross-examined Mr. Smith ---

A I did.

Q ---pretty vigorously on that point.

A I did. And in my experience in state court in general, unlike federal court -- and I certainly don't purport to be an expert in federal criminal defense, but they have proffers and they have written plea agreement and there is -- the only time you sign something in state court is your sentencing sheet when you're about to plead guilty and so, you know. So far as me searching for a written plea agreement or even an agreement that Ms. Barr or anybody else would have promised Mr. Smith in exchange for his testimony, I didn't expect to find any of that. My -- my best course of finding information that regard would -- would have been from cross-examination of Mr. Smith.

Q And Brittany, is it Croskey?

A Yes, sir.

Q She identified Mr. Palmer in court; is that correct?

A She -- she did.

Q Okay.

A Best she can.

Q Did you consider trying to move in limine of some type of Biggers hearing prior to that to question the, you know, whether that would be a reliable identification?

A I didn't. I didn't think it was a Biggers analysis because it was not a photo lineup. I mean, I understand that it doesn't necessarily have to be a photo lineup out-of-court to invoke those considerations. I do think it has to be that to invoke a Biggers hearing.

Q That's what I'm saying, a Biggers type. I mean, the judge is always the, sort of the gate keeper of evidence and you could have moved to have it excluded sort of similar to Biggers, say whether or not it would be unreliable but highly prejudicial.

A I, I could have. I, I don't think given the facts that it was a motion that had any merit. I mean, she -- her position was she had -- she had personal knowledge and she personally viewed, you

know, what she testified to and so it's a weight issue versus an admissibility issue in my opinion.

Q But she had testified -- she had gave a statement. I'll give you a second to sort of familiarize yourself.

A Yes, sir. I'm familiar with Ms. Croskey's statement.

Q Okay. And her statement wasn't necessarily that convincing?

A It was not convincing at all. I agree wholeheartedly.

Q And really, her identification is not that she saw his face; it's that she saw his walk.

A That's right.

Q Okay. And also, if you look at that statement, the investigator -- I don't know if it was Lail or the other one -- really sort of led her through that. If I could just show you those sections. Sort of look on, just be reading that on Page 15. So like, if you read on that Page 15 of that statement, can you just sort of read into the court what the first four lines are?

A Question, this would be from ---

MS. DIXON: Your Honor, I'm gonna object to hearsay. This is not in evidence.

MR. FALK: All right. So, Your Honor, we would move to have this entered as our exhibit 1. I mean, it's ---

THE COURT: You're reading a ---

MS. DIXON: A recorded statement, Your Honor.

THE COURT: It's like a transcript.

MR. FALK: Of a statement ---

THE COURT: Was it introduced at trial?

MR. FALK: No, it was not. But the reason why it was important, my point is, is that this is part of the discovery that trial counsel had and so I'm just establishing that he had knowledge of a prior statement that could have -- could have become a prior inconsistent statement and could have been used at trial.

THE COURT: Well, why do you need to read it in? Ask him to review and then ask the questions.

MR. FALK: Okay.

THE COURT: I don't know if it's damaging or not; but technically, I think she's right so.

BY MR. FALK:

Q If you read down there to about line maybe 8 through 14 and then 15. I mean, she's saying is

it fair that he's asking whether or not there's anything distinctive about him. She's sort of saying, no, no, no, and...

A That's fair.

Q And then he says, well, what about the walk?

A And that's -- that's -- that is fair.

Q Okay.

A And I was aware of this and I cross-examined Ms. Croskey extensively exactly that line of questioning about didn't -- didn't Investigator Lail ask you questions about Mr. Palmer's walk and didn't you tell Investigator Lail that he didn't have a funny walk and didn't Investigator Lail keep on and you finally relented, yes, sir, I'm aware of this. And Ms. Croskey and I got into that at length. Ms. Croskey's testimony in the transcript, again on Page 179 and it's in the record; but her and I had a very lengthy conversation about that, about her prior statements, about how inconsistent it was. In fact, I sent a private investigator that my firm hired with our own money to investigate and speak with Ms. Croskey, and she told the private investigator -- she was all over the map too and Marc believes he should have

been called as a witness; but she told the private investigator that, yeah, she made a statement to Lail and it was not accurate, but then she -- by the end of the time she was conversing with our private investigator, her position was, oh, my original statement to the police was accurate. So we didn't call the private investigator because at the end of the day prosecutor's trial testimony, which is what it turned out to be, was going to be I was truthful to the police so. That was not helpful to Marc's case and that is why the private investigator was not called as a witness.

Q But as far as being able to cross-examine her about her flip-flopping back and forth and suggestion about that, she was really identifying him based on his walk. That's something that a trial court could have evaluated first to see whether or not that was gonna be more prejudicial or probative, whether or not that was gonna be sufficiently reliable to allow her to stand up in court to point the finger?

A Can you phrase it ---

THE COURT: Was there a question there?

BY MR. FALK:

Q You could have done that; is that correct?

A You phrasing I could have? You could have -- yes, sir, I could have or I could not have.

Q And then, had that been done, that issue would have been preserved for appeal?

A I'll let, you know -- if it was raised and ruled upon, then it would have been preserved for appeal. I will agree with that statement.

Q Okay. I'm gonna try and sort of go through the transcript a little better. Can you just look at some of the court's opening remarks. Page 79, lines 19 through 23.

A Yes, sir.

Q You see the search for the truth language?

A Yes, sir.

Q Did you consider objecting to that?

A No, sir. I'm aware of the 2018 case addressing that issue; but in 2013, obviously that case was not published. And, frankly, I've heard it a hundred times. You know, that doesn't make it right. I just ---

Q No, I know. I just -- now can you look at Page 115.

A Yes, sir.

Q Starting on line, line 8. I think there's a question. So -- and this is -- this is Maurice

Smith's testimony; is that right?

A I don't disagree with that.

Q Okay. And so the question is put, "So you see Mack. Then tell us what happens at this point." And Mr. Smith's response was, "He came out across the roads towards Terrace. Terrace had already stopped. Terrace, I saw him gesture, put up his hands," I guess, like this. Did you consider test-- objecting to that as in effect a hearsay statement, the fact that he, Smith is saying that somebody else was communicating through his gestures and that there was a South Carolina case law, 321 SC 55 and State v. Townsend where they talk exactly about that, that can be hearsay testimony, you know, testimony that somebody pointed their finger or in this case put their hands up like I don't have a gun.

A I took this testimony as a present sense impression of what the witness was -- was seeing with his own two eyes. So, I mean, when he's got personal knowledge and he's describing event that he saw, I did not consider hearsay objection based on his personal knowledge of what he was looking at. It wasn't what somebody told him. It was his -- my understanding of that testimony was that it was his

personal knowledge, he witnessed that event.

Q All right. So as far as talking about hearsay, if you can -- what I want to bring you to is McFadden's testimony about the statement that Dontrell Matthews, I guess, gave to him. And it looks like there's a sidebar at Page 311.

A Yes, sir.

Q So, and if you could kind of read backwards and forwards from that to yourself, can you sort of know what was going on there, what that sidebar might have been about?

A It looks like Ms. Barr wants to know from the Investigator Matthews had any information about the murder weapon or if the witness had any information from Matthews. I objected to hearsay. Ms. Barr responded that it was impeachment testimony; and then, yeah, right, there was a sidebar and then the judge ruled on the objection.

Q So ---

A I mean, I said, Judge, this is hearsay and he said, no, it's not, Mr. Ballenger, I overrule your objection. I mean, that -- so it was raised and ruled upon. I mean, I'm done arguing with the court when he rules, when the court rules upon my objection.

Q I appreciate that, but I'm just trying to get at do you know what that sidebar -- was she saying that this is a prior inconsistent statement or ---

A I, I don't want to speculate on what exactly she said or not, but ---

Q Okay.

A I objected. She said it was proper and the judge called us to the bench and so I went and the objection I raised was overruled so.

Q Okay.

A But, no, sir, I can't ten years ago tell you ---

Q Of course not. But I'm just trying to get at since -- so he made several other, McFadden made several other statements about what Dontrell had said and you didn't object to those so I'm assuming you were not objecting because it was covered by the judge's prior ruling. Is that fair?

A I would -- I mean, again, I, I couldn't argue with that, but I don't want to mislead anyone on my exact thoughts.

Q I tried that many cases and this is a Williamsburg -- is it common for the sidebars not to be transcribed?

A I would direct that to the court reporter. I would -- I had another Williamsburg trial and that one went better for the defendant so we didn't have a transcript so I -- I'll put it to you that way. I don't -- I can't answer that question, sir. Sorry, that's the short answer.

Q But you would appreciate that if there's gonna be an issue to raise on appeal, the sidebar would be important to know the basis for why the judge ---

A I -- yes, sir.

Q ---overruled your objection?

A I would -- I would agree with that.

Q If you could look at Page 216.

A Yes, sir.

Q And if you look at that, that is Dontrell's testimony about his conversation with Mr. McFadden. Can you sort of read through that.

A I'm sorry, this is whose testimony? It would be on Page 216? Dontrell Matt-- okay, so this is Dontrell Matthew's testimony.

Q I may have given you the wrong page number.

A No, I would have Mr. Matthews ---

Q Yes.

A ---testify at 216.
Q 216.
A Yes, sir, I'm on Page 216.
Q All right. So she's asking him whether or not he ever made these statements to Mr. McFadden; is that right?
A Yes, sir.
Q And he's denying all those statements?
A Yes, sir.
Q So that sets up the impeachment under prior inconsistent statement, right?
A Yes, sir.
Q But when you look at that, do you ever see him making a statement, Dontrell ever making a statement about whether or not the gun was given to -- on O'Neill Matthews?
A (No response.)
Q And then it goes on to the next page. So that part of the statement about the gun going to O'Neill, that was not part of his original testimony, was it?
A I don't think so. I mean, the transcript will speak for itself.
Q Okay. So you would -- would you agree that if that testimony was admitted as a prior

inconsistent statement, that would not cover a statement for which there was no prior testimony?

A Yeah. There's no prior testimony in the record then I would, I would agree with that. But I ---

Q I'm gonna sort of go back and let's just look at a couple of other places in the closing argument primarily. So starting at Line 22, this is part of the State's closing?

THE COURT: What page are you on?

MR. FALK: I'm on page -- excuse me, Your Honor, Page 488.

THE WITNESS: Yes, sir, I'm on Page 488.

BY MR. FALK:

Q And then she goes on and says -- and she's talking about Smith pleading straight up; is that correct? Goes on to the next line. He pled guilty straight up. The man did his wrong. He pled guilty straight up and he's serving his sentence. He is paying his debt to society. I'm going to tell you, you know. You see that line there?

A Yes, sir.

Q All right. But Smith didn't plead straight up, did he?

MS. DIXON: I'm gonna object to facts that

are not in evidence. I don't know that we know what type of plea it was.

MR. FALK: Do you have any evidence that he ---

THE COURT: Well, hang on. He -- I'm not sure what all was in evidence at the trial, but I believe he testified there was no deal; is that right?

MR. FALK: Yes. But he still -- he still did plead straight up. That was a mischaracterization.

THE COURT: Well, explain what you mean by pleading straight up.

BY MR. FALK:

Q Mr. Ballenger, when you hear that somebody is pleading straight up or the solicitor comes to you and says your guy can go in there and plead straight up, what does that mean to you?

A That would mean without recommendation, that he was looking at a term of years and it would be completely up to the court as to what his sentence would be. That would be a straight up plea, without recommendation, without negotiation.

Q And wouldn't it also mean that he's gonna plead to the charge?

A Correct. That would be whatever he -- whatever he's pleading guilty to is without recommendation from the State as to what the appropriate sentence would be so it would be left completely to the discretion of the court.

Q So if he's pleading to a lesser charge, that's not necessarily a straight up plea?

A Not nec-- no. I mean, it would be -- he can plead straight up to a lesser charge, but I mean, yeah, he would be getting the benefit of pleading to a lesser charge so, I mean, he wouldn't be pleading straight up as he was originally charged, no. He could plead straight up to a lesser, a lesser charge with no -- no recommendation on sentence, but there would be a benefit to the defendant to obviously pleading to a lesser charge so we're parsing words which ---

Q Oh, well, now you were aware that Mr. Smith had charges in Williamsburg County; is that right?

A Yes, sir.

Q Were you aware that one -- and those are two trafficking charges; is that right?

A Yes, sir, 'cause we talked about that at length on his ---

Q Right.

A ---cross-examination about the charges he was facing and the deal that he was getting and whether he had an official deal or not on the table that he, I believe, you know, expected. It was clear that, you know, we were all concerned that he was testifying favorably for the State in exchange for a deal, you know.

Q But he was -- I mean, he was allowed to plead to trafficking to the lower quantity from the 10 to 28 'cause he was at the 28 to 100, right?

A He was under sentence. I mean, he came from SCDC. He was under sentence, I believe, for possession or trafficking at the time he testified.

Q And one of his charges was nol prossed; is that correct?

A I, I don't specifically recall, but I don't dispute that. He had a bunch of them I think. He might have had some more pending while we were trying Marc's case. I don't -- I don't recall that specifically.

Q Do you ever -- when you're trying cases do you ever consider objecting to a State's closing argument when you think that they're crossing the line?

A If I believe they crossed the line, I raise it post-argument. I mean, again, I think the criminal rules prevent an objection while the solicitor is arguing. I mean, I think the criminal rule says shall not interrupt opposing counsel. I'm not looking at the rule; but I think the appropriate time if I believe closing was objectionable, yeah, it would be raised post-closing. I mean, I think there's -- Marc and I disagree on what's objectionable and what's simply he doesn't like it 'cause he doesn't think it helps his case. But just because he doesn't like the closing doesn't make it objectionable.

Q Well, look at Page 478 starting with Line 11 and sort of going through 480, Line 10.

A Page 478 beginning which line? I'm sorry.

Q Starting Line 11 continuing to the next page on Line 10.

A Okay. Yeah, she's -- she's basically saying he dressed up for trial and that's not his, you know, true, true character, is what -- the way I characterize her testimony.

Q Part of that Line 11 through 24, "He's trying to present an image to you that he is not. He comes into this courtroom. He wants to portray

himself as conscientious, studies, you know, hits all the high marks, but it's a lie. That's a lie going on." So, I mean, when do you think that the solicitor sort of crosses the line as far as making this a personal attack against the client? Calling him a liar from the stand, I mean, during closing?

A I mean, that's her summation of what she thought the evidence reflected. I, I don't agree with it and that's why we had our own closing as well that, you know, rebutted all that. And it's ultimately up to the jury to determine. I mean, they're the fact finder whether they believe him or not, I mean. So I didn't, I didn't find that objectionable. She didn't find any of my closing objectionable which I thought was fairly aggressive on the State ---

Q If you look at page ---

A ---not having the case ---

Q Page 484, Lines 23 through 25. There she's talking about Dontrell's testimony.

A I see the page. Are you referring to particular lines?

Q 484 and then, really, like the last three lines, 22 to 25. I guess there she's summarizing a conversation that she assumed McFadden

had with the parole officer. 'Cause you remember that issue, right?

A I do. I remember the issue, yes, sir.

Q You think that part of the line that says "if the guy comes forward and he tells me the truth," do you believe that that is bolstering for his credibility?

A Yeah. That's her position, yes, sir. I mean, she says in essence her witness is telling the truth. I don't think that's a strange or out-of-line statement for the State to take. Just like I -- the State would want Palmer was telling the truth. I mean, I -- that's my position. I'm entitled to argue it ---

Q Well, then ---

A ---in closing, so is the State.

Q In looking on Page 489, lines 18 through 22.

A Yes, sir.

Q It's Mr. Palmer's contention that she's still bolstering the testimony of Dontrell Matthews. Sort of a cathartic effect of going to prison and then you want to start telling the truth and then sort of ---

A Yes, sir, I agree that testimony is in

there and that's -- that's an accurate characterization of that, or of her closing.

Q And do you think it's bolstering the testimony?

A Again, I think it's summation and closing. I...

Q Page 490, Lines 4 through 6.

A Yes, sir, I see the summation there.

Q "That's why I submit to you his testimony is believable."

A Yes, sir, that's what she says.

Q You would admit that Mr. Smith was the key witness in this case against -- I mean, he was the main identification witness; is that correct?

A He -- I -- he was certainly from the State's position very -- yes. I mean, he was an important witness in the case.

Q So the credibility of his testimony for the jury would obviously be very important?

A Everybody's credibility was very important in this entire case, him included.

Q Would you agree that in a closing argument the solicitor at least has to confine the remarks to so that the jury is gonna reach a decision based on the facts in the case, not some other kind of

passion or prejudice?

A I would agree with that. The rules prevent appealing to passion and prejudice.

Q Would you look at Page 495, lines 5 through 16.

A Yes, sir. She implores the jury to return a guilty verdict?

Q No, my -- my point is, does that not seem like that is sort of a golden rule type argument, you know, let's tell the community that we're not gonna accept vigilante justice, if he gets away with it I might as well burn down -- we might as well all just burn down the courthouse?

A I mean, that could be viewed in that fashion.

Q I have no further questions.

THE COURT: Cross.

(Attorney confers with Mr. Palmer.)

MR. FALK: If I could ask him a couple more questions.

BY MR. FALK:

Q Is there a confidential informant in this case?

A I've read Marc's, you know, application and all that. I'm not familiar with any

confidential informant and I could be ---

Q Well, did we know the name of the person who got the gun from Dontrell and then gave it back to Mr. Palmer?

A I don't recall. I mean, I -- that was, again, one of the State's problems. I, I don't know where they ever -- I don't recall where the .45 came from or didn't, and Marc never -- they never put -- our position was there was a .38. The only thing involving Marc was a .38. I mean, they found .38 shells in his car I believe, and Marc testified he never had a .45. I mean, we tried to separate ourselves from a .45, period. So I, I don't know anything about a confidential informant, no. And so the short answer to your question is I don't know anything about it.

Q Was there any proof that the gun was -- the murder weapon was a .45?

A I don't want to misrepresent anything. I think the autopsy proved that, I think.

Q 'Cause the gun was never recovered?

A Correct. I think it was pretty clear that the murder weapon was a .45. That's where the -- I didn't have a lot of objections if it involved a .45 because our case was it was a .45, and Marc had no

connection to a .45 and so anything involving a .45 was favorable to Marc.

Q Is whether or not it was a -- it really came from Dontrell Williams; is that right? I'll show you this.

MS. DIXON: May I see that? I'm sorry.

MR. FALK: Yeah.

(Attorneys confer.)

THE WITNESS: I'll be glad to look. I think they had independent corroborating satisfactory evidence that the .45 was the murder weapon. I don't ever have any doubt in my mind that was -- that was the case, whether Dontrell Matthews said it or not. I was satisfied there was independent, substantial, and significant and convincing evidence that the .45 was the murder weapon.

Q All right, thank you.

MS. DIXON: Ready, Your Honor?

THE COURT: Yeah.

MS. DIXON: May it please the Court, I apologize.

CROSS-EXAMINATION

BY MS. DIXON:

Q How are you doing today, Mr. Ballenger?

A Well. How are you? Thank you.
Q Good, good. And how many years have you been practicing law?
A I graduated from South Carolina in 2004. I clerked with Jim Brogdon, Judge Brogdon, for just about eight months before he went back to private practice and so I started March 1 of '05 in private practice.
Q Private practice. And what percentage of that do you think is criminal law if you had to guess?
A I -- it's pretty evenly split between criminal, family law, and personal injury, so about 30 percent,30 percent, and 30 percent.
Q Gotcha, okay, okay. So by the time ---
A Give or take 90 percent law practice.
Q So by the time you tried this case in 2013 you had had a good bit of criminal experience?
A Yes, ma'am, not as much as now but.
Q Do you recall the -- in terms of your representation of Mr. Palmer, do you recall how many times you met with him?
A I've tried to just do a cursory review of my file before I testified today on that issue. I have four instances where I have notes from the

jail, it looks like, where I met with him in Effingham at the Florence County detention center. 10/02/12, 10/19/12, 11/05/12, 12/28/12 we met. I have notes specifically reflecting that. I probably met with him between August of '12 and October. I probably met him soon after I was appointed so I think I probably met him -- if I had my best guess it would be six times.

Q Six times, okay. And do you remember the evidence that the State had against him in this case?

A It was admittedly circumstantial eyewitness testimony. And Mr. Smith, Ms. Croskey, those were the two key witnesses in my opinion, and they -- they claim that they witnessed it happen so that was basically the State's case.

Q Do you recall a video?

A Yes, the Money Saver video. Yeah, that was allegedly evidence of Mr. Palmer being at the crime -- crime scene at the time the 9-1-1 call came in. The State's position was 9-1-1 call came in at, say, 10:37 p.m. on the -- on 10/27/12 and then the Money Saver video shows 10:38:12, you know, Mr. Palmer's Neon leaving the immediate vicinity so.

Q Gotcha. And ---

A That was the State's position.
Q I'm sorry. Did you have time to review this video prior to trial?
A I did.
Q You did. And did you discuss all of this evidence with Mr. Palmer?
A I did.
Q And did he have any defenses?
A Yeah. Again, it was a circumstantial case. Credibility was a big problem in my opinion for the State as far as inconsistent statements of all their witnesses. Mr. Smith had a bias problem with his pending criminal charges. Ms. Croskey had a, I describe as kind of a memory problem. I mean, she would -- she had conflicting testimony as what she saw or didn't see and whether it was Mr. Palmer or whether it was not Mr. Palmer. There was absolutely no physical evidence. There was no DNA. I mean, again, it was -- it was a highly witness driven case and then not scientific from a DNA standpoint. I mean, they -- there's a bunch of testimony about whether or not Marc's car was making a noise. That's about as technical as we got.
Q Did he ever raise any kind of alibi defense with you?

A I don't wanna mislead anybody on where we left that. I mean, he gave a statement with an alibi in it that we tried to suppress and that motion was denied, so that was -- that was problematic ---

Q Do you feel like you have ---

A ---for Marc.

Q Oh, I'm sorry.

A Yeah, I mean, at the end of the day that -- he testified he was cross-examined on that so, I mean, the State tried to make points on him having inconsistent testimony so which, again, made it another credibility issue amongst all the witnesses involved, including Marc.

Q And let's see, do you feel like you had enough time to prepare for trial?

A I was appointed. Marc told me that he wanted to have a trial. The State wasn't making any offers that I thought, frankly, were -- Marc would consider, and so I just -- yeah, I had enough time 'cause I made up my mind from the outset it was likely gonna be a trial; and Marc, Marc had been sitting there over two years at that point so it needed to be tried so I had enough time and made it a point that we would -- I think, in fact, I think

knowing what I knew that it was gonna be a trial, I think I just asked the State for a date certain, you know, like the first of the year or something. Like, again, if I was appointed in August I said, you know, let's just pick a term, you know, first of the year and let's just agree that that's first up so everybody would know to be prepared and ready to go forward. I believe that's what happened.

Q And what was your trial strategy overall?

A I mean, again, the State's case had its -- had its flaws. There was a -- I don't want to say disconnect. There was a professional conflict. You know, Marc asserting actual innocence. Sometimes you -- me personally, I would rather focus wholeheartedly on reasonable doubt or actual innocence. I mean, this case presented kind of a mixed bag. Marc asserted that he was innocent, which is fine. I mean, that's his defense so that's what we went with. You know, maybe mixing those two things together made it a little more difficult, but the trial strategy was both. Marc, allowing Marc to assert his actual innocence and focus on the lack of evidence or lack of credible evidence that the State had, which was simply mainly two eyewitnesses that had statements that were all over the map. So that

was the trial strategy.

Q And how did you use those witness statements in the trial itself?

A Cross-examination. I mean, the transcript speaks for itself in that regard. I mean, those witnesses, again, were all over the map as evidenced by prior statements and as evidenced by the statements they gave at trial and in response to my cross-examining questions, cross-examination questions.

Q And talking about he's made a lot of allegations today about a deal that the State had with Maurice Smith. Are you aware of any evidence today or even at the time of the trial that there was any sort of deal that the solicitor had with Mr. Smith?

A No. No. No.

Q Let's see. And going on to allegations about Brady violations, did you have any issues getting any evidence from the State?

A No. I mean, they produced before trial everything that they introduced. They didn't introduce anything that wasn't produced pretrial. Again, I, I can't ask for what I don't know exists so, I mean, if I was misled, again, that's, that's

on the State.

Q And in terms of that same thing, so you just said there was no surprise evidence at trial. Was there any late evidence that you got on the eve of trial that you didn't feel like you had time to review, or do you feel like everything was handed over timely?

A I mean, I didn't have any objection to the timeliness of what I was given.

Q Okay. And then in terms of some specific evidence that he's raised today, he's raised some issues with surveillance videos at a gas station. Let me start by asking, did he -- what did he tell you he was doing during the time prior to the shooting? What was kind of his story of, if he had one, maybe he didn't.

A I mean, I don't wanna -- I don't wanna speculate or try to recall exactly. I think it mirrored what his trial testimony was 'cause we did -- I mean, we tried to nail down, you know, what the facts were as him and I understood them and what he was gonna testify to so his trial testimony would have reflected what I thought or what he told me. And I think that sits with, I mean, he -- there's the alibi testimony or in the previous statement,

and he said I think honestly in trial that he was nervous and that part of the statement was not accurate so I believe his trial testimony was accurate as to what Mr. Palmer's position was so that, that's what he told me.

Q Okay. And let's see, moving on to they've raised an issue that you didn't request a Neil v. Biggers hearing or some sort of hearing like that in terms of the reliability of Croskey's identification. Do you recall Croskey testifying she had known Palmer for about a year prior to this shooting?

A Again, the transcript will speak to that. I do remember cross-examination about that issue and, I mean, specifically I -- yeah, she testified to that and I think she testified that she'd only seen him four times and Ms. Barr wanted to make it clear that, no, she'd seen Mr. Palmer four times at the particular bar or area they were hanging out so I recall that testimony, yes.

Q Is it your recollection that Ms. Barr's point was that she had seen him other times as well, in addition to these four times at this bar?

A That's what she was insinuating. I mean, that's -- she was trying to establish that they had

a -- not a relationship, but that they saw each other frequently around Greeleyville which I, I personally don't think that's the case. I think the evidence was clear. I don't think it was credible that Ms. Croskey knew Mr. Palmer or saw Mr. Palmer a lot. I mean, I think that point was clear that wasn't the case.

Q And do you -- in light of that, do you think there was a reason to request a Biggers hearing?

A No. I mean, I, again, I get the point. I just, I don't think legally it rose to the level of that type of a challenge. It was a witness credibility challenge. I mean, it -- again, I think it went to weight versus admissibility. That was my professional opinion.

Q In terms of he's raised some issues about things that you did not object to at trial, is there a strat-- is there a reason that you might sometimes not object to something that would otherwise be objectionable?

A Yeah. If I know the answer and it's not harmful to my client's case, in Mr. Palmer's case in this instance, then I'm likely not to object. And I think the jury gets tired of objection after

objection after objection if it's not a really important issue, so that would be one trial reason for not objecting to everything that is technically objectionable.

Q And in terms of you were asked about several different statements made during closing argument, do you consider any of those objectionable?

A I didn't at the time. I don't necessarily disagree with that statement now. I mean, it's -- it's a summation of the evidence that was put forth at trial so I didn't find it objectionable and that's the answer to that question.

Q Okay. And I think I'm about to wrap this up. Let me just look through real quick. Let's see, in terms of sidebar discussions, is there a time when you would put it on the record versus not putting it on the record?

A My focus was if I made an objection, my focus was to obtain a rule, and I think the sidebars that were raised were objections made. And then even if we had a sidebar, objection overruled. So I mean, if it's raised and then ruled upon, the record I think is preserved so that was -- I don't think there were any sidebars raised that were not ruled

upon. There's one mention in his petition involving a question about Mr. McFadden and where -- why he was no longer with the Sheriff's Office. There was a sidebar about that, but I raised employment issue pretrial so, again, I -- my point is, I think every sidebar that's been raised was objected and ruled upon so.

Q Okay.

MS. DIXON: Just one moment, Your Honor. No further questions.

THE COURT: You have any redirect?

MR. FALK: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. FALK:

Q Just to clarify, Ms. Croskey testified that she did not see the person, did not see the face of the person who was walking back and forth under the light?

A I mean, I think that's accurate, yes.

Q And the identification of Mr. Palmer is only based on the -- her recognizing the walk, is that ---

A I think that's accurate.

Q I should have asked you this earlier and I apologize for that, but when we're talking about

this -- there was testimony at trial about the Citgo videos and the Young videos because on -- McFadden was asked a question at trial about whether or not he went to the Citgo and looked at the videos. You recall that?

A I don't recall it; but, again, I'm not gonna argue with the transcript.

Q And he said, I looked at them and there was nothing there?

A Oh, I do, I recall that.

Q Did you consider that to be possibly a hearsay statement 'cause he's saying what these videos -- I mean, the video is on the thing that's testified and he's saying there's nothing there.

A I mean, potentially, yeah. I mean, again, I, my understanding was the State's position was Mr. Palmer fled the scene in a big hurry and that nothing on the video you're referencing would contradict that, but.

Q And that would apply also to the testimony about the Young's video. Young was the gas station right by?

A Right.

Q And the Citgo was the one where he said he was getting gas at the time?

A Right. And that would -- yeah, I mean, that would apply to that.

Q And so when McFadden says I looked at the video and I didn't see anything, no one is able to really cross-examine that statement. It seem likes that's a hearsay statement. Were you aware of any relationship between Croskey and Smith?

A No. I'm not saying there wasn't. I don't -- I just, I don't recall. If there was, it didn't give me any pause for concern. I mean, you'll find a lot of people are sometimes related. But, again, if you're asking me if I thought it was reason for bias, no. I -- but, so I, I hope that's responsive to your question.

Q All right. Thank you.

MS. DIXON: Nothing further.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Anything else?

MR. FALK: No, Your Honor.

THE COURT: Anything from the State?

MR. PALMER: Hold, hold, Your Honor. Your Honor. Your Honor. Whoa. I got questions ---

THE COURT: Talk to your lawyer. Talk to

your lawyer.

MR. PALMER: This is my last bite at the apple.

THE COURT: Talk to your lawyer.

MR. PALMER: I'm trying to get him to question what these -- Your Honor.

What are you, what are you doing? Are you with them or me? Please.

MR. FALK: I'm with you. I've been here ---

MR. PALMER: This is my life. And this lady ---

THE COURT: Very well. We'll just take a short break. You two have a discussion and see if there's something else you need do for him.

THE DEFENDANT: Yes. Yes.

THE COURT: Take about five or ten minutes.

THE WITNESS: Yes, sir. Thank you, Your Honor.

(WHEREUPON, a recess was taken from the proceedings.)

MR. FALK: Your Honor, if I can re-call Mr. Ballenger so I can understand what his testimony is going to be on this point, but in order for me to

make ---

THE COURT: Okay, that's fine.

Come on back, Mr. Ballenger. You're still under oath. Thank you.

THE WITNESS: Yes, sir, Your Honor.

BY MR. FALK:

Q Do you have your transcript up there?

A I have my transcript.

Q Okay. So if you could look on Page 292. This is part of the solicitor's closing argument.

A Yes, sir.

Q About half way down.

THE COURT: You said 292?

MR. FALK: 492.

THE COURT: Okay.

THE WITNESS: Yes, sir.

BY MR. FALK:

Q And is it fair to say that she's sort of pitting TT's testimony against Mr. Palmer's testimony? Why you should believe one and not the other?

A Yeah, I mean, she's explaining her position. I -- yes, I agree with that.

Q Do you recall any testimony in this, in the case, that Mr. Palmer was wearing glasses at the

time?

A I don't recall one way or the other. I mean, the transcript will speak for itself. There's conflicting testimony on whether or not he had a mask and whether -- you know, there was conflicting testimony about the physical appearance so. And I would not be surprised at all if there was conflicting anything testimony about that issue as well.

Q So Mr. Palmer's position is that the solicitor is really mischaracterizing or what TT's testimony was 'cause she's -- 'cause I think TT said something about a mask and she's saying, no, it wasn't a mask, it was 'cause Mr. Palmer was wearing glasses and there was a gun flash.

A She gets into what she believes TT clearly said about being 15 yards away so, you know, the record is gonna reflect that. I...

Q But you would agree that she's not allowed to be arguing facts that aren't in the record?

A I would agree with that, yes, sir.

Q Okay. Was there ever an issue -- and when he got arrested originally, was there ever an issue about challenging the lawfulness of the arrest?

A I was appointed well after the preliminary

hearing stage so as far as a preliminary hearing to challenge the lawfulness of the arrest, I obviously was not appointed until that time and long since past 'cause he was well after indictment by the time I was appointed so which would eliminate his right to a preliminary hearing challenge probable cause. But, I mean, I think he was complaining about the search warrants.

Q From the car?

A Correct. And, I mean, all he needs is probable cause to get a lawful search warrant and I didn't see any probable cause issues. Again, I -- if I was his lawyer the day he was arrested, we'd have had a preliminary hearing on all those issues, but I wasn't so.

Q But it's your testimony that you did not see a probable cause issue for the -- for the support for the search warrant?

A I -- no, I did not.

Q Okay. But that would have been something that -- never mind, I'll withdraw that. Thank you.

THE COURT: Any recross?

MS. DIXON: Your Honor, just real, real quick about the search of the car.

RECROSS-EXAMINATION

BY MS. DIXON:

Q I know you testified about the search of the car and then you testified you didn't see any probable cause or any issues regarding probable cause in obtaining that warrant. Do you recall any damaging evidence that was taken from the car itself?

A No, I don't, and that was another reason I didn't concern myself a lot with that issue because all they found was, again, .38 shells, which the murder weapon was .45 caliber and the clothes they found was also -- there's tons of conflicting testimony on who had on what. So I didn't think anything they found was damaging but certainly couldn't be addressed, you know, in the case or overcome in the case.

MS. DIXON: No further questions.

THE COURT: Okay. Anything else?

MR. FALK: No, Your Honor.

THE DEFENDANT: Oh, shit. He can't file Rule 59(e) please. I don't even care. I don't even care no more. Y'all want me dead. Y'all got it. I ain't did this. I just wanted my last bite at the apple, man.

THE COURT: Okay, Mr. Ballenger, you can

stand down now I believe.

THE WITNESS: Thank you, Your Honor.

THE COURT: Anything else to present from the Applicant?

MR. FALK: No, Your Honor.

THE COURT: From the State?

MS. DIXON: Nothing from the State.

THE COURT: Anything y'all wanna tell me?

MR. FALK: Yes, Your Honor.

THE COURT: All right.

MR. FALK: Your Honor, I think -- I think I have some of my biggest problems in this case with the failure to object to the closing argument. You know, clearly, the solicitor's not supposed to be pitting one witness against the other in closing argument which she was clearly doing when she's talking about TT's testimony and trying to reconcile how you can reconcile that testimony with Mr. Palmer's testimony. And clearly that golden rule argument at the end went way overboard as far as telling -- having the jury sort of inflaming their passions to make a ruling based on something that's not in the record. You know, if you're gonna let this happen, if you're gonna let vigilante happen, you might as well burn down all the courthouses.

That was inappropriate remark that should have been objected. I don't think that trial counsel's basis for not objecting to it is legitimate. I think -- I think the case law in South Carolina is that you have to make a contemporaneous objection on -- if you have an objection to something in the closing argument, you have to make a contemporaneous objection; and the failure to make a contemporaneous objection is not -- you know, you got to do it during the argument so it can get fixed during the argument. His rule -- his decision not to was -- made, you know, I don't like to object or was objecting too much, that still does not justify allowing the jury the last thing the jury hears some prejudicial arguments.

I think in addition to some of the problems there have been with the -- his failure to try and get the videos from the Young's or failure to get the video from the Citgo gas station, we have a concern with that. My client certainly thinks he was prejudiced by the client so he thinks that Mr. Ballenger did not follow the standard of care as far as investigating the case. He didn't get -- he didn't try and pursue the prior statement from Mr. Sabb which was mentioned in the -- which he

acknowledged. He did not, you know, obtain to get -- he did not attend -- even attempt to get the videos from the Citgo and the Young's, and he allowed the State's testimony to go in saying that, I didn't see anything, so that without objecting to that testimony which I believe was hearsay.

And I think the biggest problem in this case is that before they allowed Brittany Croskey to testify and point him out, there should have been some type of hearing similar to Biggers. I mean, it might not fit exactly under Biggers, but it certainly is under the same type of notion that the judge is certainly the gate keeper on evidence and a standing up and pointing to somebody and identifying him in court, we all know that that is extremely potent evidence for the State. And the whole eval-- and the whole identification is based on somebody's walk 'cause the testimony was that, you know, she didn't see his face. He could have taken the testimony that was -- that she had given, the prior statement to McFadden, where it shows that it was being suggested to her that the walk was the issue. That could have been done at a Biggers hearing. Whether or not you agree that that would have been sufficient, that's still something that was not

preserved for appeal. So those were, I think, on the strongest arguments ---

THE COURT: Okay.

MR. FALK: ---in our favor.

THE COURT: All right, thank you.

Yes, ma'am.

MS. DIXON: May it please the Court, just a few things in summation. First of all, the State would submit there was nothing improper about the closing argument or anything that was objectionable. In terms of the truth seeking language that they raised, we would note State v. Beatty, which is 423 S.C. 26. That came out in 2018 and actually there was a Beatty that came out before; this was on reconsideration. That was a 2016 case. Both of these cases were decided after applicant's trial. The law at the time of the trial was based on Aleksey, and this is a direct quote from our supreme court. "In Aleksey we found there was no reversible error because the seek-the-truth language was charged in conjunction with the credibility of witnesses charge and not with either the reasonable doubt or circumstantial evidence charges." And we would just submit if you look at the record, the two places in the closing argument where they pointed to

were not in conjunction with reasonable doubt law. It wasn't in conjunction with circumstantial evidence law, and therefore, under the law that was in effect at the time of the trial, counsel was not deficient for not objecting to this particular language.

In terms of the videos, we would submit everything about what may or may not have been on that video is speculation. We don't even know, I don't even know how many videos these gas stations even have that were operable at that time, whether they pointed at the highway, where -- I mean, it's all just pure speculation as to the videos. In terms of the Neil v. Biggers hearing, you know, the testimony from Croskey was she had known him for about a year. Now whether that's true or not, of course, would be an issue for the jury to determine in terms of her credibility; but she has testified she knew him, knew who he was, had known him for about a year. And I would also say her entire identification of him was not based on his walk. I think she did also testify to the car that he drove, the sound it made and hearing that sound so. Those are all things, of course, that you can take notice of in the transcript.

But we would just submit that he has not met his burden of showing that counsel was ineffective.

THE COURT: Okay. Thank you very much. I will think about it and get back with you all. Okay, thank you.

* * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 18th day of May, 2023.

Frances B. Ray

FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Marc Anthony Palmer, #354634, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-45-0488 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Marc Anthony Palmer (Applicant) on October 29, 2018. On November 1, 2022, an evidentiary hearing convened before the Honorable Edward W. Miller. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In May 2011, the Williamsburg County Grand Jury indicted Applicant for murder and possession of a weapon during a violent crime (2011-GS-45-0095). These charges arose from the fatal shooting of Therris Keels on October 27, 2010.

On March 11-14, 2013, Applicant proceeded to a jury trial before the Honorable William Jeffery Young. Guy Ballinger represented Applicant, and Kimberly Barr represented the State. Applicant was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for the weapon charge.

Applicant filed a direct appeal, which was perfected by Ryan L. Beasley, Esquire, and

Chief Appellate Defender Robert M. Dudek. The Court of appeals issued an opinion vacating the five-year sentence for the weapon charge pursuant to section 16-23-490(A) of the South Carolina Code but affirming all other issues on the merits. Applicant filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent January 4, 2018.

Summary of Trial Testimony

On October 28, 2010, Therris Keels (Victim) was shot in the head and in the abdomen. (Tr. 165). At trial, the State relied primarily on eyewitness testimony from Maurice Smith. Smith testified he saw Victim with Joseph Sabb on the evening of the shooting.[1] (Tr. 113-14). He testified he saw Applicant approach Victim; Victim put his hands up as Applicant pointed a gun and shot Victim. (Tr. 114-15). Smith testified Applicant shot Victim again after Victim fell to the ground. (Tr. 115). Applicant then crossed the road and shot Victim a third time before running off. (Tr. 116). Although Smith did not see Applicant's Dodge Neon that night, he heard its distinctive squealing sound shortly after the shooting. (Tr. 119-20).

Brittney Croskey recalled seeing both Applicant and Victim earlier that evening. (Tr. 185-86). Croskey testified she later saw Victim with his hands up and heard a gunshot. (Tr. 188). She then heard a second shot before Victim fell to the ground. (Tr. 188-89). Croskey observed the shooter stand over Victim and shoot him again. (Tr. 188-89). Prior to the shooting, she recalled seeing someone pacing back and forth under a streetlight. (Tr. 187). Croskey noted the person walked in a similar manner as Applicant. (Tr. 187-88).

Wesley Walker testified he saw Victim with Sabb on the night of the shooting, which occurred between 10:00 and 10:30 p.m. (Tr. 135, 137). He testified he did not see Victim with a gun that night. (Tr. 139). Walker stated he saw the shooter reach into his pocket, pull out a gun,

[1] Sabb's nickname was "TT."

and shoot Victim twice. (Tr. 139). Walker testified the man who shot Victim had a ponytail and puffed hair, which was similar to the way Applicant sometimes wore his hair. (Tr. 140).

Investigator McFadden recovered surveillance video from a gas station near the shooting. On the video, a vehicle that Applicant later identified as his vehicle could be seen passing the gas station near the time of the shooting. (Tr. 317-25, 354-55).

In addition to the foregoing, the State presented evidence of animosity between Applicant and Victim. Smith testified a week or two before the murder, Smith saw Victim on top of Applicant. After the two were separated, Smith heard Applicant say it was not over. (Tr. 106-07). Detrel Matthews also recalled observing Applicant in an argument with Victim about a month before the murder. (Tr. 211-12). Applicant admitted he and Victim had gotten into a confrontation before, and Applicant had threatened to rob him on the day of the shooting. (Tr. 347-49, 370-71).

The State also presented evidence that Applicant had access to a pistol. Smith testified he saw Petitioner drop a gun during an altercation a few weeks before the murder. (Tr. 108-09). Matthews also recalled seeing what appeared to be a pistol fall from Applicant's waist during a prior confrontation. (Tr. 212-14). Investigator Wayne McFadden testified he learned from Matthews that Matthews' brother returned a .45 caliber handgun to Applicant before the shooting. (Tr. 312-15). Law enforcement recovered three .45 caliber shell casings from the scene but did not find any physical evidence tying Applicant (or anyone else) to the shooting. (Tr. 247-52, 255, 275-79).

SLED Agent Mark Creech testified he and two investigators interviewed Applicant but were unable to corroborate Applicant's whereabouts from 10:10 p.m. to 3:00 a.m. on the evening of the shooting. (Tr. 262-75). Investigator Wayne McFadden testified he attempted to verify Applicant's alibi for the evening of the shooting. (Tr. 305-08). He reviewed surveillance videos

from a gas station where Applicant claimed to be but did not see Applicant's vehicle in the footage. (Tr. 308-09).

Current Application

Applicant timely commenced this PCR application on October 29, 2018, raising various claims of prosecutorial misconduct and ineffective assistance of counsel. At the hearing, Applicant proceeded on the following allegations:

1. Prosecutorial Misconduct: The State did not fully disclose the nature of its relationship with Smith and the terms of his plea agreement.

2. Ineffective Assistance of Counsel:

   a. Failed to object to Brady violations;[2]
   b. Failed to suppress admission of unreliable identification evidence;
   c. Failed to make proper objections and motions at trial;
   d. Failed to object to the solicitor's improper comments in closing and reply arguments;
   e. Failed to place all sidebar discussions on the record; and
   f. Made harmful arguments against his and Brittany Croskey's testimony.

Before this Court are the records of the Williamsburg County Clerk of Court regarding the underlying convictions, the trial transcript, the records from Applicant's direct appeal, and Applicant's records from the Department of Corrections.

Testimony Presented at the Evidentiary Hearing

During the PCR hearing, Applicant testified about several pieces of evidence he believed the State withheld. Applicant acknowledged his vehicle—which was a distinct color—was captured on the surveillance camera of the "521 Saver" gas station in the area of the shooting and near the time of the shooting. However, he averred surveillance footage from Youngs, a different

[2] Applicant indicated he was proceeding on either prosecutorial misconduct or ineffective assistance of counsel as it related to an alleged Brady violation.

gas station, would have established he was merely passing through the area and had not previously been on the gravel road where the shooting occurred.[3] He acknowledged seeing the 521 Saver video right before trial but asserted he never saw a video from Youngs.

Next, Applicant alleged the State did not turn over the first statement from eyewitness Brittney Croskey, who identified Applicant as the shooter at trial based on his distinct walk.[4] He contends Croskey initially did not mention his walk but was coached by law enforcement during her second statement to identify him based on his walk. Applicant stated law enforcement mentioned a first statement but said they had technical problems while recording it. Applicant further asserted the State did not turn over a statement from Sabb, who was walking with Victim at the time of the shooting. He contended Sabb told police he did not know who killed the victim, which was the truth.[5] Applicant averred he was prejudiced by the State's failure to turn over this alleged first statement from Sabb because it could have shown a prior consistent statement.

Applicant testified Investigator McFadden did not turn over the name of a confidential informant. He further averred trial counsel should have objected when Investigator McFadden testified a gun fell out of Applicant's pocket during a prior fight with a different person. Finally, Applicant testified about his belief that the State entered into a secret plea deal with Maurice Smith, who testified against Applicant at trial. Applicant explained he and Smith got into an argument in

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[3] More specifically, based on testimony, the gravel road was between the two gas stations. Thus, if Applicant turned off the gravel road—as the State posited—he would have passed only the 521 Saver gas station. However, if he was merely passing through the area, as Applicant alleged, he would have passed both gas stations. Applicant also raised an issue with a missing video from a Citgo gas station, although it was not clear from Applicant's testimony where that gas station was located in relation to the shooting or how it would have assisted Applicant's case.

[4] Applicant acknowledged at the PCR hearing that at the time of the shooting he had pins in his legs and when he was tired he sometimes walked in a distinct manner.

[5] At trial, Sabb testified the shooter was wearing a white mask and Sabb could not identify him. (Tr. 421, 444).

December 2011, and Smith changed his statement about the shooting after that fight. Applicant further asserted Smith had multiple drug charges but was only serving probation after two years of a mandatory ten-year, 85% sentence. He pointed to that as evidence that the State had secretly struck a deal with Smith to testify against Applicant.

Solicitor Kimberly Barr testified about Smith's multiple arrests for drug charges and recalled his charges were resolved in September 2012—prior to Applicant's trial. Barr testified that after Smith testified for the State in Applicant's trial, Smith's attorney contacted her and indicated he wanted to file a motion to reduce Smith's sentence. Barr denied that she or investigators talked to Smith about changing his statement. On cross examination, she agreed that as a solicitor, she often engaged in plea negotiations and would agree to reduce charges in exchange for a plea. She also explained that when she expects a defendant to testify against another defendant as part of a plea bargain, she will ask the court to defer sentencing until after the defendant testifies. Barr testified Smith was sentenced the day he pled and she did not have a deal with him at that time; if Barr had had a deal with Smith to testify against Applicant when Smith pled, Barr would have requested Smith's sentencing be deferred.

Barr testified the only video she recalled was the video that was introduced at trial. She recalled that video showed Applicant's car—which had a distinct color and sound—passing by the gas station at the same time 911 received calls about the shooting. Barr did not recall a video from Young's gas station; based on her recollection, Investigator McFadden testified at trial that he viewed the tape from Young's and it didn't show anything. She did not recall specifically any type of alibi defense; she stated Investigator McFadden testified at trial that he was unable to confirm the initial alibi provided by Applicant.

Regarding Croskey's alleged missing statement, Barr stated her understanding was the

recording of Croskey malfunctioned early on, but the remainder of her statement was recorded. She stated law enforcement referenced Croskey's initial statements in a supplemental report, which Barr provided to the defense. Barr was unaware of the existence of any prior written or recorded statement from Sabb; she noted investigators do not always record or memorialize statements from witnesses. Barr did not recall notes from Sabb's interview. Barr stated she was unaware of investigators utilizing any confidential informant in Applicant's case. She maintained she turned over all evidence to the defense.

Guy Ballenger (trial counsel) testified the State would not offer a plea of less than thirty years, which Applicant never wanted to accept. He explained he prepped for trial pretty much the entire time he represented Applicant. Trial counsel testified he filed a Rule 5/Brady motion, the solicitor told him there were not any videos from gas stations other than the one introduced at trial, and trial counsel had no reason to dispute that. He further asserted he did not try to investigate additional videos because if they existed, they may have actually helped the State's case. Trial counsel explained he went to great lengths at trial to show Applicant's car was not speeding when it passed the 521 Saver gas station, which he averred suggested Applicant had not just shot someone. He testified he did not want any additional videos that could refute that argument.

Regarding Croskey's allegedly missing statement, trial counsel stated law enforcement often took statements that weren't recorded. Trial counsel also testified he had conflicting statements from Croskey and used them to impeach her at trial. He testified he sent a private investigator to interview Croskey, but she was "all over the map" and ultimately told the investigator that her original statement to law enforcement was correct. Trial counsel testified he did not believe Croskey's identification of Applicant created a meritorious Biggers issue because there was not a police lineup in this case. Although he acknowledged the lack of a lineup was not

conclusive as to whether there was a Biggers issue, he noted Croskey testified at trial that she had known Applicant for about a year prior to the shooting. Trial counsel explained he tried to establish on cross-examination that Croskey had only seen Applicant four times before the shooting. Ultimately, trial counsel believed it was an issue of credibility rather than admissibility.

Trial counsel testified he was not aware of any deal the State made with Smith, and he did not expect to find any type of written plea agreement between the State and Smith. He explained that based on his practice, the only signed documents he typically receives in State court related to a plea agreement is a sentencing sheet. Trial counsel noted Beaty[6] was not decided until 2018 and thus was not available at the time of Applicant's trial. He was unaware of law enforcement using a confidential informant in this case. Trial counsel testified he generally does not object to everything that is technically objectionable if it is not an important issue because the jury gets tired of constant objections. He did not recall anything objectionable about the State's closing argument.[7] Regarding the lawfulness of Applicant's arrest, trial counsel explained he was appointed after the preliminary hearing and after Applicant had been indicted on the charges. Finally, he stated he did not notice any issues regarding the search of Applicant's car.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court

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[6] State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2918) (instructing trial courts to avoid charging the jury that its job is to search for the truth).

[7] Trial counsel was questioned about specific portions of the trial transcript, including multiple statements made during the State's closing argument. Trial counsel's testimony on those specific passages will be discussed where relevant below.

finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

Brady violations / Prosecutorial Misconduct

Applicant alleges the prosecutor and/or law enforcement engaged in misconduct by withholding key pieces of evidence, coercing witnesses to change their testimony, and entering into a secret plea agreement with Smith. This Court finds Applicant has not established prosecutorial misconduct. To the extent these allegations are framed as ineffective assistance of

counsel, this Court finds Applicant did not prove trial counsel was deficient in any manner related to this issue, nor did Applicant prove any resulting prejudice.

First, Applicant did not prove the prosecution withheld any evidence. This Court finds **credible** Barr's testimony that (1) she turned all evidence over to the defense, (2) the only surveillance video in the State's possession was the video that was introduced at trial, and (3) she was not in possession of any prior written or recorded statement from Sabb. This Court likewise finds **credible** trial counsel's testimony that he did not have any reason to believe the State withheld any videos. Regarding Croskey's alleged initial statement, this Court finds that based on the testimony of Applicant, Barr, and trial counsel, the most logical inference is the investigators had to restart the recording due to a technical problem. Critically, Barr **credibly** testified she turned over the supplemental reports that referenced Croskey's initial statements. Regarding the alleged use of a confidential informant, this Court finds **credible** Barr and trial counsel's testimony that they were not aware of law enforcement using a confidential informant as part of this murder investigation. Finally, Applicant did not introduce any of these alleged prior statements or videos at the PCR hearing, making their intrinsic value—if they existed—speculative at best. Cf. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses). Based on the foregoing, this Court finds Applicant did not prove the prosecution withheld any evidence. This Court likewise finds trial counsel was not ineffective for not raising a Brady issue related to the alleged withheld evidence.

Next, Applicant did not prove the prosecution and/or law enforcement coerced witnesses to change their testimony. At the PCR hearing, Applicant averred (1) law enforcement coached Croskey to testify the shooter had a distinct walk similar to Applicant's walk and (2) Smith

changed his initial statement and testified against Applicant. However, this Court finds **credible** Barr's testimony that she did not coach or talk to any witnesses about changing their testimony, and she was likewise not aware of law enforcement coaching or talking to any witness about changing their testimony. This Court also finds **credible** trial counsel's testimony that Croskey's statements were all over the place, which trial counsel used to impeach her at trial. Based on the foregoing, this Court finds Applicant failed to prove any prosecutorial misconduct in this regard. This Court likewise finds Applicant did not prove counsel was ineffective for not raising this issue.

Finally, Applicant did not prove the existence of a secret plea agreement between Smith and the State. Critically, this Court finds **credible** Barr's testimony that (1) she did not have a deal with Smith related to testifying at Applicant's trial when Smith pled guilty, and (2) if she had entered into such an agreement with Smith, she would have asked the court to defer sentencing for Smith until after Applicant's trial. This Court notes Applicant's testimony that he and Smith got into an argument prior to Applicant's trial, which may have been the impetus behind Smith's ultimate decision to testify against Applicant. This Court further notes and finds **credible** Barr's testimony that eyewitnesses often don't initially disclose who a shooter is for various reasons. Based on the evidence and testimony presented, Applicant did not prove the existence of any secret plea agreement with Smith related to Smith testifying against Applicant. Applicant thus failed to prove prosecutorial misconduct in this regard. Likewise, Applicant failed to prove trial counsel was ineffective for not further investigating and/or raising this issue, and this claim is denied.

Failed to move to suppress unreliable identification evidence

During trial, Applicant questioned trial counsel about why he did not move to suppress Croskey's identification of him at trial under Neil v. Biggers. Trial counsel explained he did not believe Croskey's identification of Applicant created a meritorious Biggers issue because this was

not a situation involving a police lineup; rather, Croskey testified at trial that she had known Applicant about a year before the shooting. This Court finds Applicant has failed to show counsel was ineffective for not requesting a Biggers hearing.

"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." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "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. Id.

This Court finds counsel articulated a valid reason for not raising a Biggers issue and thus was not deficient. Specifically, trial counsel testified he did not believe a Biggers argument would be meritorious, and this Court agrees. The trial testimony does not establish that Croskey identified Applicant based on an unnecessary and unduly suggestive police procedure. At trial, Croskey testified she had known Applicant for about a year prior to the shooting and had seen him around town at different places, including seeing him three or four times at "the shop" where the shooting occurred. (Tr. 180-82). Croskey was also familiar with Applicant's car—a Dodge Neon—and his walk, which she described as "tip toe kind of" and "noticeable [if] you knew it." (Tr. 182, 188). No evidence shows Croskey identified Applicant as the shooter based on a line-up or show up; rather, her testimony reflects she spoke to police after witnessing the shooting and indicated the shooter walked in a similar manner as Applicant, whom she had known for about a year.

This Court further finds counsel articulated a valid strategy in attempting to undermine Croskey's identification of Applicant by highlighting on cross-examination inconsistencies with Croskey's trial testimony and her initial statement to police. Specifically, trial counsel elicited

testimony that Croskey initially "didn't have a feeling" about who the shooter was but later determined it could be Applicant after "people started talking" about the shooting. (Tr. 198-99). Due to the relative weakness of a Biggers argument here, counsel articulated a valid strategy for undermining Croskey's identification of Applicant through cross-examination instead and thus was not deficient.

Finally, based on Croskey's testimony that she was familiar with Applicant, and based on the lack of any evidence that she identified Applicant through an unduly suggestive lineup or show up, this Court finds it is not reasonably likely Croskey's testimony would have been suppressed based on Biggers. Thus, Applicant did not prove any resulting prejudice from counsel's failure to raise this issue at trial, and this claim is denied.

Failed to make proper objections and motions at trial

During the evidentiary hearing, Applicant questioned trial counsel about why he did not object to various statements in the trial transcript. Specifically, Applicant pointed to the following statement made by the Court prior to trial: "This is a real trial which is a fundamental part of our democracy and it's a search for the truth in an effort to make sure that justice is done. Searching for the truth and insuring that justice is done is often deliberate, repetitive, and slow." (Tr. 79). Trial counsel acknowledged the Supreme Court had admonished similar language in Beaty but explained that opinion was not published until after Applicant's 2013 trial.

This Court finds Applicant has not shown counsel was ineffective for not objecting to the trial court's opening statements. Initially, this Court acknowledges our Supreme Court recently instructed trial courts to avoid instructing the jury that its job is to search for the truth. State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). Notably, however, Beatty was not heard until June 15, 2017—more than four years *after* Applicant's trial. At the time of Applicant's trial,

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), was controlling. In Aleskey, our Supreme Court found "no reversible error because the 'seek the truth' language was charged in conjunction with the credibility of the witnesses charge, and not with either the reasonable doubt or circumstantial evidence charges." Beatty, 423 S.C. at 33, 813 S.E.2d at 506 (citing Aleskey). Here, this comment was made at the beginning of trial and not as part of the reasonable doubt or circumstantial evidence charges. Thus, at the time of Applicant's trial, the court's comments to the jury did not constitute reversible error. Trial counsel is not charged with foreseeing the later change in the law and thus was not deficient for not objecting. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Likewise, because this statement did not constitute reversible error, Applicant cannot show prejudice.

Next, Applicant pointed to the following direct testimony of Smith:

> Q: So you see [Applicant] then tells us what happens at that point.[8]
>
> A: He came out across the road toward [Victim, Victim] was already stopped. Victim—I saw him gesture put his hands up as I guess he might of let him know I didn't have a gun or whatever. [Applicant] had the gun pointing out at the time. [Applicant] shot him and he stood there. [Victim] he still standing there then he shot him again. He was still there and then he fell [Applicant] turned went go back across the road here this way and came back shot him again and went off the road.

(App. 115). After reviewing this testimony, trial counsel averred Smith was testifying to his own impression about what he saw, which was not hearsay. This Court agrees and finds that based upon a reading of the transcript, Smith was testifying to what he himself witnessed. This testimony is not hearsay, Applicant has not shown a valid basis to object, and Applicant has thus failed to

[8] This Court finds the "s" on "tells" is most likely a scrivener's error. Based on context, the solicitor was most likely asking, "So you see [Applicant], then tell us what happens at that point."

prove deficiency or resulting prejudice from counsel's failure to object to this testimony.

Finally, Applicant pointed to the following direct testimony of Detrel Matthews:

> Q: While you had the conversation with [Investigator] McFadden in the Sheriff's office. Did you tell him in fact that what fell from the defendant's waist was a .45 caliber pistol?
>
> A: I never told him exactly what caliber pistol it was because I really didn't know, but I just told him I thought it was a pistol that fell out of his waist.
>
> Q: Did you tell him at any point in time that you picked up a .45 caliber pistol?
>
> A: No ma'am.
>
> Q: Did you ever at any point in time tell him that [Applicant] asked for the pistol back?
>
> A: No ma'am.
>
> Q: Did you ever at any point and time tell him that you would not give the pistol back to [Applicant] because he threatened to shoot Mr. McBride?
>
> A: No ma'am.
>
> Q: Did you ever at any point and time tell him that you kept the pistol for a couple of days?
>
> A: No ma'am.
>
> Q: Did you ever at any point and time tell Mr. McFadden that the defendant called you repeatedly to get the gun back?
>
> A: No ma'am.
>
> Q: Did you ever at any point and time tell Mr. McFadden that you gave the pistol back to the defendant within three to four days after the incident with Mr. McBride?
>
> A: No ma'am.
>
> Q: Now in terms of your record. You've been candid about that and I appreciate that. Would it have been a violation of your parole

> [had] you in fact picked up that weapon and kept it for a couple of days?
>
> A: Yes ma'am.

(Tr. 216-17). Trial counsel agreed the foregoing could set the State up to introduce a prior inconsistent statement.[9] Trial counsel further explained he does not raise every technical objection if the testimony being elicited is not material or damaging because doing so can aggravate the jury.

This Court finds (1) the foregoing testimony was non-material because Matthews denied almost every question asked by the solicitor and (2) counsel articulated a valid strategy in not objecting to non-material testimony because doing so could annoy the jury. This Court further finds Applicant failed to articulate a valid objection to this testimony and thus failed to prove counsel was deficient for not objecting. Finally, this Court finds Matthews' denial of almost every question asked by the solicitor made it not reasonably likely this testimony materially impacted the jury and affected the outcome of this trial. Thus, Applicant has not established deficiency or prejudice, and this claim is denied.

Failed to object to the solicitor's improper arguments

At the evidentiary hearing, Petitioner questioned trial counsel about several portions of the State's closing argument. Specifically, he asked counsel about the following:

> I prosecuted Maurice Smith. Maurice Smith came in this court room he pled guilty and I was standing basically in the same position I'm standing right now and as I recollect his testimony when Mr. Ballinger asked him what were you convicted of he said distribution and trafficking

(Tr. 488).[10] Petitioner asked counsel whether the following constituted a personal attack:

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[9] The State, however, did not move to introduce any prior inconsistent statement from Matthews.
[10] In his application, Petitioner averred Smith's sentencing sheet indicated assistant solicitor Christopher Durant was the prosecuting attorney—not Barr, and counsel was ineffective for not objecting when the solicitor presented this "false evidence" to the jury. (Pet. 58-59).

> And folks when I talked about the defendant cutting his hair, I wasn't talking about it because I thought he was trying to conceal evidence on his hair. I was talking about it because he is trying to present an image to you of a person he is not. You know he comes into this courtroom he wants to portray himself as conscientious, studies, and you know he hits all the high marks. Young man not married check, no children check, college student check, clean cut check, nice suit check, nice tie check, shiny shoes check. He wants to create the best possible impression on this jury but it's a lie. The image that you saw in this courtroom this week folks that's a lie and just like he told me when I'm asking him questions, don't get it twisted. Ladies and gentlemen you all cannot get it twisted because this is not the person that you see in the courtroom is not the same individual who in his private life back on October 27, 2010 took a .45 caliber pistol and loaded to bullets into the victim's body.

(Tr. 478-79). Petitioner asked counsel whether the following constituted improper bolstering:

> So [the investigator] then goes to [Matthews'] parole officer and says listen ma'am I got a murder down here Williamsburg County. I got somebody that puts the murder weapon in the defendant's hand can you please just not violate this guy if he comes forward and he tell me the truth. Parole office says no . . . .

(Tr. 484).

> I would submit to you that there is something incredibly liberating about prison and I know that sounds ironic and it doesn't make—but when you go to prison and you're doing your time. I would submit to you that it kind of allows you to get it off your chest, because [Smith] knows what happened that night and he told you it's not just like I'm remembering today that [Applicant] killed [Victim]. I knew back then that [Applicant] killed [Victim] did I come forward and say yea Mr. Policeman I saw it I'm an eye witness it was [Applicant] no I didn't do that but it's[—]and please be clear it wasn't that [Smith] was uncertain back then he knew back then as he testified to you during this trial. Here is where I think it's so important and why I would submit to you that he is believable.

(Tr. 489-90). Finally, Petitioner asked counsel whether the following constituted pitting:

> Now as it relates to this issue about whether or not the shooter had the mask. Here's what I would tell you about that, to this day, TT, Mr. Sabb, is traumatized by that he couldn't bring himself to see the picture of [Victim] there. When he gave his statement to the police he says he sees the person come towards [Victim]. [Victim] walks

> up to the person, he says he hears a shot and takes off running. Now in terms of this issue about the white mask. What I would suggest to you is that when somebody points a gun at an individual and what we know is that, when [Victim] was stuck in the stomach he and the shooter were face to face. So the gun is likely held by [Applicant] like this against [Victim] and so when he fires the pistol here's a flash or light that comes from the muzzle of the gun . . . . Now [Applicant] was wearing glasses at the time. What I would suggest to you was that perhaps with the flash of the muzzle that that created a light that created a reflection on his glasses and I would submit to you that TT probably thought the person had a white mask on, but TT was clearly at least[,] according to his testimony[,] at least 15 yards away from where this happened and he didn't see or hear anything else as he can recall after that point. So I would just tell you that because quite frankly I don't think the defendant would've worn a mask because he wanted people to know that it was him.

(App. 492-93). When questioned about the preceding, counsel noted he and Petitioner "disagree[d] on what's objectionable" and testified he did not see any basis to object. He testified it was the solicitor's summation of evidence and was not out of line.

This Court finds Applicant has failed to show counsel was ineffective for not objecting to the foregoing portions of the State's closing argument. Counsel testified he believed the foregoing was the State's summation of the evidence and he saw no basis to object. Based on its review of the transcript, this Court agrees the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object. See State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) (providing statements made during a closing argument must be viewed "in the context of the entire record"). This Court thus finds counsel was not deficient in this regard.

Likewise, this Court finds Applicant has failed to show how any objection would have changed the outcome of trial and thus has not shown prejudice. Overall these arguments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." See id. ("The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."); id. ("Improper comments

during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument."). This Court further finds it is not reasonably likely a motion for a mistrial would have been granted based on the foregoing arguments. Thus, Applicant has not proven deficiency or prejudice, and this claim is denied.

Golden Rule Argument

At the evidentiary hearing, Petitioner asked counsel if the following was an improper golden rule argument:

> He committed a cold blooded, ruthless murder and at some point if we're going to just lie down and surrender our community to this type of street justice then it's time for all of us to hand our hats up. We might as well go home. Judge Young might as well retire his robe. I might as well quit this job and just do only private practice and we might as well quit blowing our money away destroy that courthouse across the street because we don't need it. If the defendant can come in here and kill somebody in cold blood and walk away with because [sic] he had the presence of mind to throw away the evidence. Then we might as well and we all say that we're done. I employ you all not to do that and I employ you all to return a guilty verdict.

(495). Counsel agreed it "could be viewed in that fashion."

This Court, however, disagrees and finds the foregoing did not amount to a Golden Rule argument. "The Golden Rule Argument is one that suggests to the jurors they put themselves in the shoes of one of the parties." State v. Rice, 375 S.C. 302, 334, 652 S.E.2d 409, 425 (Ct.App.2007). "In the criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place." Id. "Such an argument tends to destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id. The argument here did not ask the juror to put themselves in the place of the victims and thus did not amount to a Golden Rule Argument. See Harris, 382 S.C. at

122, 674 S.E.2d at 540 ("In the present case, reviewing the closing argument in the context of the entire record, the State did not make a Golden Rule Argument. Simply put, the State did not ask or suggest to the jury that they place themselves in the shoes of the victims."). Applicant has not set forth any other reason or basis that he believes trial counsel should have objected to this portion of the argument and thus has failed to prove counsel was deficient. Likewise, this Court finds that even if the foregoing argument was objectionable, this comment did not "infect the trial with unfairness as to make the resulting conviction a denial of due process," and it is not reasonably likely any objection would have changed the outcome. See id. ("The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."); id. ("Improper comments during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument."). Applicant has thus failed to prove any resulting prejudice from counsel's failure to object to this portion of the argument, and this claim is denied.

Failed to place all sidebar discussion on the record

At the evidentiary hearing, Petitioner questioned counsel about a sidebar in the transcript; counsel recalled his objection was overruled at the sidebar, but he could not specifically recall what the sidebar was about.[11] This Court finds Applicant has not shown trial counsel was ineffective for not placing this sidebar on the record. Initially, Applicant has not shown what the sidebar was about, other than the objection that was in the transcript and thus preserved for appeal. Thus, any finding of deficiency or prejudice is speculative. This Court finds Applicant has not proved this claim and this claim is denied.

[11] Prior to the sidebar, counsel objected to testimony based on hearsay, and the solicitor responded, "Judge, this is impeachment testimony." (App. 310-11).

Made harmful arguments against his and Brittany Croskey's testimony

In his application, Petitioner asserted counsel was ineffective for questioning him about whether anyone other than Croskey and "Big Moe" identified him as the shooter. (Pet. 72). Specifically, he averred Croskey did *not* identify him as the shooter. He likewise contended counsel was ineffective for "misrepresent[ing] the petitioner by inferring that the defendant's car was the car on the gravel road, inferring the petitioner, his client, is guilty." (Pet. 73). At the evidentiary hearing, however, Petitioner did not offer any testimony as to how he believed this questioning and argument by trial counsel harmed his case. He likewise did not question trial counsel about this issue at all.

This Court finds Applicant has failed to meet his burden of proof on this issue. Further, this Court has reviewed the transcript and finds counsel was not deficient for asking Petitioner this question or making this argument.[12] This Court likewise finds Applicant has not shown he was prejudiced by this question and argument by trial counsel. Thus, this claim is denied.

Conclusion

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule

[12] Croskey *did* identify Applicant as the shooter at trial. (Tr. 192). Further, a review of the portion of trial counsel's closing argument cited by Applicant shows trial counsel was noting discrepancies in testimony to cast reasonable doubt on the State's theory of the case. (Tr. 468).

71.1(g), SCRCP, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 3 **day of** January, ~~2022.~~ 2023

EDWARD D. MILLER
Presiding Judge
Third Judicial Circuit

Greenville, South Carolina