THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

Appellate Case No. 2016-002513

THE STATE,

RESPONDENT,

v.

THOMAS JAMES,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29528
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED

The Court of Appeals erred by holding it was not an abuse of discretion for the trial court to allow the solicitor to call former solicitor Von Herrmann as a witness to "explain" why certain charges were dismissed against its star witness, Keir Johnson, where Johnson admitted that he lied to the police, but maintained he was now telling the truth without consideration, since allowing the solicitor to testify about prosecutorial discretion to explain leniency towards the state's witness was improper, as were the limitations on cross-examining the former solicitor given Rule 611(b), SCRE once she was allowed to testify.

RESPONDENT'S COUNTER-QUESTION PRESENTED

The Court of Appeals committed no error in affirming the trial court's ruling allowing a former assistant solicitor to testify about the reasons that a testifying co-defendant's collateral charges were dismissed when (i) Petitioner's counsel withdrew his objection, (ii) the defense made the reasons for the charges' dismissal relevant, and (iii) the former solicitor's testimony did not vouch for or bolster the State's other witnesses.

STATEMENT OF THE CASE

Petitioner Thomas James was indicted by the Horry County Grand Jury for the November 8, 2011, murder of victim Shaquille Shontay (Keia) Pertelle. (R. pp. 917 – 18).

James was represented by Bobby G. Frederick, Esq. at trial, which began with jury selection on October 13, 2014, and continued for five days. (R. p. 1). James was jointly tried with co-defendant Carnail Graham, who was represented by David J. Canty, Esq. (R. p. 1). The Honorable Steven H. John presided, and Nancy Livesay of the Fifteenth Circuit Solicitor's Office prosecuted the case. (R. p. 1). The jury convicted James of murder and Judge John sentenced James to thirty-two years' imprisonment with credit for time served. (R. p. 910, lines 1-5).

James timely appealed. (R. p. 919). The Court of Appeals affirmed in an unpublished opinion pursuant to Rules 215 and 220(b), SCACR. *State v. James*, Op. No. 2016-UP-430 (S.C. Ct. App. filed Oct. 19, 2016) (*per curiam*). Petitioner sought rehearing, which was denied on November 17, 2016. (App. pp. 3-19).

James' Petition for Writ of Certiorari to the Court of Appeals follows, to which Respondent makes the instant Return.

RESPONDENT'S STATEMENT OF FACTS

The facts of the crime are not as shadowy as Petitioner projects. Keia Pertelle died of a gunshot wound to the chest sustained when intruders invaded her mobile home located outside of Conway. (R. p. 130, line 3 – p. 132, line 24; R. p. 147, lines 1-24). The first responding officer found Pertelle in her bedroom at the front of the residence, deceased. (R. p. 132, lines 16-24). In the living room, investigators found a comforter half thrown from the couch to the floor, indicating that someone leapt from the couch in a hurry.[1] (R. p. 264, lines 10-21).

A neighbor, David Grissett, heard the gunfire and commotion, then witnessed two people run from Pertelle's mobile home and leave in a van. (R. p. 99, line 19 – p. 100, line 10). Grissett called 911. (R. p. 100, lines 11-14). Grissett actually noticed the getaway van slightly earlier, finding its presence suspicious. He had never seen it before, but watched it circle his dark, dead-end street, park at the end, then drive two streets over and return again to park at the end of the road. This occurred around 2:00 AM. (R. p. 97, line 17 – p. 99, line 17; R. p. 104, lines 14-25).

At the crime scene, law enforcement documented signs of forced front-door entry. (R. p. 237, lines 1-16; R. p. 242, line 12 – p. 243, line 9). Outside, law enforcement took tire and shoe impressions from where the van was reported to have parked at the end of the street. (R. p. 234, line 19 – p. 235, line 18; R. p. 286, lines 1-23). No comparison was made between either the tire castings and the van, or the shoe castings and any shoes located in conjunction with the individuals who later emerged as suspects. (R. p. 289, line 22 – p. 290, line 9).

---

[1] There were two other occupants of the mobile home that night. The victim's boyfriend, Splurge, who did not testify at trial, and Carlton Watts, who was in his bedroom asleep at the time of the invasion. (R. p. 42, line 16 – p. 45, line 17). Watts could not identify the intruders, but heard the victim scream out to Splurge, and the intruders screaming "where it's at, we're not playing, where it's at." (R. p. 45, line 17 – p. 46, line 8; R. p. 52, line 19 – p. 54, line 15). Watts testified that he last saw the victim on the sofa in the living room, and last saw Splurge in the front bedroom. (R. p. 49, lines 1-17).

Inside, law enforcement collected a number of fired bullets, jackets, and fragments and documented additional bullet holes. (R. p. 239, lines 2 – p. 240, line 20; R. p. 258, line 18 – p. 259, line 25). Law enforcement concluded that a revolver was most likely the type of firearm used during the invasion. (R. p. 260, lines 1-25). Investigators collected four firearms from the mobile home. One was a .357 Taurus revolver.[2] (R. p. 250, lines 10-25). In regards to the projectiles taken from the crime scene, SLED's firearm and toolmark examiner determined that three projectile fragments and a whole fired bullet derived from the .357 Taurus revolver.[3] (R. p. 321, lines 1-8; R. p. 322, line 13 – p. 327, line 7).

While crime scene investigation concluded that some shots were fired from the bedroom of the mobile home towards the front door where the forced entry occurred, and some shots were fired from the intruders from the front door, through the living room and towards the bedrooms, the record lends to the plain inference that the bullets matching .357 Taurus revolver were fired by Splurge in defense of the home invasion. (R. p. 238, line 1 – p. 240, line 23; R. p. 261, lines 1-13). The State's firearm and toolmark examiner determined that the bullet recovered from the victim's body at autopsy did not derive from any firearm recovered from the crime scene. The fatal bullet was of .357 caliber and was fired from an unrecovered revolver.[4] (R. p. 327, line 8 – p. 329, line 7). A match was never made between the bullet sustained by the victim and any other gun. (R. p. 346, line 6 – p. 347, line 10).

---

[2] For ease of identification within the Record, the .357 Taurus revolver is State's Exhibit 64. (R. p. 253, line 15 – p. 256, line 19).

[3] State's exhibits 67, 68, 69 and 71.

[4] Although the revolver recovered from the crime scene was of .357 caliber and the bullet recovered from the victim was also of .357 caliber, toolmark examination showed that the bullet from the victim was fired from a barrel rifled with six grooves and a right twist. The .357 Taurus revolver taken from the crime scene was rifled with five grooves and a right twist. (R. p. 327, line 17 – p. 328, line 4).

The van was reported by a nearby resident who discovered it parked near a tree line behind her mobile home between 6:00 and 7:00 AM. (R. p. 163, lines 10-12; R. p. 165, line 16 – p. 167, line 4). It taken from the nearby yard, impounded, processed and fingerprinted. (R. p. 272, lines 6-25). Petitioner's right palm print was identified on a passenger side door. (R. p. 209, lines 21-23; R. p. 211, line 24 – p. 212, line 2). Other fingerprint identifications obtained from the van were to made testifying co-defendant Keir Lamont Johnson, as well as to Letitia Tasha Freshley and Markel Hasheem Rush.[5] (R. p. 209, line 23 – p. 210, line 12). It was also determined during the course of investigation that the van belonged to Kier Lamont Johnson's ex-girlfriend, Tiara Brown. (R. p. 473, lines 3-7). Kier Lamont Johnson was locally known as "Bootsie." (R. p. 366, lines 5-13).

Howard Parker, a lifelong friend of Petitioner, co-defendant Carnail Graham, and the victim, testified at trial that Bootsie drove that van around town. (R. p. 365, line 17 – p. 367, line 5). Parker saw Bootsie in the van twice the night of the murder. (R. p. 367, lines 6-8). The first was at a gas station around 11:00 PM. (R. p. 367, lines 9-25). Parker saw the van for the second time after midnight. It showed up at a house where Parker was gathered with friends. (R. p. 368, line 1 – p. 369, line 6). Parker testified that he recognized Petitioner leave that house and get inside the van before it left. (R. p. 393, line 1 – p. 394, line 19). This was around 2:00 AM. (R. p. 393, lines 5-14). On both occasions, Parker noticed, but could not identify, other individuals already inside the van. (R. p. 367, lines 9-22; R. p. 369, lines 7-23).

Cell phone evidence scattered throughout the trial and presented by both the State and

[5] Thirteen of nineteen total fingerprints lifted from the van contained enough ridge detail to utilize for comparison. (R. p. 195, line 17 – p. 196, line 10). None from the driver's side contained sufficient ridge detail for identification. (R. p. 210, lines 19-25). The passenger side of the van returned five identifiable prints. (R. p. 209, lines 11-18).

Petitioner showed that Petitioner, Dubba and Bootsie had at least two phones each. (R. p. 455, line 2 – p. 456, line 6). Through expert testimony on cell-phone tracking and electronic communications, Petitioner established that one of his phones did not conduct any traceable activity near the victim's residence during the time in which the home invasion and murder occurred. (R. p. 751, lines 13-22). No records were introduced or discussed regarding Petitioner's second cell phone. (R. p. 759 lines 8-15). The same expert witness also testified that Bootsie's phone made and received a total of 28 calls in an area northwest of Conway, the direction of the crime scene, around the time of the home invasion and murder. (R. p. 732, line 1 – p. 736, line 14; R. p. 751, lines 18-22).

At trial, a federal inmate testified that after the murder, he heard Dubba speaking with Petitioner on the phone apologizing "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (R. p. 626, line 3 – p. 627, line 17; R. p. 641, lines 10-20). A second inmate corroborated the story, testifying that he witnessed Dubba talking about the State's case against them in the county detention center. According to this inmate, Dubba explained what happened that night:

> We got to the house, kicked the door in, we kicked the door in, the alarm went on. Keia was on the couch, she jumped up, started running, screaming for Splurge. Everything happened so fast, he just started shooting. She seen his face. He started shooting, you know, he didn't have a choice because she seen him.

(R. p. 661, lines 9-17). Dubba also allegedly stated he went in the front door, that there were eight people in the van, and that Petitioner and Dubba "put a gun to Lil Bootsie's head and told him not to tell[.]" (R. p. 671, lines 4-16).

Bootsie Implicates Petitioner —And Himself

Bootsie was close friends with Petitioner, "Cutty," and co-defendant Graham, "Dubba." (R. p. 447, lines 15-25). Bootsie explained at trial that Dubba called him from Petitioner's phone asking for a ride to "go buy some drugs" at Splurge's mobile home. (R. p. 450, lines 18-22). Bootsie picked them up near Conway in Tiara's brown Chevy Astro van around 1:40 AM. (R. p. 456, lines 10-21). Bootsie testified that he drove around the block and spoke to a neighbor while Petitioner and Dubba went inside Splurge's trailer. (R. p. 460, line 4 – p. 461, line 9). Then Petitioner and Dubba got back in Bootsie's van and Bootsie drove away at their direction. (R. p. 450, line 18 – p. 451, line 8).

As they left the scene, a Horry County police officer "swerved around" to follow them, and Dubba urged Bootsie to make a getaway. At that point, Bootsie parked the van in "somebody's backyard" and all three men took off into the woods. (R. p. 451, lines 9-15). It was during their getaway that Dubba expressed to his cohorts that he thought he "just killed that mother------." (R. p. 461, lines 17-24). Bootsie recalled Petitioner and Dubba wearing blue latex gloves and discarding them in the woods; they did not wear masks. (R. p. 550, lines 1-21). Bootsie also testified that Dubba threw two guns out of the van window.[6] (R. p. 462, lines 1-5; R. p. 504, lines 1-25).

Bootsie later asked his girlfriend to call the police and report the van stolen—he falsely explained to law enforcement that he was robbed of the van while at a gas station. (R. p. 462, line 22 – p. 463, line 6; R. p. 518, line 23 – p. 521, line 4). The instruction to report the van

[6] Bootsie testified that he had never shot a gun, but that the guns thrown out the van window that night were of .45 and .38 caliber. (R. p. 504, lines 10-25). The State elicited testimony from its firearm and toolmark examiner that a .38 revolver looked similar to a .357 revolver, such as the caliber gun that fired the fatal bullet. (R. p. 345, lines 2-9).

stolen appeared to be one of Bootsie's initial strategies to attempt to evade law enforcement from discovering that he was involved in the victim's murder. (R. p. 462, line 22 – p. 463, line 15). Bootsie incurred a charge for driving without permission with intention to deprive, and made bond the following day. (R. p. 463, lines 7-12).

Bootsie later incurred a murder charge in relation to the case at bar which remained pending at the time of Petitioner's trial.[7] (R. p. 463, lines 13-21). Bootsie's attorney acquired his client a bond on the murder charge. (R. p. 468, lines 3-11; R. p. 484, line 14 – p. 486, line 22; R. pp. 912 – 913 Defendant's Exhibit 5). At trial, Bootsie maintained that he was telling the truth about what happened that night—he said that after he hired an attorney he told the truth in every statement that he gave. (R. p. 463, line 22 – p. 464, line 15; R. p. 466, lines 20-23; R. p. 518, line 21 – p. 519, line 1). Bootsie also testified that prior to bonding out, he lied about the events related to this case because he was receiving threats in the county detention center. (R. p. 468, lines 3-18). Even after bonding out, Bootsie made inconsistent statements, but only related to what happened *after* he, Petitioner, and Dubba left the victim's mobile home. For instance, Bootsie said that his grandmother's boyfriend picked him up, or that he took a cab after dropping off the van, or that he walked backed to Conway. (R. p. 509, line 8 – p. 514, line 20). It appears however that a fourth party, Mike Pyatt, picked Bootsie up. (R. p. 508, line 27 – p. 509, line 4; R. p. 522, line 18 – p. 523, line 6). But Bootsie never changed his recollection regarding Petitioner and Dubba's entering and exiting the victim's mobile home at the time of the murder. (R. p. 555, line 5 – p. 556, line 4).

[7] Bootsie previously incurred additional, unrelated charges for burglary first, possession of a weapon, and assault and battery first, the discussion of which gives rise to the issue on review. (R. p. 494, line 21 – p. 496, line 21).

ARGUMENT

I. The Court of Appeals committed no error in affirming the trial court's ruling allowing a former assistant solicitor to testify about the reasons that a testifying co-defendant's collateral charges were dismissed when Petitioner's counsel withdrew his objection, the defense made the reasons for the charges' dismissal relevant, and the former solicitor's testimony did not vouch for or bolster the State's other witnesses.

Outside of concerns with issue preservation addressed below, the Court of Appeals correctly affirmed Petitioner's conviction premised upon the support of *State v. McEachern,* 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012) and *State v. Inman,* 395 S.C. 539, 720 S.E.2d 31 (2011), *et al.* The latitude of cross-examination remains in the purview of the trial court, and "[w]hen a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *State v. McEachern*, 399 S.C. at 137, 731 S.E.2d at 610 (citing *State v. Jackson,* 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); *State v. Stroman,* 281 S.C. 508, 513, 316 S.E.2d 395, 398 (1984); *State v. Beam,* 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct.App. 1999)). Furthermore, a former solicitor is not barred from testifying as a fact witness so long as his or her testimony is—or becomes—necessary under the circumstances of the case. *State v. Inman*, 395 S.C. 539, 557, 720 S.E.2d 31, 41 (2011).

Petitioner interjected the issue of whether Bootsie testified against him in exchange for the dismissal of collateral charges. This notion could have the effect of misleading the jury. Once Petitioner impeached Bootsie in this vein, the State was entitled to present testimony to corroborate Bootsie's own explanation of the reasons that the State dismissed his other charges.

A. Background

As soon as Bootsie took the stand, the jury was ushered out and an *in limine* hearing

began to determine the extent of the admissibility of Bootsie's prior charges and convictions. (R. p. 411, line 18 – p. 438, line 22; R. p. 443, line 8 – p. 444, line 16). Petitioner sought leeway to cross-examine this co-defendant about the progression of events related to the State's dismissal of unrelated first degree burglary and possession of a weapon charges. (*See* R. p. 421, line 14 – p. 422, line 17). Bootsie also had an assault and battery charge which the State dismissed. (R. p. 443, lines 11-25).

Petitioner sought to establish that when Bootsie "was charged with murder for this particular crime, [that] he thereafter made a statement that implicated the two defendants." (R. p. 436, lines 16-24). Petitioner next sought to establish that after making this statement, Bootsie "was granted bond on the murder charge, that thereafter the State of South Carolina dismissed a burglary first charge and a weapons charge; and that thereafter [Bootsie] was convicted of [petit] larceny or pled guilty to [petit] larceny." (R. p. 436, line 24 – p. 437, line 8).

The State countered that the inference Petitioner wished to draw from establishing the above timeline was not congruent with the circumstances of Bootsie' having other charges dismissed. (R. p. 438, line 23 – p. 440, line 11). Solicitor Livesay noted that it would be "extremely prejudicial to bring up and insinuate that the State dismissed charges in exchange for [Bootsie's] testimony" when the State already had a statement form Bootsie regarding Pertelle's murder and when other reasons existed for his charges' dismissal. (*Id.*).

The trial court did not choose to limit Bootsie's cross-examination, but rather allowed the State an opportunity to respond to it by calling Ms. von Herrmann, a former assistant solicitor who had been assigned to Bootsie's previous charges. The purpose of allowing Ms. von Herrmann to testify was to establish the reason that Bootsie's other charges were dismissed. (R. p. 441, lines 6-14). The trial court reasoned that the jury should be afforded "the full and

complete picture of what occurred or didn't occur" for their consideration. (R. p. 442, lines 7-10). The court also reasoned in Petitioner's favor:

> But I think it is proper to allow that timeline to be established [by Petitioner]. There might be an extremely valid reason why the State dismissed it. But I think the jury is entitled to know that part of it. So I will allow you, if you want to, to later call in your case in chief Ms. Von Herrmann to say, you know, establish she is the solicitor and why she dismissed the charge, all right. But I'm going to allow the defense to ask the question[.]

(R. p. 441, lines 15-23). The court further reasoned that it would not be within Bootsie's knowledge precisely why his charges were dismissed because Ms. von Herrmann was the person in charge of the dismissal. Therefore, Ms. von Herrmann was the proper party to answer those questions. (R. p. 444, line 17 – p. 445, line 4).

Then, Bootsie testified. He emphasized that his lawyer, not the solicitor, was responsible for getting his other charges dismissed. (R. p. 468, line 19 – p. 469, line 11). On cross-examination, Bootsie explained—as defense counsel desired—that he was charged with murder in 2011, (R. p. 494, lines 21-22; R. p. 497, line 13), and that in 2013, he incurred charges for first degree burglary, first degree assault and battery, and petit larceny, all of which were dismissed. (R. p. 494, line 25 – p. 495, line 23). Bootsie also testified that he pled guilty to the petit larceny while his murder charge was pending "so that [he could] make bond." (R. p. 496, lines 2-14). Moreover, Bootsie's cross-examination revealed that he was charged with possession of a weapon during the commission of a violent crime in 2012, yet another charge which was dismissed. (R. p. 496, lines 17-21). *Then, Bootsie clarified: "[t]o tell you the truth, that happened after the murder charge[;] [t]hat burglary first and all [the dismissals] happened after this murder charge . . . .*" (R. p. 497, lines 1-25).

He also testified that he lied to law enforcement in his November 2011 statement

regarding the murder, but that he gave a truthful statement in 2012 after speaking to his lawyer. (R. p. 525, line 6 – p. 527, line 6). Bootsie next testified that his robbery and possession of a weapon charges were dismissed after he made the 2012 statement, but that they had been pending since 2009 and the State "had no evidence on [him]" in regards to those charges. (R. p. 530, line 2 – p. 531, line 10). Counsel pointed out to Bootsie that the State dismissed his charges twenty days after he gave the statement to law enforcement in 2012. (R. p. 531, lines 11-16).

Petitioner Premised his Objection Upon the Scope of Allowable Testimony

Following the conclusion of Bootsie's testimony, the State did elect to call former assistant solicitor von Herrmann to "reply to the questions as to why [Bootsie's] charges were dismissed after this case, after 2011." (R. p. 563, lines 9-17). The State wanted to establish that at one time "she was handling the pending charges, all of Keir Johnson's [Bootsie's] charges. Some of those charges were dismissed, they were not dismissed in any exchange for his testimony or anything regarding this [trial]." (R. p. 564, lines 20-25).

Petitioner objected on the basis that once Ms. von Herrmann is called to testify, the defense is "entitled to cross examine her on any issue relevant to this case" pursuant to Rule 611(b), SCRE. (R. p. 563, line 20 – p. 564, line 2). Petitioner intimated that by "calling a former solicitor to testify about her prosecutorial decisions," the State opened the door for Petitioner to cross-examine Ms. von Herrmann about "any issue relevant to this case," which would include her exercise of prosecutorial discretion. (R. p. 565, lines 10-13; R. p. 566, line 22 – p. 567, line 7).

The court green-lit Ms. von Herrmann's testimony only in reply to matters brought out through Petitioner's cross-examination of Bootsie, noting that a reply was entitled because

defense counsel raised the issue. (R. p. 565, lines 14-19). The court was not "going to allow [Petitioner] to delve into "prosecutorial ideas." (R. p. 566, lines 15-21).

The trial court then invited a proffer of Petitioner's cross-examination. Petitioner questioned Ms. von Herrmann on the following topics: (1) how long she was assigned to Petitioner's charges, (2) whether she ordered that cell phone records be analyzed in relation to the murder investigation, (3) about a scrivener's error in a former indictment which was later corrected and re-indicted, and (4) whether she ordered an analysis of shoe impressions related to the murder investigation. (R. p. 568, line 1 – p. 573, line 2). Dubba's counsel, Mr. Canty, questioned Ms. von Herrmann regarding (5) whether she was aware of jailhouse informants who could testify at Petitioner's trial, (6) whether she turned over any incriminating statements provided by third parties, and (7) what she remembered about being at the crime scene investigation immediately following the murder. (R. p. 573, line 24 – p. 576, line 8).

The trial court ruled that Petitioner could not "ask about a scrivener's errors in the previous indictment."[8] (R. p. 572, lines 10-16). Additionally, because Ms. von Herrmann was not the prosecutor trying the case at bar, the trial court also did not allow defense counsel to question her about whether "there was a witness [or statement] in this case whom she elected not to use." (R. p. 573, lines 4-16; R. p. 574, lines 2-14). The trial court otherwise placed no specific limitations on the proffered cross-examination.

At this point, *Petitioner withdrew his Rule 611(b), SCRE, objection* to the court's limiting Ms. von Herrmann's cross-examination. (R. p. 576, lines 9-13). The trial court responded that it may disagree with Appellant regarding the specific latitude the court intended to apply to Petitioner's cross-examination. (R. p. 577, lines 8-22).

[8] Petitioner does not take issue with this specific limitation in his brief.

Heather von Herrmann before the Jury—No Objections by Petitioner

First, the former assistant solicitor testified that Bootsie incurred a burglary first and an assault and battery first for an incident that occurred on April 28, 2013. (R. p. 580, lines 2-5). His then-girlfriend was the victim, and she asked for the charges to be dismissed because they resulted from an argument. (R. p. 580, lines 5-11). Information relayed by the victim indicated that "it was a mutual combat type situation and [Bootsie] had not broken into that house." (R. p. 580, lines 7-16). That case was dismissed "based on the victim's assurances." (R. p. 580, lines 12-16).

Second, Ms. von Herrmann testified that Bootsie incurred an armed robbery and a related weapons charge on October 14, 2009. (R. p. 580, lines 17-20). The State determined that the victim in that case was experiencing an unrequited affection for Bootsie and reported that Bootsie struck her and took $7 from her pocket. (R. p. 580, line 24 – p. 581, line 4). But the charge was dismissed due to a dearth of corroborating evidence: Bootsie was not wearing the clothing the victim reported him to be wearing when he was investigated shortly after the report, and law enforcement could not locate any weapon alleged to have been used in connection with the charges. (R. p. 581, lines 4-15). Ms. von Herrmann explained that it was "just not a prosecutable case," because if there is not "sufficient evidence to bring [it] to a jury," the State dismisses it. (R. p. 581, lines 15-21).

Third, the former assistant solicitor stated that prosecutors attempt to sort through their cases and go forward with ones that they "feel like are prosecutable, "but when they do not "feel like there [is] sufficient evidence to bring to a jury," they dismiss the charge. (R. p. 581, lines 16-21).

Fourth, she succinctly summarized that Bootsie's other charges "were dismissed on their

own merit for lack of evidence." (R. p. 582, lines 3-8).

Fifth, Ms. von Herrmann testified that she was called to the crime scene in this case "when the murder took place," and retained the file on this case until she left the solicitor's officer in October 2013. (R. p. 582, lines 9-25). She finished by testifying that she had no involvement in any decision making related to Petitioner's trial, which occurred approximately one year later in October 2014. (R. p. 583, lines 2-12).

Cross-Examination

Petitioner was then afforded a full, fair, and uninterrupted opportunity at cross-examination. (R. p. 583, line 17 – p. 588, line 4). Counsel for Petitioner's co-defendant was likewise afforded a full, fair, and uninterrupted opportunity. (R. p. 588, line 11 – p. 601, line 23; R. p. 609, line 9 – p. 610, line 11). The matters explored during this time expounded upon details in the timing of Bootsie's charges, their dismissal, and the development of evidence in this case. The State did object to relevance during Mr. Canty's cross-examination, but was overruled. (R. p. 599, line 22 – p. 601, line 23). During this time, Ms. von Herrman also testified, without objection, that it was not her practice to offer or promise to dismiss a charge as quid pro quo for cooperation. (R. p. 593, line 14 – p. 594, line 16).

Therefore, aside from limiting testimony related to a previous indictment which contained a scrivener's error, the trial court did not limit Ms. von Herrmann's cross-examination in any way. The only exception was a ruling that Mr. Canty not continue to examine Ms. von Herrmann on a topic which she testified she could not recall: whether defense counsel indicated at a preliminary hearing that Howard Parker was a potential witness in the present case. (R. p. 610, lines 1-12). Petitioner never renewed his Rule 611(b), SCRE objection.

B. Petitioner withdrew his objection, leaving the question presented unpreserved for review.

"An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

Certiorari should not be granted to review the question presented because Petitioner withdrew it at trial. "An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." *Ligon v. Norris*, 371 S.C. 625, 633, 640 S.E.2d 467, 472 (Ct. App. 2006) (holding issue unpreserved where initial objection withdrawn after *in limine* discussion of the issue). "[W]here an objection is expressly withdrawn, it cannot be raised on appeal." *State v. King,* Op. No. 5390 (S.C. Ct. App. filed March 16, 2016) (Shearouse Adv. Sh. No. 11 at 29). "Furthermore, a party may not argue on ground at trial and an alternate ground on appeal." *State v. Prioleau,* 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (citing *State v. Dickman,* 341 S.C. 293, 534 S.E.2d 268 (2000)).

The basis of Petitioner's objection was that the court should not allow the testimony of a former assistant solicitor who was once assigned to a co-defendant's charge because under the scope of cross-examination allowed by Rule 611(b), SCRE, her cross-examination could improperly delve into her exercise of prosecutorial discretion in relation to the case at bar. (R. p. 563, line 20 – p. 567, line 7). But Petitioner withdrew his Rule 611(b), SCRE objection to Ms. von Herrmann's cross-examination following a proffer of his cross-examination. (R. p. 576, lines 9-13). It appears from the record that Petitioner was able to conduct a cross-examination of Ms.

von Herrmann which was unlimited in the topics he desired to explore.[9] (R. p. 583, line 17 – p. 611, line 6). Because Petitioner withdrew and did not renew his objection, the question presently before this Court is unpreserved for review.

C. No bar applied to Ms. von Herrmann being called to testify as a former assistant solicitor because she was not an advocate for the State at the time of Petitioner's trial, because she served as a fact witness regarding a topic which became of consequence to the determination of Petitioner's guilt, and because her testimony did not offer an opinion on the truthfulness of the State's other witnesses.

Certiorari should additionally be denied on the question presented because the Court of Appeal's *per curiam* validation of the trial court's exercise of discretion in this case is supported by the facts and circumstances giving rise to Ms. Von Herrmann's testimony.

"The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice." *State v. McEachern,* 399 S.C. at 140, 731 S.E.2d at 611. Moreover, "[w]hen a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *Id.* at 137, 731 S.E.2d at 610. "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page,* 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008).

The reasons for the dismissal of Bootsie's collateral charges became of consequence to the determination of Petitioner's guilt due to the light cast upon those reasons by defense

[9] With the exception of proffered cross-examination on what was found to be as scrivener's error in relation to the victim's name on a previous indictment. Petitioner was re-indicted with a corrected notice instrument. (R. p. 572, lines 10-16; R. pp. 917 – 918 Indictment).

counsel. Petitioner's cross-examination of Bootsie implied that the State dismissed his collateral charges in exchange for his implicating Petitioner in the victim's murder. Once Petitioner elicited testimony from Bootsie regarding why his other charges were dismissed by the State, the prosecution became able to corroborate Bootsie's cited reasons. The trial court did not err in allowing the former solicitor to testify.

The fact that the State's witness was a former prosecutor does not invalidate the trail court's exercise of discretion. "There is no statutory prohibition which prevents the calling of a prosecuting attorney by the *defense* as a witness, and generally speaking he is a competent witness to testify as to all relevant facts coming to his knowledge, except privileged communications." *State v. Lee*, 203 S.C. 536, 536, 28 S.E.2d 402, 404 (1943) (emphasis added). Our courts have held that "a criminal defendant has a right to call the prosecuting attorney as a witness, subject to the trial court's usual discretion to exclude witnesses or evidence." *State v. Quattlebaum,* 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000); *State v. Lee, supra.* The *Lee* court further recognized that "[i]t seems to be well settled that litigants, especially defendants in criminal cases, should not be hampered in their choice of those by whom they choose to prove their cases." *State v. Lee, supra* at 540, 28 S.E.2d at 404.

"Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case . . . . The propriety of allowing the prosecutor to testify is a matter largely within the trial Court's discretion." *Id.* at 540, 28 S.E.2d at 403. "It seems to be generally recognized . . . that the attorney for the State may properly testify under several contingencies in the course of the trial, -viz: where the State has been taken by surprise; and in other instances to meet the exigencies of the case" so long as the advocate and witness not be "mixed up in the same case." *Id.* (internal quotation omitted).

While calling a prosecutor as witness may be disfavored, our court has agreed with other jurisdictions and has refused to bar the possibility of calling a prosecutor to testify as a witness even where that prosecutor is participating as an advocate. *State v. Inman,* 395 S.C. at 557, 720 S.E.2d at 41. Our court has found that the prosecutor may testify so long as his or her testimony is "relevant and material to the theory of the defense and it must not be privileged, repetitious, or cumulative." *Id.* (internal quotations and alterations omitted).

Moreover, recusal is not *per se* required when a prosecutor acts as both a witness and an advocate. *Id.* (quoting 81 Am.Jur.2d *Witnesses* § 229 (2004 & Supp. 2011) ("There is no inherent right to disqualification when a member of the state attorney's office is called as witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown."). However,

> it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable.

United States v. Hosford, 782 F.2d 936, 939 (11th Cir. 1986) (rejecting the argument that a prosecutor should have been disqualified from prosecuting a particular charge because that prosecutor participated in negotiations for a use and immunity agreement that the government alleged the same defendant had violated); *see United States v. Thomas,* 193 Fed. Appx. 881, 887-88 (11th Cir. 2006) (court did not abuse its discretion by refusing to remove a prosecutor who was also a potential witness due to his prosecution of an underlying charge held by the same defendant).

The case at bar is distinguishable—Ms. von Herrmann did not prosecute Petitioner, nor

did she prosecute Bootsie's murder charge for the same case. The testimony at issue is that of a former prosecutor who made it known to the jury from the outset that she no longer worked for the State, but was engaged in private practice at the time of her testimony. (R. p. 289, lines 1-12).

Respondent submits that the propriety of Ms. von Herrmann's testimony as a fact witness merits the same analysis as is applied to the admissibility of a proffer agreement. Had Bootsie entered into a proffer agreement for his collateral charges, the proffer agreement would have been admissible as evidence relevant to bias, prejudice or any motive to misrepresent which Bootsie may employ. "[I]t is generally recognized that the existence of a plea agreement 'may be elicited by the prosecutor on direct examination so that the jury may assess the credibility of the witnesses the government asks them to believe.'" *United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983) (quoting *United States v. Halbert,* 640 F.2d 1000, 1004 (9th Cir. 1981)); *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006); *State v. Shuler*, *infra*, 344 S.C. 604, 634, 545 S.E.2d 805, 820 (2001); *State v. Willis,* 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010) (defendant's proffer agreement admissible for impeachment absent some affirmative indication the proffer was entered into unknowingly or involuntarily); *see also United States v. Spriggs,* 996 F.2d 320 (D.C. Cir. 1993) (permitting the prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not result in improper bolstering).

If evidence of a plea agreement is generally admissible, it follows that the absence of a plea agreement to other collateral charges is similarly admissible, especially where the defense presents to the court its intention to use that information to impeach the State's witness in the same manner it would utilize a proffer agreement for impeachment purposes. "At least where the

defendant plans to impeach a witness by showing the existence of a plea agreement, the government's direct examination need not be restricted to the scope of the defendant's intended cross-examination." *United States v. Henderson, supra* (citing *United States v. Whitehead,* 618 F.2d 523, 529 (4th Cir. 1980)). Defense counsel made it clear in the present case that he would be utilizing the dismissal of Bootsie's charges for impeachment, and the State was entitled to respond by presenting additional facts on this topic via the only witness with personal knowledge of why the charges were dismissed: the former assistant solicitor.

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), is additionally instructive regarding the admissibility of Ms. von Herrmann's testimony in this case. In *Shuler*, as in this case, the State's key witness was an inmate who previously lied to law enforcement, but who testified at trial that he initially lied out of fear and was now truthful. *Id.* at 627, 545 S.E.2d at 816-17. Defense counsel's cross-examination of this witness focused on previous deals made with the United States attorney in exchange for his trial testimony. *Id.* at 628, 545 S.E.2d at 817. "Defense counsel's cross-examination was extensive and focused on [the witness'] legal troubles and deals with law enforcement. The cross-examination effectively impeached [the witness] by demonstrating he had incentive to testify in order to cut time off his sentence." *Id.* Expecting the defense to impeach its witness on this point, the State questioned its witness on his truthfulness on direct examination and again on re-direct. *Id.* The court found the anticipatory examination appropriate given the circumstances:

> Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury. Most courts generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness.[10]

[10] *See generally United States v. Spriggs,* 996 F.2d 320 (D.C. Cir. 1993) (permitting the

> However, the Fourth Circuit Court of Appeals has found this freedom is not unlimited. *United States v. Romer,* 148 F.3d 359 (4th Cir. 1998) *cert. denied,* 525 U.S. 1141, 119 S.Ct. 1032, 143 L.Ed.2d 41 (1999). The Fourth Circuit Court of Appeals allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness' veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation. *Id.* at 369.

State v. Shuler, 344 S.C. at 628-29, 545 S.E.2d at 817-18 (footnote in original).

The *Shuler* court went on to find that the State neither implied that it held special knowledge nor guaranteed the witness' veracity during its examination or closing argument. *Id.* 629, 545 S.E.2d at 818. That court found that "[a]lthough no cautionary instruction was given by the trial judge, the Solicitor did not pursue the plea agreement [in detail] until re-direct examination." *Id.* That court found "no merit to Shuler's argument" because the Solicitor's questions occurred in large part after the witness' credibility had been attacked by the defense, and because the Solicitor "never personally vouched for the truthfulness of [the witness'] testimony," never insinuating he knew the truth better than the jury and never making an overt statement that he personally believed the witness' testimony to be true. *Id.* at 631, 545 S.E.2d at 819.

Shuler's holding in part relies on the finding that the State did not vouch for or bolster the witness' testimony. *Id.* "Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to

---

prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not result in improper bolstering); *Massachusetts v. Rivera,* 430 Mass. 91, 712 N.E.2d 1127, 1132 (1999) ("On direct examination the prosecution may, of course, properly bring out the fact that the witness has entered into a plea agreement and the witness generally understands his obligations under it."). *State v. Shuler*, *infra* at 634 n.2, 545 S.E.2d at 820 n.2.

the jury." *United States v. Sanchez,* 118 F.3d 192, 198 (4th Cir. 1997); *State v. Shuler,* 344 S.C. at 630, 545 S.E.2d at 818 ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); *see State v. Kelly,* 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds,* 534 U.S. 246, 122 S.Ct. 726 (2002) ("Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness' credibility.").

The former assistant solicitor's testimony in the present case fails to meet either definition. Ms. von Herrmann did not testify, nor was she questioned, regarding whether or not Bootsie was telling the truth. She offered no opinion. The State did not act through Ms. von Herrmann to assign credibility to Bootsie's implication of Petitioner. (R. p. 578, line 25 – p. 611, line 4). Instead, the State put direct evidence in front of the jury so that they could determine the totality of the facts surrounding the timing and dismissal of Bootsie's other charges, which became of consequence at trial because they were dismissed only after Bootsie implicated Petitioner in the victim's death. Therefore, her testimony "cannot be vouching, since [either the former prosecutor or the State] made no statement about [a] personal belief in the truth of the statement . . . . Likewise, it cannot be considering bolstering, as it does not refer to evidence not presented to the jury." *United States v. Sullivan,* 455 F.3d at 259.

Von Herrmann's testimony as a fact witness constituted permissible relevant evidence speaking to the topic of whether a testifying co-defendant embodied a motive to implicate Petitioner for the offense for which he stood trial. No bar applies. *State v. Inman,* 395 S.C. at 557-559, 720 S.E.2d at 41-42.

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari to the Court of Appeals. Respondent maintains that Petitioner withdrew his objection lending to the question presented. Additionally, for the reasons discussed above, the Court of Appeals was correct in affirming the trial court's exercise of discretion in allowing the former assistant solicitor to testify.

Respectfully Submitted,

ALAN WILSON
Attorney General

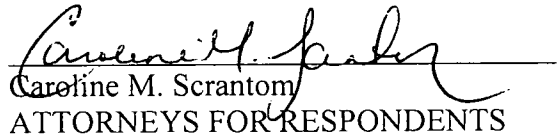
J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General
S.C. Bar No. 101357

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Caroline M. Scrantom
ATTORNEYS FOR RESPONDENTS

January 17, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

Appellate Case No. 2016-002513

THE STATE,

RESPONDENT,

V.

THOMAS JAMES,

PETITIONER.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two (2) copies of the same via United States mail, addressed to his attorneys of record at:

Robert M. Dudek, Esquire
SCCID/Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 17th day of January, 2017.

CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357