

Trial Counsel was ineffective for failing to object to witness John Presley introducing evidence of Applicants prior arrest for a domestic violence charge against the victim. The evidence was then allowed to be emphasized by the solicitor in his closing argument.

John Presley testified saying that Petitioner told him that he was arrested for domestic violence after hitting the victim, but the victim later dropped the charges and Petitioner was released. (Trl transcript p. 608). PCR Judge states that the allegation of domestic violence was not addressed any further by the State or Petitioner. This ~~statement~~ is not true. The Solicitor in his closing arguments paraphrased Mr. Presley's testimony by stating: "I had a cdv, but she dropped it before, didn't have to go through it." Trl transcript. Pg. 857. The solicitor making this statement was highly prejudicial to the Petitioner for several reasons. The

first one being that the solicitor is not supposed to knowingly give false testimony and has a duty to correct testimony that he or she knows to be false. Napue v. Illinois, 360 US 264, 269 (1959). The State trial counsel had a copy of petitioner's previous charges therefore he had access to knowing that Mr. Presley was lying when he stated that petitioner told him that he had a previous domestic violence charge against the victim. [Trial counsel never objected to either one of these statements. Petitioner gave testimony at PCR that he never had a domestic violence charge against the victim. PCR transcript pg. 39.]

He knowingly told a lie to the jury and violated the petitioner's due process of law by commenting on the defendant's previous charges bringing his character into question to the jury. The solicitor committed prosecutorial misconduct. He also brought Mr. Presley's previous statement back into the mind of the jury who could have used that statement to convict the defendant. There was no other statement at trial that portrayed petitioner as a violent person.

There was other circumstantial evidence given at trial but none of previous evidence stated that the victim and the petitioner had a violent past. One cannot say that these two statements did not effect trial outcome. These two statements helped establish Commanders propensity to commit the crime charged. US v. Beahm, 664 F2d 414, 418 (4th Cir 1981)
US v. Cavender, 578 F2d 528 (4th Cir 1978)

National perception is that when a man commits domestic violence on a woman is that sooner or later he will hurt her badly or kill her. That is what makes these two statements highly prejudicial and not harmless error. Chapman v. California, 386 US 18

[Before a federal Constitutional error can be held harmless, the court must be able to declare a belief that it was harmless by a reasonable doubt.]
Therefore, this case should be reversed and remanded for a new trial and the solicitor should be reprimanded for prosecutorial misconduct.

Ineffective assistance of Counsel- Trial Counsel failed to sufficiently challenge the forensic pathologists findings of homicide as a manner of death by failing to adequately cross examine the witness and failing to present expert testimony on behalf of the defendant. Further, Trial Counsel was ineffective in failing to seek an instruction by the court regarding the definition of homicide.

The applicant testified on his own behalf in the evidentiary hearings. According to his testimony he was arrested in Louisiana in January of 2005 and extradited back to South Carolina. Shortly after returning to South Carolina Jeanette VanGinhoven with the Richland County Public Defenders was appointed to represent him on this charge. Ms VanGinhoven was his attorney for the majority of the year and a half he was incarcerated, but she left her employment with the office shortly before his trial. At that time Doug Strickler took over his representation. During his representation by the Public Defenders office, generally, he testified that he met with his attorneys, received approximately 50 pages of his discovery, and he was made aware that his counsel had retained a medical expert and private investigator to assist in his representation. Douglas Strickler, trial counsel for Commander, testified that he became the lead attorney on the Applicants criminal matter shortly prior to trial, but he had consulted with Jeanette VanGinhoven

on multiple occasions about the case while she was counsel for Applicant. Counsel testified that he was aware that Ms. Van Ginhoven had consulted with Dr. Sandra Conradi, a retained expert in forensic pathology, and he had spoken with Ms. Van Ginhoven about this and reviewed her notes. Counsel admitted that he never made an attempt to contact Dr. Conradi directly, after he became Applicant's attorney to get further opinions or advice. He also never considered asking Dr. Conradi to assist him personally with the trial. Counsel testified that his review of the notes from the conversation between Ms. Van Ginhoven and Dr. Conradi reflects that Dr. Conradi would not have been able to provide testimony at Applicant's criminal trial that would have been helpful and that Dr. Conradi appeared to agree with the forensic pathologist who conducted the autopsy, Dr. Clay Nichols. Counsel further testified that he believed Ms. Van Ginhoven had done a cursory review of other causes of death but did not find any that they believed had merit. Counsel testified that he thoroughly objected to Dr. Nichols' definition of the word "homicide" during the trial but he cannot recall why he did not ask the Court to provide an instruction regarding this issue, especially when the Court offered to issue an instruction for clarity.

During the evidentiary hearings Dr. Kimberly Collins was called to testify by the Applicant as an expert in forensic pathology. She testified thoroughly as to her background and training and was admitted as an expert without

Objection from the State. See, also Court Exhibit - Curriculum Vitae of Dr. Collins. Dr. Collins testified that in preparing for this hearing she reviewed the Postmortem records including the autopsy report, death certificate, coroner report, activity log, evidence transfer, incident report, trial transcript, handwritten notes from defense counsel regarding conversation with Dr. Sandra Conradi, photographs from the autopsy and scene, investigative records from law enforcement and medical records of Gervonya Goodwin. (See, Applicants exhibit 1, Opinion Letter of Dr. Collins.)

During the criminal trial Dr. Clay Nichols testified that he performed the autopsy of the victim and certified her death as a "homicide". He based his conclusion on the "suspicious circumstances" surrounding her death and the "lack of findings" of a scientific nature. Trl Transcript 539 and 575. During the PCR evidentiary hearing Dr. Collins testified consistently with her opinion letter, stating that, based on her education and training, she believes the cause of death should be certified as "undetermined." See, Applicants exhibit 1, Opinion Letter of Dr. Collins. She explained that the basis of this opinion was the lack of apparent physical signs of asphyxia or any other cause of death and the existence of many natural entities which can cause maternal death.

Dr. Collins testified that it appeared to her, from reviewing the documentation, that none of the possible causes of maternal death were scientifically ruled out by pathologist

conducting the autopsy. She specifically referred to the fact that the autopsy records show that the adult body was not X rayed, no autopsy of the fetus was performed, and tissues and organs of the mother and fetus were not microscopically examined including the uterus (often the last organ decompose). Due to the fact that several possible causes of maternal death were not ruled out by this autopsy, and the fact that asphyxia was not medically or scientifically supported, Dr. Collins opined that cause of death should have been certified "undetermined". She further testified that a review of the trial transcript and the testimony and explanation of Dr. Nichols do not change her opinion as to the proper certification of death.

The Applicant also testified during the evidentiary hearings. He testified that prior to trial his first attorney, Jeanette Van Ginhoven, said that she consulted with Dr. Sandra Conradi. Van Ginhoven told him that she believed Dr. Conradi would not be helpful to his trial because Dr. Conradi would testify that Dr. Nichols was correct in his opinion of death by asphyxia. This was the only information ever given to the Applicant.

Trial Counsel Strickler testified during the evidentiary hearings that he spoke with Ms. Van Ginhoven and reviewed her notes but never spoke to Dr. Conradi personally. However, his review of the notes ~~but never spoke to~~ leads him to believe that the testimony of Dr. Conradi would not have been helpful in the Applicants trial. See Applicants exhibit 4, Attorney Notes.

Specifically, he stated that he believed that Dr. Conradi was going to agree with Dr. Nichols and he pointed out that the notes state "she going to testify against him." Id.

In contrast, Dr. Collins testified that her review of the attorney notes reflects that Dr. Conradi had opinions very similar to the ones Dr. Collins testified to at the evidentiary hearings. While it remains true that neither Counsel Strickler nor Dr. Collins spoke with Dr. Conradi about her findings, this Court is able to review the attorney notes and make an objective determination that the following statement fragments are sufficiently consistent with Dr. Collins testimony:

- "Cause of death could be undetermined or homicide"
- "Autopsy alone - undetermined cause"
- "Doesn't mention X-raying body for bullets - theoretically bullet would could have been missed"
- "Doesn't mention anything about uterus, fetus, ovaries, Placenta or could have said could'nt because too decomposed because supposed to have a cyst"
- "Testis of fetus - fetus may have DNA - femurs come from fetus - should be some type of report"
- "Could have died suddenly and unexpectedly from anything"
- "Could call it undetermined or undetermined homicide"

See Applicants exhibit 4. At a minimum this information shows that defense counsel was put on notice that additional tests should have been performed, additional reports should have been created, and that the autopsy did not support a conclusive finding of a "homicide"

While it appears that the notes are not entirely clear and portions of the notes are illegible, this Court notes that this fact further proves that trial counsel was ineffective in his representation of the Applicant for not contacting the retained expert himself to get further opinion and detail first hand. Applicant asserts Counsel's reliance on these notes solely without further inquiry was objectively unreasonable and resulted in ineffective assistance at trial. Further, an objective review of the notes shows that several opinions were stated that may have assisted the Applicant in challenging the findings of the forensic pathologist. These issues were not raised in the cross examination of the pathologist at trial. It should be noted that trial counsel testified at the evidentiary hearing that the sole defense strategy was to challenge the state's case and the findings of the pathologist. Applicant asserts that testimony at his trial consistent with Dr. Collins testimony, either from Dr. Conradi or another expert, would have been extremely

helpful in his defense. Accordingly, failure to contact the already retained expert directly and have her assist in the Applicants trial by assisting counsel to prepare a cross-examination or by testifying directly constitutes deficiency on the part of trial counsel.

As to trial counsel's assertion that Ms. Van Ginhoven did her own research as to other causes of death, this effort does not save Applicant from the deficiency and prejudice suffered. In ruling out other, possible causes of death Dr. Nichols testified at trial that the victim was "not stabbed, not shot, not beaten, not strangled with hands, and he was "looking for a cause of death that would leave no marks, no evidence of injury". See trial transcript pg. 559. The trial transcript does not reflect a list of natural causes of death that were considered and ruled out by Dr. Nichols, assumedly because his fixation on the suspicious circumstances led him to disregard anything except for a homicidal act. Counsel testified that Ms. Van Ginhoven had researched other possible causes of death and had not found any that had merit. Counsel testified that he offered "choking" as a possible cause of death during trial, but a review of the transcript shows that this was easily ruled out by the pathologist. See trial transcript p. 576. The transcript does not reflect that counsel suggested any other legitimate natural causes of death to the

jury during trial. See trial transcript generally. Dr Collins testified that there were several other possible causes of death, specifically for maternal death, that were possible and were not ruled out scientifically. As Dr. Collins is a forensic pathologist with years of education and training in the field, her testimony in this regard is credible and compelling. A review of Dr. Conradi's notes shows that she had similar thoughts.

It is objectively unreasonable to rely on a cursory review of possible causes of death by an attorney who has no medical training or experience. Based on the testimony of Dr. Collins it appears clear that several other possible causes of death could have been presented by an expert witness or by trial counsel through cross examination. Based upon a review of the transcript and a review of Dr. Collins testimony, the failure of counsel to effectively challenge the forensic pathologists testimony during cross examination constitutes ineffective assistance of counsel.

Applicant was prejudiced by counsels ineffective challenge of the forensic pathologist because the jury was left with only one "medical" opinion to consider - that of Dr. Nichols certifying death by homicide. Counsel was aware of this

Prejudice and made an extremely thorough objection to Dr. Nichols certifying death by homicide. Counsel was aware of this prejudice and made an extremely thorough objection to Dr. Nichols use of the term "homicide" based on the argument that "homicide is a legal term" and is "precisely one of the issues that the jury in this case will have to address in the course of its deliberations at trial." See trial transcript, p. 540. Additionally, counsel's objection was based on the fact that the doctor's opinion was not based on "the condition of the body" but rather the surrounding facts and circumstances. ID at 546. During argument and proffer Dr. Nichols testified that a "homicide is someone who died as a result of the actions of another individual" as opposed to "an accidental cause where somebody unintentionally caused the death to another individual." ID at 552 and 553. In response, the Court reviewed case law supplied by defense and suggested that prejudice may be created from the use of the word "homicide" but that prejudice can be prevented by the defense requesting an instruction "explaining that the term homicide merely distinguishes a death caused by another human being from accidental and natural deaths and suicide" ID at 553-544. The Court pointed out that the distinction is that the

doctor's opinion does not consider whether or not there was malice. ID at 554. Counsel responded that "an instruction on the part of the Court that homicide - perhaps could clear that up" ID at 555. The Court held that the doctor could continue to testify as to cause of death and his definition of "homicide" and an instruction by the court could be requested by the defense at the appropriate time" ID at 557.

Upon resuming testimony in front of the jury Dr. Nichols testified that a "homicide" is a "person that has died as a result of another person's actions" and that he does not believe this death was accidental, suicidal, or natural. ID at 558. Based upon a review of the transcript, there is no subsequent request from defense counsel explaining the definition of "homicide" to the jury. See trial transcript generally. At the evidentiary hearing trial counsel testified that he does not recall a specific reason why he did not request court instructions. To fully have avoided prejudice, trial counsel should have requested a court instruction regarding the definition of homicide. An instruction that a pathologist's determination of "homicide" does not include an evaluation of the presence or absence of malice would have assisted in reducing or

Eliminating prejudice. Alternatively, the definition of "homicide" as used by the Supreme Court in the Applicants appellate case could have assisted in removing prejudice: A death "by the act, procurement, or omission of another without regard to the criminality of the killing or culpability of the killer." State v. Commander, 396 SC 254 265, 721 SE2d 413, 419, 2011, citing 23 SC Jur. Homicide § (2011) (quoting Blacks Law Dictionary 661 (5th ed 1979)). Defense Counsel did not request any such instruction from the Court as to how they should interpret the word "homicide".

It is important to note that in the Applicants appellate case the Supreme Court ruled that the pathologists opinion testimony that the victims cause of death was a "homicide" was admissible because the witness did not "opine on the criminal defendants state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendants guilt or innocence" State v. Commander 396 SC 254, 270, 721 SE 2d 413, 421 (2011). The Court added:

"We further recognize that, practically speaking, there is a real possibility that a lay jury person could interpolate into our technical definition of "homicide" his or her preconceived notions of criminal

Culpability. Depending on the circumstances, a jury instruction on the meaning of "homicide" could prove necessary to prevent any resulting prejudice to the criminal defendant. In the present case, not only did counsel for the petitioner inform the trial court that he did not seek an instruction on the meaning of "homicide"; but the trial judge went to great lengths to ensure that the jury was aware to the context of Dr. Nichols' testimony. In particular, the trial court judge directed counsel to question Dr. Nichols in front of the jury on the meaning of "homicide". In addition, the trial judge gave a standard instruction to the jury concerning the relative weight to accord witness testimony, including expert witness testimony, along with the other evidence in the case. Therefore, we find that any potential prejudice was cured, and the trial judge did not abuse his discretion in admitting the testimony. ID at 269, 421."

Applicant asserts that the appellate court was unable to find the existence of possible prejudice resulting from the pathologists' testimony without a clarifying court instruction because counsel failed to request the instruction as to the definition of "homicide" and thereby waived any appellate argument as to the lack of instruction being given. Applicant

asserts that Dr. Nichols testimony regarding the definition of "homicide" and the general jury instruction as to "expert witnesses" would not have been sufficient to cure the prejudice by themselves, but that prejudice could not be found in the direct appeal where trial counsel failed to request the court instruction curing the prejudice. As a result, not only did counsel fail to attempt to cure the prejudice by requesting the court instruction, he also failed to preserve the issue for appellate review by not requesting the court instruction.

Reviewing of the trial transcript and the evidence presented at the evidentiary hearings reflects that counsel was ineffective in his representation of the applicant by failing to contact the retained expert witness directly, failing to adequately challenge the forensic pathologists testimony, and failing to request a court instruction regarding the definition of "homicide". The errors by trial counsel effectively resulted in prejudice to the applicant, especially in light of the fact that counsel testified in the evidentiary hearings that the ~~defendant~~ defense strategy consisted solely of

attacking the State's case and challenging the findings of the forensic pathologist

Trial Counsel failed to object to witness John Presley offered testimony as to his opinion regarding whether the Defendants statements were true. Trial transcript pgs. 603-604, pg. 636, 637, 643 and 645. With no objection the improper evidence was then emphasized by the Solicitor in his closing argument. (Trial Transcript pg. 859). Trial Counsel was ineffective.

During trial the state introduced the testimony of inmate witness John Presley who was called to testify that the Applicant allegedly admitted his involvement in the victims death. The witness testifies:

"He said that he and she had an argument, she hit him with a stick, and in other words he - she pissed him off and he fell on her and suffocated her. I asked him were you unconscious, and he said no, he wasn't unconscious, he suffocated her." See trial transcript p. 603-604.

The state went on to ask Mr. Presley specifically if the victim provoked the Applicant. Mr. Presley responded:

"I mean of course, its common sense if someone hit you with a stick that is enough to provoke anyone. Did she actually hit him with a stick? In my opinion, I mean, I don't believe that he you know, I don't believe that she hit him with a stick. I believe that he was - he just made this up to lead me on, you know, I don't believe that is at all true about the stick part". See trial transcript pg. 604.

He also went on to testify on Cross Examination from Douglas Strickler as follow:

Q: And then he said that she hit him in the head with a stick and -

A: This was maybe - which part is it, which statement the part when he lied and said that he fell unconscious on her... (trial transcript pg. 636 lines 10-16)

Q: Second - both of them were hit with stick, right?

A: So he says

Q: Right

A: God knows best. So he said (Trial transcript, 637 lines 4-7)

Q: Okay That's the part of any deal, correct?

A: Well if they had'nt first of all, I highly oppose Murder. I have never murdered anyone. I have no intentions of doing so. If it were my own son, I would not uphold him. (Trl transcript p. 643 line 16-20)

This is an innocent person here. It is an entirely different thing. (Trl transcript ps. 645 lines 16-17.)

Presley was properly allowed to testify as to his alleged conversation with the Applicant as the comments are not considered to be hearsay under South Carolina Rule of Evidence 801(d)(2). However, Presley should not have been allowed to comment upon whether he believed

or did not believe the Applicants' statements to him. There is no rule of evidence that would allow Presley to testify regarding his opinion as to what may or may not have happened. Further, the Rules of Evidence strictly prohibit Presley from testifying as to his opinion as to the Applicants' credibility.

Rule 608(a) of the South Carolina Rules of Evidence states that opinion evidence regarding credibility "may refer only to character for truthfulness or untruthfulness," and "evidence for truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." See Rule 608(a) SCRE. "Even a witness permitted to give an opinion under Rule 608(a) must restrict the opinion to 'character for untruthfulness' and may not testify whether the witness believes a specific statement or account given by another witness." *State v. McKelley*, 397 SC 461, 465, 725 S.E.2d 139(141) (Ct App 2012). A witness is not allowed to testify regarding the credibility or believability of another's account of what occurred. Accordingly, Presley's testimony was improper and an objection should have been made by trial counsel.

Applicant was prejudiced by counsel's failure to object to the admissibility of Presley's statements because

the state was allowed to emphasize Presley's opinion in closing argument. The Solicitor states:

"Well, John Presley said- he said they were having trouble, this confirms it, Mr. Presley, do you believe him? No, these other stories and it wasn't credible, he just suffocated her. I knew he wasn't telling the truth about the stick. He suffocated her." See trial transcript pg. 859.

While it may have been fair for the State to introduce the Applicants alleged statements about the incident at trial it is inherently unfair for the State to introduce the Applicants alleged statement and then allow their witness to judge the credibility of the statement to the point where the witness is allowed to testify as if he actually knew what happened. Especially, when his comments go against the lesser included charges in this case. Counsel's failure to object was objectively unreasonable and his testimony was prejudicial to the Applicant

Ineffective assistance of Counsel - Trial Counsel failed to effectively communicate with client in making the decision not to present exculpatory DNA evidence at trial. Further, trial Counsel failed to object and request a mistrial when the prosecutor improperly made a statement in his closing argument inferring that a DNA was found at the crime scene and that the defendant used the gloves (Trial transcript pg. 849).

Part 1

Prior to the Applicants criminal trial the State provided a forensic examination report with results from DNA analysis as part of the discovery process. See, Applicants Exhibit 3. Although the document itself states that it was created June 28, 2005, or one year and four months prior to trial, trial counsel testified at the evidentiary hearing that it was received by the Defense very shortly before trial. The report stated that fingernail scrapings from the victims right and left and were tested for the presence of DNA and that DNA was discovered and found to be consistent with DNA from a female individual. ID. The report ^{also} stated that swabs were taken from rubber gloves found in the victims home and a mixture of DNA found on the gloves. ID This DNA was compared to a compared to a known sample of DNA from Christopher Commander and he was excluded as a contributor

to the mixture. Id. UPon information and belief the DNA was never compared to any other known source of DNA and therefore belonged to an unknown male.

During the criminal trial Investigator Oats testified as follows:

Solicitor: Just for the record, in States number - see Part of it. In States Number 28⁵, what items are depicted in there?

Witness: There is a pair of clear rubber gloves on top of a freezer near the back door.

Solicitor: And what are the two items on the floor?

Witness: It is a trash can and a black container contains cleaning products, household cleaning products.

Solicitor: What products?

Witness: Household cleaning products.

Solicitor: And I believe States Exhibit Number 29⁶ is looking down on those two?

Witness: Yes

Solicitor: And you mentioned a pair of rubber gloves. Where did you find those gloves?

Witness: At the bottom of the trash can.

Solicitor: At the bottom of the trash can?

Witness: Yes, on top of other trash.

Solicitor: Okay. And to make it clear, was that in the bottom of the trash can containing the cleaning supplies

of the bottom of the trash can with the trash in it?

Witness: The bottom of the trash can with the trash.

Solicitor: And, asaini, state's Exhibit 29 is how that appeared?

Witness: Yes

Solicitor: Did you actually collect those plastic gloves and take them back to headquarters?

Witness: Yes, I did.

See, trial transcript pg. 349-350. Trial Counsel then proceeded to cross examine Investigator Oats by pointing out that the gloves cannot be seen in the photograph of the trash cans and trial counsel stated that the gloves were found on the bottom of the trash in the trash can. Trial transcript ID at pg. 351-352. This was a clear misstatement of the facts by trial counsel. The Investigator clearly stated on Direct Examination by the Solicitor that the gloves were found on top of the trash. By stating that the gloves were found at the bottom of the trash trial counsel gives the jury a feeling that the gloves could have been placed there a long time ago, and that the gloves may not be a part of this case. If trial counsel had introduced the gloves into evidence along with the facts that the gloves were found on top of the trash in the trash can the jury could have felt that this other male whose mixture is found with the victim could have done this.

The victims family testified that no one else was at the victims house, her family members testified as follows:

Latisha Pratt alleged victims cousin:

Q: Just for the record, had you actually been to her house and seen who was living there?

A: Yes

Q: And who was there?

A: Herself (Trial transcript Pg. 259 lines 9-13.)

Sheryl Smith alleged victims sister:

Q: And do you know who was staying with her then at Tiltins Rock?

A: She was by herself

Well if no one was at the victims home then: Where did the DNA mixture that was found laying on top of the trash in the trash can come from? This was a good question for trial counselor to ask the jury during his closing if he had introduced the DNA test findings into evidence. Trial counsel also had Investigator Dates admit that he had no personal knowledge as to how or when the shoes got in the trash can or who placed them there. ID

Subsequently in trial Investigator McDonald testified for the state. During this testimony the Solicitor began asking McDonald about the fingernail scrapings and, specifically, where Chris Commanders DNA was underneath the fingernails. See, trial transcript pg. 803. Trial counsel for the Applicant objected and the witness was not allowed to answer and inform the jury that the Applicants DNA was in fact not found under the victims fingernails. Id, see also Applicants' Exhibit 3.

During the cross-examination of Investigator McDonald. Trial counsel elicited information that a Search Warrant was previously obtained for DNA samples from the Applicant for the purpose of DNA testing. See trial transcript ps. 804-805. McDonald testified that the initial plan was to use the DNA to compare with the fetus to confirm whether it was the Applicants child but that test was never done. Id at 806. McDonald confirmed that the fingernails scrapings and the glove from the trash can were tested for DNA and a report with results was generated June 29, 2005. Id 807-808. Trial Counsel then concluded his cross examination without admitting the results of the DNA test into evidence. The State then rested their case and the results of the DNA analysis were never offered as testimony or evidence by either party.

As an initial matter, the Applicant contends that trial Counsel was ineffective for failing to admit the results of the DNA report into evidence. At the evidentiary hearings Applicant testified that he was aware of the existence of the DNA report prior to trial and had discussed it with trial counsel. He testified that he originally believed the results would be offered as evidence at trial, but during trial his attorney informed him that he was not going to admit it as evidence because he wanted to preserve the right to have that last closing arguments. The Applicant testified that he trusted his attorney during the trial with this decision, but now believes it was a mistake and trial counsel should have admitted the exculpatory evidence during trial. Applicant believes that the result of his trial would have been different had the jury known about this DNA evidence. At the evidentiary hearings Trial Counsel testified that he did not want to introduce the evidence as he did not believe it was relevant as to who killed the victim. Trial Counsel inferred that this evidence was not relevant enough or helpful enough that it was worth risking the right to lose the right to last closing argument. Applicant contends that counsel's initial failure to

introduce the DNA evidence was objectively unreasonable and constitutes ineffective assistance of counsel. The jury was aware that 1) DNA from fingernail scrapings and the rubber glove was tested, 2) it was compared to the defendants DNA, 3) the results were known for a year prior to trial 4) knowing the results the state was still prosecuting the Defendant 5) Defense counsel objected when the state tried to tell the jury about the results from the fingernail scrapings DNA tests, and 6) Defense counsel never offered the results of the DNA tests into evidence. A typical juror does not know that a Defendant loses the right to last closing when they offer evidence at trial. They don't know of any potential negative consequence from offering evidence. If the jury was never aware of the DNA analysis at all, then it most likely would not have affected the Defendants trial. However, given the extent of information that the jury knew about the DNA testing (much of which came from trial counsel himself), failure to introduce the results of the DNA analysis was ineffective as it left the jury no choice other than to assume the test results were harmful to the Defendants case. This was prejudicial to the Defendants case and it is probable that the results at trial would have been different had the DNA analysis results been introduced.

Part II

Regardless of the reasonableness of trial counsel in failing to introduce DNA, counsel was ineffective for failing to object when the Solicitor's closing argument improperly inferred that no DNA was found at the crime scene and that the Defendant used the same gloves that were the subject of the DNA testing. In closing the Solicitor stated:

"He's cleaning up, there are gloves in there. If he tries to make any issue about why anything wasn't else there DNA his client, may try to get, they're cleaning, he cleaned it up. That's a question that's got nothing to do with this case. There's no doubt who killed Vonnie. Cleaning fluid, it kind of sealed the case, but it wasn't the cleaning fluid." (See trial transcript pg. 849 line 19-25, page 850 lines 1-2)

The transcript reflects that trial counsel failed to object and failed to request a mistrial in response to this statement.

During the evidentiary hearing trial counsel was asked why he didn't object to this statement. He conceded that he should have objected and he "dropped the ball." Trial counsel agreed that this statement by the Solicitor was improper.

Regardless of what testimony and evidence was presented to or withheld from the jury, the Solicitor was clearly aware the information contained within

the discovery materials. The Solicitor was aware that DNA was found on the gloves. The Solicitor was aware that Commander was excluded as a contributor to the DNA found on those gloves. Yet, the Solicitor clearly argued that no DNA was found anywhere at the scene, and the reason that no DNA was found at the scene was because the Applicant used these exact same gloves to clean the existence of any and all DNA. The Solicitor mis stated the actual evidence and did so with intention to mislead the jury. Trial Counsel should have immediately objected and requested a mistrial as this error most likely could not be cured without informing the jury about the DNA analysis results which was not entered into evidence by either party. A mistrial should have been granted.

State v. Coleman was a murder trial where the victim was last seen with Coleman. During the trial defense counsel questioned law enforcement witnesses about their failure to question other witnesses and pursue other possible suspects, specifically including some soldiers that were in the bar at the same time as the victim and Coleman. 301 SC 59, 389, SE2d 659 (1990). In closing argument the Solicitor stated that "he did not call the soldiers

As witnesses because there was nothing probative in their statements." *Id.* at 61, 661. Defense counsel objected that a solicitor is not allowed to state his personal knowledge of facts outside the record but was overruled. *Id.* On appeal the Supreme Court noted that the appropriate question is "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'." *Id.* The Court found that this statement unfairly prejudiced appellant's right to a fair trial. *Id.* In reversing Coleman's conviction the Court noted, "Despite the elementary proposition that counsel in a criminal case must confine themselves to the record in addressing the jury, the jury in the present case was effectively presented with testimony from the solicitor as if he had taken the stand himself." *Id.*

In the instant case the solicitor "effectively presented testimony" that no DNA was found at the crime scene and alleged this was because the defendant cleaned all DNA from the scene. This statement was much more prejudicial than the statement in Coleman, because the statement in the instant case was incorrect, DNA was found and it was found on the exact gloves that he accused the defendant of using. The statement was unfair and misleading that it effectively denied applicant due process. Counsel was

ineffective for failing to object or request a mistrial and the Applicant suffered prejudice. As a result, the Applicant's conviction should be overturned.

Ineffective assistance of counsel - Trial Counsel failed to request a mistrial when the Prosecutor incorrectly advised the jury that they were allowed to consider events occurring after the death of the victim and use these events to infer malice existed at the time of the death. (Trial Transcript pg. 843). The trial court correctly instructed the jurors that "Malice must exist in the mind of the Defendant just before and at the time the act is committed". (Trial Transcript pg. 904) The trial court later refused to instruct the jury as to the Prosecutor's version of the law creating confusion in the minds of the jurors as to what the law regarding malice allowed. (Trial Transcript pg 912-915). Trial Counsel failed to request a mistrial.

During the criminal trial the State did not present evidence of exactly what action or inaction caused the victim's death. The date of death was approximated at November 8, 2004. See Applicant's exhibit 2. The State's case rested mostly upon the fact that the victim was found in a decomposed state, the ~~the~~ findings of the pathologist of possible asphyxiation, and the Defendant's suspicious behavior. Because the State did not know exactly what happened to the victim they were unable to present any evidence of actual malice aforethought occurring at the time of her death.

During trial the Solicitor made this comment in his closing argument, "Somebody remind me at the end of my closing argument where I added a different additional definition of malice", pg. 829 lines 11-13. Then he goes on to do just that in his misstatements of the law. Solicitor referenced the fact that in December of 2004 the victim's daughter was waiting for her mother to call and instead received text messages from the victim purportedly from someone pretending to be the victim. See, trial transcript pg. 842. The Solicitor states "if this isn't malice, malice doesn't exist." Id trial counsel objected and was overruled. Id. at 843.

Applicant asserts that an objection during closing arguments always gets special attention from the jury, and when an objection is overruled the jury is left to believe that the attorney making the closing argument must have been correct about what he was saying. After the objection the Solicitor stated to the jury "[Y]ou can take statements and actions made after the events have happened and infer malice at the time this happened, and I'm begging y'all to do that, because that is what it was." Id. at 843. The Solicitor then went on to argue that the text messages occurring in December are evidence of malice. He again states without objections "Inference of malice that existed back when this happened? Yes, sir, yes ma'am" Id. at 845.

During his instruction on the law the Judge correctly charged the jury that "Malice aforethought does not require that the malice exist for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act". See trial transcript, pp. 904-905. The trial judge does not tell the jury that malice cannot be inferred from actions or statements made after the incident therefore he did not cure the Solicitor misstatement of law. Simmons v. State, 331 SC 333; 503 SE2d 164, Trial counsel was ineffective for not requesting the judge to give instructions on the Solicitor's comments. After the charge was complete the Solicitor requested that the judge further instruct the jury that acts occurring after the event can be used to infer malice at the time of the incident. *Id.* at 912-913. The Court refused to make the additional charge to the jury because he believed this would be too close to charging on the facts. *Id.* at 915.

Trial counsel made a timely objection to the Solicitor's initial statement, however it was overruled and the Solicitor was allowed to further misstate the law to the jury. Trial counsel did not preserve his objection later and did not request a mistrial based on this misstatement of the law.

South Carolina law does not allow an inference of malice at the time of an event based on events that take place after the event. It is true that certain facts, such as flight or other bad conduct, may be used to show identity or absence of mistake under 404(b), SCRE. However, for the purpose of determining whether the presence or absence of malice exists for a conviction of Murder or Voluntary Manslaughter (The jury was provided the option of Voluntary Manslaughter. See trial transcript 904-906) no South Carolina Court has ever held that an inference of malice aforethought can be created by behavior occurring after the fact. Malice is a necessary element of the charge of Murder and therefore the State has a burden to prove this element beyond a reasonable doubt.

The Solicitor's entire closing argument based the Proff of malice on events that took place after the incident occurred. Although trial counsel made a timely objection, it was overruled and the Solicitor was allowed to emphasize this point as if it was a correct statement of the law. At this point trial counsel should have offered a second objection and requested a mistrial. Petitioner contends that the jury could have been confused and applied the wrong law when rendering its decision. As no other evidence of malice was offered by the State, there is a

Substantial likelihood that a different result would have been reached by the jury if they were not misled regarding what they could or could not use to infer malice. Accordingly, the Applicant was Prejudiced.

Ineffective assistance of counsel - Trial Counsel failed to object to the Court's instruction to the jury that "malice may also rise where a deed is done with a deadly weapon" (Trial Transcript pg 905) where this instruction had a tendency to confuse the issues, mislead the jury, and inappropriately shifted the burden to the defense.

The trial transcript reflects that the judge included the following in his instruction on the law to the jury:

"Malice may be inferred from conduct showing a total disregard for human life. Inferred Malice may also arise where a deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case." See trial transcript pg. 905. Trial counsel did not object to this instruction.

In State v. Belcher the Supreme Court held that the jury instruction allowing malice to be inferred from use of a deadly weapon is inappropriate when evidence is presented at trial that would reduce, mitigate, excuse or justify the Killins, 385 SC 597, 685 SE 2d 802 (2009). While this holding does not apply directly to the Applicant's trial, Applicant argues that this holding should be extended in the general sense to mean that the jury charge is not appropriate in every case and that the appropriateness of the instruction depends upon the facts of each case.

Applicant has asserted that the instruction in the Applicant's trial was improper because it has a tendency to confuse the issues, mislead the jury, and it inappropriately shifted the burden to the defendant. It is undisputed that the State's case did not allege the use of a deadly weapon. In fact, the State's case did not allege the particular use of any weapon or instrument in the causing of the victims death.

The State has the burden to prove all elements of the crime of Murder, including malice aforethought, beyond a reasonable doubt. The State was not able to prove how the victim was killed. However, the jury was instructed that if they believe some article, instrument or substance caused her death they can infer malice. This instruction was likely to mislead or confuse the jurors as there was no evidence offered regarding any article, instrument or substance used to cause the victim's death. Furthermore, the instruction may have improperly shifted the burden to the Defense to prove how the victim was or was not actually killed.

Trial counsel was ineffective for not objecting when this instruction was presented to the jury. The prejudice against the Applicant arises because the State did not present any evidence of malice aforethought. Accordingly, without this inference there is a probability that the jury would not have found that the State proved the necessary malice for the murder conviction and the result at trial would have been different. Further, trial counsel failed to preserve this issue for the appellate courts who probably would have taken the opportunity to determine if Belcher should be extended accordingly.

Prejudice Created By Cumulative Nature Of Counsel's Errors

Applicant has raised a number of issues in his Amended Application which were addressed during the evidentiary hearings. Each of the deficiencies alleged, on their own, resulted in the Applicant being denied effective assistance of counsel under Strickland v. Washington. Nonetheless, as recently addressed by the South Carolina Court of Appeals, it appears that a court in a post conviction relief matter may be able to consider the cumulative effect of counsel's errors in determining deficient performance. Walker v. State, 397 SC 226, 243 (2012) citing Lorenzon v. State, 376 SC 521, 535 (2008)

In Walker the applicant alleged that trial counsel failed to interview alibi witnesses and failed to cross examine the victim or call witnesses to testify about conflicting evidence as to the time of the rape incident. Applicant alleged that these errors were deficient and the cumulative effect of trial counsel's errors resulted in prejudice. The Court of Appeals held that Walker failed to demonstrate that trial counsel was deficient on either ground such that it did not independently warrant relief under Strickland. The Court further noted, that "even if South Carolina did allow PCR based upon cumulative prejudicial effect of two or more instances of deficient performance, Walker would still have to demonstrate 'a reasonable probability that, for [the cumulation of] counsel's unprofessional errors, the result of the proceedings would have been different.'" Walker at 243, citing Edwards v State, 392 SC 449 at 459 (2011)

In Walker, the applicant was found not to have proven the deficiencies in counsel's performance. In contrast, in the instant case counsel's deficiency has been proven on each independent ground. While it may be questionable as to ~~whether~~

whether each ground may be substantial enough to have caused prejudice, the errors in counsel's performance were so interrelated that the cumulative effect of prejudice was such that, but for the series of errors, the result of the proceedings would have been different.

The record reflects that much of the trial was predicated on circumstantial evidence. The certification of the cause of death as "homicide" was not sufficiently challenged nor was it sufficiently explained to the jury by way of court instruction. The jury was misled regarding their ability to imply malice from use of a weapon or acts occurring after the crime. A witness was allowed to testify in a highly prejudicial manner regarding the Applicant's credibility and prior bad acts without objection. And finally, exculpatory DNA evidence was not admitted at trial and the State was allowed to misstate what the DNA analysis results actually revealed. When taken as a whole, the cumulative nature of these deficiencies resulted in prejudice to the Applicant and but for trial counsel's deficient performance, there is a reasonable probability that the jury would have reached a different decision.

STATE OF SOUTH CAROLINA IN THE SUPREME COURT

CHRISTOPHER COMMANDER

PETITIONER,

RECEIVED

v.

JUN 11 2015

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true COPY of this Memorandum for writ of certiorari has been sent to the South Carolina Supreme Court. at PO Box 11330, Columbia SC 29211A At this day of June 15 2015.



Christopher Commander 310173

SWORN TO BEFORE ME this 5th day of June, 2015

(LS)

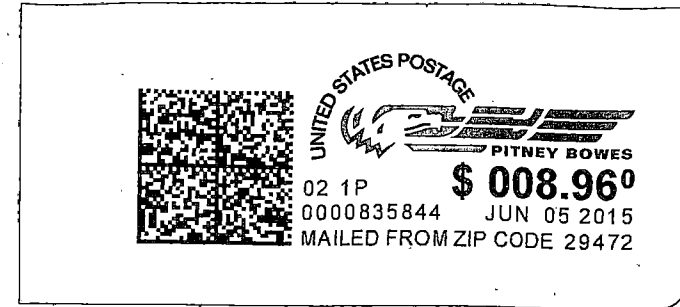
Notary Public for South Carolina

My Commission Expires: _____

Commander 319173

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