

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
James R. Barber, III, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2014-001774

PHILLIP H. CROCKER, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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- II. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to present a third party guilt defense.
- III. Whether Petitioner is entitled to the benefit of Holmes v. South Carolina is not preserved for this Court's review, as Petitioner did not raise the issue below.
- IV. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to request a jury instruction on alibi.
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XIII. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to object to the assistant solicitor's closing argument regarding inferred malice from trafficking in marijuana.

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XV. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to call character witnesses.

XVI. The PCR court properly excluded the affidavit of Cynthia McInnis.

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STATEMENT OF THE CASE

During its January 2002 term, the Richland County Grand Jury indicted Petitioner for murder and trafficking in marijuana—greater than ten pounds but less than one-hundred pounds. Chief Public Defender of the Fifth Judicial Circuit, Douglas S. Strickler, and Chief Public Defender of Richland County, E. Fielding Pringle, represented Petitioner. On December 1-5, 2003, Petitioner proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., after which the jury convicted Petitioner as indicted. Judge Cooper sentenced Petitioner to thirty years imprisonment for murder and a concurrent five years imprisonment for trafficking in marijuana.

A notice of appeal was filed and an appeal was perfected on Petitioner's behalf by retained counsel, John D. Delgado, Esquire. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences by published opinion. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005). The Remittitur was sent on November 16, 2005.

On October 17, 2006, Petitioner filed a *pro se* application for PCR. The State filed a return on May 4, 2007, requesting an evidentiary hearing be held. Thereafter, Petitioner, through counsel, Tricia A. Blanchette, filed an amended application on January 9, 2014, alleging nineteen different grounds for relief. Petitioner proceeded forward on these grounds as set forth in his amended application at the evidentiary hearing, convened on January 21-23, 2014, before the Honorable James R. Barber, III. Petitioner was present at the hearing alongside counsel Blanchette. Testifying at the hearing were Petitioner, homicide reconstruction specialist Wayne N. Hill, Sr., trial counsels E. Fielding Pringle and Douglas S. Strickler, appellate counsel John D. Delgado, and Petitioner's friend Jeff McInnis. At the conclusion of the hearing, the PCR court requested and received memorandums from both parties. By order signed and filed July 1, 2014,

the PCR court denied and dismissed Petitioner's application for relief. On July 17, 2014, Petitioner filed a motion for rehearing pursuant to Rule 59(a), SCRCF, and to alter or amend pursuant to Rule 59(e), SCRCF. The State served its return to this motion on July 28, 2014. The PCR court signed and filed an order denying Petitioner's motion on August 6, 2014. Petitioner filed a Notice of Appeal on August 18, 2014. Petitioner filed a Petition for Writ of Certiorari and Appendix on August 30, 2016.

STANDARD OF REVIEW

The PCR court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a PCR decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

In a PCR action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCF; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C.

318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Furthermore, as our appellate courts have consistently recognized, trial counsels are not required to be

clairvoyant or anticipate changes in the law which were not in existence at time of trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (holding an attorney is not required to anticipate potential changes in the law not in existence at the time of the conviction).

ARGUMENT

I. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to retain a crime scene expert.

Petitioner contends the PCR court erred in denying his allegation that trial counsel was ineffective for failing to retain an independent crime scene expert to testify for the defense. Specifically, Petitioner asserts trial counsel should have retained an expert to “explain why it was **impossible**¹ for [Petitioner], standing 6’8” tall to be the person who 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.” (emphasis added). Additionally, Petitioner speculates that two of his associates, Marty Morgan² and Willie Jennings, planned to defraud the Caseys by staging a fake drug transaction and that Morgan, who was significantly shorter than Petitioner, was the triggerman that fatally shot Nathaniel Casey. Petitioner’s allegation is without merit and the PCR court properly denied relief as to this allegation.

In support of this allegation, Petitioner cites to testimony from Wayne N. Hill, Sr., who was admitted as an expert in homicide reconstruction over Respondent’s strenuous objections³ at

¹ Petitioner repeatedly states that it was “**impossible**” for him to have shot the victim based on the height discrepancy between the two. However, the record is completely devoid of any evidence or testimony to support this assertion, as Petitioner’s own expert conceded during the evidentiary hearing. (App. 1808-10).

² Morgan died prior to Petitioner’s trial, and therefore, is unable to refute Petitioner’s speculative claims.

³ Following a lengthy voir dire, Respondent objected to Hill’s classification as an expert in homicide reconstruction, noting that: he had no formal education (including continuing education classes) since 1980; no training since 1988; had contributed to no publications since 1997; could not name any recent publications or materials he used to stay current in his field; had never investigated a homicide; his only investigative experience was taking photos of a non-homicide crime scene in the 1980s; his only medical training was as an emergency medical technician from 1975-77; had no pathology training; and he testified that his primary training is “informal training” including shooting a

the PCR hearing. Petitioner, through Hill, presented several diagrams exemplifying the difficulty Petitioner would have had shooting the victim based on his tall stature. Crucially though, Hill admitted numerous times during cross examination that no witnesses saw the exact position of either the shooter or decedent and that his diagrams and testimony were based on the unverified and speculative assumption that both parties were standing when the decedent was shot. Hill also conceded the position decedent was originally in was unknown, which also affected his results. Hill testified while he believed it would have been “unlikely” for a shooter of Petitioner’s height to shoot decedent, he testified this opinion was based on his assumption the shooter was standing upright. Ultimately, Hill testified he could not determine to any reasonable degree of certainty that it was impossible for Petitioner to have shot decedent based on the discrepancies in their height. (App. 1808-10).

This testimony from Hill was paramount in the PCR court’s denial of this allegation. The PCR court found, “[Petitioner]’s own expert was unable to say to any reasonable degree of certainty that [Petitioner] could not have been the shooter.” (App. 2525). The court also noted “[t]rial counsel was able to convey to the jury the same information that a ballistics expert would have, highlighting the difficult angle required for [Petitioner] to have shot decedent,” a clear reference to trial counsel’s closing argument highlighting the height discrepancy between Petitioner and the decedent and the improbability that Petitioner was shooter. (App. 1411, 2525). Unequivocal evidence in the record supports the PCR court’s findings.

The PCR court’s findings are supported by ample evidence of probative value in record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626. The PCR court properly

variety of ammunition into different masses and analyzing the results. The PCR court qualified Hill as an expert in “homicide reconstruction” but noted that Respondent’s objections all go towards the weight of any testimony he provides and that this is a “limited field.” (App. 1756-1782; 2524)

determined trial counsel was not ineffective for not retaining a crime scene expert to testify on Petitioner's behalf. Furthermore, the PCR court properly found Petitioner failed to meet his requisite burden of establishing any prejudice from this alleged deficiency.

II. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to present a third party guilt defense.

Petitioner contends the PCR court erred in denying his allegation trial counsel was ineffective for failing to present a third party guilt defense. Petitioner alleges there is "evidence that someone else committed the crime." Specifically, Petitioner asserts there is evidence that either Willie Jennings, Marty Morgan, or his own late father—Phillip Crocker, II—murdered decedent.⁴ In support of this allegation, Petitioner argues witness descriptions of the shooter closely resembled the other men and that his father's fingerprints were found on the storage container found at the crime scene.⁵ Petitioner asserts trial counsel should have submitted a brief to the trial court asserting his right to argue third party guilt to the jury and that counsel's failure to do so prejudiced Petitioner because he then would have been able to present a third party guilt defense to the jury resulting in a verdict of acquittal. The PCR court denied this allegation, finding based on the controlling law at the time of Petitioner's trial, Petitioner would not have been permitted to present a defense of third party guilt based on the speculative evidence he presented at the evidentiary hearing. This ruling is supported by the record.

At the time of Petitioner's trial, State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), abrogated by Holmes v. South Carolina, 547 U.S. 319 (2006), was the controlling law on third party guilt. Pursuant to Gay, evidence of third party guilt offered by a defendant was strictly

⁴ During the lower proceedings, Petitioner also alleged two other men— Jonathan Love, and Ezat Saied—were possible shooters. Petitioner seems to have abandoned any claims regarding these two men in this appeal.

⁵ Petitioner acknowledged that his father lived with him and had free access to his home at the time of the crime.

limited to facts which are inconsistent with the defendant's guilt. Therefore, trial counsel was limited in evidence he could present as to other possible suspects.

At the evidentiary hearing, trial counsel testified based on this standard, he knew he would not be able to formally argue third party guilt and therefore, decided not to file any motions regarding third party guilt or formally request to argue third party guilt, despite having initially addressed the issue with the trial court and the State in a pre-trial hearing. He testified although he was not able to formally argue third party guilt, he was able to present evidence of third party guilt informally throughout the trial by referencing the other suspects, which he believed raised reasonable doubt as to Petitioner's guilt. The PCR court found trial counsel's handling of third party guilt was reasonable based on the case law at the time of trial and his performance was not deficient. Furthermore, the court found Petitioner could establish any resulting prejudice from this alleged deficiency, as trial counsel would not have been able to present a third party defense under the controlling case law at the time of Petitioner's trial if counsel had submitted a brief on the issue.

The PCR court's findings are supported by ample evidence of probative value in record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626. The PCR court properly determined counsel performed effectively in his handling of the third party guilt based on the applicable law at the time of Petitioner's trial. Furthermore, the PCR court properly found Petitioner failed to meet his requisite burden of establishing any prejudice.

III. Whether Petitioner is entitled to the benefit of Holmes v. South Carolina is not preserved for this Court's review, as Petitioner did not raise the issue below.

Petitioner also asserts he is entitled to the benefit of Holmes v. South Carolina, 547 U.S. 319 (2006), as a constitutionally binding decision pursuant to S.C. Code Ann. § 17-27-45(B). In

Holmes, decided on May 1, 2006—years after Petitioner’s trial—the United States Supreme Court overruled State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) and its short-lived progeny of cases and returned to the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) to determine the admissibility of evidence of third party guilt:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

State v. Burgess, 391 S.C. 15, 22–23, 703 S.E.2d 512, 516 (Ct. App. 2010) (quoting Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35). Even though Holmes was decided after Petitioner’s direct appeal had concluded, he argues he is entitled to use this standard to evaluate counsel’s performance. However, Petitioner did not raise this issue to the PCR court and accordingly, the PCR court was never afforded an opportunity to evaluate and rule on the merits of this case. Therefore, this issue is not preserved for appellate review.

It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974); see also State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. This same standard is

employed on appellate review of PCR matters. See Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (noting an issue that was neither raised to nor ruled upon by the PCR court is not preserved for appellate review).

In this case, Petitioner did not raise this allegation in his application for relief and did not present the argument to the lower court on the issue and the PCR court did not rule on this unpresented issue. Accordingly, this issue is not preserved for this Court's review.⁶

IV. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to request a jury instruction on alibi.

Petitioner contends the PCR court erred in denying his allegation trial counsel was ineffective for failing to request a jury instruction on alibi. Petitioner alleges his trial testimony that he was at his home in Charlotte, North Carolina with his late father at the time of decedent's death entitled him at an alibi instruction and trial counsel's failure to request an alibi charge resulted in his conviction. The PCR court denied this allegation, finding Petitioner failed to meet his burden of proof as to both deficiency of counsel and prejudice. Specifically, the PCR court found Petitioner failed to present evidence of a viable alibi defense and therefore could not establish counsel was deficient for failing to pursue an alibi defense or that an alibi instruction would have been given if so requested. This ruling is supported by the record.

"To be successful, [a defendant's] alibi must cover the entire time when his presence was required for accomplishment of the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (internal citations omitted). "[S]ince an alibi derives its potency as a defense from the

⁶ Even if this Court was to determine this issue is preserved for appellate review, trial counsel cannot be found ineffective for failure to anticipate a change in the law years after Petitioner's trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (holding an attorney is not required to anticipate potential changes in the law not in existence at the time of the conviction).

fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

As the PCR court properly discerned, Petitioner failed to establish a viable alibi defense or that he was so entitled to an alibi charge. This is supported by the record, including the testimony of trial counsel that he and the members of his trial team attempted to verify his alibi through other witnesses or means to no avail. Furthermore, the PCR court's finding Petitioner failed to establish any requisite prejudice since he was unable to produce any alibi witnesses to account for his whereabouts is also supported by the record. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). The PCR court properly denied this allegation.

V. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish appellate counsel was ineffective for failing to brief the alleged improper pitting of witnesses.

Petitioner asserts appellate counsel was ineffective for failing to brief the State's alleged improper cross-examination of him where he was asked to respond to allegations made by numerous State's witnesses. Petitioner alleges the State's questioning of him was "improper, prejudicial pitting of witnesses" and if the issue had been briefed on appeal, the appellate court would have granted him a new trial.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357

S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836.

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

“To establish prejudice relating to the actions of appellate counsel, [a d]efendant must establish a reasonable probability that, but for his counsel’s unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Employing this proper standard, the PCR denied and dismissed this claim. At the evidentiary hearing, appellate counsel Delgado testified he decided to raise four issues on appeal and he selected these four issues because he thought they were the most meritorious issues that constituted reversible error and had the greatest chance of success. He testified he chose not to raise the issue of witness pitting on appeal because he did not think that the issue was as meritorious as other issues and that it did not arise to reversible error. The PCR court properly denied this allegation, finding appellate counsel properly used his “vast experience as both a trial and appellate lawyer to select the most meritorious issues on appeal.”

VI. There is evidence of probative value to support the PCR court’s finding Petitioner failed to establish appellate counsel was ineffective for failing to brief the alleged improper testimony of Investigator McDonald.

Similar to his previous allegation, Petitioner asserts appellate counsel was ineffective for failing to brief the propriety of the trial court allowing Investigator McDonald to testify about cell site information without the proper qualifications. Again, Petitioner alleges if the issue had been briefed on appeal, the appellate court would have granted him a new trial.

Employing the proper standard discussed within the previous allegation, the PCR denied and dismissed this claim, again finding appellate counsel properly relied on his experience to select the most meritorious claims to raise on appeal. As discussed above, appellate counsel is “not required to raise every non-frivolous claim, but may select among them in order to

maximize the likelihood of a favorable outcome.” Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). This ruling is supported by the record and should be affirmed.

VII. There is evidence of probative value to support the PCR court’s finding Petitioner failed to establish counsel was ineffective for failing to move to suppress the cell phone records.

Petitioner contends the PCR court erred in denying his allegation trial counsel was ineffective for failing to move to suppress the three search warrants for out-of-state cellphone records based on the issuing magistrate’s lack of jurisdiction. During the course of the investigation into the decedent’s murder, law enforcement sought and obtained search warrants for three cell phone numbers. All three warrants were obtained in Richland County pursuant to S.C. Code Ann. § 17-13-140 and were sent to the custodian of record for the various cell phone entities, all located outside of South Carolina. Petitioner alleges trial counsel rendered ineffective assistance of counsel by failing to move to suppress the introduction of and testimony relating to these cell phone records, which he alleges were obtained in violation of S.C. Code Ann. § 17-13-140 because they were sent to entities outside of South Carolina. Petitioner alleges because the cell phone records obtained from these warrants were such a critical part of the State’s case, he was prejudiced by trial counsel’s failure to move for suppression of these records and the accompanying testimony. The PCR court denied this allegation, finding any such motion would not have resulted in their suppression.

To establish that counsel was ineffective for failing to move for suppression, an applicant must show that had such a motion to suppress been made, there is a reasonable probability that the trial court would have granted the motion. Bannister v. State, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998). As the PCR court properly discerned, there is no reasonable probability that the

cell phone records would have been suppressed if counsel made such a motion based on either a “good faith exception” or by the State obtaining a “D Order” pursuant 18 U.S.C.A. § 2703. In State v. Sachs, this Court recognized a good faith exception permits the introduction of evidence seized pursuant to a warrant that is defective under S.C. Code Ann. § 17-13-140 if the officers have made a good faith attempt to comply with the affidavit requirement. State v. Sachs, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975). In the present case, officers fully complied with S.C. Code Ann. § 17-13-140 and the only complaint made by Petitioner is that the warrants were improperly sent to entities outside of the state beyond the magistrate’s authority. As the post-conviction court correctly found, there is no reasonable likelihood that a motion to suppress would have been granted based on the ground that the warrants were sent to entities outside of South Carolina, as a good faith exception akin to Sachs would not have required exclusion.

Furthermore, if trial counsel had moved to suppress the cell phone records, it likely would have been denied as the State could have obtained the records without a search warrant pursuant to 18 U.S.C.A. § 2703 (d). 18 U.S.C.A. § 2703 (d) states:

“A court order for disclosure under subsection (b) or (c) may be issued **by any court that is a court of competent jurisdiction** and shall issue only if the governmental entity offers specific and articulable facts showing that there are **reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation**. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.”

In State v. Odom, this Court held any circuit court within South Carolina is a “court of competent jurisdiction” that can issue orders pursuant to 18 U.S.C.A. § 2703 (d) and determined such orders are not a violation of South Carolina law. State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009). Therefore, had trial counsel moved to suppress the cell phone records based on a violation of the South Carolina search warrant statute, the State easily could have obtained the information without a warrant pursuant to 18 U.S.C.A. § 2703 (d), as it had reasonable belief that the electronic communications records were material to an on-going criminal investigation.

There is no reasonable likelihood the records would not have been able to be reproduced by the custodians of record for the various entities, and, therefore, Petitioner cannot show that there is a reasonable likelihood the result would have been different if a motion to suppress had been made. The PCR court properly determined Petitioner was unable to establish any prejudice stemming from the alleged deficiency of counsel. Bannister, 333 S.C. at 304, 509 S.E.2d at 810.

VIII. There is evidence of probative value to support the PCR court’s finding Petitioner failed to establish counsel was ineffective for failing to challenge the search warrant of his home in North Carolina.

Petitioner contends the PCR court erred in denying his allegation trial counsel was ineffective for failing to challenge the search warrant of his home in Charlotte, North Carolina. At the evidentiary hearing, Petitioner made various allegations of defects on both the structure and execution of the search warrant, all of which were properly denied by the lower court. On appeal, Petitioner argues the search warrant was invalid because “Richland County Sheriff’s Department personnel forced entry into [Petitioner]’s home, detained him, conducted the search, and completed the return” in violation of North Carolina law. However, the record does not support these allegations. As the PCR court properly noted, Petitioner repeatedly speculated as to

possible defects in the search warrant itself and its execution, but failed to present anything beyond mere speculation to support these claims. (App. 2517-23). As it was Petitioner's burden to establish such defects, the PCR court properly denied this allegation. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (an applicant bears the burden of proving his allegations).

IX. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to move for a trial based on the dismissal of Willie Jennings's charges.

Petitioner contends trial counsel should have moved for a new trial pursuant to Rule 29, SCRCrimP, based on after discovered evidence once the State dismissed Jennings's marijuana charge following his testimony during Petitioner's trial. Petitioner speculates the State "probably already planned to dismiss Jennings' charge after he testified," which he characterizes as a "wink-and-a-nod' tactic" intended to bolster the State's "weak case." The PCR court denied this allegation, finding such a motion would not likely have been granted if made because it ultimately would not have changed the result of Petitioner's trial. This finding is legally correct and supported by the record.

"A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence. . . ." Rule 29(b), SCRCrimP. "A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). "The granting of a new trial because of after-discovered evidence is **not favored**," and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. Id. at 545, 243 S.E.2d at 197-98. In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a

new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999)).

In the present case, there is no reasonable likelihood a motion for a new trial pursuant to Rule 29(b), SCRCrimP, would have been granted. As the PCR court properly ruled, the dismissal of Jennings's marijuana charge would not have changed the result of Petitioner's trial and was not material to Petitioner's guilt. Furthermore, as the lower court also noted, the dismissal is cumulative when considered in conjunction with trial counsel's cross-examination of Jennings, where counsel was able to elicit from Jennings that he lied to law enforcement numerous times, attempted to minimize his own involvement in the drug transaction out of self-interest, and was hoping for immunity in exchange for his testimony against Petitioner. The PCR court properly denied this allegation.

X. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing cross-examine decedent's wife about potential incarceration for her role in the drug transaction.

Petitioner asserts the PCR court erred in denying his allegation trial counsel was ineffective in his cross-examination of decedent's wife, Consuelo Casey. Specifically, Petitioner asserts trial counsel should have specifically asked her about a potential ten year sentence she could have faced for trafficking in marijuana if the State had not granted her immunity from prosecution in exchange for her assistance in solving her husband's murder. Petitioner asserts trial counsel's failure to cross-examine Casey on this narrow issue prejudiced him to such an

extent that he should be granted a new trial. This allegation is without merit and the PCR court properly denied it.

As the PCR court noted (and Petitioner neglects to recognize), trial counsel's cross-examination of Casey encompassed forty-four pages of the trial transcript and covered a wide variety of topics, including her immunity from prosecution. Trial counsel was able to elicit from Casey eleven times that she lied to law enforcement and highlighted that these lies were memorialized in signed, sworn statements. Trial counsel was also able to elicit testimony from Casey that she only began being forthright with law enforcement once immunity was promised in regards to her role in the drug transaction, showing that she was motivated by self-interest and self-preservation, not out of a desire to solve her husband's murder. Trial counsel then was able to elicit similar testimony from Sergeant McDonald during his cross-examination. Additionally, trial counsel highlighted to the jury that Casey was granted immunity and this was her sole motivation for assisting law enforcement. In light of this testimony, trial counsel was not deficient and there is no reasonable probability that the result of Petitioner's trial would have been different had Casey been asked about a possible ten year sentence. The PCR court properly denied this allegation.

XI. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to request a jury instruction on Casey's immunity.

Petitioner argues the PCR court erred in denying his allegation trial counsel was ineffective for failing to request a jury instruction cautioning the jurors about the reliability of Casey's testimony in light of her immunity from prosecution. Petitioner asserts trial counsel should have requested an instruction pursuant to United States v. Brooks, 928 F.2d 1403 (4th

Cir. 1991). Petitioner further asserts trial counsel's failure to request a charge pursuant to Brooks led to the jurors wrongly believing Casey and led to his conviction. The PCR evaluated this claim and properly denied relief, finding there was nothing improper about the State's grant of immunity to Casey and trial counsel's failure to request a specific jury instruction on Casey's immunity was neither deficient nor prejudicial.

This ruling is supported by the record, particularly in light of trial counsel's lengthy cross-examination of Casey that highlighted weaknesses in her credibility to the jury as discussed in the previous allegation. There is no reasonable probability that the result of Petitioner's trial would have been different had an instruction on Casey's immunity been given. See Strickland v. Washington, 466 U.S. at 688-89 (holding that to establish a claim of ineffective assistance of counsel, an applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case).

XII. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to object to the trial court's jury instruction on malice.

Petitioner argues the PCR court erred in denying his allegation trial counsel was ineffective for failing to object to the trial court's jury instruction on malice that provided several examples of inferred malice, such as the use of a deadly weapon, commission of another felony such as trafficking in marijuana, or preparation. Petitioner asserts the trial court's jury instruction amounts to an impermissible comment on the facts and "expressed an opinion about the State's case." In support of this allegation, Petitioner cites to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which was decided five years after Petitioner's trial. The PCR court rejected this argument, noting the trial court's instructions on malice were proper, particularly when

considered as a whole. The court also noted the trial court's jury instruction specifically cautioned the jury against placing undue emphasis on inferred malice. App. 1465.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct .App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464.

In the present case, the trial court's jury instruction on the permissive inference of malice was proper and therefore, trial counsel was not deficient for failing to object to the instruction. Furthermore, there is no reasonable likelihood the result of Petitioner's trial would have been different had counsel objected. The PCR court properly denied this allegation.

XIII. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to object to the assistant solicitor's closing argument regarding inferred malice from trafficking in marijuana.

Petitioner asserts the PCR court erred in denying his allegation trial counsel was ineffective for failing to object to the State's closing argument about implied malice from using a weapon during a felony drug deal. Petitioner also argues—albeit erroneously—that the PCR court “did not consider the Solicitor’s entire argument.”⁷ The PCR court denied this allegation, finding the passage in question was not objectionable and noting the State’s argument did not inform the jury that a finding of guilt for trafficking in marijuana would automatically result in a finding of guilt for murder, but rather, simply argued that malice may be implied. Furthermore, Petitioner’s assertion that the State’s argument misleads the jury because it did not use 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) is wholly without merit, as the trial court’s jury instruction contains the exact language requested by the Elmore court. The PCR court’s ruling is supported by the record and should be affirmed.

XIV. There is evidence of probative value to support the PCR court’s finding Petitioner failed to establish counsel was ineffective for failing to object to the assistant solicitor’s closing argument vouching for the credibility of Jennings and Casey.

Petitioner asserts the PCR court erred in denying his allegation that counsel was ineffective for vouching for the credibility Willie Jennings and Conseuelo Casey. Specifically, Petitioner alleges the following passage of the State’s closing argument was objectionable:

When considering a witness’s believability or credibility, you can consider the following things, and the judge will tell you, you can consider their demeanor on the stand. Were they forthright? Were they hesitant? Was their testimony corroborated by other testimony? Was their testimony corroborated by the evidence? You can believe one witness against many, many against one. You can believe part of what a witness says, none, or all. It is totally up to you. You must determine the credibility of what has come before

⁷ In its order of dismissal, the PCR court specifically noted that it “reviewed the passages in question, in conjunction with the State’s closing on the law in full . . .” (App. 2540).

you. Do they have a bias? Do they have a prejudice? What do they have to gain or lose? I beg you, ladies and gentlemen, judge Consuelo Casey. She came up here, and I don't think it was pleasant for her. She told you what she was involved with. You heard from Willie Jennings. What makes him credible? He didn't want to be here. There's no dispute about that. What makes them absolutely credible is the evidence. Judge the credibility of each and every witness the state puts before you. Consuelo Casey got up here, and she told you flat out she didn't tell the truth at first. She didn't tell the truth for a while. I submit that's what makes her credible. Why would she choose to pick him if he didn't do it?

App. 1392-94. The PCR court denied this allegation, finding the passage was not improper vouching. This ruling is legally corrected and supported by the record.

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a prosecutor cannot vouch for a witness' credibility. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. Id.

Here, the State did not make explicit personal assurances of Jennings or Casey and did not reference any information not presented to the jury to support their testimony. The closing argument does not amount to vouching and the PCR court properly denied this allegation.

XV. There is evidence of probative value to support the PCR court's finding Petitioner failed to establish counsel was ineffective for failing to call character witnesses.

Petitioner asserts the PCR court erred in denying his allegation that counsel was ineffective for failing to call character witnesses on his behalf, particularly former professional basketball player Jeff McInnis and his mother. However, Petitioner neglects to note that trial

counsel called **five** character witnesses during his trial, all of whom testified about Petitioner's work in the community and peaceful nature. In its order of dismissal, the PCR court recognizes this crucial fact and specifically references that "[f]ive witnesses were called to testify to [Petitioner]'s outstanding character and reputation in the community and this Court is convinced that any additional witnesses would be cumulative and would have had no impact on the proceedings." (App. 2529). These findings are supported by the record and should be affirmed.

XVI. The PCR court properly excluded the affidavit of Cynthia McInnis.

Petitioner asserts the PCR court erred in sustaining the State's objection to an affidavit from Cynthia McInnis. At the evidentiary hearing, the State objected the introduction of the affidavit, citing an inability to cross-examine McInnis and the PCR court sustained this objection. While S.C. Code Ann. § 17-27-80 states "[t]he [PCR] court **may** receive proof by affidavits. . . .[,]" the court is under no such obligation to do so and may order the applicant or any other witnesses it deems necessary brought before it for hearing. See S.C. Code Ann. § 17-27-80. The PCR court did not err in excluding this affidavit, as McInnis was not present and the court was therefore unable to observe her or her credibility. See *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (noting the opportunity for the PCR court to "directly observe witnesses" is paramount).

XVII. This Court should not apply a cumulate error analysis to Petitioner's case

Petitioner urges this Court to adopt a cumulative error analysis when reviewing his claims. The PCR court refused to do so, citing Green v. State, where this Court expressly declined to address whether a post-conviction relief applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. Green v. State, 351 S.C. 184, 196-

97, 569 S.E.2d 318, 324-25 (2002). See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (recognizing that “[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina” and holding that “[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis”). In this case the PCR court reviewed each of Petitioner’s allegations and expressly found all to be without merit, noting “that nothing presented by [Petitioner] gives even the slightest indication that trial counsel ‘entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing.’” See United States v. Chronic, 466 U.S. 648 (1984).

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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January 3, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
James R. Barber, III, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2014-001774

PHILLIP H. CROCKER, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

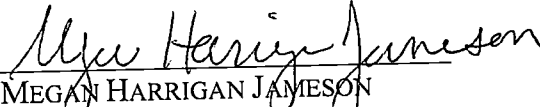
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.

This 3rd day of Jan., 2017.


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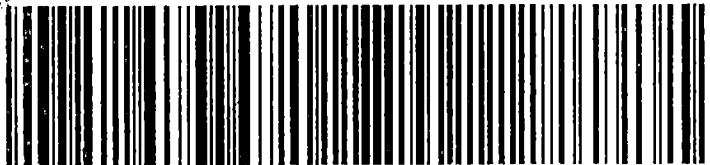
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