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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-001303

Nathaniel Charles Teamer,.....Respondent ~~Petitioner~~

v.

State of South Carolina,.....Petitioner ~~Respondent~~

BRIEF OF PETITIONER

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ATTORNEYS FOR RESPONDENT

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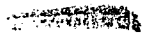

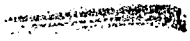

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QUESTIONS PRESENTED

1. Did the PCR court err in granting Respondent's application based upon Counsel's failure to move for a continuance when Respondent's alleged alibi witness became ill during the trial and where the testimony of the alibi witness did not meet the legal definition of alibi?

2. Did the PCR court err in granting post-conviction relief where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for failing to provide the trial court with a suggested third party guilt jury instruction?

3. Did the PCR court err in granting Respondent's application where Respondent failed to prove that Counsel's failure to object to portions of the trial court's jury instructions constituted deficient performance where the jury instructions, taken as a whole under the prevailing law at the time, would not have constituted reversible error?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Respondent was indicted at the May 2006 term of the Spartanburg County Grand Jury for murder (07-GS-42-1407) and assault and battery with intent to kill (07-GS-42-1408). E. Joshua Schultz, Esquire, represented him. On January 16, 2008, Respondent was convicted of these charges by a jury. The Honorable J. Derham Cole sentenced him to confinement for life for murder and a consecutive sentence of twenty years for assault and battery with intent to kill.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. An Anders brief was filed on Respondent's behalf by the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Teamer, Op. No. 2010-UP-062 (filed January 28, 2010). A Petition for Rehearing was filed by the Respondent and denied by the Court on April 21, 2010; however, the Court withdrew its earlier opinion (2010-UP-062) and substituted an opinion dated April 21, 2010. Respondent then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was denied on May 18, 2010. The Remittitur was sent on May 19, 2010.

The Respondent filed his application for post-conviction relief on August 2, 2010 (2010-CP-42-4181), and an amendment to the application on October 8, 2012. An evidentiary hearing was held on October 29, 2012, at the Spartanburg County Courthouse. The Respondent was present and represented by Counsel, Tricia Blanchette, Esquire, and Jeremy Thompson, Esquire. The State of South Carolina was represented

by Suzanne H. White, Assistant Attorney General. The Honorable Brooks P. Goldsmith granted the application by written Order on February 8, 2013. Petitioner filed a 59(e) Motion and a hearing was held on the Motion on April 18, 2013. Judge Goldsmith denied the Motion by written Order on May 6, 2013. Petitioner filed a timely notice of appeal and Petition for Writ of Certiorari. Respondent filed a cross appeal and Petition for Writ of Certiorari. This Court denied Respondent's Petition for Writ of Certiorari, while granting Petitioner's. This Brief of Petitioner follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) proceeding, an Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The reviewing Court may reverse the PCR judge's factual findings where the record lacks "any evidence of probative value" to sustain them. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)) ("[A] PCR judge's findings should not be upheld if there is no probative evidence to support them"). Further, where the PCR court's decision is premised on an error of law, this Court must reverse. Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 596 ("this Court will reverse the PCR court's decision when it is controlled by an error of law.").

ARGUMENT

I. The PCR court erred in granting post-conviction relief based upon Counsel's failure to move for a continuance when Respondent's alleged alibi witness became ill during the trial and where the testimony of the alibi witness did not meet the legal definition of alibi.

Petitioner respectfully submits that the PCR court incorrectly found that Counsel was ineffective for failing to move for a continuance during trial because one of Respondent's alibi witnesses became ill during the trial and was unable to testify.

Daisy Elaine Feaster, the mother of the Respondent's girlfriend at the time of the charges, testified at Respondent's burglary trial in September 2007. Feaster became ill after a couple of days of the murder trial and did not testify at that trial in January 2008. Respondent presented Ms. Feaster's testimony at the post-conviction relief hearing to support his claim that Counsel was ineffective.

At the PCR hearing, Ms. Feaster denied that she ever testified on Respondent's behalf at any trial. (App. p. 656). In fact, Feaster asserted **no less than twenty-two times** that she did not testify at any of Respondent's trials and refused to acknowledge the transcript that said otherwise. (App. pp. 640-9) (emphasis added). However, Feaster affirmed that she would have been willing to testify at the murder trial if Counsel had requested and obtained a continuance of the trial once she became ill. Feaster testified that she was at the trial "every day until the day [she] was supposed to testify." (App. p. 644). Feaster acknowledged that her daughter testified at the murder trial. (App. p. 644). At the PCR hearing, Feaster testified that she would have testified that the Respondent "**called** into [her] house about 8:30 or 9:00 and **told [Feaster] that he was outside** waiting on [her] daughter. (App. p. 646, lines 3-7) (emphasis added). Furthermore, Feaster testified that Respondent was at the home when Feaster returned around 12:00 that night. (App. p. 646).

Counsel also testified that he recalled Feaster's testimony at the burglary trial and the fact that she became ill and was unable to testify at the murder trial. (App. p. 904-5). Counsel did not specifically recall, but agreed that if the transcript reflected that he did not make a motion for a continuance due to Feaster's unavailability, then he most likely did not. (App. p. 905). However, Counsel also testified that he did not believe it would have helped to have Feaster testify at the murder trial based upon her inability to provide an alibi for Respondent from approximately 8:00 "something" until midnight, the time frame for which the murder occurred. (App. p. 915).

The PCR court was provided with the transcript of Feaster's testimony during the initial burglary trial in consideration of Respondent's claims. Following the hearing and review of the record, the PCR court found Counsel was ineffective for failing to move for a continuance based upon Feaster's illness during trial. (App. p. 1573-4). In support of this finding, the PCR Court referenced Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012), rev'd, 407 S.C. 400, 756 S.E.2d 144 (2014). In Walker, the South Carolina Court of Appeals addressed the issue of failure to investigate and utilize an alibi witness and reasoned:

> When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.

Pursuant to the requirements set forth in Walker, the PCR Court found that Feaster's testimony at the burglary trial met the legal definition of an alibi. (App. p. 1575). Further, the Court found that because an alibi is a complete defense to a criminal charge, there was no conception of sound judgment that would permit counsel to choose not to request a continuance to procure the testimony of a witness whom counsel has reason to believe could provide an alibi. (App. p. 1575). The PCR Court granted a new trial on this issue.

First, even with a review of the testimony provided by Ms. Feaster during the burglary trial, Petitioner submits that Feaster's testimony fails to rise to the definition of a legal alibi. Petitioner notes that the PCR court specifically did not find Feaster's testimony credible and in fact, expressed concern about her adamant denials of providing any prior testimony. (App. p. 1574-5). During the burglary trial, Feaster testified that she received a phone call from Respondent "something after 8," while she was taking a bath in her home, telling her that Respondent was outside waiting on Feaster's daughter. (App. p. 1414). Feaster testified that when she got out of the bath, Respondent was in the home because her daughter had arrived home. (App. p. 1414). However, Feaster then testified that she and a cousin left her home "something till 9:00 or 9:00 o'clock," and did not return to the home until about 12:00 am. (App. p. 1414). On cross-examination, Feaster confirmed that she had no idea where the Respondent was between the hours of 8:30 pm or 9:00 pm until 12:00 am because she had left the home. (App. p. 1416).

Testimony of the responding officer indicates that he received the call from dispatch at 8:46 pm and was on the scene by 8:49 pm. (App. p. 97, 99, 102). The surviving victim testified that he picked the shooter up in front of the Feaster home, after

several phone calls back and forth between the Respondent and the victim of the murder. (App. p. 109). The surviving victim also testified that after picking up the shooter, it was approximately two to three minutes before the shooting occurred at the intersections of Theodosia and Chester streets. (App. p. 110). The victim testified that he immediately ran to a house down the street and after knocking on a few doors, was able to get a homeowner to call 911. (App. p. 111). Additional testimony from a responding officer indicated that the Respondent's home was approximately half a mile from the scene of the shooting. (App. p. 228).

To be successful, [Respondent's] alibi must cover the entire time when his presence was required for accomplishment of the crime. State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (affirming that since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all). This Court has previously found that a defense counsel's failure to contact alleged alibi witnesses was not prejudicial, absent showing that witnesses' testimony would have established alibi defense because an alibi that leaves it possible for the accused to be the guilty person "is no alibi at all." Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (citing Robbins). Even if this Court gave Feaster the benefit of the doubt when reviewing her testimony based upon the fact that she completely denied testifying at the first trial and refused to accept the trial transcript of the burglary trial as accurate, her testimony does NOT meet the requirements set forth in Walker, Robbins, and Glover to establish an alibi.

Second, the Respondent's burden of proof is to establish that not only was Counsel deficient for failing to request a continuance because of Feaster's illness, but that he

suffered prejudice as a result. Petitioner submits that to the extent that this Court finds the PCR court correctly determined that Counsel was deficient for failing to move for a continuance based upon Ms. Feaster's illness during the middle of trial, there was no probative evidence in the record to support the PCR court's finding that the trial court would have granted the motion. It has long been held that a judge's ruling denying a motion for a continuance based on the ground of the absence of a material witness ruling will not be disturbed unless it be shown that there was an abuse of discretion. Norton v. Ewaskio, 241 S.C. 557, 561, 129 S.E.2d 517, 519 (1963). See State v. Mitchell, 330 S.C. 189, 192, 498 S.E.2d 642, 644 (1998) (confirming that requests for a trial recess during trial are within the trial judge's discretion, and will be reversed on appeal only upon a showing of an abuse of that discretion).

Not only can Respondent not demonstrate that the judge would have granted his motion for a continuance, but he cannot establish that the outcome of his trial would have changed had the motion been made. Accordingly, no evidence in the record supports the PCR court's finding that Respondent satisfied the prejudice prong of Strickland. Respondent failed to offer any evidence that the trial court would have continued a trial that was already several days into testimony, to obtain the testimony of a witness who was present in the courtroom for those initial days.

II. The PCR court erred in granting post-conviction relief where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for failing to provide the trial court with a suggested third party guilt jury instruction.

Petitioner submits that the Respondent failed to offer any evidence of probative value to support his claim that Counsel was ineffective for failing to provide the trial court with a suggested third party guilt jury instruction.

During the PCR hearing, Respondent testified that he supposed the strategy for the defense at trial was to show that it was possible for Kelvin McKinney to have been the person who committed the murder. (App. p. 759). Respondent acknowledged that Counsel proffered testimony from Keith Letmon during the trial and the trial judge allowed Letmon's testimony in as evidence of third party guilt. (App. p. 759). Letmon testified that while in the Spartanburg County Detention Center, Kelvin McKinney told Letmon that he was the person who shot and killed Tony Hunter, the victim of the murder. (App. p. 405-6).

Counsel testified that he did not prepare a proposed third-party guilt instruction to give to the trial court. (App. p. 912). During the colloquy regarding the jury charge, Counsel asked if the trial court had "any third party guilt instructions." (App. p. 420). The trial court responded that it did not. (App. p. 420). After the charge to the jury, trial counsel stated that he had no objection to the charge as given. (App. p. 476). Counsel also testified that he had never heard a third party guilt instruction given at a trial before and was not aware of one in any bench or charge book. (App. p. 928).

The PCR Court found that Counsel was ineffective for failing to provide the trial court with a proposed instruction on third party guilt. (App. p. 1576). The PCR Court cited Rule 20(a), SCRCrimP, which requires that all proposed instructions "must include accurate citation to authorities relied upon," and found Counsel's failure to provide "accurate citation[s]" to any decision pertaining to third party guilt constituted deficient conduct. (App. p. 1576).

The PCR Court also found that Counsel was deficient for failing to request an instruction on third party guilt. (App. p. 1577). The PCR Court found that a charge on third

party guilt was warranted because the identity of the perpetrator was an essential issue in the case and because evidence that a third party committed the crime was admitted. (App. p. 1577). However, the PCR Court acknowledged that there was no established third party guilt charge currently in South Carolina. The PCR Court utilized a case that is non-binding on this Court as a basis for its finding that Counsel was deficient: State v. Arroyo, 284 Conn. 597, 610, 935 A.2d 975, 984 (Conn. 2007) (App. p. 1577).

Further, the PCR Court found that Counsel's deficient performance prejudiced Applicant. (App. p. 1577). In making this finding, the PCR Court relied on State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (establishing that in single witness identification cases, the trial court should instruct the jury that the burden of proving the identity of the defendant rests with the State), to make the inference that a third party guilt jury instruction was appropriate. However, this case is distinguishable from Simmons because not only did the surviving victim provide a description to police for a sketch and details about the home where the Respondent was picked up from, but phone records linked the Respondent to the victim and Respondent's DNA was found on a cigarette butt in the backseat of the victim's car. "The trial court is required to charge only the current and correct law of South Carolina." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). Petitioner submits that the charge given to the jury was proper and as a whole contained the current and correct law of this state.

In order to satisfy his burden of proving that Counsel was ineffective, Respondent would have had to prove that Counsel's election not to request or provide the court with a third party jury charge amounted to a failure to provide "reasonably effective assistance under prevailing professional norms," and that such failure prejudiced him. Brown, 340

S.C. at 593, 533 S.E.2d at 309 (citing Strickland v. Washington, 466 U.S. 668 (1984)). Additionally, in order to prove that Counsel's performance prejudiced him, Respondent must have shown that "but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. at 593, 533 S.E.2d at 309-10 (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)) (citations omitted). The jury was presented with the only evidence to support a claim of third-party guilty in the way of testimony that McKinney confessed to the murder by Keith Letmon, as well as testimony which implied his access to the murder weapon and a possible motive. (App. p. 920-2). Petitioner submits that no evidence of probative value in the record supports the PCR court's finding that Respondent satisfied this burden.

Accordingly, Petitioner submits that any error that would have resulted from Counsel's failure to provide the court with a suggested third party guilt jury instruction under these circumstances would have constituted harmless error. Because the essential premise of a harmless error determination is that the trial would have turned out the same way notwithstanding the lack of the error, no evidence supports the PCR court's finding that Respondent proved he was prejudiced by Counsel's failure to offer a suggested third party guilt jury instruction. See State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("Error is harmless where it could not reasonably have affected the result of the trial").

III. The PCR court erred in granting Respondent's Application where Respondent failed to prove that Counsel's failure to object to portions of the trial court's jury instructions constituted deficient performance where the jury instructions, taken as a whole under the prevailing law at the time, would not have constituted reversible error.

Petitioner submits that the PCR court's granting of Respondent's Application is controlled by an error of law because Respondent failed to prove under Strickland that Counsel rendered ineffective assistance when he failed to object to two phrases that the trial court made in its jury instruction: "your sole objective is to simply reach the truth of the matter" and "simply give both the State and the defendant a fair and impartial trial." (App. p. 437.). "In determining whether a defendant was prejudiced by improper jury instructions, the [PCR] court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

First, in finding that Counsel was ineffective for failing to object to the trial court's jury instructions, the PCR court erred as a matter of law in improperly holding Counsel to the Daniels standard, which was decided more than five years after Respondent was convicted on these charges. State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (finding that jury instructions indicating that a jury is to reach a decision that is "just" and "fair" to all parties are improper and could be misleading, but jury instructions should be reviewed as a whole and isolated instructions which could be misleading do not constitute reversible error). Petitioner submits that the PCR court, in applying Daniels, incorrectly held that Counsel should have objected based not on what the law actually was at the time of Respondent's trial, but what the law would become. In other words, the PCR court's ruling

suggests Counsel should have been clairvoyant. The law, however, is unequivocal on this point: South Carolina courts "have never required an attorney to be clairvoyant or anticipate changes in the laws which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (holding Counsel "could not be ineffective" for failing to request a jury charge that would not have been applicable for at least other year). At the time of Respondent's trial and even still today, "[t]he standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violate[d]" the Constitution. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (quoting Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)) (footnote omitted). Strickland requires that Counsel's performance may not fall below an "objective standard of reasonableness." Because Daniels had not yet been decided at the time of Respondent's trial, the court's instructions were proper at the time of trial, and even if improper, they would not have constituted reversible error. Therefore, according to an objective standard of reasonableness, Counsel acted reasonably in not objecting to the trial court's instructions.

Second, even if this Court finds that these instructions, taken in isolation of the jury instructions as a whole, were improper, courts have refused to reverse a conviction where the instructions as a whole properly informed the fact-finders that a criminal defendant is presumed innocent unless the State is able to prove his guilt beyond a reasonable doubt. Aleksey, 343 S.C. at 26–27, 538 S.E.2d at 251 (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)) (citations omitted) ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.' However, jury instructions

should be considered as a whole, and if as a whole they are free from error, any *isolated portions* which may be misleading *do not constitute reversible error.*") (emphasis added). In this case, the two statements objected to were made at the very beginning of the jury charge, prior to an extensive charge related to reasonable doubt and the State's burden of proof. (App. p. 437, lines 20–24). In fact, the words reasonable doubt and phrases indicating that the State had the burden of proof and the defendant had the presumption of innocence were used more than twenty times following that introduction. (App. p. 438, lines 20-22; p. 439, lines 1-9, 12-14; p. 440, lines 9-25; p. 441, lines 2-19; p. 448, lines 1-2; p. 449, line 18; p. 454, lines 13-15; App. p. 456, lines 6-11; p. 457, lines 16-18; p. 458, lines 20-21; p. 459, lines 11-13; p. 462, lines 9-18, 25; p. 463, lines 1-4; p. 464, lines 5-10). Thus, the jury instructions, considered in their entirety, were correctly rendered. There is no probative evidence to support a finding that a reasonable likelihood exists that "the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

Further, the trial judge made the statement regarding truth-seeking— "your sole objective is to simply reach the truth of the matter"—in the context of instructing the jury on witness credibility. (App. p. 445, lines 24-25). Accordingly, even if this Court determines the instructions were improper, they would not have constituted reversible error. See State v. Aleksey, 343 S.C. at 29, 538 S.E.2d at 252–53 (holding, where truth-seeking instructions were given in context of witness credibility and where the court gave complete instructions on reasonable doubt and burden of proof, that "the instruction as a whole properly conveyed the law to the jury and there [was] not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a

reasonable doubt."). Moreover, even the Daniels court recognized that overwhelming evidence of guilt rendered harmless any error in improperly instructing the jury. Daniels, 401 S.C. at 258, 737 S.E.2d at 477. Because clairvoyance is not required and because the analysis in Aleksey does not support a conclusion that the trial court's instructions, if objected to, would have resulted in reversible error, no evidence of probative value supports the PCR court's finding that "[C]ounsel's failure to object . . . was deficient conduct." (Order p. 36). Accordingly, the PCR court erred in finding that Respondent satisfied his burden of proof.

CONCLUSION

For the reasons stated above, this Court should reverse the PCR Court's ruling.

Respectfully submitted,

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By:
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Petitioner** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Mr. C. Rauch Wise, Esquire
305 Main St.
Greenwood, SC 29646

This 19h day of February, 2015

SUZANNE H. WHITE
ATTORNEY FOR RESPONDENT

SWORN to before me this 19th day of February, 2015.
Ashley Haunt

Notary Public for South Carolina.
My Commission Expires: 3-18-2023

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 19 2015
S.C. Supreme Court

February 19, 2015

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

Re: **Nathaniel Teamer v. State of South Carolina**
Appellate Case No. 2013-001303
Lower Court Case No. 2010-CP-42-4181

Dear Mr. Shearouse:

I am enclosing the original and fifteen (15) copies of the **Brief of Petitioner** and thirteen (13) additional copies of the **Appendix** in the above case.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General
S.C. Bar No. 78225

SHW/ah

cc: C. Rauch Wise, Esquire (2 copies)
Trisha Allen, Victim Services