

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY

James R. Barber, III, Circuit Court Judge

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Appellate Case Number: 2014-001774

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SEP 02 2016

**S.C. SUPREME COURT**

Phillip H. Crocker, III

Petitioner,

v.

State of South Carolina

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Respondent.

**Petition for Writ of *Certiorari***

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**S.C. SUPREME COURT**

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## STATEMENT OF QUESTION'S PRESENTED

I. Did trial counsel render prejudicial, ineffective assistance of counsel by failing to retain a crime scene expert to explain why it was impossible for Phillip Crocker, III, standing 6'8" tall, to be the person that shot the victim, standing only 5'7" tall, when the trajectory of the bullet was at an upward angle entering near the victim's mouth and exiting through the top of his head?

II. Did trial counsel render prejudicial, ineffective assistance of counsel by failing to present a third-party guilt defense when there was evidence that someone else committed the crime?

III. Is Phillip Crocker, III entitled to the benefit of *Homes v. South Carolina*, pursuant to S.C. Code Ann. § 17-27-45(B), as a constitutionally binding decision decided after his jury trial?

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V. Did appellate counsel render prejudicial, ineffective assistance of counsel by failing to brief on appeal the Solicitor's improper cross-examination of Phillip Crocker, III pitting him against State's witnesses and forcing him into a position of having to provide a motive for those witnesses to testify falsely?

VI. Did Appellate counsel render prejudicial, ineffective assistance of counsel by failing to brief on appeal the trial court judge allowing Investigator Scott McDonald to testify about the cell site information when he lacked the necessary expert qualifications?

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VIII. Did trial counsel render prejudicial, ineffective assistance of counsel by not moving to suppress the search warrant of Phillip Crocker, III's home in Charlotte, North Carolina when that search warrant was not executed in accordance with the laws of North Carolina?

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X. Did trial counsel render prejudicial, ineffective assistance of counsel by failing to cross-examine Consuelo Casey about her potential sentence of ten years imprisonment for trafficking 10-100 pounds of marijuana?

XI. Did trial counsel render prejudicial, ineffective assistance of counsel by failing to request an instruction cautioning the jurors about the reliability of testimony offered after the grant of immunity from criminal prosecution?

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XV. Did trial counsel render prejudicial, ineffective assistance of counsel by failing to call witnesses to testify about Phillip Crocker, III's good character, including N.B.A. legend Jeff Lemans McInnis and his mother?

XVI. Did the PCR judge err when he excluded the affidavit of Cynthia McInnis?

XVII. Should this Court grant relief based on the cumulative error doctrine?

#### **STATEMENT OF THE CASE**

The State indicted Phillip Crocker, III for murder and trafficking 10-100 pounds of marijuana. A. 2567-68; 2570-71. The State tried Crocker from December 1-5, 2003. The jurors convicted Crocker, and the Honorable G. Thomas Cooper, Jr. sentenced him to thirty years for murder and five consecutive years for trafficking marijuana. A. 1480; 2569; 2572. The Court of Appeals affirmed. *State v. Crocker*, 366 S.C. 394, 621 S.E.2d 890, 892 (Ct. App. 2005).

On October 17, 2006, Crocker filed an application for post-conviction relief ("PCR"). A. 1559-1630. The State served its return on May 4, 2007. A. 1631-38.

Crocker amended the application on November 1, 2013 and January 9, 2014. A. 1664-1709; 1723-28. From January 21-23, 2014, the Honorable James R. Barber, III convened a PCR hearing. By order dated July 1, 2014, Judge Barber dismissed the Crocker's PCR. A. 2490-2552. On July 17 2014, Crocker served a Rule 59(e), SCRPC motion. A. 2553-57. The State served a return on July 28, 2014. A. 2558-62. On August 6, 2014, Judge Barber denied this motion. A. 2563-65. This petition for writ of *certiorari* follows.

### **STATEMENT OF FACTS PRESENTED AT TRIAL**

Consuelo Casey owned a barbershop in Dillon, South Carolina. She met Nathaniel Casey, Jr., who she called "Junior," in 1992 and married him 2001. Junior "sold marijuana for a living." By buying and selling marijuana, they planned to buy land and build a house. Consuelo contacted Willie Jennings about buying \$40,000.00 of marijuana. Jennings knew "people who had it in large quantities." Jennings arranged a meeting at the barbershop on November 20, 2001. Consuelo, Junior, Jennings, and a man Jennings brought with him, that Consuelo did not know, attended.<sup>1</sup> Consuelo and Junior arranged to buy over fifty pounds of marijuana the next day in Columbia. A. 239-64.

On November 21, 2001, Junior and Consuelo drove to Columbia in Junior's black Tahoe. They talked on the phone with the marijuana seller before and during the trip. Once in Columbia, the meeting location changed from a toy store to the parking lot of the Lowe's on Two Notch Road near I-20. An old, dark gray station wagon with wood grain paneling followed them into the parking lot and "backed up" to the Tahoe. A man asked Junior "to help him take the container out of the car." Consuelo remained "in the front passenger seat doing [her] makeup in the mirror." Consuelo saw Junior put "a big blue,

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<sup>1</sup> Sharon Miles, client and friend of Consuelo's, was also present. Miles identified Crocker in a photo lineup when Consuelo was present. A. 256; 519-52; 570-74.

Tupperware like container” in the back of the Tahoe. Junior and the man “had some type of words,” but Consuelo could not hear the conversation. Consuelo testified the man pulled a gun from his clothing, shot Junior, and she “saw him fall.” She saw blood. The man looked at Consuelo. She was “fanning” him away “so he wouldn’t shoot me.” Consuelo grabbed a blanket from the blue container and put it across Junior. Junior was pronounced dead at the hospital. Consuelo initially claimed the man tried to rob Junior. Later, she claimed she was not truthful with the police about the drug deal because she “knew I was going to go to jail.” Consuelo retained a lawyer because she was concerned about being charged with trafficking marijuana, disclosed the drug deal, and identified Crocker as the man that shot Junior. A. 264-97; 312-13. On cross-examination, Consuelo confirmed she initially described “a dark station wagon, possibly blue” and the shooter being a black, male, about 6’2” tall, weighing “around 220” pounds. A. 302-09.

Consuelo was the only witness that identified Crocker as the shooter, but other witnesses testified. James Davis, a contractor leaving Lowe’s, heard a gunshot. He called 911. Davis observed a black, male about 6’2” get into an “Olds Cutlass Sierra Station Wagon with wood grain siding and beige in color.” He noted a partial tag number of a Georgia license plate. He gave this description to a bank security officer, David Gibson. A. 183-222. Gibson, after hearing a gunshot, went outside to investigate and saw Consuelo “at the parking lot in Lowe’s waiving her arms and saying, ‘Call 911.’” Gibson called 911 and got information from Consuelo. She described a black man driving a station wagon that left in northerly direction. Gibson also got information from Davis. Gibson provided the information to law enforcement. A. 157-82. Richland County Sheriff Deputy Jerry Cannon was nearby and “heard a gunshot.” Cannon spoke

to Consuelo, Davis, and Gibson. Cannon broadcast a description over the radio,<sup>2</sup> secured the crime scene, and called for additional support. A. 131-57.

Investigators found blankets, concrete blocks, and cement mix in the blue plastic container. A. 835. Jerry Russell processed the crime scene and discovered fingerprints on the blue plastic container that matched Phillip Crocker, II, who is Phillip Crocker, III's father. A. 345-413. Russell collected a gunshot residue kit from the victim. Consuelo gave Junior's cellphone to Richland County Sheriff Department Investigators Weeks and Gonzales, who retrieved numbers from the phone. The last call placed was to a number belonging to someone identified as "CROC." A. 557; 718-33.

Crocker testified. A. 1186-1335. He stands 6'8" tall. He attended college on a basketball scholarship and played professional basketball in Brazil. A. 1194-1205. Crocker met Marty Morgan<sup>3</sup> in 1989 in Laurinburg, North Carolina. Crocker would visit Morgan in Bennettsville. Morgan introduced Crocker to Willie Jennings in 2001. Crocker saw Jennings only three times, always with Morgan. Morgan and Jennings visited Crocker's house on November 18, 2001. Morgan stayed the night. Crocker did not know where Jennings went. The next morning, Jennings returned and stayed at the house with Morgan while Crocker went to traffic court. When Crocker returned, Morgan and Jennings were at his house. Crocker gave Morgan a large amount of winter clothing and told him to carry it in "one of the containers or a duffel bag" in his garage. Morgan and Jennings left that night. A.1212-15; 1220; 1233-45; 1255.

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<sup>2</sup> The BOLO was for a black male, 6'2" tall, weighing 220 pounds. A. 2428.

<sup>3</sup> Marty Morgan died prior to Crocker's jury trial. A. 693; 2066-77.

Crocker's father stayed at Crocker's home. He suffered from depression and abused alcohol and drugs, including marijuana. Only Crocker's father had the key to the shed in Crocker's back yard where marijuana was found. Crocker, II's fingerprints probably got on the plastic container by moving things around at the house. A. 1221-26; 1240; 1248-52.

On November 20, 2001, Crocker went back to traffic court, traveled around Charlotte, and stayed at home the rest of the day. Crocker never left Charlotte, never drove to Columbia, and did not arrange the drug deal. Crocker did not shoot Nathaniel Casey, Jr. A. 1186-88; 1254-57.

#### STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g.* *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

## ARGUMENTS

### *Question I*

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to retain a crime scene expert to explain why it was impossible for Phillip Crocker, III, standing 6’8” tall, to be the person that shot the victim, standing only 5’7” tall, when the trajectory of the bullet was at an upward angle entering near the victim’s mouth and exiting through the top of his head?***

The jurors never heard Crocker’s defense. Consuelo and Nathaniel Casey arranged a drug deal with Jennings and Morgan. Jennings and Morgan reneged on the deal and attempted to scam the Caseys. Jennings made calls with the phone that belonged to “CROC.” A. 926-41; 1441. According to a police report, Morgan looked like the composite sketch,<sup>4</sup> “knew that Junior had lots of money,” and was trying to purchase a 9mm pistol in Latta, South Carolina. A. 2259. Consuelo initially told investigators she was “90%” sure Morgan shot her husband. A. 2264. Consuelo ultimately conspired with Jennings and Morgan to frame Crocker for her husband’s

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<sup>4</sup> Another report stated, “Lutherine Williams (mother of Consuelo) has shown the composite around the Dillon area. She had indicated that several people in the area thought the composite fit the description of a subject named ‘Marty.’” A. 2272.

murder to avoid prosecution. Framing Crocker was easy for Jennings and Morgan because they had just visited Crocker and used items given to them by Crocker to fake the drug deal.

Immediately following the incident, Consuelo described the shooter as standing 6'2". A. 308-09. Davis initially told law enforcement the shooter was 5'11 to 6'0" tall, weighing about 165 to 170 pounds. A. 2004-05.

Dorothy Filiatreault, a Trace Evidence Department analyst at the South Carolina Law Enforcement Division ("SLED"), testified a gunshot residue ("GSR") kit indicated that no gunshot residue was present on the victim's hands. A. 594-602.

Anne Vandersteenhoven, an anatomic and clinical pathologist, determined the cause of death was a "penetrating gunshot wound with extensive brain injury." She found "a small, approximately one centimeter, [entrance] wound just to the lateral aspect of the mouth" and "a large exit wound, which was on the top of the head." "There were multiple fractures to the skull around the area of the exit wound." There was internal damage "from the area around the mouth out to the exit wound." She prepared a chart showing the path of the bullet. There was no evidence of stippling, gun power burns, or anything indicating a close or contact wound. A. 767-80; 785-78. She opined how a person 6'9" could inflict a bullet wound that travels from the mouth to the top of the head of a 5'6" person. Trial counsel did not challenge her explanation. A. 794-95.

Dr. Clay Nichols, a forensic pathologist, reviewed the autopsy and concluded the victim died as the result of "a distant gunshot wound, which means that the muzzle was approximately 18 to perhaps even 24 inched away, at least, from [the victim] when the trigger was pulled." Dr. Nichols opined, without much explanation, how a much taller

person could inflict a gunshot wound on a shorter person with and bullet path in an upward angle. Trial counsel did not cross-examine Dr. Nichols. A. 999-1005.

During closing arguments, trial counsel acknowledged the testimony from the pathologists and merely argued, “you get 6’8” firing at 5’6”, and you don’t get an angle like that, period.” A. 1411, lines 7-19. The prosecutor cited the testimony from the two pathologists and argued, “The angle of the bullet is consistent with what Consuelo Casey said happened. It again corroborates what she said happened.” A. 1436-37.

Prior to his jury trial, on May 13, 2003 and June 16, 2003, Crocker wrote Strickler about “obtain[ing] a Ballistics Expert to give a report” about “the possibilities o[f] myself committing this murder due to my height and the victim’s height.” A. 2415; 2419.

For the PCR Hearing, Wayne Hill, a “homicide reconstruction specialist,” reviewed extensive material including a crime scene picture, the GSR report regarding the victim, the autopsy report, and a document called a “death scene investigation review points.” A. 1756-86, Ex. 2230-39. Hill noted the GSR test “was found to be negative by SLED,” indicating his hands were not “up in the area of the gunshot at the time it was fired.” The autopsy indicated a “distant wound.” The range of a distant wound “starts at about 18 inches.” Following the “rod that the medical examiner placed through the head” of the victim determines “the approach of that bullet, its trajectory.” A. 1788-93.

Hill knew the victim was 5’7” tall. He considered potential shooters standing 6’8,” 6’0,” and 5’11.” Hill prepared a diagram showing the orientation of the three suspects and the victim in order to show the trajectory of the shot.” A 6’8” person “would have a difficult time achieving that position of the orientation of the two people.” Hill concluded “it is much easier for short in statute people” to make that shot. And, it is

not possible for a 6'8" person to have fired the shot that killed the victim. A. 1793-96, Applicants Ex. 6. Based on Hill's expert opinion, both Jennings and Morgan are the right height to be the person that shot and killed Nathaniel Casey, Jr. A. 2119-25; 2138-43.

"Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issues of both guilt and penalty." *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). "With the assistance of appropriate experts, counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." *Ard*, 372 S.C. at 332, 642 S.E.2d at 597. *See also McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008).

The PCR court found a strategic reason for not consulting a ballistics expert, concluding, "Trial counsel elaborated that he felt like he was able to successfully convey to the jury that it was unlikely that Applicant was the shooter based on the height discrepancy compared to with the entry and exit wound." A. 2523-27. The record does not support this conclusion. *Freiburger* and *Ingle, supra*. When questioning Dr. Vandersteenhoven, trial counsel merely pointed out the difference in the heights of Crocker and the victim. Counsel did not challenge her opinion that a taller person could have inflicted this wound. Trial counsel did not cross-examine Dr. Nichols. The assertion, "you get 6'8" firing at 5'6", and you don't get an angle like that, period," was effectively countered by the State referring the jurors to the opinions of the pathologists.

Because of the height disparity between Crocker and the victim, the angle of the gunshot wound was one of the most significant issues at trial. Hill refuted the vague opinions by the two pathologists about how the wound was inflicted by someone over a

foot taller than the victim. Hill's testimony undermines confidence in the verdict and creates a reasonable probability that Crocker would be acquitted.

### *Question II*

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to present a third-party guilt defense when there was evidence that someone else committed the crime?***

The State moved to exclude evidence of third party guilt. A. 2427. At a pre-trial hearing, the trial judge expressly asked Strickler to submit a brief on third-party guilt. Strickler never submitted that brief. A. 1997-2000; A. 2191-93. At the PCR hearing, Strickler testified he has "never" been able to argue third-party guilt or even present that evidence to a jury. Strickler testified he had to "tiptoe" around that issue in this case by trying to raise inferences to the jury about Jennings' guilt as the shooter. Morgan, who stood 6'1,"could have been the shooter, as Consuelo had told law enforcement. Phillip Crocker, II, who's fingerprints were found on the plastic container at the crime scene, also had the same physical description as the shooter. A. 1995-2014; 2119-25; 2138-43.

The PCR Court concluded *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001) *abrogated by Holmes v. South Carolina*, 547 U.S. 319 (2006), controlled at the time of Crocker's jury trial. A. 2532-33. *Gay*, and similar cases, "held that evidence of a third party's motive and opportunity to kill the victim is properly excluded where the appellant nonetheless fails to show that the proffered evidence is inconsistent with his guilt." 343 S.C. at 549, 541 S.E.2d at 544. Here, Casey died from a single gunshot wound with no evidence of a second shooter. The physical descriptions of the shooter more closely resembled Jennings and Morgan. Phillip Crocker, II's fingerprints were found at the

crime scene. Trial counsel denied his client the opportunity to argue one of these people killed Casey by not briefing third-party guilt as requested by the trial judge.

Had trial counsel briefed third-party guilt, there is a substantial probability the judge would have admitted the evidence leading to Crocker's acquittal. Crocker was prejudiced because presenting evidence and arguing third-party guilt was appropriate in this case, even under *Gay*. If Consuelo, Jennings, and Morgan conspired to frame Crocker, then that proof is inconsistent with Crocker's guilt. Additionally, had trial counsel briefed the issue, it would have been apparent that our state's third-party guilt rule, as it existed at the time, was contrary to *Rock v. Arkansas*, 483 U.S. 44 (1987), *Crane v. Kentucky*, 476 U.S. 683 (1986), *Green v. Georgia*, 442 U.S. 95 (1979), *Cambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967).

### ***Question III***

***Is Phillip Crocker, III entitled to the benefit of *Holmes v. South Carolina*, pursuant to S.C. Code Ann. § 17-27-45(B), as a constitutionally binding decision decided after his jury trial?***

The PCR Court did not consider *Holmes* because that case was decided "more than three years after [Crocker's] trial." A. 2532. *Holmes* abrogated *Gay* because the "the critical inquiry [under *Gay*] concerns the strength of the prosecution's case" rather than "the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt" without "examination of the credibility of the prosecution's witnesses or the reliability of its evidence." 547 U.S. at 329. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331. Crocker is entitled to the benefit of *Holmes* pursuant to S.C. Code Ann. § 17-27-45(B), as

a constitutionally binding decision. *See e.g. Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

#### *Question IV*

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to request a jury instruction on alibi when Phillip Crocker, III testified he was somewhere else at the time of the murder?***

Crocker testified he was at home in Charlotte at the time of the victim's death. The Solicitor mocked the defense, arguing, "[T]his case is unique," and, "I've never seen the defense do this before. They just kick it around ***and act like he's not there.***" A. 1416-18 (emphasis added).

Trial counsel did not request a jury instruction on alibi, and the trial judge did not instruct it. Trial counsel mistakenly believed that someone other than Crocker had to testify about the alibi, which was not possible in this case because Crocker's father was deceased. A. 2116-18, 2215. The PCR Court concluded, "Applicant's only possible alibi witness was his father, who had passed away well before trial and before trial counsel was even appointed to the case. Therefore, Applicant did not have a viable alibi defense that could have been pursued at trial." A. 2531. This conclusion is not supported by the record, and it misstates the law. Where the accused claims to be at another place at the time of the crime, it is reversible error not to instruct the jurors about alibi. *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980). "Counsel's rejection of the charge at trial constitutes inadequate legal representation." *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). *And see Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995). Had trial judge charged alibi, the result would have been different. The Solicitor's closing argument compounded the prejudice. *See Roseboro and Riddle*.

### *Question V*

*Did appellate counsel render prejudicial, ineffective assistance of counsel by failing to brief on appeal the Solicitor's improper cross-examination of Phillip Crocker, III pitting him against State's witnesses and forcing him into a position of having to provide a motive for those witnesses to testify falsely?*

Referring to Consuelo Casey, Nathaniel Casey, Jr., and Shannon Miles, the State asked Crocker, "Just to make sure the jury can understand, there is no bias or prejudice or any reason they should hold something against you that you know of?" Trial counsel objected, and the trial judge sustained the objection. A bench conference followed where trial counsel moved for a mistrial based on the objection to the Solicitor pitting witnesses and requesting Crocker to comment "on the testimony of other witnesses in this case." The State resumed, "Mr. Crocker, as I was saying, do you know of any grudge they would have against you, Ms. Casey, Mr. Casey." Trial counsel objected again, but the judge overruled the objection. The State asked, "Do you know of any grudge that Mr. Casey, Ms. Casey, Shannon Miles, would have against you?" Crocker answered, "Not in particular, but from what I've heard in the court session—its hard to say." The State asked Crocker, "Do you want to say anything?" Crocker responded, "No. I'm just saying they accused me of an act I did not commit." The State pressed, "Do you know of any reason, sir—my questions is do you know of any reason they would have a bias or a prejudice against you?" Trial counsel objected again, and the trial judge overruled the objection again. Crocker repeated, "Not in particular. . . . But from what I've heard in the court session, as I stated, possibly." The State asked Crocker, "Did you need to say anything else on the subject?" Crocker replied, "No." A. 1261-64; 1336-37.

The State's questioning of Crocker was improper, prejudicial pitting of witnesses, and contrary to a longstanding precedent. *State v. Brown*, 297 S.C. 27, 29, 374 S.E.2d

669, 670 (1988); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988); *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 389 (1947); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945). The improper questioning required Crocker to provide a motive for these witnesses to testify falsely and devastated the defense. Had appellate counsel briefed this issue, the appellate court would have reversed and ordered a new trial.

### *Question VI*

***Did Appellate counsel render prejudicial, ineffective assistance of counsel by failing to brief on appeal the trial court judge allowing Investigator Scott McDonald to testify about the cell site information when he lacked the necessary expert qualifications?***

McDonald obtained subscriber and site information for cellphones belonging to the victim, Jennings, Morgan, and the suspect number. The Solicitor asked, “Can you explain to the jury when a phone is being used, how that can aid you in your investigation as to where a person is when they’re using that phone?” Trial counsel objected, “[H]e is not qualified to testify” about that information “as a police officer.” A. 874. With the jury out, McDonald testified he and another investigator visited “a local Sprint office,” showed them the records, “were instructed on how to decipher these records,” and were provided with a key indicating what the information means. The trial judge overruled the objection. A. 875-95. With the jurors present, McDonald testified and offered opinions about where cellphone calls were initiated and received and the location of the calls in relationship to someone traveling from Charlotte to Columbia. A. 896-924. The State recalled Investigator McDonald to offer more testimony about the records. A. 1357-75.

*Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) summarized the three-part process for admission of expert testimony. *And see* Rules 602, 701, 702, and 703, SCRE. First, the subject matter of the testimony must be something that requires the

assistance of an expert. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). Second, “[t]o be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). Third, the trial court must determine whether “the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Here, McDonald did not have the expertise to interpret the cellphone subscriber information and site records. Credibility of prosecution witnesses was critical to the State’s case. During closing arguments, the prosecution argued these records established that Crocker himself arranged the drug deal and traveled from Charlotte to Columbia to commit the murder. A. 1440. Had appellate counsel briefed this issue, the appellate court would have reversed the convictions and ordered a new trial. *See e.g. Watson*. Admission of this testimony undermines confidence in the verdict.

#### *Question VII*

***Did trial counsel render prejudicial, ineffective assistance of counsel by not moving to suppress the three search warrants for out-of-state cellphone records when the magistrate court judge lacked jurisdiction to issue those search warrants?***

McDonald obtained three search warrants to obtain cellphone records from Verizon Wireless in New Jersey, Sprint PCS in Kansas, and Cingular Wireless in Georgia. A. 2283-94. The judges issuing the search warrants lacked “jurisdiction over the area where the property sought [was] located.” S.C. Code Ann. § 17-13-140. Trial counsel did not move to suppress the evidence obtained pursuant to these search warrants. *See State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987) (suppression

appropriate remedy for not complying with warrant statute). Failure to move to suppress a search warrant can constitute ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *And see e.g. Gantt v. State*, 354 S.C. 183, 580 S.E.2d 133 (2003). As seen in Question VI, *supra*, Crocker was prejudiced by the State's use of the phone records as circumstantial evidence he arranged a drug deal and traveled to Columbia to commit the murder. *See also* post hearing brief at A. 2469-74.

### ***Question VIII***

***Did trial counsel render prejudicial, ineffective assistance of counsel by not moving to suppress the search warrant of Phillip Crocker, III's home in Charlotte, North Carolina when that search warrant was not executed in accordance with the laws of North Carolina?***

A court in North Carolina issued the search warrant for Crocker's house, "[t]o any officer with authority and jurisdiction to conduct the search." A. 2352. But, Richland County Sheriff's Department personnel forced entry into Crocker's home, detained him, conducted the search, and completed the return. A. 848-72; 2357. Crocker briefed the relevant North Carolina law. A. 2477-87. Counsel was ineffective for failing to challenge the search warrant. *E.g. Kimmelman* and *Gantt, supra*. The State's use of items found at his residence as circumstantial evidence of the crimes prejudiced Crocker.

### ***Question IX***

***Did trial counsel render prejudicial, ineffective assistance of counsel by not moving for a new trial, pursuant to Rule 29, SCRCrimP when the prosecution dismissed Willie Jennings charges after he testified at Phillip Crocker III's jury trial and implied that he would be sentenced to prison for his role in setting up the drug deal and the prosecution did not correct that testimony?***

Willie Jennings testified for the State. Jennings met Crocker through Morgan. Jennings made Compact Discs of music. Morgan and Crocker were working on a basketball documentary. Jennings would go with Morgan to see Crocker, including

visiting Crocker in Charlotte. Jennings also knew Consuelo. Consuelo asked Jennings to help obtain some marijuana. Jennings claimed he introduced Consuelo to Crocker at the meeting at the barbershop about the marijuana deal. Jennings was supposed to receive \$500.00 for arranging the deal. Consuelo told Jennings about the shooting. A. 625-60.

The State charged Jennings with trafficking 10-100 pounds of marijuana and released him on a personal recognizance bond. The charges were pending when Jennings testified against Crocker. Jennings claimed no one promised him anything in exchange for his testimony, he didn't care if the prosecution assisted him the trafficking charge, and suggested he was willing to go to prison for ten years. The Solicitor did not correct Jennings' testimony and argued in closing, "He got charged with this offense. He's still charged with this offense, his part in it." A. 668-72; 1428. After Crocker's trial, the State dismissed Jennings' charge. A. 2030-31; 2444.

Trial counsel should have moved for a new trial, pursuant to Rule 29, SCRCrimP, based on after discovered evidence. *Giglio v. United States*, 405 U.S. 150 (1972) (due process requires State to disclose any promises regarding future prosecution). *And see Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). The Solicitor and Jennings misled the jurors into believing that Jennings would go to prison, denying Crocker his Sixth Amendment right to confront and cross-examine Jennings. *See also* S.C. Const. Art. I, § 14; S.C. Code Ann. § 17-23-60. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004)

*affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). See also *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012); *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002); *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). In cases implicating the Confrontation Clause, this Court applies the factors in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) to determine prejudice resulting from improperly limited cross-examination. *Mizzell* and *Gracely*, *supra*.

By the time of trial, the Solicitor probably already planed to dismiss Jennings' charge after he testified. This "wink-and-a-nod" tactic occurs far too often. "[P]rosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice." *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). This Court consistently warns prosecutors about adopting a "'win at all costs' attitude." *State v. Inman*, 395 S.C. 539, 564, 720 S.E.2d 31, 45 (2011). See also *State v. Dawkins*, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989) ("prosecutor striving to obtain a conviction regardless of the costs").

The PCR judge found, "[H]ad trial counsel made a motion for a new trial pursuant to Rule 29(b), SCRCrimP, this motion would have been denied because the dismissal of Jennings' charge would not "probably change the result if a new trial is granted." A. 2535. This finding overlooks the fact that Jennings' credibility was central to the prosecution's weak case. If the jurors had been told Jennings' charge would be dismissed, they would not have believed his testimony.

### ***Question X***

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to cross-examine Consuelo Casey about her potential sentence of ten years imprisonment for trafficking 10-100 pounds of marijuana?***

Consuelo Casey retained a lawyer in case law enforcement charged her with trafficking marijuana. In order to get Consuelo's cooperation, law enforcement granted her immunity from prosecution for trafficking 10-100 pounds of marijuana. A. 959. Consuelo downplayed the grant of immunity, and trial counsel never cross-examined her about her facing ten years imprisonment for this offense. A. 311-15. The PCR Court concluded trial counsel fully explored Consuelo's "motivations for testifying." A. 2514. Crocker had a right to confront and cross-examine Consuelo about her potential sentence. U.S. Const. Am. VI & XIV; S.C. Const. Art. I, Sec. 14; S.C. Code Ann. § 17-23-60; and Rule 608(c), SCRE. *See Gilliam, Sims, Mizzell, Gracely, and Brown, supra.* Trial counsel was ineffective for not impeaching Consuelo in this manner. *See Miller and Ard, supra.* Here, Consuelo's testimony was crucial to the prosecution's weak case. Crocker was prejudiced by counsel's deficient performance. *Van Arsdall, supra.*

### ***Question XI***

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to request an instruction cautioning the jurors about the reliability of testimony offered after the grant of immunity from criminal prosecution?***

Consuelo received immunity from prosecution for trafficking 10-100 pounds of marijuana for her cooperation. Trial counsel did not request an instruction based on *United States v. Brooks*, 928 F.2d 1403, 1409 (4th Cir. 1991). "Under the authorities, an informer cautionary instruction is only appropriate when 'the individual supplying the information generally is either paid for his services or, having been a participant in the

unlawful transaction, is granted immunity in exchange for his testimony.’” *Brooks*, at 1409. Consuelo admitted to arranging an unlawful drug transaction, and she got immunity for her cooperation. Trial counsel was ineffective for not requesting the *Brooks* instruction.<sup>5</sup> See e.g. *Riddle v. State* and *Roseboro*, *supra*. Had counsel requested the instruction, the jurors would not have believed Consuelo.

### ***Question XII***

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to object to a jury instruction regarding the permissive inference of malice that cited examples of malice based on the State’s theory of the case?***

The trial judge emphasized multiple examples of inferred malice based on the use of a deadly weapon, commission of another felony such as trafficking in marijuana, preparation, and lying in wait. A. 1453-55. “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. Art. V, § 21. “A Judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony . . . without violating the prohibition of the Constitution as to charging upon the facts.” *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244, 249 (1942). *And see State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) (charging examples of legal provocation for manslaughter is comment on the facts) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Hartley*, 307 S.C. 239, 240–41, 414 S.E.2d 182, 183 (Ct. App. 1992) (instructing “absence of a motive is a circumstance to be duly considered in weighing the question of guilt . . . . constitutes an impermissible

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<sup>5</sup> The PCR judge concluded that *Brooks*, holding it not error to refuse the instruction, was similar to Consuelo’s situation. A. 2510-11. The record does not support this conclusion. *Brooks* “was paid nothing, nor was he promised immunity for his testimony, nor did he seek ‘personal advantage or vindication’ by his testimony.” 928 F.2d at 1409. Here, Consuelo was promised immunity in exchange for her cooperation. See A. 2512 (PCR Court finding Consuelo was promised immunity).

charge on the facts). The trial judge's instructions expressed an opinion about the strength of the State's case. In *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court rejected an instruction that malice can be inferred from the use of a deadly weapon. Two concerns are present here. First, *Belcher* left undecided the issue of whether a "permissive inference charge violates . . . our constitutional prohibition against charging juries on the facts." 385 S.C. at 602, 685 S.E.2d at 804. Second, the rationale in *Belcher*, regarding a permissive inference of malice, would apply equally to the other examples of malice charged by the trial judge.

### ***Question XIII***

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to object to the Solicitor's argument that finding Phillip Crocker, III guilty of trafficking marijuana amounts to an automatic finding of guilt for murder?***

The Solicitor argued, "Malice may be inferred 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." A. 1835. And, "The law says if one intentionally kills another during the commission of a felony, and the judge will tell you trafficking in marijuana is a felony, the implication of malice may arise." A. 1386-87. The Solicitor concluded by arguing participation in the drug deal equaled malice. A. 1442. The order of dismissal did not consider the Solicitor's entire argument. A. 2541. The State essentially argued that guilt for trafficking equated to guilt for murder but did not recite the permissive inference language mandated by *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). *And see Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). This argument denied Crocker procedural justice. *Jones and Quattlebaum, supra*.

#### *Question XIV*

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to object to the Solicitor's improper vouching for the credibility of Consuelo Casey and William Jennings?***

The credibility of Consuelo Casey and William Jennings was crucial to the prosecution's case. During closing argument, the Solicitor discussed bias and prejudice and argued, "***I beg you***, ladies and gentlemen, judge Consuelo Casey. She came up here, and . . . [s]he told you what she was involved with. . . . You heard from Willie Jennings. . . . What makes them absolutely credible is the evidence." A. 1392-93 (emphasis added).

The PCR Court concluded this argument was "neither objectionable nor improper vouching." A. 2538. This Court consistently holds, "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness" by "making explicit personal assurances of a witness' veracity" or "by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (internal citation omitted). By ***begging*** the jurors to believe these two witnesses, the prosecutor expressed an opinion about these witnesses and placed her prestige behind their accounts. Trial counsel was ineffective for not objecting. Crocker was prejudiced because Consuelo and Jennings were the key witnesses for the prosecution. Their "credibility was crucial to the government's case." *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002).

#### *Question XV*

***Did trial counsel render prejudicial, ineffective assistance of counsel by failing to call witnesses to testify about Phillip Crocker, III's good character, including N.B.A. legend Jeff Lemans McInnis and his mother?***

Pringle's role for the defense included interviewing and presenting character witnesses. At the PCR hearing, she testified there were character witnesses that were

available that she did not call as witnesses. A. 2108. *And see* A. 1476-77 (Prior to sentencing trial counsel stating more character witnesses were available).

At trial, Crocker testified he knows Jeff McInnis, a professional basketball player in the N.B.A., and they operated a summer basketball camp together. A. 1235. Cynthia McInnis is Jeff McInnis' mother. She had known Crocker "for about five years, saw him quite a bit with the Hoop Family Summer League." She could have testified about how Crocker dressed, including the "jewelry he wore," and "her opinion about his reputation and nonviolence." Pringle thought McInnis would be a good witness. A. 2208-09; 2134-35. Jeff McInnis testified at the PCR hearing that no one from Crocker's defense team contacted him. McInnis was very willing to testify as a character witness. A. 2223-25. Crocker wanted Cynthia and Jeff McInnis to be character witnesses. A. 1841. Pringle recalled speaking to Cynthia McInnis but not Jeff McInnis. She could not recall who Jeff McInnis was. Both lived in North Carolina, and Pringle testified she would not have been able to subpoena witnesses from out of state *in time for trial*. A. 2219-21. The PCR Court "note[ed] that most of Applicant's desired witnesses lived outside South Carolina and, therefore, could not be subpoenaed by trial counsel." A. 2529. *But see* S.C. Code Ann. § 19-9-10 *et. seq.* (procedure for securing out of state witnesses). Counsel had duty to interview Jeff McInnis and Cynthia McInnis and secure their presence at trial. *Ard, supra; Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650-51 (2008). Jeff McInnis would have been a significant witness by placing his reputation and, therefore, his N.B.A. career on the line.

*Question XVI*

*Did the PCR judge err when he excluded the affidavit of Cynthia McInnis?*

Crocker tried to introduce the affidavit of Cynthia McInnis, who had a doctor's appointment and family obligations that prevented her from attending the PCR hearing. The judge sustained the State's objection. A. 1941-42. McInnis' affidavit should have been admitted. S.C. Code Ann. § 17-27-80. See e.g. *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006); *Beckett v. State*, 278 S.C. 223, 294 S.E.2d 46 (1982).

*Question XVII*

*Should this Court grant relief based on the cumulative error doctrine?*

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). And see *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000).

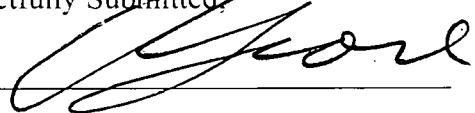
**CONCLUSION**

This Court should grant the writ and consider the questions presented.

August 30, 2016

Respectfully Submitted,

By



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY

James R. Barber, III, Circuit Court Judge

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Appellate Case Number: 2014-001774

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Phillip H. Crocker, III

Petitioner,

v.

State of South Carolina

Respondent.

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Certificate of Service

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I certify that I serve a copy of the Petition for Writ of *Certiorari* on the State of South Carolina and prior appointed counsel by placing a copy in the US Mail, postage prepaid, on the date reflected below.

Megan Harrigan Jamison, Esquire  
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