ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

March 5, 2015

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

RE: **Terrance V. Smith v. State of South Carolina**
Lower Court Case No: 2006-CP-32-3862
Appellate Case No. 2014-001261

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
SC Bar No. 68571

DS/ah
Enclosures

cc: Jeremy A. Thompson, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
Frank W. Addy, Jr., Circuit Court Judge

TERRANCE V. SMITH,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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II.

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Counsel was not ineffective for failing to request a charge on self-defense where no evidence shows that Petitioner acted in self-defense, and where the trial court instructed the jury on mere presence, which was supported, but not dependent, on co-defendant's imperfect self-defense claim.

STATEMENT OF THE CASE

Petitioner Terrance Smith was indicted in Lexington County for murder, first degree burglary, assault and battery with intent to kill, attempted armed robbery, criminal conspiracy, possession of a firearm during the commission of a violent crime, and ill treatment of an animal. Petitioner was tried jointly with his co-defendant Ivan Collins in a jury trial before the Honorable Marc H. Westbrook. Collins was convicted of all charges. Smith was convicted of every charge except the animal cruelty charge. Smith was sentenced to life without parole.

Smith appealed. The Court of Appeals affirmed Smith's convictions and sentences. State v. Smith, 2005-UP-600 (S.C. Ct. App., filed Nov. 30, 2005). Smith then filed a PCR application. An evidentiary hearing was held before the Honorable Frank W. Addy, Jr. Judge Addy denied relief by order dated April 2, 2014. Smith filed a Rule 59(e), SCRCP motion. Judge Addy denied the motion by order dated May 12, 2014. Petitioner seeks a petition for writ of certiorari. The State's return to this petition follows.

STATEMENT OF FACTS

A failed home invasion/robbery by Petitioner Smith and his co-defendant Collins of a small-time drug-dealer left one man dead and another man wheel-chair bound.

The home invasion occurred in Charles Penny's apartment. Franklin Hook lived next door to Penny as did Hook's brother-in-law, Sindey Muller, the deceased. Penny, Hook, Muller, and Ronnie were at the apartment smoking pot, drinking, and playing video games. Hook confirmed that Penny usually had marijuana at his apartment, but was not a big drug dealer. Hook testified that he had one drink and half a blunt. App. pp. 246-252.

A female came over shortly after he arrived. This female received a phone call on her cell phone and went into the back of the apartment to answer. The female left immediately after this phone call, and Penny walked her to the door. At this point, two men came through the door before Penny could close it, one man with two guns in his hands started shooting, while the other stood in the doorway. Hook did not see a weapon on the second man. Hook testified that the robbers went through everyone's pockets. Hayward charged the gunman from the kitchen and wrestled with him. After the shooting, Penny went to get his gun. Hook testified that Penny did not have the gun on him at the time the men entered the apartment. By the time Penny returned with the gun, the men were gone. Hayward said he could not move and Hook tried to help him next door. Hook told his son, who was back at Hook's apartment, to call 911. Hook testified that he was unable to pick anyone out of the photographic lineups he was shown by law enforcement. App. pp. 252-264.

Charles Penny testified that he occasionally sold marijuana, mostly to friends. Penny testified that at the time of the shooting, Ronnie Rogers, John Hayward, and Sidney Muller

were at his apartment. Williams came over around 10 p.m. and asked Penny for his phone number. She stayed only fifteen minutes, talked on her cell phone, and then left. Penny walked her to the door. As she was leaving, two men stopped Penny from closing the door, made their way into the house, and one of them started shooting. Penny saw the second man's face. He did not seem to have a gun on him during the shooting. Penny retrieved his gun, but the two robbers were gone when he returned. Hayward was writhing in pain and could not feel his legs. Outside, Penny discovered his dog was shot, she died. Penny testified he cooperated with the police. He told them about his registered gun and gave it to police.[1] Penny found additional shell casings in the house after the incident and called the police to collect the shell casings. Penny was unable to identify the shooter, but he was able to identify Smith as the accomplice who stood inside the apartment. App. pp. 299-315.

Penny became suspicious about Williams as he thought about the incident later because the two men let Williams leave, but did not let anyone else leave when they entered the apartment. App. p. 312. On cross-examination, Penny explained he was hoping for Williams to become his girlfriend. He confirmed on cross-examination, as he had alluded to on direct, that he suspected Williams was involved in the robbery. App. p. 340.

Counsel cross-examined Penny, who admitted he sold marijuana from his home for a little while. Penny admitted he had three mixed drinks, a couple of beers, and smoked a couple of marijuana blunts at the time of the shooting. Penny admitted he sold marijuana to a couple earlier that day. Penny testified no drugs were left after the shooting. Tr. pp. 326-

[1] SLED forensic examiners determined that none of the bullets or cartridges recovered in the apartment matched Penny's gun. A cartridge found in the front yard matched Penny's weapon, but based on its corroded condition, SLED examiners determined it was not fired the day of the incident. App. pp.659-666, tr. pp. 679-686.

346.

Based on discussions with Penny, law enforcement spoke with Williams on August 4. She provided a statement admitting she was present at the scene and later gave a second statement. Investigator Mark Jones' testimony revealed that although in Williams' initial statement she identifies Collins by his alias as one of the two men involved, both statements identified Smith as one of the perpetrators. App. pp. 576-580, tr. pp. 596-600.

John Hayward testified for the State as well. Hayward testified that when the two robbers burst into the house, they both had guns. One man had two guns. When they entered the apartment, Hayward went into the bathroom and then the kitchen, before trying to tackle one of the robbers. Hayward identified the man with whom he fought as Smith. Hayward was also able to identify co-defendant Collins. Hayward was shot and is now wheel chair bound. App. pp. 365-378; tr. pp. 375-388.

Wykiesha Williams testified for the State. She admitted on direct examination that she was convicted in 1999 of forgery. She testified she knew Collins all her life and they were dating for about a year before the robbery. She knew Smith for about two or three months and only by his nickname "Smiley." Collins and Smith were always together. App. pp. 440-443, tr. pp. 450-453. Williams testified that on Monday before trial, she pled guilty to conspiracy, burglary in the first degree, and attempted armed robbery. Williams' sentencing hearing would not occur until after trial. She testified she was aware that when she was sentenced, she could receive up to a life sentence for burglary, and she testified about the maximum sentences she could receive for attempted armed robbery[2] and

[2] Williams erroneously testified she was facing fifteen years for attempted armed robbery instead of twenty

conspiracy. Williams testified her sentence would be up to the judge. She testified that the State dismissed a murder charge and additional counts of attempted armed robbery. App. pp. 445-448, tr. pp. 455-458.

As to the dismissed charges, Williams testified as follows:

> Q: Are you aware that the State originally had you charged with murder?
>
> A: Yes, sir.
>
> Q: Are you aware that there [were] some additional attempted armed robberies against you from this same incident regarding other individuals in the house?
>
> A: Yes, sir.
>
> Q: And those charges have been dismissed, have they not?
>
> A: Yes, sir.

App. p. 448, tr. p. 458, lines 6-15.

Williams testified she met Penny roughly two or three weeks before the robbery. She smoked marijuana with Penny. She told Collins that Penny sold marijuana, which led to a plan by Collins to rob Penny. On August 3, 2001, she was at work at a fast food restaurant in Irmo when she received a call from Collins who wanted to rob Penny that night. Williams testified she agreed with the plan. At the end of her shift, Collins and Smith picked her up in her white Honda. They drove to West Columbia in Williams' white Honda Civic. Williams testified that Collins had two guns, Smith had one. She testified they always had guns. App. pp. 449-454; tr. pp. 459-464.

Williams dropped Collins and Smith off at a nearby parking lot. Williams then

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years. App. p. 447, tr. p. 457, lines 3-4.

parked the car and went inside Penny's apartment. While there, Collins called. She gave a code to indicate there was marijuana in the apartment.[3] She promptly left, Penny walked her to the door. She saw Collins and Smith come towards the door from their hiding spot in the bushes. They had their guns. App. pp. 454-460; tr. pp. 464-470. Williams testified that sitting in her car, she saw clearly into the apartment and saw Smith "tussling" with someone and saw Collins fire his weapon. App. pp. 462-464, tr. pp. 472-474.

As she was leaving in the Honda, Collins and Smith caught up to her and got in the car. They were mad because they did not get anything.[4] The three conspirators went to a motel on St. Andrews Road. She rented a room under an alias, Lashawn Geiger. Williams identified the motel receipt during direct examination. The three stayed overnight, and the next morning, Collins and Smith dropped Williams off at work. App. pp. 465-472, tr. pp. 475-482. Williams left work after she received a threatening phone call, Collins and White picked her up. App. p. 473, tr. p. 483.

Their plan was to go to Swansea, but they missed the exit and stopped in Orangeburg for lunch. They then went to Williams' house in the Friarsgate neighborhood in Irmo. While they were there, Irmo and West Columbia police officers came to speak with Williams. The officers were speaking outside with Williams' mother when Williams went outside to speak to them. Collins and Smith remained hidden in her room. App. pp. 473-475, tr. pp. 483-485. She went with the officers to West Columbia, leaving Collins and Smith behind. When she

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[3] Specifically, the agreed plan is that Collins would ask her if she was going to the club. Williams would say yes if she saw marijuana in the apartment and no if she did not see marijuana. App. p. 534, tr. p. 544.

[4] At the PCR hearing, Smith confirmed they were unsuccessful, replying to the State's question as follows: "No we didn't even commit a robbery. What did we take?" App. p. 1240, lines 4-8. Smith testified he was Collins' lackey. He explained, "say like if he wants to plan a robbery that night, he would do things without saying, you

returned, they were gone. App. pp. 479-480, tr. pp. 489-490.

Initially, Williams lied and claimed not know anything about the robbery/murder. When she later was told one person was killed and another fighting for their life, Williams told some of the truth: she denied being part of the robbery, but told law enforcement that Smith and a person she identified alternatively as "Buck" and "Richard Smith" committed the robbery. Williams explained that Collins went by both "Buck" and "Richard Smith" sometimes. She explained she gave that statement because she did not want Collins or herself to get in trouble. App. pp. 480-485, tr. pp. 490-495.

Williams gave another statement later admitting her role in the robbery and identifying Collins as Buck. The statement is mostly consistent with her testimony, but she admitted to a couple of lies in the statement. She said in the statement that she dropped Collins and Smith off, and she claimed she gave the cell phone to Smith instead of Collins. App. pp. 489-494, tr. pp. 499-504.

On August 6, Williams gave her fourth statement with her lawyer present. Williams confirmed most of the content of her third statement, but expounded on some points. She discussed the phone call she received from Collins inside Penny's apartment and told law enforcement about her previous encounters with Penny. Williams also told law enforcement about what she observed from her car and what happened afterwards. She admitted that when law enforcement arrived at her house that Collins and Smith were inside. At that time, Williams agreed to help locate Collins and Smith who were still at large. App. pp. 500-508, tr. pp. 510-518.

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know, 'Smiley, I'm about to do this, . . .'" App. p. 1239, lines 1-5.

On August 8, Williams agreed to speak with law enforcement for a question and answer section. The subject of the questioning chiefly concerned whether she had heard from Collins and Smith, Williams had not. She testified that she was truthful with police since her statement on August 6. App. pp. 509-511, tr. pp. 519-521.

On cross-examination, trial counsel examined Williams on the fact that Collins discussed the robbery plan with Williams, but without Smith present. App. p. 522 (tr. p. 532). Williams admitted that only she of the three co-defendants knew where Penny lived. App. p. 523, tr. p. 533. Williams again admitted to committing forgery. App. p. 524, tr. p. 534. Trial counsel pointedly asked: "But part of the understanding was, and you didn't have any doubts about this when you pled, that you were expected to testify in this trial as a part of the plea agreement where other charges were dismissed against you and the judge would consider your sentence, whatever it was to be, after you testified in this trial; is that right?" App. p. 525, tr. p. 535, lines 4-9. Williams replied she had the other charges dropped for the guilty plea, and she would be sentenced sometime later. App. p. 525, tr. p. 535.

Trial counsel cross-examined Williams on the fact that she married a Chinese citizen in March 2001 while she was still dating and "spending every day with" Collins. Williams confirmed marrying the Chinese gentleman. Trial counsel asked Williams whether it was so the man could stay in the country and asked whether it was true that she was paid $1,000 for the marriage. Williams denied this. Williams also denied knowing the Chinese man was a drug dealer. She admitted that at the time of the incident, only five months after the marriage, she did not know where the Chinese man was and still does not know where he is. App. pp. 529-530, tr. pp. 539-540.

Collins' counsel asked Williams whether she told a fellow jail-mate that she went to Penny's to sell heroin, which Williams denied. App. p. 532, tr. p. 542. Williams was questioned on whether or not she used marijuana and whether she knew the street value of marijuana. App. pp. 537-538; tr. pp. 548-49. Williams was also cross-examined on whether she slashed the tires of Collins' other girlfriend, which she denied, and whether she kicked in the door of someone named Erica, which she admitted. She denied breaking a window at Tammy's residence, apparently Tammy was another girlfriend. Williams denied knowing Tammy. App. pp. 546-547, tr. pp. 556-557. Williams testified she served about five and a half months in jail, but was released on bond. Her bond was reduced after her statements. App. pp. 548-549; pp. 558-559. She admitted to Collins' counsel that she did not know Smith's real name even though he was Collins' best friend and they had been dating a year. App. p. 560, tr. p. 570. Additionally, Williams was cross-examined about her prior statements and her earlier opportunity to turn Collins and Smith into police.

Trial counsel then conducted a short, pointed re-cross examination as follows:

> Q: . . . Despite everything that's been said, once again you don't recall having any conversations about anything that was going to happen with Terrence Smith?
>
> A: No, Sir, I don't.
>
> Q: You didn't have any agreement with him.
>
> A: I don't remember having an agreement with him.

App. p. 564, tr. p. 574, lines 1-8.

Dr. John Carter, an expert in pathology, testified that based on the apparent trajectory of the bullet through Muller, the angle of weapon fire was likely at a higher level than

Muller; he was most likely seated or squatted below the weapon when shot. App. pp. 689-693; tr. pp. 709-713. This is consistent with Hook's testimony that Muller was sitting in his chair and never had a chance to move before Collins started firing. App. p. 257, line 25 – p. 258, line 2.

Collins testified in his defense. He claimed there was no planned robbery or burglary and claimed self-defense. His testimony was not fruitful for him because the jury convicted Collins of every charge he faced.

ARGUMENT

I.

Probative evidence supports the PCR court's conclusion that counsel was not ineffective in his cross-examination of the cooperating co-defendant where she admitted she was facing a potential life sentence for burglary and that she was originally charged with murder, and where she was extensively cross-examined for bias, consistency, and her past conduct.

Smith complains the PCR court erred in finding counsel was not ineffective because, Smith contends, trial counsel should have questioned Williams on the minimum and maximum exposure for murder and the minimum sentence for burglary. Smith primarily relies on the authority of State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), which was decided long after the 2003 trial.[5] However, his reliance on Gracely fails to touch on the critical question: Gracely allows a defendant to cross-examine a cooperating co-defendant on the co-defendant's exposure, including the maximum and minimum sentence for the charges the co-defendant may face or expect to have dismissed, but the pertinent question is whether defense counsel is required, through some rigid view of his conduct, to cross-examine on this point. In the instant case, counsel and Collins' counsel collectively conducted a thorough and effective cross-examination. There is no constitutional requirement that trial counsel exhaust every single feasible cross-examination question. Counsel's cross-examination meets the standard of reasonableness articulated in Strickland, infra.

In order to prove counsel was ineffective, a PCR applicant must show counsel's

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5 Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial") *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

A review of counsel's performance "must be highly deferential" and "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. "[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id. at 689. "Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance of the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." Id.

The right to cross-examination is guaranteed by Davis v. Alaska, 415 U.S. 308 (1974). It is described as an essential and fundamental right. Winzer v. Hall, 494 F.3d 1192, 1196 (9th Cir. 2007). However, in assessing counsel's performance, cross-examination is not required to be flawless, it must be objectively unreasonable. A review of counsel's cross-examination naturally should be viewed with great deference. Dows v. Wood, 211 F.3d 480,

487 (9th Cir. 2000). "The issue is not whether counsel attacked a prosecution witness on every conceivable point but whether they subjected his testimony to the adversarial testing that is integral to the trial process." Johnson v. Nagle, 58 F.Supp.2d 1303, 1356 n.42 (N.D. Ala. 1999). For instance, the Ninth Circuit found counsel cross-examined a prison informant sufficiently to put the inmate's credibility thoroughly at issue, and therefore, extra impeaching would not have changed the result of trial. Malynsky v. Budge, 577 F.3d 1083, 1093 (9th Cir. 2009).

In the instant case, counsel, testifying long after trial, could not recollect what reasons he might have had to refrain from further cross-examination of Williams concerning her potential exposure. However, her credibility, like the prison informant in Malynsky, was thoroughly put at issue. Counsel noted, "I will say that I think it was kind of obvious that she was getting some kind of consideration for her cooperation and testimony." App. p. 1075, lines 19-23. Counsel later explained: "And I think the jury – most jurors would understand that that's a pretty good benefit to have a murder charge dismissed." App. p. 1110, line 21 – p. 1111, line 1. The jury knew she still faced life and extra for the charges she pled to and the prosecution was not pursuing murder or additional attempted armed robbery charges in exchange for her testimony. She was impeached on her prior statements, her ability to perceive events in question was thoroughly challenged, and her character was put at issue with her 1999 forgery conviction and her dubious marriage to a Chinese man. Counsel also effectively examined Williams on the point that she and Collins never discussed robbery plans in front of Smith (although Smith's actions proved he was part of the plan). Accordingly, the PCR court's findings are supported by probative evidence.

II.

The PCR court did not rule on the alleged "Brady" issue raised as Petitioner's issue number two, and further, no Brady violation occurred.

Smith claims that the fact the prosecution had not dismissed the murder indictment prior to trial amounts to a Brady violation.[6] Smith misapprehends Brady and raises an argument not ruled upon by the PCR court. The record reveals trial counsel was aware of the very term of the agreement that is the substance of the purported discovery violation.

This Court should refrain from reviewing the issue because it was not ruled upon by the PCR court. Smith misrepresents the record to claim this issue was raised and ruled upon by the PCR court. Smith quotes the order out of context to substantiate his erroneous claim that the issue was ruled upon. Under the subsection of the order entitled "**Counsel adequately cross-examined co-defendant Wykiesha Williams,**" the PCR court summarized Smith's allegations as follows:

> Applicant alleges trial counsel was ineffective for failing to cross-examine Williams with respect to the plea agreement. Similarly, Applicant alleges a Brady violation on the basis that Williams received an illegal sentence in that the sentence for Burglary in the First Degree, which carries a minimum sentence of fifteen years imprisonment which may not be suspended, relying upon the holding of State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

App. p. 1397. The section is silent as to whether the timing of dismissal on the murder indictment constitutes a discovery violation. At the conclusion of the section, the PCR court finds counsel was not ineffective and addresses the Brady issue regarding Williams' sentence

[6] Brady v. Maryland, 373 U.S. 83 (1963).

for burglary as follows: "Further, this Court finds Applicant has failed to show any basis to believe that there were negotiations between Williams and the prosecution other than what was presented at trial." App. p. 1398. Smith attempts to recast this ruling regarding the burglary charge as a ruling on the issue of the timing of dismissal for the murder indictment.

Smith further misrepresents the content of the Rule 59(e) motion to suggest the issue was raised in that motion. However, the issue regarding the dismissal of the murder indictment was raised as an ineffective assistance of counsel claim and not as a Brady issue. The relevant part of this motion is as follows:

> The Order fails to make findings of fact and ruling of law on Applicant's claims that Trial Counsel neglected to adequately cross-examine this witness concerning the following:
>
> . . .
>
> 2. Whether her murder charge had in fact been dismissed prior to her testimony at Applicant's trial;
>
> . . .
>
> 6. Her claims that her murder charge had been (past tense) dismissed because of her pleas on other charges.

App. pp. 1411-12. As shown above, the issue of a Brady violation was not ruled upon by the PCR court and was not raised in the Rule 59, SCRCP motion, therefore it should not be reviewed. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred.").

Further, the issue raised is not cognizable in PCR as it is a direct appeal issue. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Note Smith does not attempt to

raise the issue as after-discovered evidence.

Counsel testified as follows concerning his interpretation of the timing of dismissal of indictments:

> As far as – I cannot tell you that I understood that to mean that they had necessarily signed off on any indictments or anything, that is, the Solicitor's Office had signed off on the indictments. But if it had not been done, clearly it was supposed to be done as a part of the plea arrangement with Ms. Williams.

App. p. 1069, line 9 – p. 1070, line 2. Counsel elaborated further:

> In dealing with the Solicitor's Office across the state, I mean, I've never known Solicitors, in my experience, who announced in court that this charge was being dismissed and later on brought it back. Now, there might be some exceptions if part of the deal was that somebody was to give truthful testimony and it turns out they didn't.

App. p. 1071, lines 14-22. On redirect, he addressed the issue further:

> But my understanding was that the charge of murder was going to be dismissed. And much like Mr. Matthews said, I had no reason to believe that that wasn't going to happen and that it wasn't going to be with finality.

App. p. 1210, lines 13-17. Counsel confirmed his understanding that the charge "**was being** dismissed." Tr. p. 1210, lines 18-23 (emphasis added). Accordingly, counsel confirmed he was aware of the agreement between Williams and the prosecution, so no Brady violation occurred. Further, no testimony suggests time was of the essence as to dismissal of the murder indictment. The indictment needed to be dismissed and Williams needed to testify truthfully, but which occurred first was immaterial to the agreement. Ultimately, the material term of the agreement was that Williams not be prosecuted for murder if she testifies

truthfully.

Under Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999), the parties to a plea agreement are bound by the plea court's acceptance of the plea agreement. Id. at 688, 511 S.E.2d at 402. Once Williams' plea agreement was accepted by the court prior to trial, the prosecution was bound by the terms of the agreement. Williams would be able to enforce the terms of the agreement. Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014). So contrary to the argument presented by Smith, the prosecutor could not unilaterally decide to prosecute Williams for murder in contradiction of the agreement, but would need to convince the trial court over the likely objection by Williams' able counsel that Williams breached the agreement by testifying untruthfully.

Brady v. Maryland, 373 U.S. 83 (1963) is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: 1) the evidence was favorable to the accused, 2) it was in possession of or known to the prosecution, 3) it was suppressed by the prosecution, and 4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Certainly, Brady requires disclosure to the accused of a favorable plea bargain with a cooperating co-defendant. State v. Cain, 297 S.C. 497, 503, 377 S.E.2d 556, 559 (1988). However, as counsel's testimony demonstrates, his understanding was that the murder charge **was going to be dismissed**, which aligns exactly with the prosecution's actions.

Further, the timing of disclosure is hardly material to the present case. Reversal is required only if improperly withheld evidence is material to the guilt or punishment such that there is a reasonable probability that had the evidence been disclosed the result would have

been different. Id. For Brady purposes, the court's function is to determine whether the appellant's right to a fair trial has been impaired when viewing the non-disclosed evidence in the context of the entire record. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987). In the instant case, the distinction of whether the charge would be dismissed or had been dismissed is immaterial. In either case, the jury was aware that Williams received a substantial benefit. Further, actual dismissal of the indictment would not be an impediment to restoring the charge if Williams failed to testify truthfully. Finally, in light of the abundant evidence of guilt and the vigorous cross-examination of Williams by both defense attorneys, there is no probability that the outcome of trial would have been different on this point.

It should be noted that Smith erroneously claims the State would prosecute Williams "if she didn't testify to what the prosecutor wanted her to testify to." See pet. for certiorari, p. 14. The charges were going to be dismissed provided Williams gave "truthful testimony during the trial of the co-defendants . . . ." App. p. 1260, lines 2-7. Respondent is confident that the tone and connotations implied in this argument by petitioner is unintentional, but nonetheless, it is unfair to the prosecutor in this case who prosecuted this trial fairly.

Probative evidence supports the denial of the PCR application, and as mentioned above, this issue was not ruled upon by the PCR court and should not be reviewed. Accordingly, certiorari should be denied.

III.

Counsel was not ineffective for failing to request a charge on self-defense where no evidence shows that Petitioner acted in self-defense, and where the trial court instructed the jury on mere presence, which was supported, but not dependent, on co-defendant's imperfect self-defense claim.

Smith claims his trial counsel was ineffective for failing to request a jury instruction on self-defense based on his co-defendant's imperfect claim of self-defense. No evidence supports that Smith himself acted in self-defense. Smith was not prejudiced by the alleged deficiency because the jury was instructed on mere presence. Smith's mere presence defense was broader than Collins' self-defense claims, and if the jury believed Collins testimony and followed the trial court's instructions, the jury would have acquitted Smith. Obviously, the jury did not believe any part of Collins' testimony except, as discussed below, the part about Collins shooting the dog.

Collins testified that at the time of the robbery, he was a drug dealer. Collins testified that he borrowed Williams' car that day and that he and Smith picked her up from work. Collins wanted to go back to his home on Cherry Road in Columbia, but Williams, who was now driving, wanted to make a stop. She drove to Penny's apartment and went inside. Collins testified he had never been to the apartment before and did not know Penny or any of the others at the apartment. He waited outside the car and at one point called her on his cell phone. She told Collins she would be out in a minute. However, as they continued to wait, Smith walked up to the door and knocked. At that moment, someone threw something out the door at Smith who ducked. Then someone grabbed Smith and slammed him to the ground. App. pp. 727-737, tr. pp. 747-757.

Collins testified, "And when the guy slammed him to the ground, I looked up. And it was a big guy, and he went and pulled a gun and I had to pull my gun." App. p. 737, tr. p. 737, lines 1-3. Collins confirmed he keeps a gun because he is a drug dealer.[7] Collins shot at the gunman, who he contended was Penny. Penny shot back, and Collins ran. Collins denied he was ever in the house. App. p. 737, tr. p. 757. Collins admitted he shot the dog. App. p. 741, tr. p. 761. Collins admitted he did not call law enforcement, that he threw his gun in the Broad River, and that he fled to Georgia. He claims it was because there was a warrant for his arrest on another armed robbery, which he subsequently pled guilty to. App. pp. 761-763, tr. pp. 781-783. Collins admitted that when he was first arrested in Georgia, he told law enforcement his name was Richard Smith, which was the same name Williams used when she told law enforcement about Collins. App. pp. 766, line 25 – p. 767, line 10.

This testimony perhaps supports self-defense as to Collins, but it certainly supports mere presence as to Smith. In order to establish self-defense, evidence must show: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or must have actually been in imminent danger; (3) if the defense is based on the actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the instant case. State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

In the instant case, Collins never testified that he felt he was in imminent danger, and

[7] Collins sold crack cocaine. App. p. 764, tr, p. 784, lines 2-11.

until Collins fired the first shot, Collins was not in imminent danger. Penny was the homeowner and under Collins version of events, merely had a gun. Collins also had a duty to retreat for a self-defense instruction, and it is not clear that he could not have retreated.[8] However, even if his defense of self-defense was imperfect, Collins' testimony does establish mere presence for Smith. Smith's mere presence is broader than Collins' self-defense case based on Collins' testimony alone. Further, counsel was successful in eliciting testimony from Williams that Williams and Collins never discussed the robbery plans in front of Smith. Accordingly, Smith's guilt or innocence did not reside with possible jury issues of duty to retreat or actual belief of danger. The trial court instructed the jury on mere presence as follows:

> But, however I will tell you that mere presence at the scene of a crime is not enough to prove someone guilty of a crime. The burden is upon the State to prove every element of the crime charged.
>
> So if you find after reviewing all of the evidence that the State has proven that a defendant was only present at the scene of the crime and that they have not proven beyond a reasonable doubt any other participation in the crime then you must find that defendant is not guilty. The law says that proof of mere presence at the scene of a crime is not enough to find someone guilty.

App. p. 852, tr. p. 872, lines 9-19.

If the jury believed Collins' absurd story and followed the trial court's instructions, they would have acquitted Smith. Jurors are presumed to follow the trial court's instructions.

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[8] Smith misapplies the law of the case doctrine in claiming that his contention that Collins' testimony supports a self-defense charge is the law of the case. This Court may affirm on any ground appearing in the record. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent – the 'winner' in the lower court– may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by

State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). Without a doubt, the instructions provided to the jury were sufficient to judge **Smith's** criminal liability. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial **to the defendant**. State v. Gaines, supra; State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

In the instant case it is clear the jury understood mere presence when the jury acquitted Smith of the animal cruelty charge, the only crime Smith really was just merely present for. On the other hand, it is clear the jury did not believe Collins' version of events since under his version, there was no robbery or burglary; the jury convicted both Collins and Smith of those charges. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) (citations omitted) (citing with approval cases holding that a robber may not claim self-defense for an ensuing homicide).

Accordingly, since mere presence, Smith's defense, was charged to the jury, and it is clear the jury did not think Smith was merely present for the attempted robbery or burglary,

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the lower court.").

counsel was not ineffective merely because self-defense – Collins' defense – was not charged to the jury. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent would respectfully request permission to more fully brief the issues herein.

Respectfully submitted,

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March 5, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Lexington County
Court of Common Pleas

The Honorable Frank W. Addy, Jr., Circuit Court Judge
Appellate Case No. 2014-001261

TERRANCE V. SMITH, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Jeremy Adam Thompson, Esquire
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This 5th day of March, 2015

Ashley Haworth

ASHLEY HAWORTH
LEGAL ASSISTANT