

ATTACHMENT #1

(Case History for Case 2006-CP- 006124)

(see 02/26/2013 and 11/05/2013)

CASE HISTORY FOR CASE 2006CP4006124



Crocker, Phillip H #298423 III
 Broad River Correctional Institution
 4460 Broad River Road
 Columbia, SC 29210

Age: Unknown
 DL#:

DOB: Unknown
 SSN: 000-00-0000


COST	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
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Total:

DATE	TIME	EVENT DESCRIPTION
10/17/2006	2:18 PM	Filing recorded: Post Conviction Relief
10/23/2006	11:11 AM	Filing recorded: Verified
10/27/2006	2:36 PM	Filing recorded: letter to appoint atty - kmh
2/28/2007	4:35 PM	Filing recorded: Misc letter requesting copy of show cause complaint rgs
4/20/2007	3:12 PM	Form order Motion to withdraw as counsel granted, Atty needs
4/20/2007	3:38 PM	Filing recorded: Letter to appoint atty - kmh
5/7/2007	12:07 PM	Filing recorded: Miscellaneous A Letter From Phillip H Crocker III
5/8/2007	11:42 AM	Filing recorded: Return
6/12/2007	8:39 AM	Filing recorded: Transcript Of Record
2/8/2008	11:05 AM	Order Substituting Counsel J/Manning
7/15/2008	10:03 AM	Order Relieving Counsel J/Manning
7/9/2008	11:57 AM	Filing recorded: Letter to appoint atty - kmh
1/28/2009	11:27 AM	Filing recorded: Motion to Relieve Counsel
1/28/2009	11:27 AM	Order to Relieve Counsel J/Barber
7/28/2009	3:28 PM	Motion and Demand to Dismiss Counsel and Appoint new Counsel
7/28/2009	3:34 PM	Filing recorded: Affidavit/Affidavit of Service
11/4/2009	9:09 AM	Motion to Relieve Counsel and Motion for Hearing
11/4/2009	9:10 AM	Filing recorded: Affidavit/Affidavit of Service
11/12/2009	3:25 PM	Filing recorded: Reply to Pro Se Motion to Relieve Appointed Counsel
5/25/2010	9:42 AM	Motion for Appointment of Investigative Services and Motion
5/25/2010	9:44 AM	Filing recorded: Certificate of Service
6/1/2010	10:13 AM	Filing recorded: Reply to Motion for Appointment of Investigateive Services a
10/3/2011	2:04 PM	Supplemental Motion for Discovery
12/5/2011	9:28 AM	Order for Discovery and for Payment of Discovery Fees.
12/5/2011	9:33 AM	Order for Appointment of Investigator and for Investigative
2/14/2012	11:16 AM	Amended Order for Discovery and Amended Order for Payment of
2/26/2013	9:18 AM	Filing recorded: Amended PCR 
2/26/2013	9:20 AM	Filing recorded: Amended PCR 
5/22/2013	3:31 PM	Supplemental Motion For Discovery and Authorization of Indig
7/16/2013	9:43 AM	Order for Discovery and for Authorization of Indigent Funds.

Print Date: 10/23/2015
 Print Time: 1:43:00PM
 Requested By: DAVISJ

CASE HISTORY FOR CASE 2006CP4006124

10/18/2013	8:46 AM	Supplemental Motion For Discovery and Authorization of Indig
11/5/2013	1:50 PM	Filing recorded: Amended PCR Application 
11/18/2013	11:09 AM	Order for Discovery and for Authorization of Indigent funds
1/9/2014	10:47 AM	Filing recorded: Amendment to Application For Post Conviction Relief
1/31/2014	3:18 PM	Order for Authorization of Attorney Fees and Interim Payment
1/31/2014	3:38 PM	Order for Payment of Expenses
2/28/2014	2:41 PM	Filing recorded: Memorandum in Support of Application For PCR
7/1/2014	4:31 PM	Order of Dismissal
7/17/2014	11:09 AM	Motion For Rehearing, Motion to Alter or Amend
8/6/2014	11:26 AM	Order DENYING Applicant's Motion for Rehearing Pursuant to R
8/18/2014	2:06 PM	Filing recorded: Filing/Notice of Appeal
4/20/2007	12:00 AM	GUNTERP recorded the following Case Note: to be appointed, formal order to follow J/Lee
7/29/2009	12:00 AM	MCBRIDEG recorded the following Case Note: Motion and Demand to Dismiss Counsel and Appoint new Counsel(Hearing Demanded Priority Matter)
6/1/2010	12:00 AM	MCBRIDEG recorded the following Case Note: Motion for Appointment of Investigative Services and Motion for Discovery
6/8/2010	12:00 AM	MCBRIDEG recorded the following Case Note: Reply to Motion for Appointment of Investigative Services and Motion for Discovery
10/5/2011	12:00 AM	MORENOC recorded the following Case Note: Supplemental Motion for Discovery, Certificate of Service
12/6/2011	12:00 AM	GUNTERP recorded the following Case Note: Order for Appointment of Investigator and for Investigative fees
12/5/2011	12:00 AM	COCJEFFERS recorded the following Case Note: BOOK ST PAGE 925
2/15/2012	12:00 AM	GUNTERP recorded the following Case Note: Amended Order for Discovery and Amended Order for Payment of Discovery Fees.
5/22/2013	12:00 AM	MORENOC recorded the following Case Note: Supplemental Motion For Discovery and Authorization of Indigent Funds, Certificate of Service
10/21/2013	12:00 AM	MORENOC recorded the following Case Note: Supplemental Motion For Discovery and Authorization of Indigent Funds, Certificate of Service
11/5/2013	12:00 AM	MORENOC recorded the following Case Note: Certificate of Service
1/13/2014	12:00 AM	MORENOC recorded the following Case Note: Certificate of Service
2/3/2014	12:00 AM	GUNTERP recorded the following Case Note: Order for Authorization of Attorney Fees and Interim Payment of Attorney Fees.
3/6/2014	12:00 AM	MORENOC recorded the following Case Note: Certificate of Service
7/18/2014	12:00 AM	MORENOC recorded the following Case Note: Certificate of Service
8/11/2014	12:00 AM	GUNTERP recorded the following Case Note: Order DENYING Applicant's Motion for Rehearing Pursuant to Rule 59(a) and Motion to Alter or Amend pursuant to Rule 59(e)
8/19/2014	12:00 AM	MORENOC recorded the following Case Note: Certificate of Service

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ATTACHMENT #2

(Amended POST CONVICTION RELIEF APPLICATION)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-400-6124

Phillip H. Crocker, III -- Applicant,

-vs-

State of South Carolina -- Respondent,

RICHLAND COUNTY
FILED
2013 FEB 26 AM 10:29
JEANETTE W. HERRING
C.C.R. & G.S.

APPLICANT'S AMENDED POST CONVICTION

RELIEF APPLICATION PURSUANT TO:

RULE 15, SCRPC

Phillip H. Crocker, III
SCDC# 298423
BRCI
4460 Broad River Rd.
Columbia, SC. 29210

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT COMMON
)

Phillip H. Crocker, III

Applicant,

-v-

State of South Carolina

Respondent,

) C/A NO. 2006-CP-400-6124
)
)
)

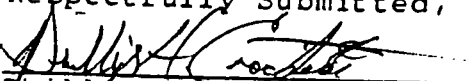
APPLICANT'S AMENDED POST

) CONVICTION RELIEF APPLICATION

) PURSUANT TO RULE 15, SCRPC
)

COMES NOW, Phillip H. Crocker, above captioned Applicant, by and through attorney of record, who respectfully moves this Honorable Court to amend the Original application in the above captioned case number.

Respectfully Submitted,

/s/ 
Phillip H. Crocker

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER CLOSING, THAT RESULTED IN A STRUCTURAL ERROR OF THE CONSTITUTIONAL MECHANISM OF THE TRIAL AND HAD A SUBSTANTIAL AND INJURIOUS EFFECT OF THE JURY'S VERDICT?

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER CLOSING THAT ROSE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT, WHEN THE PROSECUTION ASKED THE JURY TO CONVICT APPLICANT FOR MURDER, SOLELY FOR TRAFFICKING MARIJUANA?

Facts

Applicant was indicted for the offenses of murder and trafficking marijuana. The Trial Court instructed the jury that Applicant entered a plea of not guilty to both offenses, and that plea places the burden on the State to prove the defendant guilty, [Tr.p.1443, L.11-13].

During closing summation the Solicitor argued the following, as recorded:

Now, the next statute before you is murder. Very simply, Ladies and Gentleman, murder, to be the most serious crime possible in our State, has a very, very simple definition. The Judge will charge you as to the definition.

Very simply, In our code of law, it is defined in the following manner. It is the unlawful killing of another person with malice aforethought, either expressed or implied.

What does that mean, expressed or implied?

It's also called express or inferred,
[Tr.p.1382, L.20-25, p.1383, L.1-5].

The Solicitor has just told the jury that that are (3) three
types of malice, "expressed, implied, or inferred."

Coming directly after the Solicitor argued:

One of the simplest definitions of murder is
the unlawful injury without just cause or
excuse. It's the unlawful act without just
cause or excuse. [Tr.p.1383, L.21-23].

Malice may be implied from the willful,
deliberate, and intentional doing of an
unlawful act, and nobody is going to argue
that taking a gun to a drug deal is an
unlawful act, without just cause or excuse,
[Tr.p.1384, L.10-13].

Very simply, Ladies and Gentleman, listen to
the Judge. You can infer malice from the use
of a deadly weapon alone. The use of a
deadly weapon alone to injure or attempt to
injure which results in death is malice.
[Tr.p.1384, L.14-18].

As was seen in the above under-lined portions of the
Solicitor's closing, the State told the jury that murder is
defined as "the unlawful act" without just cause or excuse.
Applicant asserts the Solicitor has told the jury that if they
"conclude" that Applicant was in anyway involved in an "unlawful
act", then Applicant is guilty of malice murder. The Solicitor
further told the jury that malice could be "implied from the
willful, deliberate, and intentional doing of an unlawful act,
and nobody is going to argue that taking a gun to a drug deal is
an unlawful act or inferred from from the use of a deadly weapon,

Id

This argument fails for (2) two reasons, (1) the Solicitor has told the jury that "malice can be "implied" simply if the State proves Applicant committed an "unlawful act", thus being a "conclusive" presumption and (2) that malice can be inferred from the "use of a deadly weapon". Therefore [if] the jury couldn't "conclude" Applicant had committed an "unlawful" act, but if a deadly weapon was involved, then it malice is implied, resulting in a mandatory presumption. Applicant asserts that regardless of the nomenclature used, conclusive and mandatory presumptions are unconstitutional because both relieve the State of their burden of proof on an element deemed necessary.

The Solicitor then made the following argument:

For this charge of murder, all the State must prove is this: It is the unlawful killing with malice aforethought either express or implied or inferred, [Tr.p.1384, L.24-25, p.1385, L.1].

Again the Solicitor has told the jury there are (3) three types of malice, expressed, implied and inferred.

Coming directly after the Solicitor further argued:

In this case, Ladies and Gentleman, there's another inference of malice you may consider, because the law recognizes inherently, that some criminal acts that cause a killing make it malice.

The law says if one intentionally kills another during the commission of a felony, The Judge will instruct you that trafficking in marijuana is a felony, the implication of malice may arise.

Ladies and Gentleman, this is an implication just like an additional implication, just the use of a weapon, just looking at his

action. If one intentionally kills another during the commission of a felony, the implication of malice may arise. [Tr.p.1385, L.19-25, p.1386, L.1-6].

Sometimes people, when they get used to having certain things, will turn to things, to do things, such as dealing in drugs. Things of that nature, to continue to support their way of life. [Tr.p.1439, L.5-8].

Ladies and Gentleman, Phillip Crocker miscalculated. Back on November 21st, He made choices, he chose to involve himself in a drug deal. He chose to go there without drugs, and to try to fake it. He chose to take his gun with him, and when things got out of hand, I submit Nathaniel Casey looked in there and saw it wasn't drugs, he panicked. That doesn't reduce it from murder to manslaughter, Because he's committing a felony. [Tr.p.1441, L.7-15].

All the State asks is to hold him responsible for what he did, [Tr.p.1441, L.20-21].

You think he didn't commit murder? Find him guilty for the murder, for the trafficking, [Tr.p.1441, L.25, p.1442, L.1-3].

As is seen in the above underlined portions of the Solicitor's closing, the Solicitor has appealed to the jury to convict Applicant of [the offense of murder] solely on the basis if they, the jury concluded Applicant committed an, "trafficking in marijuana", thus relieving the State of the burden of proving the essential element of malice to support a conviction for murder. Counsel should have lodged a timely objection to this misstatement of law and fact that had a substantial and injurious effect on the jury's verdict.

Applicant further contends the Solicitor's improper closing by relying on the "unlawful act" to substitute the State's burden of proving malice was unduly prejudicial and denied Applicant his Fourteenth Amendment right to a fair trial. Further, for the Solicitor to ask the jury to convict Applicant for the offense of murder, solely based on the offense of "trafficking marijuana" substantially lightened the State's burden of proof in violation of the Due Process Clause, that rose to the level of "deliberate prosecutorial misconduct."

Discussion

Applicant asserts that counsel should have objected to this line of argument. As was seen the Solicitor was allowed to appeal to the jury to convict Applicant of murder solely on the basis of "trafficking marijuana", i.e. "the "unlawful act", [Tr.pl442, L.2-3]. This is a blatant misquote of law that substantially lightened and relieved the State's burden of proving each and each fact of every element necessary to convict Applicant of malice murder that clearly had a substantial and injurious effect on jury's verdict.

Applicant contends he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment and counsel's failure to lodge a timely objection to the Solicitor's improper closing denied Applicant his Fourteenth Amendment right to a fair trial.

Applicant further asserts that this contention also supports Applicant's allegation that the Solicitor's closing summation

also resulted in "deliberate Prosecutorial Misconduct." The role of an American prosecutor as a minister of justice is firmly established, See, berger v. United States, 295 U.S. 78, 88 (1935)(government attorney is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"); ABA Standards for Criminal Justice: Prosecution Function & Defense, Standard 3-1.2(c)(3rd ed. 1993)("the duty of the prosecution is to seek justice, not merely to convict"); Nat'l Dist. Attyns, National Prosecution Standards, Standard 1.1 (2nd ed. 1991)("the primary responsibility of the prosecution is to see that justice is accomplished"). Thus, a prosecutor may not seek a conviction at any price, State v. Porter, 526 N.W.2d 359, 362-63 (Minn.1995); accord Salitros, 499 N.W.2d at 817.

The Court quoting, State v. Gilstrap, 205 S.C. 412, 416, 32 S.E.2d 163, 164-65 (1944), reasoned.... "the rule followed in this State, and We think in most jurisdictions, is that if upon the whole case, it appears to the Court that the defendant was prejudiced by the language used, as a result of which he did not have a fair and impartial trial, it would be the duty of the Court to reverse the case and remand for a new trial. The Court further opined: "an argument of this nature tends to completely destroy and nullify all sense of impartiality in a case of this kind. It's logical effect is to arouse passions and prejudices of the jurors. Jurors are sworn to be governed by the evidence and

it is their duty to regard the facts of case impersonally, See, State v. Cannon, 93 S.E.2d 889; State v. White, 246 S.C. 502, 144 S.E.2d 481, State v. Gilstrap, supra.

The solicitor's argument must not be calculated to arouse the passions and prejudices of the jurors, State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

While there are numerous kinds of trial conduct that are improper for prosecutors, i.e. "alluding in argument to the defendant's exercise of the right to remain silent, or to the defendant's failure to call witnesses, misstating the presumption of innocence, interjecting the prosecutor's personal opinion about the veracity of witnesses, inflaming the passions and prejudices of the jury, disparaging the defendant's defense to the charges."

In the instant case, the Solicitor was allowed to tell the jury that malice was **implied** from the willful, deliberate and intentional doing of an **unlawful act** or from the use of a deadly weapon." Then during closing the Solicitor was allowed to plead to the jury to convicted Applicant of "murder" solely on the basis of trafficking marijuana, i.e...the unlawful act, that resulted in the denial of due process, Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471; also see, Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868.

Many of these prohibitions also appear in the Standards of Conduct the American Bar Association has established for prosecutors and defense counsel alike. See ABA Standards for

Criminal Justice, Prosecution Function & Defense Function, Standards 3-5.9 (prosecution; 4-7.4 through 4-7.8 (defense. Prosecutors as well as defense counsel, are aware of case perscribing particular conduct as well as the Standards of Conduct perscribed by the ABA. Courts throughout the circuits have struggled with the errors complained of in the instant case, and other circuits have struggled effectively to respond to the problems presented when prosecutors engage in off-limits conduct.

The Illinois Supreme Court has referred to prosecutorial misconduct as "a problem that courts across the country have, for the most part, been unable or unwilling to control, *People v. Johnson*, 803 N.E.2d 405, 412 (Ill.2003). A Florida intermediate appellate court described a "vertiable torrent of cases" involving significant prosecutorial improprieties, and noted that "this pattern of conduct cannot be tolerated", and further expressed frustration that the courts "prior efforts to eliminate the practice have proven entirely inadequate", *Thornton v. State*, 852 So.2d 911, 914-915 (Fla.Dist.Ct.App.2003)(citations omitted).

Where a defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice, that is, the misconduct did not affect the defendant's substantial rights. Placing the burden on the prosecution to show lack of prejudice is not a novel approach. In *Chapman v. California*, the case in which the United States Supreme Court held that constitutional error can be harmless, the Court placed the burden on the government, stating: "Certainly error, constitutional error * * *

casts in someone [other than] the person prejudiced by it a burden to show that the error was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of a error to either prove that there was no injury or to suffer a reversal of his erroneously obtained judgement." 386 U.S. 18, 24 (1967). The Court "requir[ed] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute tot the verdict obtained." Id. Interestingly, Chapman was itself a prosecutorial misconduct case, involving impermissible comment on the defendant's election not to testify at trial. Id. at 24-25. Similarly at least two states, including Wisconsin, follow Chapman and continue to place the burden on the State to show lack of prejudice, See Wilson v. State, 874 So.2d 1155, 1159 (Ala.Crim.App.2003)(holding the state must establish that prosecutorial misconduct did not injuriously affect the defendant's substantial rights), also see, State v. King, 555 N.W.2d 189, 194 (WIS.Ct.App.1996)(holding that under the state's plain error rule, the burden is on the state to prove that plain error is harmless). In turning to our Circuit, our Supreme Court in, State v. Quattlebaum, 527 S.E.2d 105, 108-09 (2000), held that a defendant must show [either] deliberate prosecutorial misconduct or prejudice, but not both. Id.(emphasis original).

Reducing the incidences of prosecutorial misconduct is a shared obligation of prosecutors, who need to be aware of and comply with proscribed standards of conduct; defense counsel, who

should seek corrective action by the trial court when the misconduct occurs, and trial courts, "have a duty to intervene and caution the prosecutor, even in the absence of objection", State v. Glaze, 452 N.W.2d 655, 622 (Minn.1990). It is the duty ~~of the trial court to correct mistakes of law made by counsel in~~ closing argument, United States v. Varlark, 225 F.2d 665; Frady v. People, 96 Colo.43, 40 P.2d 606, 96 ALR. 1052; Linder v. State, 156 Neb. 504, 56 N.W.2d 734. To satisfy the requirements of reversal, the prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial, United States v. Blevins, 555 F.2d 1236, 1240 (5th Cir., cert. denied 434 U.S. 1016, 98 S.Ct. 733.

It is clear that it is error for a prosecutor to mischaracterize evidence in summation, Gaithers v. United States, 413 F.2d 1061, 1079 (1969). In order to warrant reversal, an improper prosecutorial remark must cause substantial prejudice to the defendant. In determining whether a defendant has suffered substantial prejudice, one must look at the severity of the misconduct, the measures adopted to cure the misconduct, and certainty of conviction absent the improper remarks, United States v. Monaghan, 741 F.2d 1434, 1443 (D.C.Cir.1984), cert. denied 470 U.S. 1085, 105 S.Ct. 1847.

As a result of the aforementioned reasons, Applicant is entitled to reversal of his conviction, or in the alternative a new trial.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S INSTRUCTIONS TO THE JURY THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF CASE, WHEN THE TRIAL COURT USED "HYPOTHETICAL FACTUAL EXAMPLES" OF THE CASE IN CHARGING THE JURY ON "EXPRESSED MALICE"?

Facts

During closing summation to the jury the State's theory was that Applicant had previously called the decedent via a cell phone a few days prior to the decedent's death occurring and set up a drug deal, [Tr.p.1434, L.4-8].

The Solicitor told the jury that "basically you can see where on the day the phone calls are within a mile of Applicant's house, and how the calls lead to Columbia, how first Applicant was in the "Toys are Us" area and then Applicant was to have come close to Lowe's". The State further argued that "you can see from the night before how Applicant was to have traveled down the interstate, and then traveled back to Charlotte after leaving Dillion around 9:30, 9:20, and you can plot where it went", [Tr.p.1439, L.15-23].

The Solicitor further told the jury "all the State asks is to hold him responsible for what he did. He came to Columbia. He set up a drug deal, first at a toy store, and then at Lowe's. When things went bad, he took care of business, [Tr.p.1441, L.20-23].

The State's theory was that Applicant had set-up and planned

a drug deal days prior that ultimately went bad resulting in the Applicant allegedly to have shot and killed the decedent.

During the Trial Court's charge to the jury the following statements by the Court were made to the jury, as was recorded:

Expressed malice is shown where a person speaks words which express hatred or ill will for another, or when a person prepared before hand to do the act which was later accomplished: For example, lying in wait for a person, or other acts of preparation going to show the deed was done within the defendant's mind would be expressed malice, [Tr.p.1453, L.14-20].

Applicant asserts the counsel should have objected to the Trial Court's charge that used "hypothetical examples" of circumstances that could have easily constitute an impermissible comment on the facts of the case in such the jury was to determine whether or not malice existed. This was easily seen as the Court's examples of malice consisted of "lying in wait", or other acts or preparation". The very points stressed by the Solicitor's just finished closing argument, that Applicant planned a drug deal and laid in wait for the decedent.

Discussion

Applicant asserts that the Trial Court's "hypothetical factual examples" created in effect an impermissible comment on the facts of case.

Judicial comments on the facts of a case is prohibited in

South Carolina, See South Carolina Constitution, Article 5, §17:
"A trial judge may not instruct the jury regarding what weight
should be given to certain evidence or that certain evidence is
or is not entitled to consideration from them.

~~As the South Carolina Supreme Court said in State v. Hartley,~~

414 S.E.2d 182 at 183:

"A judge shall not charge in respect to matters of fact, but shall declare the law, State v. Bagwell, 23 S.E.2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon the facts), 75 A.Am.Jur.2d §1203 at 693 (1991)(the trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them), State v. Edwards, 120 S.E. 490 (1923)(Wherein our Supreme Court held: "[t]he absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts").

In the case at bar the Court's examples of expressed malice reflected the facts of the case and reiterated "points" stressed in the State's just finished closing argument to the jury. The Court's definition included "hypothetical factual examples" which concurred with the State's articulated theory of expressed malice..

This charge only reiterated the facts as put forth by the Solicitor, to where the expressed malice charge could be reasonably interpreted as a judicial endorsement of the

Solicitor's argument. Proving malice was essential to the State's case against Applicant. Since the Court's charge impermissibly skewed the jury's consideration of the facts regarding these issues, Applicant was unduly prejudiced by the error and was further denied the effective assistance counsel when counsel failed to object to the improper instructions given by the Court.

Applicant further argues that his due process rights to a fair trial was abridged and violated by the comments of the Court. For through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States, *Whitney v. California*, 47 S.Ct. 641 (1927).

The threshold question, is whether the comments by the trial Court were sufficiently conscience-shocking as to implicate substantive due process protections. Applicant contends they were, because the trial Court acted intentionally, for purposes that only served the Solicitor. Here the issue asserted is one protected by the Due Process Clause, when it's violation by the Court served a compelling interest, which amounted to abuse of power sufficient to shock the judicial conscience, *Lewis v. County of Sacramento*, 118 S.Ct. at 1717-18.

Applicant asserts these direct comments by the Trial Court were a direct violation of Applicant's rights to a fair trial, and that the only purpose served by the comments was to direct a verdict for the State. Further, Counsel was deficient in failing to object and preserve this meritorious issue for appellate review, as there is a reasonable probability, that but for this

deficiency the results of the proceeding would have been different, as well as there is a reasonable probability the results of the appeal would have been different.

For the aforementioned reasons, Applicant respectfully prays
~~this Court will grant the requested relief of a new trial.~~

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS ON "IMPLIED MALICE" THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE THAT DENIED APPLICANT HIS RIGHT TO A FAIR TRIAL?

Facts

During the charge conference the Court made the following statement:

The Court: I agree. Now let's move on to the more lengthy charge, which may be -- It doesn't talk about malignant recklessness. It talks about willful, deliberate, intentional doing of an unlawful act without just cause of excuse; Inference of malice from the use of a deadly weapon, [Tr.p.1344, L.10-16].

Applicant asserts that as is seen in the above underlined the Court has offered a "conclusive" presumption charge on the element of malice from the doing of an **unlawful act**, and an "inference" charge on the element of malice from the use of a deadly weapon. Coming directly after the following colloquy was recorded between the Court and Solicitor:

The Court: Let me put it this way.

Ms. Campbell: Yes, Sir.

The Court: I'm not going to charge malice three different ways. I have one, You offered two, [Tr.p.1346, L.19-22].

As is seen the Solicitor has requested the Court to charge (2) two different types of malice in conjunction with the Court's one

description of malice, and as was seen the Court declines to charge malice (3) three different ways. Applicant asserts, as will be seen infra the Court ultimately does in fact charge (3) three different type of malice, i.e., expressed, implied, and inferred.

During the charge conference the Solicitor made the following request:

Ms. Campbell: All I ask Your Honor is that you talk about Malice may be implied from the willful, deliberate, intentional doing of an unlawful act without just cause or excuse, [Tr.p.1347, L.20-23].

Mr. Strickler: Of course, Your Honor, in the second paragraph, Malice may be implied from the willful, deliberate, intentional doing. Your second page, Malice may be inferred from conduct --

The Court: I said parts of the word into a coherent charge.

Mr. Strickler: That's fine. [Tr.p.1348, L.15-21]

As is seen the Solicitor has requested an unconstitutional "implied" malice instruction and counsel unwittingly agrees to the unconstitutional "implied" malice instruction.

Coming directly after the charge conference the Solicitor argued the following in closing summation to the jury, as was recorded:

Now, the next statute before you is murder. Very simply, Ladies and Gentleman, murder to be the most serious crime possible in our State

has, has a very, very simple definition. The judge will charge you as to the definition. Very simply, in our code of law, it is defined in the following manner: It is the unlawful killing of another person with malice aforethought either expressed or implied.

What does that mean, expressed or implied. It's also called expressed or inferred, [Tr.p.1382, L.20-24, p.1383, L.4-5].

Here the Solicitor has told they jury there are (3) three types of malice, ["expressed, implied and inferred"], without objection from counsel, (emphasis supplied).

The Solicitor further argues:

One of the simplest definitions of murder is the unlawful injury to another without just cause or excuse. It's an unlawful act without just cause or excuse, [Tr.p.1383, L.21-23].

Malice may be implied from the willful, deliberate, and intentional doing of an unlawful act, and nobody is going to argue that taking a gun to a drug deal is an unlawful act, without just cause or excuse.

Very simply, Ladies and Gentleman, listen to the Judge. He will tell you you can infer malice from the use of a deadly weapon alone. The use of a deadly weapon alone to injure or attempt to injure which results in death is malice. [Tr.p.1384, L.10-18].

For this charge of murder, all the State must prove is this: It is the unlawful killing with malice aforethought either expressed or implied or inferred. [Tr.p.1384, L.24-25, p.1385, L.1].

As is seen in the above underlined portions the Solicitor has told the jury that malice may be "implied" simply if the jury

"concludes" Applicant committed an "unlawful act", i.e. "a drug deal", or if a deadly weapon [a gun] was used then it's "mandatory" they, the jury find malice. The issue is more confused now because the Solicitor has again successfully told ~~the jury there are (3) three types of malice, ["expressed,~~ implied and inferred], without objection from counsel.

The Solicitor further argues:

I'd like to discuss those aspects of the case with you. I'm not going to debate the law of what murder is. Murder is the unlawful killing of another person with malice aforethought, either expressed or implied, that's true, all right, [Tr.p.1393, L.24-25, p.1394, L.1-3].

Ladies and Gentleman, Phillip Crocker miscalculated. Back on November 21st, he made choices, he chose to involve himself in a drug deal. He chose to go there without the drugs, and try to fake it. He chose to take his gun with him, and when things got a out of hand, I submit when Nathaniel Casey looked in there and saw it wasn't drugs, he panicked. That does reduce it from murder to manslaughter, because he's committing a felony, [Tr.p.1441, L.7-15].

Just hold him responsible. Find him guilty for the murder. For the trafficking, [Tr.p.1442, L.1-3].

As is seen above the Solicitor has asked the jury to convict Applicant of murder, based solely on "implied malice" from the "unlawful act", without objection from counsel.

Coming directly after the Solicitor's just finished closing the Trial Court gave the following instructions to the jury, as was recorded:

The Court: The charge of trafficking in marijuana is a felony in the State of South Carolina.

Secondly, the defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of an unlawful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer evil intent., [Tr.p.1452, L.18-25, p.1453, L.1-2].

The Court has instructed the jury that marijuana is a felony, and while this is true, the subsequently instructs the jury on the charge of murder and the elements of malice, required to find Applicant guilty of murder.

As is seen in the above underlined portions the Court instructs the jury that malice is the "intentional doing of an unlawful act", therefore a reasonable jurist could have interpreted this instruction to find the element of malice solely on the basis if they, the jury believed Applicant committed an unlawful act, i.e. a drug deal, especially in light of the Solicitor's just finished closing asking the jury to convict Applicant of murder, for the trafficking (emphasis supplied).

The Trial Court further charges:

Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist,

that is either by direct evidence or by inference from facts and circumstances which are proved.

Expressed malice is shown when a person speaks words which express hatred or ill will, or when a person prepared beforehand to do the act which was later accomplished. For example: lying in wait for a person, or any other acts of preparation going to show the deed was within the defendant's mind would be expressed malice.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon, [Tr.p.1453, L.7-23].

The Court has instructed the jury on "expressed and inferred" malice. The Court's charge on "expressed" malice has instructed the jury that they could find the element of malice if they, the jury concludes that Applicant prepared beforehand to do any act, then that would be expressed malice. Applicant asserts that a jurist of reason could have interpreted this instruction to mean that if they found Applicant prepared before hand to committ any other act, i.e. trafficking in marijuana, then malice was present and they could find Applicant guilty of murder.

The Court further instructed the jury on "inferred" malice, by instructing the jury that "inferred malice may also arise if a deadly weapon was involved."

The Court went further to explain what malice is, as was recorded:

Let me explain a little further what is meant by the word "malice". It is a term of art, a technical term importing wickedness and excluding just cause or excuse. It is something

.springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief.

The words expressed or implied do not mean different kinds of malice, but merely mean the manner in which the malice is proven, whether by direct or indirect evidence.

Expressed malice is shown by direct evidence, whereas, implied malice is shown by in direct or circumstantial evidence, [Tr.p.1454, L.6-18].

As is seen in the above underlined portions, the Court has now instructed the jury that malice is "expressed or **implied**", in contravention with the initial instruction that malice is "expressed or inferred", thus clearly constituting the Court instructing the jury on (3) three different types of malice (emphasis supplied). This was clearly error, especially in light of the fact during charge conference the Solicitor had requested the Court to charge malice (2) two ways in conjunction with the Court's (1) one charge and the Court clearly admonished the Solicitor, "I'm not going to charge malice three different ways" (Tr.p.1346, L.19-22).

Coming directly after the Court further charged:

Malice may be **implied** from the willful, deliberate and intentional doing of an **unlawful act without just cause or excuse or from the use of a deadly weapon,** [Tr.p.1454, L.16-21].

Applicant asserts the underlined portions of the "**implied**" instruction just given unconstitutionally shifted the burden of

proof in violation of the Due Process Clause and the South Carolina Supreme Court and United States Supreme Court's precedent *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884 (1991), where in [both] Courts held the error complained of was not ~~harmless beyond a reasonable doubt.~~

Applicant asserts he was denied his Sixth Amendment right to the effective assistance of counsel when counsel failed to object to the unconstitutional jury instructions, and Applicant was further denied his Fourteenth Amendment right to a fair trial and was prejudiced since the burden shifting instruction was decreased with burden shifting malice instructions that had a substantial and injurious effect on the jury's verdict.

DISCUSSION

In a long line of cases, culminating in *Yates v. Evatt*, 111 S.Ct. 1884 (1991), the United States Supreme Court has recognized that the prosecution [must prove each and every element] of the crime charged beyond a reasonable doubt, *In re Winship*, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense, because doing so decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975, the United States Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden of proof on any element of the crime charged

to the defendant, *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). The Court found the risk described to be intolerable and reversed Wilbur's conviction.

The United States Supreme Court overturned a conviction in ~~*Sandstrom v. Montana*, 442 U.S. 510 (1979)~~. ~~Montana law provided~~ that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury that, "the law presumes that a person intends the ordinary consequences of his voluntary acts, Sandstrom, supra, at 512.

After considering Sandstrom's argument, the Court agre[ed] that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense, (that he purposely or knowingly killed another person). The Court again noted that a State [must] prove every element of the crime charged beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A "reasonable juror might have interpreted the instruction either as a conclusive presumption or as a burden shifting presumption, but either interpretation the Court rendered the instruction unconstitutional.

The United States Supreme Court was confronted with another burden shifting jury instruction in, *Francis v. Franklin*, 471 U.S. 307 (1985). The Court found that the use of a "rebuttable presumption" was also unconstitutional for the same reasons set forth in Sandstrom, supra. The defendant there was charged with malice murder, and his sole defense was that he lacked the

requisite intent to kill. The Court focused on, and held unconstitutional (2) two sentences of the trial judge's jury charge; as follows: "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted," Franklin, at 311.

The Franklin Court evaluated both "conclusive and rebuttable" mandatory presumptions and concluded that both place the burden of persuasion on the defendant, Franklin, at 314. Both types of presumptions were deemed unconstitutional because they relieve the State of the affirmative burden of persuasion on the presumed element, by instructing that it must find the presumed element unless the defendant persuades the jury not to make such a finding, Franklin, at 355. [S]uch shifting of the burden of persuasion with respect to a fact the State deems so important that it must be either proved or presumed, is impermissible under the Due Process Clause. See Patterson v. New York, 432 U.S. 197, 215 (1977). As part of it's decision the Court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury that the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding Francis v. Franklin, the Court relied on it's

decision in Mullaney v. Wilbur, just as the Court did in Sandstrom. But more importantly all (3) three cases relied on the bedrock constitutional principles set forth in, In re Winship, supra (that a State must prove every element of the crime charged ~~beyond a reasonable doubt, and mandatory burden shifting jury instructions~~ relieves the State of that burden of proof in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Shortly after Franklin was decided a South Carolina case began winding it's way through the appeals process on it's way to consideration by the United States Supreme Court. Dale Robert Yates was convicted of murder and sentenced to death. His direct appeals were denied at all levels, See State v. Yates, 310 S.E.2d 805 (1982), cert. denied, Yates v. South Carolina, 462 U.S. 1124 (1983).

Yates then filed a petition for writ of habeas corpus to the South Carolina Supreme Court, claiming the trial court erred in charging the jury... "that malice is implied or presumed from the use of a deadly weapon"; because that presumption relieved the State of it's burden of proof on an essential element of the crime. His application was summarily denied by the Court. Yates then filed an appeal to the United States Supreme Court in 1985, and that Court remanded his case to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin, supra; See Yates v. Aiken, 474 U.S. 896 (1985). On remand of the Yates case, the South Carolina Supreme Court noted that the jury instruction at Yates trial suffered from the same infirmities

preferred course.¹⁴ We take responsibility for drafting rules, and we consent to their imposition.¹⁵

The very act of taking that responsibility shapes those rules profoundly. When we negotiate the rule about "causing death," we know that we are writing a rule that someday may apply to us. We could be Rok, the one who ends up dead at the hand of Og, and, in that spirit, we are motivated to write a rule that by its severity might prevent Og from acting, or at least vanquish him for extinguishing from the earth that which we value most highly—our own life.

But we also could be Og. We could innocently cause a stone to fall from the scaffold upon which we are working, killing a stranger named Rok on the street below; or we could kill Rok as he lunges at us with a knife, or find him coupling with our beloved and kill him in a sudden, jealous rage. Without deprecating the value of Rok's life in absolute terms, as Og we demand consideration of circumstances before anything approaching our vanquishment is authorized. Minimally, reasoned self-interest demands contemplation of a range of societal responses in the final rule we write.

The rule will not, however, merely reflect the personal interests of the Og and Rok in each case, as it is neither written by, nor

14. John Adams put it succinctly and categorically: "It is *Consent alone*, that makes any human Laws binding." *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 143 (C. Bradley Thompson ed., 2000). This conception of consent of the governed was even more profound for Americans than for their British counterparts. Our Constitution was to be a *written* charter of power that entrusted power directly from the people to their government without reliance on custom and precedent. See John De Witt, *Essay III* (November 5, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 311, 312 (Ralph Ketcham ed., 1986).

15. *The Federalist* begins with this challenge:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1, at 27 (Clinton Rossiter ed., Signet Classic 1999) (1788). Indeed, Hamilton would remark in *Federalist No. 22* that one of the deficiencies of the government under the Articles of Confederation was that it was based on the unsteady, delegated authority of the states alone, and not on the people directly. *Id.* at 148. There is a necessity, he wrote:

[O]f laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of the American empire ought to rest on the solid basis of *THE CONSENT OF THE PEOPLE*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.

Id. Antifederalists agreed on the importance of the consent of the governed, but disagreed that the proposed form of government would actually maintain such consent for long. See *Letters from the Federal Farmer*, in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 261-301 (Michael Kammen ed., 1986).

present in State v. Elmore, 308 S.E.2d 781 (1983), and addressed in Francis v. Franklin, supra. However, and questioned only whether it's previous decision in Elmore should be applied retroactively. After deciding that Elmore would not be applied retroactively, the Court affirmed Yates conviction.

Yates again appealed to the United States Supreme Court. In a second decision early in 1988, the Court briefly recounted the procedural history of Yates against the background of decisions in Sandstrom, Elmore, Franklin and In re Winship. The Court noted that the South Carolina opinion apparently concluded that Franklin was not to be applied retroactively because it had announced a new rule of law. The Supreme Court disagreed, however saying Franklin was merely an extension and reaffirmation of it's prior decisions. The Yates opinion concluded, since it [The South Carolina Supreme Court] has considered the merits of the federal claims, it has a duty to grant the relief that federal law requires, Yates v. Aiken, 484 U.S. 211 (1988).

Again the South Carolina Supreme Court refused to vacate Yates' conviction, finding that the charge used was harmless error, Yates v. Aiken, 391 S.E.2d 530 (1989). Once again Yates appealed this denial to the United States Supreme Court. In it's third review of his conviction, the United States Supreme Court set aside Yates conviction without a third remand to the South Carolina Supreme Court, See, Yates v. Evatt, 500 U.S. 391 (1991),

Based on case law, there is no doubt that the malice instructions given in Applicant's trial were unconstitutional

unconstitutional mandatory and conclusive burden shifting instructions, that were additionally confusing since the trial court instructed the jury there was (3) three types of malice, "expressed, implied and inferred". The trial Court further ~~charged the jury "malice may be implied from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse or from the use of a deadly weapon".~~ The very instruction prohibited in Yates and Elmore supra Id. In essence there has been no finding of guilt beyond a reasonable doubt, for the trial court's instructions substantially relieved the State of the burden of proof of proving every fact of every element of the offense alleged.

Here the trial Court told the jury that "if the jury concluded that Applicant had committed an "unlawful act" or if a "deadly weapon" was used then malice was **implied** and the jury could find the element of malice. This was all the more confusing and damaging when the jury considered the Solicitor's just finished closing where the Solicitor asked the jury to find Applicant guilty of murder, for the trafficking offense. (emphasis supplied).

Applicant asserts the trial Court's jury instructions was unconstitutional and deceased with burden shifting **implied** malice instructions that denied Applicant his right to a fair trial. Applicant further asserts that counsel was ineffective in failing to object to the instructions given in the instant matter. Had counsel of objected there is a reasonable probability that but for this error the result of the trial would have been different.

CONCLUSION

WHEREFORE, based on the foregoing statement of facts, issues presented and citations of authorities relied on Applicant respectfully prays this Honorable Court grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Phillip H. Crocker
Phillip H. Crocker

4 of 1

Applicant asserts the trial court's unconstitutional jury instructions and counsel failure to object had a substantial and injurious effect on the jury's verdict. For the aforementioned violations, Applicant respectfully prays this Court will grant ~~the requested relief of a new trial.~~

ATTACHMENT #3

(Amended POST CONVICTION RELIEF APPLICATION)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A NO. 2006-CP-40-6124

RICHLAND COUNTY
FILED
2013 NOV -5 PM 1:45
JEANETTE W. HOBBS
C.C.P. & G.S.

Phillip H. Crocker III -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

AMENDED POST CONVICTION RELIEF APPLICATION
PURSUANT TO RULE 15, SCRPC

Phillip H. Crocker, III
SCDC# 298423
BRCI
4460 Broad River Rd.
Columbia, SC. 29210

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-40-6124

Phillip Crocker, III -- Applicant,

-Vs-

State of South Carolina -- Respondent,

RICHLAND COUNTY
FILED
2013 NOV -5 PM 1:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

CERTIFICATE OF SERVICE

The undersigned does hereby certify he has served a true and correct copy of the enclosed Amended Post Conviction Relief application on attorney for Respondent, Mr. Donald J. Zelenka, Assistant Attorney General, P.O. Box 11549, Columbia, SC, 29211

by placing the aforesaid in a properly addressed envelope, first-class postage affixed and placed in the U.S. Mail this ^{1st} day of November, 2013.

Sworn to and Subscribed Before Me

This 1 day of NOV, 2013

Eugene Keet
NOTARY PUBLIC

My Comm. Expires My Commission Expires April 4, 2016

Respectfully Submitted,

/s/ [Signature]

Phillip Crocker, III

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2013 NOV -5 PM 1:45
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

Phillip H. Crocker, III)

C/A No. 2006-CP-40-6124

Petitioner,)

-Vs-)

AMENDED APPLICATION FOR POST

State of South Carolina)

CONVICTION RELIEF PURSUANT TO

Respondent,)

RULE 15, SCRPC

COMES NOW, above captioned Petitioner, Phillip H. Crocker, III, by and through attorney of record, respectfully moves this Honorable Court to amend the Original Application in the above captioned case number.

Respectfully Submitted,

/s/ Phillip H. Crocker, III
Phillip H. Crocker, III

ATTACHMENT #4

(Amended POST CONVICTION RELIEF APPLICATION)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A NO. 2006-CP-40-6124

RICHLAND COUNTY
FILED
2013 NOV -5 PM 1:45
JEANETTE M. MCBRIDE
C.C.P. & C.S.

Phillip H. Crocker III -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

AMENDED POST CONVICTION RELIEF APPLICATION
PURSUANT TO RULE 15, SCRPC

Phillip H. Crocker, III
SCDC# 298423
BRCI
4460 Broad River Rd.
Columbia, SC. 29210

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-40-6124

Phillip Crocker, III -- Applicant,

-Vs-

State of South Carolina -- Respondent,

RICHLAND COUNTY
FILED
2013 NOV -5 PM 1:45
JEANETTE W. MCBRIDE
C.C.P. & G.S.

CERTIFICATE OF SERVICE

The undersigned does hereby certify he has served a true and correct copy of the enclosed Amended Post Conviction Relief application on attorney for Respondent, Mr. Donald J. Zelenka, Assistant Attorney General, P.O. Box 11549, Columbia, SC, 29211

by placing the aforesaid in a properly addressed envelope, first-class postage affixed and placed in the U.S. Mail this ^{1st} day of November, 2013.

Sworn to and Subscribed Before Me

This 1 day of NOV, 2013

Eugene Ketchum

NOTARY PUBLIC

My Comm. Expires My Commission Expires April 4, 2016

Respectfully Submitted,

/s/ Phillip Crocker, III

Phillip Crocker, III

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2013 NOV -5 PM 1:45
JEANNETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

Phillip H. Crocker, III)
Petitioner,)
-Vs-)
State of South Carolina)
Respondent,)

C/A No. 2006-CP-40-6124

AMENDED APPLICATION FOR POST
CONVICTION RELIEF PURSUANT TO
RULE 15, SCRPC

COMES NOW, above captioned Petitioner, Phillip H. Crocker, III, by and through attorney of record, respectfully moves this Honorable Court to amend the Original Application in the above captioned case number.

Respectfully Submitted,

/s/ Phillip H. Crocker, III
Phillip H. Crocker, III

ISSUE () WAS COUNSEL INEFFECTIVE FOR FAILING TO MOTION THE COURT TO SUPPRESS ALL THE EVIDENCE OBTAINED FROM THE SEARCH WARRANTS, WHERE THE MAGISTRATE JUDGE LACKED AUTHORITY TO ISSUE OUT OF STATE/NATION WIDE SEARCH WARRANTS?

Facts

During trial the following colloquy of Investigator McDonald was recorded:

Q). And the next day you were able to get from the victim's phone in this case?

A). Yes, I prepared search warrants for the calls coming in and out from the victim's cell phone which ended up being a singular cell phone. I also prepared a search warrant on "a possible suspect phone". The last phone call the victim had received by a person only identified as "Croc" in the saved portion of the phone.

Q). What number were you getting search warrants for?

A). (646)(408-5502), that would be a Sprint phone.

Q). How can you tell it's a sprint phone?

A). There's actually a web site I've been provided with, Primers.com. You can go and put the prefix in. A 646 or 408, it will tell you what company that phone is associated with.

Q). And that day, did you forward these search warrants to sprint and to singular?

A). Yes, I had them signed that night by a magistrate, [Tr.p.832, L.20-25,-p.833, L.1-4]

As is seen in the above, McDonald prepared the out-of-state/nation wide "search warrants" and had the Magistrate sign the warrants the very same night.

The warrants in question read as follows:

Sprint PCS, Custodian of Records, Meianie Hall, Sprint Spectrum, L.P.
6480 Sprint Parkway
Overland Park, Kansas, 66251
(see attached exhibit (A))

Cellco Partnership DBA Verizon Wireless
Att: Custodian of Records
180 Washington Valley Rd.
Bedminister, NJ., 07921
(see attached exhibit (B))

Cingular Wireless Compliance Center
Attention: Custodian of Records
5600 Glenridge Dr., Suite G418
Atlanta, GA., 30342
(see attached exhibit (C))

As is seen all of the search warrants are for (3) three different States, to which Petitioner asserts the Magistrate [lacked] authority to issue out-of-state/nation wide search warrants.

Coming directly after McDonalds's testimony, the State called Lieutenant James Smith, and the following colloquy was recorded:

Q). Over the course of the next week, were you able to develop the name of Willie Jennings as someone you needed to talk with in the case?

A). Yes, I did.

Q). And how did that come about?

A). Well, what happened was that through the records that were back from the phone in question, what's been referred to as the "Croc" phone, we did locate a couple Columbia

numbers which were called on the phone. Of course, that is right in our jurisdiction so we could try to make contact with those individuals to find out who it was that called. We were successful in doing that with Marvin Flemming and Monica McClain. We learned that the common denominator to them was Willie Jennings, [Tr.p.1012, L.20-25, p.1013, L.1-14].

On the 11th we actually prepared a search warrant affidavit based on the information we had gotten. Mr. Jennings had fully identified the defendant, [Tr.p.1018, L.16-18].

As is seen during Lt. Smith's testimony, Petitioner's name and identity was provided to law enforcement by "Willie Jennings" whose name was only discovered by the information obtained by the search warrants, and the Magistrate under S.C. Code Ann §17-13-140 lack[ed] authority to issue, and therefore Counsel should have motioned to suppress [all] the evidence and information gathered therefrom as "fruit of the poisonous tree".

According Section 17-13-140 states in pertinent part:

Section 17-13-140, Issuance, executions and Return of Search Warrants for property connected with the Commission, Inventory of Property Seized:

Any Magistrate or recorded or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant for a seizure...

As is seen in the underlined portions of 17-13-140, the Magistrate of "the State having jurisdiction over the area where the property is located" has jurisdiction to issue a search

warrant. In the instant matter the Magistrate clearly did not have the authority to issue out-of-state/nation wide search warrants for (Overland Park, Kansas); (Bedminister, New Jersey); and (Atlanta, Georgia)(emphasis supplied).

Petitioner asserts the Magistrate according to S.C. Code Ann. §17-13-140 lacked authority to issue three (3) out-of-state/nation wide search warrants and therefore Counsel should have moved to suppress all the evidence and information obtained from those search warrants, i.e. The pretrial and in-court identification testimony of Shannon Miles [Tr.p.62-p.87; Tr.p.519-p.551]; the pretrial and in-court identification testimony of Consuelo Casey [Tr.p.104-p.132; Tr.p.552-p.585]; the testimony of Rodney Gonzales [Tr.p.89-p.104]; the trial testimony of Lt. James Smith [Tr.p.133-p.137]; the in-court identification and trial testimony of Willie Jennings [Tr.p.626-p.717]; Sgt. Earles [Tr.p.734-p.739]; the trial testimony of Ms. Howell [Tr.p.799-p.816] and trial testimony of Investigator McDonald [Tr.p.832-p.997; Tr.p.1361-p.1374] and most importantly trial exhibits

(12),(13),(48-70),(90),(91),(97),(99),(100),(102-117),(119) et al. as "fruit of the poisonous tree" (emphasis supplied).

Petitioner would further assert he was denied his Sixth Amendment Constitutional right to the effective assistance of counsel and his Fourteenth Amendment right to a fair trial when counsel failed to motion the Court to suppress all three (3) search warrants and the evidence and information obtained therefrom, including but not limited to the pretrial, trial

testimony, in-court identification and trial exhibits cited above.

Discussion

While the Magistrate did have authority to issue [a] search warrant for the "information in the victim's phone found at the scene, in the State of South Carolina, Petitioner's argument is premised on the belief that the Magistrate lacked authority and jurisdiction to issue three (3) out-of-state/nation wide "search warrants" for the phone records out-side the jurisdiction of a State of South Carolina Magistrate, See §17-13-140.

The three (3) search warrants issued by the South Carolina Magistrate which were executed in the States of Kansas, New Jersey, and Georgia, were clearly outside the scope and jurisdiction of 17-13-140, as well as outside of South Carolina's jurisdiction all together (emphasis supplied).

§17-13-140 clearly states in pertinent part: "the State having jurisdiction over the area where the property is located may issue a search warrant for seizure." In determining the intent of the legislature one must turn to the principles of statutory construction.

Principles of Statutory Construction

The cardinal rule of statutory interpretation is to determine the intent of the legislature, Georgia-Bail Bonds Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct.App.2003), see also Gordon v. Phillips Utils. Inc., 362 S.C. 403, 406, 608 S.E.2d

425, 427 (2005)("The primary purpose in construing the a statute is to ascertain legislative intent"). All rules of statutory construction are subservient to the one that the language used, and that language must be construed in the light of the intended purpose of the statute, *McClanahan v. Richland County Co. v. School Dist. of Greenville*, 331 S.C. 19, 501 S.E.2d 725 (1998); *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002); *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999).

The legislature's intent should be ascertained primarily from the "plain language" of the statute, *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct.App.2004), *Morgan*, supra 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996). The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly, *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 564 S.E.2d 358 (Ct.App.2002). Once the legislature has made a choice, there is no room for the courts to impose a different judgement based upon their own notions of public policy, *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989).

When a statute's terms are clear and unambiguous on their face, there is [no] room for statutory construction and a court must apply the statute according to it's literal meaning, *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 442 S.E.2d 177 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of

statutory construction and this Court has no right to look for or ~~impose any other meaning, Tilley v. Pacesetter Corp., 355 S.C.~~ 361, 585 S.E.2d 292 (2003); Pachal v. State Election Comm'n Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997)("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into which are not in the legislature's language"). What the legislature says in the text of a statute is construed the best evidence of the legislative intent or will, Bayle v. South Carolina Dept. of Tranp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001).

A "warrant" is a judicial authorization to law enforcement to search and seizure persons or things. To preserve advantages of speed and surprise, the order is issued without prior notice and is executed often by force, with an unannounced and unanticipated "physical" intrusion, See Marshall v. Barlow's Inc., 436 U.S. 307, 316, 98 S.Ct. 1816 (1978)(recognizing that search warrants may be executed without delay and without prior notice, thereby preserving the element of surprise).

Because the intrusion is both an immediate and substantial invasion of privacy, a warrant may only be issued by a judicial officer upon demonstration of probable cause -- the safe guard required by the Fourth Amendment,, See U.S. Const. amen XIV ("no warrant shall issue but upon probable cause"), see also Camara v. Municipal Court, 387 U.S. 523, 528-29, 87 S.Ct. 1727 (1967).

The demonstration of probable cause to a neutral judicial officer places a "check point" between the government and the

citizen where there otherwise would be no judicial supervision, Steagald v. U.S., 451 U.S. 204, 212, 101 S.Ct. 1642 (1981).

In the instant case the Magistrates according to S.C. Code Ann. §17-13-140 lack[ed] authority and jurisdiction to issue three (3) out-of-state/nation wide search warrants for three (3) different State(s). Here the case becomes problematic as it cannot be said that the Investigator in the instant case presented evidence sufficient to establish probable cause because the very purpose of requesting the information (phone records) is to ascertain whether probable cause even exists. As was noted supra, the Magistrate had the authority to issue [a] search warrant for the information inside the victim's cell phone found at the scene in the State of South Carolina, but, the Magistrate lacked authority to issue nation-wide search warrants for the phone records in three (3) States themselves. Petitioner is not arguing this as a Fourth Amendment claim, but rather as a statutory violation as well as an ineffective assistance of counsel claim.

The South Carolina Supreme Court has recognized, Section 17-13-140 of the South Carolina Code actually imposes stricter requirements than constitutional provisions, See State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000)(citations omitted). The more appropriate remedy for the State's "fishing expedition" would have been to "subpoena" the phone records, but the Officers instead elected and chose to prepare "search warrants" instead

which are distinctly different and have different functions from
~~"subpoenas", See In Re Subpoena Duces Tecum, 228 F.3d 341, 346-47~~
(4th Cir.2000).

The fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light, but for the illegal actions of the police, and the evidence has been obtained by exploitation of that legality, State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996)(citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963)).

One contesting the legality of a search of a defect under Section 17-13-140 need only show that the State is attempting to introduce the evidence against him, See State v. McNight, (S.C.1987), 291 S.C. 110, 352 S.E.2d 471, at 474 (emphasis original).

When considering Counsel's failure to move to suppress, the defendant must show that the verdict would have been different, absent the evidence that should have been excluded, Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986).

Here there can be no doubt that the evidence was "fruit of the poisonous tree" and should have been suppressed. Had it not been for the information obtained by the unlawful statutory violations and actions of the Magistrate issuing out-of-state/nation wide search warrants for the State's "fishing expedition", Petitioner would never have been considered a suspect much less the alleged perpetrator in the incident in question.

If Counsel would have motioned to suppress all the evidence and information obtained by the out-of-state search warrants, there is more than a reasonable probability the jury would have returned a different verdict, as Petitioner would not have ever been sitting before the jury from the on set.

Petitioner is entitled to a new trial on this issue with instructions to suppress the evidence and information obtained through the phone records.

ISSUE () WAS COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS WILLING JENNING'S STATEMENTS AND TRIAL TESTIMONY DUE TO POLICE CONDUCTING AN EXTRA-TERRITORIAL INVESTIGATION WITHOUT HAVING MULTI-JURISDICTIONAL AGREEMENTS, AND THEREFORE ALL THE INFORMATION GATHERED THEREFROM IS FRUIT OF THE POISONOUS TREE?

Facts

Applicant asserts he was denied his Sixth Amendment right to counsel and his Fourteenth Amendment right to a fair trial when counsel failed to motion the Court to suppress multiple statement(s) and Trial testimony given by State's witness Willie Jennings ("Jennings") where law enforcement conducted an extra-territorial investigation without multi-jurisdictional agreements.

During trial the State called Willie Jennings to testify. Jennings testified he really didn't know what happened, Tr.p.657, 11.1-12. Jennings said once he learned the police were looking for him he came to Columbia, Tr.p.657, 13-17. Jennings testified that when the Police Department told him the Investigator that was looking for him was on a trip, so he (Jennings) went back home to Latta, in Dillon County, Tr.p.657, 11.18-25-p.658, 11.1-10.

Jennings testified that the Police contacted him at his mother's. Thereafter, the Richland County Sheriff's Department [came to Dillon] County and brought him [back] to Columbia with

them, Tr.p.658. During cross-examination, Jennings admitted that he gave a "couple of statements" to Investigator McDonald, Tr.p.662, 11.1-25.

Jennings testified the first statement was given to Investigator McDonald [in Dillon County], Tr.p.663, 11.1-9. In the first statement Jennings admitted that his house was in Dillon County and that December 10, 2001, he told Investigator McDonald that Applicant drove a Range Rover with Georgia tags, and that he met Applicant a couple of years ago in Atlanta, Tr.p.663-p.664.

Jennings further admitted, that [part] of this conversation was given at his mother's house in Dillon County, Tr.p.665, 11.1-4. Trial Counsel further questioned Jennings if he recalled calling Lt. Smith and if he agreed to come to Columbia to speak with them, Tr.p.666, 11.1-8. The following was recorded:

Q). But the fact is, you didn't end up coming back to Columbia? They ended up coming down to Dillon or Latta and met you there, right?

A). Right, [Tr.p.666, 11.9-14].

Jennings further testified that "then they got back into contact with him. They (Investigator McDonald & Lt. Smith) came back to his mother's house in Dillon County, Tr.p.666, 11.15-16.

Applicant asserts counsel should have motioned to suppress this the statements and testimony of Willie Jennings as fruit of the poisonous tree where the information obtain from Willie Jennings was obtained during a extra-territorial investigation

without multi-jurisdictional agreements in place between Richland and Dillon Counties for the purposes of criminal investigation.

Here, Applicant asserts that Richland County did not have the respective statutory required "written agreements", before traveling from Richland County to Dillon County and conducting an extra-territorial investigation and therefore, any evidence obtained therefrom should have been suppressed. In support of Applicant's assertion Richland County did not have the "required written agreement", see Applicant's attached exhibit (D).

S.C. Code Ann. §23-1-215 states:

§23-1-215, Agreements between multiple law enforcement Jurisdictions for purposes of Criminal Investigation; jurisdiction of Law Enforcement Officers.

(A). In the event of a crime in multiple jurisdictions, either county or municipal, are involved law enforcement officers are authorized to exercise jurisdiction with other counties or municipalities for the purpose of criminal investigation only if a written agreement between or among the law enforcement agencies involved has been executed. This limitation on law enforcement activity shall not apply to anything authorized by §17-13-40.

(B). Any law enforcement officer working under this agreement is vested with equal authority and jurisdiction outside his resident jurisdiction for the purpose of investigation, arrest or any other activity related to the criminal activity for which the agreement was drawn.

(C)...

(D). The agreement authorized by this section may be terminated in writing at the discretion of any of the law enforcement agencies involved. The termination must be

7.

mailed to the appropriate agencies with return receipt requested. The agreement shall terminate at the conclusion of the investigation for which it was executed.

(E). The respective governing bodies of the political subdivisions where each of the law enforcement agencies entering into the agreement authorized in subsections (A) is located must be notified by it's agency of the agreements execution and termination. The notification must be in writing and accomplished within seventy-two hours of the agreements executions and within seventy-two hours of the agreements termination.

As is seen in the above underlined portions of §23-1-215 a "written agreement" between to two counties for purposes of extending jurisdiction to the Officers of each County, [is] a mandatory requirement of South Carolina Law.

Discussion

Applicant asserts Richland County officers were without jurisdiction to conduct extra-territorial investigations in Dillon County and the evidence obtained from the unlawful investigation should have been suppressed. It is thus premised that counsel rendered ineffective assistance, and the prejudice incurred is easily seen as had, counsel appropriately moved to suppress the evidence based on the unlawful investigation, and in the event trial court agreed with Applicant and suppressed the evidence, the jury would have been subjected to Willie Jennings's testimony and there is a reasonable probability the jury could have returned with a different verdict minus this evidence.

Principles of Statutory Construction

The cardinal rule of statutory interpretation is to determine

the intent of the legislature, Georgia-Bail Bonds Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct.App.2003), see also Gordon v. Phillips Utils. Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("the primary purpose in construing a statute is to ascertain legislative intent"). All rules of statutory construction are subservient to the one that the language used and that language must be construed in the light of the intended purpose of the statute, McClanahan v. School Dist. of Greenville, 331 S.C. 19, 501 S.E.2d 725 (1998); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002); State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999).

The legislature's intent should be ascertained primarily from the "plain language" of the statute, State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct.App.2004), Morgan, supra, 352 S.C. 334, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996). The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly, Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct.App.2002). Once the legislature has made a choice, there is no room for the courts to impose a different judgement based upon their own notions of public policy, South Carolina Farm Bureau Mur. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989).

When a statute's terms are clear and unambiguous on their face, there is [no] room for statutory construction and a court

must apply the statute according to it's literal meaning, ~~Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (1994).~~ If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose any other meaning, *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003); *Pachal v. State Election Comm'n Brasell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997)("where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into which are not in the legislature's language"). What the legislature says in the text of a statute is construed the best evidence of the legislative intent or will, *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001).

In *State v. Boswell*, 391 S.C. 592, 707 S.E.2d 65 (2011), *Boswell* contended the trial judge should have suppressed his confessions to Capt. Quig as they were the product of an unlawful arrest by Lexington County officers acting outside their territorial jurisdiction. *Boswell* asserted that neither the 1999 multi-jurisdictional agreement nor any provision of South Carolina law authorized the Lexington County deputies to arrest *Boswell* in Calhoun County, and because the arrest was unlawful, *Boswell* argued that his confessions were inadmissible as they were fruit of the poisonous tree. In *Boswell* the Court found that Lexington County Sheriff James Metts and Calhoun County Sheriff

Dennis Jones signed a written agreement "for purposes of securing to each other the benefits of mutual aid in the event of a natural disaster, disorder, or other emergency situations..." The terms of the agreement incorporate the test of sections 23-1-210 and 17-35-45 of the South Carolina Code, which governs the agreement involving the temporary transfer of law enforcement officers. In 2000, the Legislature promulgated section 23-20-50 to "require County approval of multi-jurisdictional agreements. In Boswell the Court found that none of the above out-lined requirements were present. The Court noted that, Lexington County Officers "cleared" their surveillance operation with the Sheriff of Calhoun County. Although Sheriff Summers and several officers were present at the begining of the surveillance operation. Sheriff Summers did not feel that it was necessary for his county officers to remain at the surveillance site. The Court further noted that, no Calhoun County officers were present at the time of Boswell's arrest. The Court concluded the 1999 agreement did not authorize the Lexington County officers to arrest Boswell in Calhoun County. Id

The instant case is distinguishable from Boswell with respect that Applicant's arrest arouse after 2000 and therefore §23-20-50 is applicable here, where the Legislature promulgated §23-20-50 to "require County approval of multi-jurisdictional agreements. In Boswell an agreement did exist, but in the instant case no agreement exists, nor was a written agreement submitted to County Council for approval. While the Boswell Court found Lexington

County officers did not have the authority to arrest Boswell in Calhoun County, they found so because the 1999 agreement did not authorize it. In the instant case, here there was no agreement in existence at all, and therefore, Richland County officers were without jurisdiction to conduct an extra-territorial investigation in Dillon County and the information (statements) obtained from Willie Jennings as well as his trial testimony should have been suppressed as fruit of the poisonous tree. Richland County officer's illegal actions is exploited to the max since they "failed" to even contact Dillon County Sheriff's Department to put them on notice that Richland County Officers were investigating in their County, or at least have a Dillon County officer present while questioning Willie Jennings.

The fruit of the poisonous tree doctrine provides that evidence must be excluded [if] it would not have come to light, but for the illegal actions of the police, and the evidence has been obtained by exploitation of that legality, *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996)(citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963)).

When considering counsel's failure to move to suppress, the defendant must show that the verdict would have been different, absent the evidence that should have been excluded, *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986).

For the aforementioned, Applicant respectfully prays this Court will grant the requested relief of a new trial, with instructions to suppress the evidence in question.

ISSUE () WAS COUNSEL INEFFECTIVE FOR FAILING TO REQUEST THE TRIAL COURT TO GIVE A SPECIAL JURY INSTRUCTION REGARDING STATE'S WITNESS CONSEULO CASEY RECEIVING "IMMUNITY" FROM PROSECUTION FOR HER TESTIMONY?

Facts

Applicant asserts he was denied the effective assistance of counsel when counsel failed to request the trial court to instruct the jury regarding the credibility of State's witness Consuelo Casey ("Casey"), and the fact Casey was receiving "immunity" for her testimony.

Applicant asserts that Casey was not only the State's star witness, but Casey also claimed to be an eye witness to the incident at hand. Therefore, Casey's testimony was critical for the State. It should be noted that Casey gave the Police numerous inconsistent statement(s) during the investigation. It is for this reason, Applicant would assert the "cautionary" instruction would have been helpful to Applicant, and his right to a fair trial.

Applicant would further assert that the evidence in this case was not overwhelming and had the jury been properly instructed regarding Casey and the "immunity" she received from the Police may have reasonably unearthed any underlying allegiance Casey may have had with the State and a reasonable expectation of her testimony in the outcome of the trial.

Discussion

A criminal defendant in this country is entitled to a fair, ~~but not a perfect trial. "[G]iven the myriad safeguards provided~~ to assure a fair trial, the focus on fairness, rather than perfection, Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986).

In reviewing jury charges for error, the Court should construe the court's charge as a whole in light of the evidence and issues presented at trial, Keaton v. ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2s 570, 575 (1999). Jury instructions must be viewed as a whole and there is error when the Applicant proves that there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates due process, Boyde v. California, 494 U.S. 370, 380-81, 110 S.Ct. 1190 (1990); also see Weeks v. Angelone, 528 U.S. 225, 236, 120 S.Ct. 727 (2000).

An instruction that the testimony is to be weighed with greater care to determine if testimony is affected by interest or prejudice need only be given if the witness is informant, i.e. is paid for services, or is receiving immunity, or other benefit, United States v. Brooks, 928 F.2d 1403 (4th.Cir.), cert. denied, 60 U.S.L.W. 3260 (U.S.1991).

While there are no South Carolina Cases directly on point, however, the more generally a pattern jury instruction has been developed to address the credibility of testimony, by informants and individuals obtaining "immunity" for their testimony, See Edward J. Devitt, et al., Federal Jury Practice and Instructions §15.02 (1992).

The South Carolina Code of Laws applicable here is S.C. Code Ann. §8-13-705, offering, giving, soliciting, or receiving anything of value to influence action of public employee, member or official, or to influence a witness, exceptions, penalty for violations, Code of Ethics. As is seen it is against South Carolina Code of Laws to offer anything of value to influence the testimony of a witness. Here a reasonable juror could agree that the fact Consuelo Casey was receiving immunity for her testimony that she could have tailored here testimony to fit the State's theory of the case.

The federal counter-part here is defined in §201(c)(2), the general protection of §201(c)(2) -- "whoever... gives... anything of value to a person, for or because of the testimony to be given by such a person as a witness at trial, United States v. Anty, 203 F.3d 310 (4th Cir.2000).

Here there is a reasonable probability that had counsel requested a cautionary instruction that Court no doubt would have given the instruction and there is a reasonable probability the jury could have returned a different verdict.

Counsel was clearly aware that Casey had been given "immunity" from the Officers, as Counsel clearly extracted this information from Investigator McDonald while testifying. Had the jury been given the instruction there is a reasonable probability that the jury would have given great difference to Casey's damaging testimony in a different light.

As this Court knows, "a properly instructed jury is believed to follow the trial judge's instructions, Richardson v. Marsh,

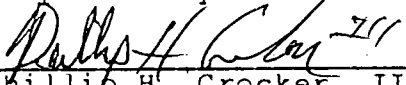
481 U.S. 200 (1987). A court should evaluate counsel's conduct
~~from counsel's perspective at the time, Strickland v. Washington,~~
466 U.S. at 689.

For the aforementioned reasons, Applicant respectfully prays
this Court will grant the requested relief of a new trial.

Conclusion

WHEREFORE, based on the foregoing, Petitioner respectfully

prays this Honorable Court will grant the requested relief of a
new trial.

Respectfully Submitted,
/s/ 

Phillip H. Crocker, III

Exhibit (A)

Ex. 2

STATE OF SOUTH CAROLINA

County of Richland

SEARCH WARRANT

Date 11-22-01

Officer Sgt. McDonald

BSCC0111S1628

RECD 11/22/01

SEARCH WARRANT

STATE OF SOUTH CAROLINA}

COUNTY OF RICHLAND }

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF _____

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

Cingular Wireless Subpoena Compliance Center
Attention: Custodian of Records
5600 Glenridge Dr. Suite G-418 Atlanta, GA, 30342

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

All originating and terminating calls to Cingular phone number 843-615-3711 between November 15, 2001 through November 22, 2001

This Search Warrant shall not be valid for more than ten days from the date of issuance.
A written inventory of all property seized pursuant to this Search Warrant shall be made to

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Colt. _____, S.C.
November 22 _____, 2001

[Signature] _____ (L.S.)
Signature of Judge

STATE OF SOUTH CAROLINA)

AFFIDAVIT

COUNTY OF RICHLAND)

Personally appeared before me, one Sgt. McDonald who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

All originating and terminating calls to Cingular phone number 843-615-3711 between November 15, 2001 through November 22, 2001.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

Cingular Wireless Subpoena Compliance Center
Attention: Custodian of Records
5600 Glenridge Dr. Suite G418 Atlanta, GA, 30342

REASON FOR AFFILANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

During the late afternoon hours of November 22, 2001, in Richland County, the Richland County Sheriff's Department was notified of a shooting incident at 7441 Two Notch Rd. (Lowe's parking lot). Upon the deputies arrival at the scene, they observed one Nathaniel Casey Jr. shot one time in the head area which resulted in his death. The victims wife Consuelo Casey was present during this incident and indicated that the victim makes and receives calls on a Nokia cellular phone that was present at the scene. The service provider for this phone is Cingular Wireless. Law enforcement believes that information sought in this search will assist in the on going investigation into the death of Mr. Casey. Investigators feel that the information sought after will be located at the the location to be searched.

Sworn to and Subscribed before me)

this 22 day of November, 2001

[Signature] (L.S.)
Signature of Judge

Bill P.M.

[Signature]

Affiant

Address Richland County Sheriff's Department
5623 Two Notch Road, Columbia, S.C. 29223
Phone (303) 691-9000

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Phillip H. Crocker, III, #298423
Appellant, Pro Se.

V.

STATE OF SOUTH CAROLINA
Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

AFFIDAVIT OF SERVICE
BY MAIL

CASE No. _____

1. I am the Pro Se Appellant in the above captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the "MOTION TO RELIEVE COUNSEL AND ORDER APPELLANT TO PROCEED PRO SE" in the above captioned matter on the person by depositing same in the United States certified return receipt mail (No. 7010 0780 0001 3118 5947), postage prepaid addressed as follows:
Mr. Alan Wilson, S.C. Attorney General,
Office of S.C. Attorney General,
P.O. Box 11549,
Columbia, S.C. 29211.

Dated this 8th day of December 2015

Phillip H. Crocker III

Phillip H. Crocker, III #298423.

Appellant, Pro Se.

TURBEVILLE C.I.
MAIL ROOM
BOX 252
TURBEVILLE, S. C. 29182

Phillip H. Crocker III #298923

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DEC 09 2015
MAILROOM
TURBEVILLE CI

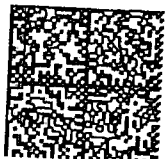
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PRIMEV HAWKES

South Carolina Supreme Court
 Clerk of Court Office
 Attn: Mr. Daniel E. Johnson, Clerk of Court
 Post Office Box 11330
 Columbia, South Carolina 29211