

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY

James R. Barber, III, Circuit Court Judge

Appellate Case Number: 2014-001774

RECEIVED

AUG 24 2016

SC SUPREME COURT

Phillip H. Crocker, III

Petitioner,

v.

State of South Carolina

Respondent.

Petition for Writ of *Certiorari*

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

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

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

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

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

STATEMENT OF THE CASE

The Richland County Grand Jury indicted the applicant, Phillip Crocker, III, for murder and trafficking 10-100 pounds of marijuana. Appendix (hereinafter "A.") 2567-68; 2570-71. From December 1-5, 2003, the State tried Crocker before the Honorable G. Thomas Cooper, Jr. and a jury. Douglas S. Strickler and E. Fielding Pringle represented Crocker. Kathryn Luck Campbell and Dietrich Lake represented the State. The jurors convicted Crocker as charged. Judge Cooper sentenced Crocker to thirty years imprisonment for murder and five years imprisonment for trafficking marijuana. The sentences are consecutive. A. 1480; 2569; 2572.

Crocker appealed the convictions and sentences. John Delgado and Katherine H. Hudgins represented Crocker. William Edgar Salter, III represented the State. The Court of Appeals affirmed the convictions and sentences. *State v. Crocker*, 366 S.C. 394, 621 S.E.2d 890, 892 (Ct. App. 2005).

On October 17, 2006, Crocker filed an application for post-conviction relief (hereinafter "PCR"). A. 1559-1630. The State served its return on May 4, 2007. A. 1631-38. Crocker amended the application on November 1, 2013 and January 9, 2014. A. 1664-1709; 1723-28. From January 21-23, 2014, the Honorable James R. Barber, III convened an evidentiary hearing. Tricia A. Blanchette represented Crocker. Megan Harrigan Jameson represented the State. By written order dated July 1, 2014, Judge Barber dismissed the Crocker's PCR. A. 2490-2552. On July 17, 2014, Crocker served his Rule 59(e), SCRPC motion. A. 2553-57. The State served a return on July 28, 2014. A. 2558-62. On August 6, 2014, Judge Barber denied this motion. A. 2563-65.

Crocker filed a notice of appeal, and this petition for writ of *certiorari* follows.

STATEMENT OF FACTS¹

Consuelo Casey lived in Latta, South Carolina all of her life and owned a barbershop in Dillon where she was a stylist. She met Nathaniel Casey, Jr., who she called "Junior," in 1992 and married him 2001. In November 2001, Junior "sold marijuana for a living." Through buying and selling marijuana, Consuelo and Junior planned to buy land and build a house. Consuelo contacted Willie Jennings,² who she knew from school and who dated a co-worker at her barbershop, about buying \$40,000.00 of marijuana³ because Jennings was connected to "people who had it in large quantities." Jennings scheduled a meeting at Consuelo's barbershop on November 20, 2001. Consuelo claims she, Junior, Jennings, and a man Jennings brought with him, that she did not know, were present at this meeting.⁴ Consuelo and Junior arranged to buy over fifty pounds of marijuana from the man accompanying Jennings. The sale was planned for the following day in Columbia. A. 239-64.

After lunch on November 21, 2001, Junior and Consuelo drove to Columbia in Junior's black Tahoe.⁵ Junior drove. According to Consuelo, she and Junior talked on

¹ The statement of facts is based on the trial record.

² Willie Jennings also testified for the prosecution. His testimony is discussed in detail in Question IX, *infra*.

³ Depending on the selling price, \$40,000.00 could buy forty to fifty pounds of marijuana. A. 250, line 14 – 252, line 3.

⁴ Sharon Miles, a client and friend of Consuelo's, was also present. Miles identified Crocker in a photo lineup presented to her by Investigator Gonzales at a McDonalds when Consuelo was present. Miles road with Consuelo to the McDonalds to view the lineup. A. 256, lines 14-25; 519-52; 570-74.

⁵ Consuelo and Junior had two guns in the car. A. 267-68.

the phone with the marijuana supplier, both prior to leaving Dillon and during the car trip to Columbia. Upon arriving in Columbia, the meeting location was changed from a toy store to the parking lot of the Lowe's located on Two Notch Road near the intersection with I-20. An old, dark gray station wagon with wood grain paneling⁶ followed them into the parking lot and "backed up" to the Tahoe. According to Consuelo, the man asked Junior "to help him take the container out of the car." Consuelo remained "in the front passenger seat doing [her] makeup in the mirror." Consuelo saw Junior put "a big blue, Tupperware like container" in the back of the Tahoe. Junior and the man "had some type of words," but Consuelo could not hear the conversation. Consuelo testified the man pulled a gun from the front of his clothing, shot Junior, and, "I knew [Junior] was shot because I saw him fall." She also saw blood. The man looked at Consuelo. She was "fanning" him away "so he wouldn't shoot me." Consuelo grabbed a blanket from the blue container and put it across Junior. She tried to call 911 and asked people in the parking lot for help. An ambulance took Junior to the hospital where he was pronounced dead. Consuelo initially claimed the man tried to rob Junior. Later, she claimed she was not truthful with the police about the drug deal because she "knew I was going to go to jail." Consuelo obtained a lawyer within two weeks of Junior's death because she was concerned about being charged with trafficking marijuana, disclosed the drug deal, and ultimately identified Crocker as the man that shot Junior. A. 264-97; 312-13.

On cross-examination, Consuelo confirmed she initially described "a dark station wagon, possibly blue" and the shooter being a black, male, about 6'2" tall, weighing

⁶ There were multiple descriptions of the station wagon.

“around 220” pounds. A. 302, Lines 12-14; 308, lines 2-23. Consuelo was the only witness at trial that identified Crocker as the shooter—or even being present at the time of the shooting.

James Davis, a self-employed contractor, was leaving Lowe’s when he heard a gunshot. He called 911. He heard Consuelo hollering. From 50-100 feet away, Davis observed a black, male about 6’2”⁷ get into an “Olds Cutlass Sierra Station Wagon with wood grain siding and beige in color.” He was able to get a partial tag number off the Georgia license plate. He gave this description to a bank security officer. A. 183-222.

David Gibson,⁸ a security guard and a nearby Bank of America branch, heard the gunshot and went outside to investigate. He saw Consuelo “at the parking lot in Lowe’s waiving her arms and saying, ‘Call 911.’” Gibson called 911 and tried to get information from Consuelo. She described a black man driving a station wagon that left in northerly direction. Gibson also got information from Davis. Gibson provided this information to law enforcement.⁹ A. 157-82.

Richland County Sheriff Deputy Jerry Cannon was in the Columbia Mall area and “heard a gunshot.” Shortly afterwards, he was dispatched to the Lowe’s parking lot. Consuelo was on top of her unconscious husband trying to control his bleeding. Deputy Cannon moved Consuelo away from her husband “so that he could get some medical attention.” Deputy Cannon spoke to Davis and Gibson. Gibson described to Deputy

⁷ Davis gave a statement to law enforcement describing the shooter as 5’11 to 6’0” tall, weighing about 165 to 170 pounds. A. 2004-05.

⁸ Gibson served 27 years in the Marine Corps, and his service included supervising M.P.s and correctional facilities.

⁹ Investigator Gonzales took a written statement from Gibson. A. 553-57.

Cannon "that it was a black male driving a small brown station wagon that fled on Two Notch Road northbound towards I-20." Deputy Cannon broadcast that description over the radio,¹⁰ secured the crime scene, and called for additional support. A. 131-57.

At the hospital, Consuelo gave Junior's cellphone to Richland County Sheriff Department Investigators Lancy Weeks and Rodney Gonzales, who retrieved numbers from the phone. The last call placed was to a number belonging to someone identified as "CROC." A. 557; 718-33.

Investigators determined the blue plastic container contained blankets, concrete blocks, and cement mix. A. 835. Jerry Russell, a forensic investigator with the Richland County Sheriff's Department processed the crime scene. He discovered fingerprints on the big blue plastic container and matched them to Phillip Crocker, II,¹¹ who is Phillip Crocker, III's father. A. 345-413. Zane Padgett, the supervisor over the Forensic Laboratory Unit and the Richland County Sheriff's Department verified the fingerprints on the blue plastic container matched Phillip Crocker, II. A. 483-503. At the hospital, Investigator Russell collected a gunshot residue kit from Nathaniel Casey, Jr.¹²

¹⁰ The Richland County Sheriff's Office BOLO for a black male, standing 6'2" tall, weighing 220 pounds, was Applicant's Ex. 38 at the PCR hearing. A. 2428.

¹¹ James Powell, a fingerprint analysis at the Mecklenburg County Sheriff's Department in Charlotte, North Carolina provided a fingerprint card with Philip Crocker, II's original fingerprints. A. 474-76.

¹² Ray Livingston, another forensic investigator from the Richland County Sheriff's Department assisted Investigator Russell collecting the GSR kit and transported it to SLED for analysis.

Crocker testified in his own defense. A. 1186-1335. He stands 6'8" tall. He attended college on a basketball scholarship and played professional basketball in Brazil until he hurt his knee. A. 1194-1205.

Crocker met Marty Morgan¹³ in 1989 in Laurinburg, North Carolina. They became friends, and Crocker would visit Morgan in Bennettsville, South Carolina. Morgan introduced Crocker to Willie Jennings in the summer of 2001. Crocker saw Jennings on only three occasions, always in the presence of Morgan. Morgan and Jennings visited Crocker's house on Sunday, November 18, 2001. Morgan stayed the night. Crocker did not know where Jennings stayed. The next morning, Jennings came back and stayed at the house with Morgan while Crocker went to court on a traffic violation. When Crocker came back that evening, Morgan and Jennings were at his house. They heated up and ate some food. Crocker gave Morgan a large amount of winter clothing and told him to carry it in "one of the containers or a duffel bag" in his garage. Morgan and Jennings left that night. A.1212-15; 1220; 1233-45; 1255.

In November 2001, Crocker's father stayed at Crocker's home in Charlotte, North Carolina. He suffered from depression, resulting in involuntary commitments, and abused alcohol and drugs, including marijuana. Crocker's father was the only person that had the key to the shed in Crocker's back yard where the marijuana was found. Crocker did not use or sell marijuana. Phillip Crocker, II's fingerprints probably got on the plastic container when he moved things around at the house. A. 1221-26; 1240; 1248-52.

On November 20, 2001, Crocker went back to court for another traffic violation, traveled around Charlotte some, and stayed at his home the rest of the day. Crocker

¹³ Marty Morgan died prior to Crocker's jury trial. A. 693; 2066-77.

never left Charlotte. Crocker never drove to Columbia. Crocker did not arrange a drug deal with William Jennings and Consuelo Casey. Crocker did not shoot Nathaniel Casey, Jr. A. 1186-88; 1254-57

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). Publications of the American Bar Association, the National Legal Aid and Defender Organization, public defender organizations, and state bar associations “are guides to determining what is reasonable.” *Id.* at 366-68. “Although they are only guides and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with . . . modern criminal prosecutions.” *Id.* at 367.

Once the defendant asserting ineffective assistance of counsel has established counsel’s failure to comply with the prevailing professional norms, under the second prong of *Strickland*, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

“If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (“Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness.” (emphasis supplied by court)).

Due process of law also requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). Certainly, appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a “brief that raises every colorable issue runs the risk of burying good arguments.” *Jones*, 463 U.S. at 752-53. Appellate counsel, however, is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its “ordinary and plain meaning,” pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985)). *And see Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609

(2002) (Appellate counsel's performance was deficient in failing to adequately raise or address merits of the issue of prosecutorial retaliation).

ARGUMENTS

The jurors sitting in judgment of Phillip Crocker, III never heard his defense. Consuelo and Nathaniel Casey, Jr. arranged a drug deal with William Jennings and Marty Morgan. Jennings and Morgan reneged on the drug deal and attempted to scam the Caseys. Willie Jennings used the suspect phone that supposedly belonged to "CROC."¹⁴ A. 926-41; 1441, lines 4-5. According to an investigative report, Morgan looked like the composite sketch,¹⁵ "knew that Junior had lots of money," and was trying to purchase a 9mm pistol in Latta. A. 2259. After viewing a photo lineup, Consuelo Casey told investigators she was "90%" sure Morgan shot her husband. A. 2264. Consuelo Casey ultimately conspired with Jennings and Morgan to frame Crocker for Nathaniel Casey, Jr.'s murder in order to avoid prosecution. Framing Crocker was easy because Jennings and Morgan had just visited Crocker in Charlotte and used items given to them by Crocker to fake the drug transaction.

¹⁴ Jennings failed a polygraph. A. 2441.

¹⁵ According to another investigative report, "Lutherine Williams (mother of Consuelo) has shown the composite around the Dillon area. She had indicated that several people in the area thought the composite fit the description of a subject named 'Marty.'" A. 2272.

Question I

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

As seen, immediately following the incident, Consuelo Casey described the shooter as standing 6'2" tall. James Davis gave a statement to law enforcement describing the shooter as 5'11 to 6'0" tall, weighing about 165 to 170 pounds. A. 2004-05.

The State called Dorothy Filiatreault, an expert analyst employed by the Trace Evidence Department at the South Carolina Law Enforcement Divisions (hereinafter "SLED"). She testified that a gunshot residue kit was properly collected from the victim and indicated that no gunshot residue was present on his hands. A. 594-602.

The State called Anne Vandersteenhoven, an anatomic and clinical pathologist, who performed the autopsy on the victim. The cause of death was a "penetrating gunshot wound with extensive brain injury." She found "a small, approximately one centimeter, [entrance] wound just to the lateral aspect of the mouth" and "a large exit wound, which was on the top of the head." "There were multiple fractures to the skull around the area of the exit wound." There was internal damage "from the area around the mouth out to the exit wound." She prepared a chart showing the path of the bullet wound. The autopsy did not reveal any evidence of stippling, gun power burns, or anything indicating a close or contact wound. A. 767-80; 785-78; State's Ex. 118.

On cross-examination and re-direct, Dr. Vandersteenhoven offered an opinion about how a person 6'9" could inflict a bullet wound that travels from the mouth to the

top of the head of a 5'6" person. Trial counsel did not challenge this explanation. A. 794, line 25 – 795, line 20.

The State called Dr. Clay Nichols, a forensic pathologist. He reviewed Dr. Vandersteenhoven's autopsy. Dr. Nichols concluded the victim died as the result of "a distant gunshot wound, which means that the muzzle was approximately 18 to perhaps even 24 inched away, at least, from [the victim] when the trigger was pulled." Dr. Nichols offered an opinion, without much explanation, about how a taller person could inflict a gunshot wound on a shorter person with and bullet path in an upward angle. Trial counsel did not cross-examine Dr. Nichols. A. 999-1005.

During closing arguments, trial counsel acknowledged the testimony from the pathologists and merely argued, "you get 6'8" firing at 5'6", and you don't get an angle like that, period." A. 1411, lines 7-19. The prosecutor countered:

You heard from Dr. Vandersteenhoven and Dr. Nichols. What is significant about what they told you? As I heard his [closing] argument, he said the one thing that they just can't get around, this was the winning point, the angel of the bullet.

Ladies and Gentlemen, I submit if it had been an upward in the stomach – no. The bullet went in the cheek the top of the head. It would be consistent with someone seeing someone pull out a gun to shoot at them, and that person reacting, just as people react when you see something coming at you, when you see a weapon coming at you, the automatic reaction of any human being is to flinch away, to pull away, from where the shot is coming. Is that consistent?

We aren't submitting to you that he stood out there for a long time and held him at gunpoint. That's not what happened. He pulled out the gun, and he shot him. The angle of the bullet is consistent with what Consuelo Casey said happened. It again corroborates what she said happened.

A. 1436, line 16 – 1437, line 10.

Prior to his jury trial, on May 13, 2003, Crocker wrote Strickler about the need to “obtain a Ballistics Expert to give a report of the scene scenario, [] autopsy report, and a trajectory of the shooting” about “the possibilities o[f] myself committing this murder due to my height and the victim’s height.” A. 2415. Crocker renewed this request in a letter dated June 16, 2003. A. 2419.

During the PCR hearing, Crocker called Wayne Hill as an expert witness, and the court qualified him as “homicide reconstruction specialist.” A. 1756-82. Hill reviewed extensive material including but not limited to Applicants Exhibits 2-5, which are a crime scene picture, gunshot residue test report (“GSR test”) regarding the victim, the autopsy report, and a document called a “death scene investigation review points.” A. 1783-86, Ex. 2230-39.

Hill noted the victim’s GSR test “was found to be negative by SLED,” indicating his hands were not “up in the area of the gunshot at the time it was fired.” No vehicles were “penetrated by the exiting projectile.” The autopsy did not report any “stippling from the unburned powder particle of an intermediate range wound” or “any soot from a close-range wound.” This information indicates a “distant wound.” A. 1788, line 22 – 1790, line 11. The range of a distant wound “starts at about 18 inches.” A. 1791, lines 21-25. Following the “rod that the medical examiner placed through the head” of the victim determines “the approach of that bullet, its trajectory.” A. 1793, lines 5-9.

Hill knew the victim was 5’7” tall.¹⁶ He considered potential shooters standing 6’8,” 6’0,” and 5’11.” Hill prepared a diagram (Applicant’s Ex. 6) showing the

¹⁶ Dr. Vendersteenhoven measured the victim to be five-feet, six-and-one-half-inches during the autopsy. A. 792, lines 7-11.

orientation of the three suspects and the victim in order to create the trajectory of the shot.” A 6’8” person “would have a difficult time achieving that position of the orientation of the two people.” Hill concluded “it is much easier for short in stature people” to make that shot. And, it is not possible for a 6’8” person to have fired the shot that killed the victim. A. 1793, line 10 – 1796, line 14; 1802, lines 1-25; Applicants Ex. 6.

Based on Hill’s expert opinion, both Willie Jennings and Marty Morgan are the right height to be the person that shot and killed Nathaniel Casey, Jr. A. 2119-25; 2138-43.

“Counsel has a duty to conduct an independent investigation.” National Legal Aid and Defender Organization (“NLADA”) Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.1(a). “Counsel should secure the assistance of experts where it is necessary or appropriate to the preparation of the defense, adequate understanding of the prosecution’s case; [or] rebut the prosecution’s case.” *Id.* Guideline 4.1(b)(7).¹⁷ *And see Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (“Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issues of both guilt and penalty.” (emphasis supplied by court)). “With the assistance of appropriate experts, counsel should [] aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.” *Ard*, 372 S.C. at 332, 642 S.E.2d at 597. *See also*

¹⁷ The South Carolina Commission on Indigent Defense Performance Standards for Public Defender’s and Appointed Counsel (Non-Capital), Standard 4.1(a) and 4.1(b)(7) are identical to NLADA Guidelines 4.1(a) and 4.1(b)(7). Although adopted after Mr. Crocker’s trial, the Commission noted the standards “are benchmarks taken from existing national standards.” *See* <https://www.sccid.sc.gov/resources/policies>.

McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered ineffective assistance when she failed to call an expert witness whose testimony supported the defense and failed to investigate medical evidence contradicting the State's experts' testimony).

The PCR court found trial counsel had a strategic reason for not employing a ballistics expert, concluding, "Trial counsel elaborated that he felt like he was able to successfully convey to the jury that it was unlikely that Applicant was the shooter based on the height discrepancy compared to with the entry and exit wound." A. 2523-27. The record does not support this conclusion. *Freiburger* and *Ingle, supra*. As seen, when cross-examining Dr. Vandersteenhoven, trial counsel merely pointed out the difference in the heights of Mr. Crocker and the victim. Counsel did not challenge her explanation about how a taller person could have inflicted this wound. Trial counsel did not even cross-examine Dr. Nichols. Counsel's assertion, "you get 6'8" firing at 5'6", and you don't get an angle like that, period," was effectively countered by the prosecutor who referred the jurors back to the testimony of the two pathologists.

Because of the height disparity between Crocker and the victim, the angle of the gunshot wound was one of the most significant issues in the case. Defense counsel did not call an expert witness to refute vague explanations by the two pathologists about how this would could have been inflicted by someone over a foot taller than the victim. Hill's PCR testimony explained how it is extremely unlikely that a person of Crocker's height could have fired the fatal shot. Crocker was prejudiced by not having his own expert witness. Hill's testimony undermines confidence in the verdict and creates a reasonable probability that Crocker would be acquitted.

This Court should grant the writ and consider the question.

Questions II

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

The State moved to exclude evidence of third party guilt.¹⁸ A. 2427. At a pre-trial hearing, the trial judge expressly asked Strickler to submit a brief on third-party guilt. Strickler never submitted that brief. A. 1997-2000; A. 2191-93.

At the PCR hearing, Strickler testified he has “never” been able to argue third-party guilt or even present that evidence to a jury. Strickler testified he had to “tiptoe” around that issue in this case by trying to raise inferences to the jury about Jennings’ guilt as the shooter. Martin Morgan, who stood 6’1,” was also someone that could have been involved in the shooting. A. 2119-25; 2138-43. Phillip Crocker, II, who’s fingerprints were found on the plastic container at the crime scene, also had the same physical description as the shooter.

The PCR Court concluded that *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 authority at the time of Crocker’s jury trial. A. 2532-33. Like other cases before it, *Gay* “held that evidence of a third party’s motive and opportunity to kill the victim is properly excluded where the appellant nonetheless fails to show that the proffered evidence is inconsistent with his guilt.” 343 S.C. at 549, 541 S.E.2d at 544. Here, Nathaniel Casey,

¹⁸ The State’s motion cited *State v. Gay*, 541 S.E.2d 541 (2001), *State v. Mansfield*, 538 S.E.2d 257 (2000), *State v. Beckham*, 513 S.E.2d 606 (1999), *State v. Bryan*, 485 S.E. 360 (1997), *State v. Williams*, 468 S.E.2d 626 (1996), *State v. Southerland*, 447 S.E.2d 862 (1994), *State v. Parker*, 366 S.E.2d 10 (1988), and *State v. Gregory*, 16 S.E.2d (1941). A. 2427.

Jr. died from a single gunshot wound. There was no evidence of a second shooter. The physical descriptions of the shooter more closely resembled William Jennings, Martin Morgan, and Phillip Crocker, II's fingerprints were found at the crime scene. Trial counsel denied his client the opportunity to argue one of these people killed Nathaniel Casey, Jr. by not briefing third-party guilt when the trial judge requested it.

Had trial counsel briefed our state's third-party guilt rule, there is a substantial probability of a different outcome of Crocker's jury trial. First, Crocker was prejudiced because presenting evidence and arguing third-party guilt was appropriate in this case, even under *Gay*. If Consuelo Casey, Willie Jennings, and Marty Morgan conspired to frame Crocker, then that proof is inconsistent with Crocker's guilt. Second, had trial counsel briefed the issue, it would have been apparent that our state's third-party guilt rule, as it existed at the time, was contrary to or involved an unreasonable application of the holdings in the United States Supreme Court opinions, *Rock v. Arkansas*, 483 U.S. 44 (1987), *Crane v. Kentucky*, 476 U.S. 683 (1986), *Green v. Georgia*, 442 U.S. 95 (1979), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967).¹⁹

This Court should grant the writ and consider the question.

¹⁹ Although *Holmes* held our state's third-party guilt rule unconstitutional, that case did not create a new rule of law, but rather was the latest expression of constitutional principals enunciated in *Rock*, *Crane*, *Green*, *Chambers*, and *Washington*.

Question III

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

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

Even if third-party guilt evidence was inadmissible under *Gay*, it became admissible when the Supreme Court decided *Holmes*. Crocker is entitled to the benefit of *Holmes* pursuant to S.C. Code Ann. § 17-27-45(B), as a constitutionally binding decision decided after his jury trial. *See e.g. Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

This Court should grant the writ and consider the question.

Question IV

Did trial counsel render prejudicial, ineffective assistance of counsel by failing to request a jury instruction on alibi²⁰ when Phillip Crocker, III testified he was somewhere else at the time of the murder?

Crocker testified he was at home in Charlotte, North Carolina at the time of Nathaniel Casey, Jr.'s death. He provided documentation of his activities. The Solicitor mocked the defense:

I must admit this case is unique. As I have listened to the defense over the last two days, hearing it, the defense in this case is, or seems to be, it's not trafficking . . . because he welched on the deal, and it's not murder because he used to be a nice guy.

And, "I've never seen the defense do this before. They just kick it around ***and act like he's not there.***" The Solicitor then focused on law enforcement finding marijuana, ammunition, plastic containers, and blankets during the search of Crocker's house. A. 1416, line 16 – 4118, line 20 (emphasis added).

Trial counsel did not request a jury instruction on alibi, and the trial judge did not instruct it. At the PCR hearing, trial counsel mistakenly believed that someone other than the accused had to testify about the alibi, which was not possible in this case because Crocker's father was deceased. A. 2116-18, 2215. The PCR Court, likewise, concluded:

In the present case, Applicant's only possible alibi witness was his father, who had passed away well before trial and before trial counsel was even appointed to the case. Therefore, Applicant did not have a viable alibi defense that could have been pursued at trial.

A. 2531.

Not only is this conclusion not supported by the record, it is a misstatement of the law. Where the accused claims to be at another place at the time of the crime, it is

²⁰ Crocker requested trial counsel obtain his cellphone records, but trial counsel failed to do so. A.t 1995.

reversible error not to instruct the jurors about alibi. *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980). “Counsel’s rejection of the charge at trial constitutes inadequate legal representation.” *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). *And see Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) (held that trial counsel provided ineffective assistance by failing to request alibi charge). Had trial counsel requested the alibi instruction, there is a reasonable probability the result would have been different. The prejudice was compounded by the Solicitor’s closing argument. *See Roseboro and Riddle*.

This Court should grant the writ and consider the question.

Question V

Did appellate counsel render prejudicial, ineffective assistance of counsel by failing to brief on appeal the Solicitor’s improper cross-examination of Phillip Crocker, III pitting him against State’s witnesses and forcing him into a position of having to provide a motive for those witnesses to testify falsely?²¹

Referring to Consuelo Casey, Nathaniel Casey, Jr., and Shannon Miles, the prosecutor cross-examined Crocker, “Just to make sure the jury can understand, there is no bias or prejudice or any reason they should hold something against you that you know of?” Trial counsel objected, and the trial judge sustained the objection. A bench conference followed where trial counsel moved for a mistrial based on the objection to the Solicitor pitting witnesses and requesting Crocker to comment “on the testimony of other witnesses in this case.” The prosecutor resumed, “Mr. Crocker, as I was saying, do you know of any grudge they would have against you, Ms. Casey, Mr. Casey.” Trial counsel objected again, but the judge overruled the objection. The prosecutor then asked,

²¹ Appellate counsel did not raise any issues on appeal contesting the murder conviction. By letter dated August 30, 2004, appellate counsel suggested to Crocker that the murder charge still could be reversed. A. 2058-59; 2447.

“Do you know of any grudge that Mr. Casey, Ms. Casey, Shannon Miles, would have against you?” Crocker answered, “Not in particular, but from what I’ve heard in the court session – its hard to say.” The prosecutor asked Crocker, “Do you want to say anything?” Crocker responded, “No. I’m just saying they accused me of an act I did not commit.” The prosecutor pressed, “Do you know of any reason, sir – my questions is do you know of any reason they would have a bias or a prejudice against you?” Trial counsel objected again, and the trial judge overruled the objection again. Crocker repeated, “Not in particular. . . . But from what I’ve heard in the court session, as I stated, possibly.” The prosecutor asked Crocker, “Did you need to say anything else on the subject?” Crocker replied, “No.” A. 1261-64; 1336-37.

The prosecutor’s questioning of Crocker was highly improper, prejudicial pitting of witnesses and contrary to a longstanding South Carolina case law. *State v. Brown*, 297 S.C. 27, 29, 374 S.E.2d 669, 670 (1988) (“we are compelled to reverse a conviction because the assistant solicitor forced Brown to attack the veracity of the investigating officers by inquiring whether the officers “made the story up” about Brown’s participation”); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988) (“It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness.”); *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 389 (1947) (prosecutor’s cross-examination was improper when defendants “were forced in effect to directly attack the veracity of the state’s witnesses”); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945) (cross-examination of accused as to whether sheriff had told the truth in previous testimony for state concerning statement allegedly made by accused while in jail was improper).

The prosecutor's improper questioning placed Crocker in a position of having to provide a motive for these three witnesses to testify falsely. This questioning could not have been more prejudicial. Had appellate counsel appealed this issue, the appellate court would have reversed the convictions and ordered a new trial.

This Court should grant the writ and consider the question.

Question VI

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

Investigator McDonald obtained cellphone subscriber and site information for Nathaniel Casey, Jr.'s cellphone, Willie Jennings's cellphone, Marty Morgan's cellphone, and the suspect cellphone. The prosecutor asked, "Can you explain to the jury when a phone is being used, how that can aid you in your investigation as to where a person is when they're using that phone?" Trial counsel objected because "he is not qualified to testify" about that information "as a police officer." A. 874.

Investigator McDonald's testimony was proffered outside the presence of the jurors. He and another investigator visited "a local Sprint office," showed them the records, "were instructed on how to decipher these records," and were provided with a key indicating what the information means. Trial counsel pointed out that the employees of the cell phone company would have the appropriate expertise to interpret the records. The trial judge overruled the objection. A. 875-95.

With the jurors present, Investigator McDonald testified and offered opinions about where cellphone calls were initiated and received. He testified and offered opinions about the location of the calls in relationship to someone traveling from

Charlotte to Columbia. A. 896-924. Over the same objection, the State re-called Investigator McDonald to offer additional testimony about the records. A. 1357-75.

In *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), this Court summarized the three-part process governing the admission of expert testimony. *And see* Rules 602, 701, 702, and 703, SCRE. First, the subject matter of the testimony must be something that requires the assistance of an expert. *E.g. State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). Second, “[t]o be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (internal quotations omitted). Third, the trial court must determine whether “the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Here, interpreting the cellphone subscriber information and site records required expertise Investigator McDonald did not possess. Had trial counsel briefed this issue, the appellate court would have held the testimony inadmissible, reversed the convictions, and ordered a new trial. *See Watson* (witness offered to testify as an expert on cruise control system diagnosis was not qualified). Admission of the testimony prejudiced Crocker. The credibility of prosecution witnesses was critical to the State’s case. During closing arguments, the prosecution argued that these records established that Crocker himself arranged the drug deal and traveled from Charlotte to Columbia to commit the murder. A. 1440, lines 15-23. Admission of this testimony undermines confidence in the verdict.

This Court should grant the writ and consider the question.

Question VII

Did trial counsel render prejudicial, ineffective assistance of counsel by not moving to suppress the three search warrants for out-of-state cellphone records when the magistrate court judge lacked jurisdiction to issue those search warrants?²²

Investigator McDonald obtained three search warrants to obtain cellphone records from Verizon Wireless in Bedminster, New Jersey, Sprint PCS in Overland Park, Kansas, and Cingular Wireless in Atlanta, Georgia. A. 2283-94. None of the judges issuing these search warrants had “jurisdiction over the area where the property sought [was] located” in these other three states and, therefore, lacked jurisdiction pursuant to S.C. Code Ann. § 17-13-140. Trial counsel did not move to suppress the evidence obtained pursuant to these search warrants. *See State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987) (suppression was appropriate remedy for failure to comply with warrant statute). Failure to move to suppress a search warrant can constitute ineffective assistance of counsel under some circumstances. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *And see e.g. Gantt v. State*, 354 S.C. 183, 580 S.E.2d 133 (2003). As seen in Question VI, *supra*, Crocker was prejudiced by the State’s use of the phone records as circumstantial evidence he arranged a drug deal and traveled to Columbia to commit the murder.

This Court should grant the writ and consider the question.

Question VIII

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

The General Court of Justice, District Court Division, in Mecklenburg County, North Carolina, issued the search warrant for Crocker’s house, “[t]o any officer with

²² Following the PCR hearing, Crocker briefed this issue. A. 2469-74.

authority and jurisdiction to conduct the search.” A. 2352. Deputies and investigators of the Richland County Sheriff’s Department, however, forced entry into Crocker’s home, detained him, and conducted the search. E.g. A. 848-72. Even the search warrant return is written on a Richland County Sheriff Department form. A. 2357. Following the PCR hearing, Crocker briefed the relevant North Carolina law. A. 2477-87. Counsel can be ineffective for failing to challenge a search warrant. E.g. *Kimmelman* and *Gantt, supra*. Crocker was prejudiced by the State’s use of items found at his residence as circumstantial evidence he arranged a drug deal and traveled to Columbia to commit the murder.

This Court should grant the writ and consider the question.

Question IX

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

Willie Jennings testified for the prosecution. He previously lived in Latta, South Carolina and Raleigh, North Carolina. Jennings met Crocker through Marty Morgan. Jennings made Compact Discs of music. Morgan was working on a basketball documentary with Crocker. Jennings would go with Morgan to see Crocker, including visiting Crocker’s house in Charlotte, North Carolina. Jennings also knew Consuelo Casey. Consuelo asked Jennings if he knew where she could get some marijuana. Jennings claimed he asked Crocker if he could get the marijuana. Jennings further claimed he introduced Consuelo and Crocker by arranging a meeting at Consuelo’s barbershop. Junior was at the meeting, but Jennings did not deal with him directly.

Jennings testified he was supposed to receive \$500.00 for arranging the deal. Jennings claimed he learned of the shooting from Consuelo. A. 625-60.

The State arrested Jennings and charged him with trafficking 10-100 pounds of marijuana. Jennings was released on a personal recognizance bond. The charges were still pending when Jennings testified at Crocker's trial. Jennings' attorney was present when Jennings testified. The following occurred during cross-examination:

Q: And I understand from your testimony to Ms. Campbell, that no one has promised you anything in exchange for your testimony, right?

A: That's right.

Q: Okay. You certainly hope to better yourself or your position as far as your charge goes though your testimony here, don't you, sir?

A: I mean, sir, really at this point in my life, I really don't care about that.

Q: You don't care about that?

A: No, I don't.

Q: You realize that you're facing up to 10 years in prison?

A: That's fine.

Q: On the trafficking charge.

A: Uh-huh.

Q: And that's no concern to you at this point?

A: Not right now.

Jennings, accordingly, claimed he did not have a deal with the prosecution and suggested he was willing to go to prison for up to ten years. The Solicitor did not correct Jennings' testimony. The Solicitor later argued in closing, "He got charged with this offense. He's still charged with this offense, his part in it." A. 668-72; 1428. After

Crocker's trial, the State dismissed Jennings' charge without ever having sought an indictment. A. 2030-31; 2444.

Trial counsel should have moved for a new trial, pursuant to Rule 29, SCRCrimP, based on after discovered evidence. *Giglio v. United States*, 405 U.S. 150 (1972) (due process requires prosecutor to disclose all material evidence to the jurors, including any promises regarding future prosecution); *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) ("The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching.").

The prosecutor and Jennings mislead the jurors into believing that Jennings would go to prison, thereby resulting in prejudice to Crocker. The improper tactic implicates Crocker's Sixth Amendment right to confront and cross-examine Jennings. *See also* S.C. Const. Art. I, § 14; S.C. Code Ann. § 17-23-60. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). *See also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted."); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the

possible sentence for a defendant who faces the same charges as a witness against him.”). See also *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012) (“The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.”); *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (“The fact [a cooperating witness] was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury.”).

In cases implicating the Confrontation Clause,

[w]hether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). This Court has applied the *Van Arsdall* factors and held improperly limited cross-examination required new trials. *Mizzell* and *Gracely*, *supra*.

After a full investigation and preparation for a lengthy murder trial, it is highly improbable that the Solicitor's Office did not already have plans to dismiss Jennings' charge after Crocker's trial. This “wink-and-a-nod” tactic occurs far too often in our state. “[P]rosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice.” *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (internal citations and quotations omitted) (citing *State v. Quattlebaum*, 338 S.C. 441,

527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). This Court consistently warns prosecutors about adopting a “win at all costs’ attitude.” *State v. Inman*, 395 S.C. 539, 564, 720 S.E.2d 31, 45 (2011). *See also State v. Dawkins*, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989) (“This case is a prime example of a prosecutor striving to obtain a conviction regardless of the costs, only to have the conviction reduced to vulnerability because of the improper tactics utilized.”).

The order of dismissal stated, “This Court finds that had trial counsel made a motion for a new trial pursuant to Rule 29(b), SCRCrimP, this motion would have been denied because the dismissal of Jennings’ charge would not “probably change the result if a new trial is granted.” This finding overlooks the fact that Jennings’ credibility was central to the prosecution’s weak case. Reasonable jurors would view, as more credible, a witness legitimately facing ten years imprisonment. Reasonable jurors would view, as less credible, a witness completely escaping criminal responsibility for arranging a drug deal that resulted in a murder. The jurors, accordingly, should have been told Jennings’ charge would be dismissed.

This Court should grant the writ and consider the question.

Question X

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

Consuelo Casey testified that, within two weeks of her husband’s shooting, she retained a lawyer in case law enforcement charged her with trafficking marijuana.²³ Consuelo’s lawyer was present during multiple meetings with investigators. Consuelo

²³ During the investigation, Consuelo Casey was hospitalized for mental health breakdown and prescribed medication. A. 2258; 2273.

continued to make false statements and conceal the identity of Willie Jennings. In order to get Consuelo's cooperation, law enforcement granted Consuelo immunity from prosecution for trafficking 10-100 pounds of marijuana. A. 959, lines 15-25. Consuelo downplayed the grant of immunity, and trial counsel never cross-examined her about her facing ten years imprisonment for this offense. A. 311-15. Despite not asking these questions, the PCR Court concluded trial counsel fully explored Consuelo's "motivations for testifying." A. 2514.

As seen in Question IX, *supra*, Crocker had a right to confront and cross-examine Consuelo about avoiding prosecution and imprisonment. U.S. Const. Am. VI & XIV; S.C. Const. Art. I, Sec. 14; S.C. Code Ann. § 17-23-60; and Rule 608(c), SCRE. *See Gilliam, Sims, Mizzell, Gracely, and Brown, supra.* Trial counsel was ineffective for not impeaching Consuelo in this manner. *See Miller and Ard, supra.* Here, Consuelo's testimony was crucial to the prosecution's weak case. Crocker, accordingly, was prejudiced by trial counsel's deficient performance. *Van Arsdall, supra.*

This Court should grant the writ and consider the question.

Question XI

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

As seen, Casey Consuelo and, eventually, Willie Jennings received immunity from prosecution for trafficking 10-100 pounds of marijuana for their testimony. Trial counsel did not request the following instruction:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine

whether the informer's testimony has been affected by interest or by prejudice against a defendant.

United States v. Brooks, 928 F.2d 1403, 1409 (4th Cir. 1991) (citing Section 17.02 of *Devitt and Blackmar's Jury Practice and Instructions* (3d ed. 1977)).

“Under the authorities, an informer cautionary instruction is only appropriate when ‘the individual supplying the information generally is either paid for his services or, having been a participant in the unlawful transaction, is granted immunity in exchange for his testimony.’” *Brooks* at 1409 (quoting *United States v. Miller*, 499 F.2d 736, 742 (1974)). Consuelo admitted to participating in arranging an unlawful drug transaction, and law enforcement promised her immunity in exchange for her cooperation. The charge was appropriate, and trial counsel was ineffective for not requesting it.²⁴ *See e.g. Riddle v. State* and *Roseboro, supra*. Had trial counsel requested the instruction, the jurors would have been less inclined to believe Consuelo Casey’s testimony.

This Court should grant the writ and consider the question.

Question XII

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

When charging the law of murder, the trial judge emphasized multiple examples of inferred malice based on the use of a deadly weapon, commission of another felony such as trafficking in marijuana, preparation, and lying in wait. A. 1453-55.

²⁴ The PCR judge concluded that *Brooks*, holding it not error to refuse the instruction, was similar to Consuelo’s situation. A. 2510-11. The record does not support this conclusion. *Brooks* “was paid nothing, nor was he promised immunity for his testimony, nor did he seek ‘personal advantage or vindication’ by his testimony.” 928 F.2d at 1409. Here, Consuelo was promised immunity in exchange for her cooperation. See A. 2512 (PCR Court finding Consuelo was promised immunity).

“Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. Art. V, § 21. “A Judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony . . . without violating the prohibition of the Constitution as to charging upon the facts.” *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244, 249 (1942). *And see State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) (when instructing jury on involuntary manslaughter, court was not required to provide specific factual examples of legal provocation that amounted to comments on the facts) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Hartley*, 307 S.C. 239, 240–41, 414 S.E.2d 182, 183 (Ct. App. 1992) (instructing “absence of a motive is a circumstance to be duly considered in weighing the question of guilt constitutes an impermissible charge on the facts). Here, the trial judge’s instructions expressed an opinion about the weight of the State’s evidence.

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

This Court should grant the writ and consider the question.

Question XIII

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

During closing, the Solicitor argued, "Malice may be inferred from the willful deliberate, and intentional doing of an unlawful act, and nobody is going to argue that taking a gun to a drug deal is an unlawful act, without just cause or excuse." A. 1835. And, "The law says if one intentionally kills another during the commission of a felony, and the judge will tell you trafficking in marijuana is a felony, the implication of malice may arise." A. 1386-87. The Solicitor concluded:

[Crocker] chose to involve himself in a drug deal. He chose to go there without drugs, and to try to fake it. He chose to take he gun with him, and when things got out of hand, I submit when Nathaniel Casey looked in there and saw it wasn't drugs, he panicked. That doesn't reduce it from murder to manslaughter, because he is committing a felony. . . . The State asks you to hold him responsible for what he did. He came to Columbia, he set up a drug deal, first at a toy store, and then at the Lowe's. When things went bad, he took care of business.

A. 1442.

The order of dismissal did not consider the entire argument on this subject. A. 2541. The prosecutor essentially argued that guilt for trafficking equated to guilt for murder but did not recite the permissive inference language mandated by *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). And see *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (burden of proof was shifted in violation of due process clause by instruction that malice could be implied or presumed from willful, deliberate, and intentional doing of unlawful act without just cause or excuse or from use of deadly weapon deliberately,

intentionally, and without just cause or excuse to take life of another). This argument denied Crocker procedural justice. *Jones and Quattlebaum, supra.*

This Court should grant the writ and consider the question.

Question XIV

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

The credibility of Consuelo Casey and William Jennings was crucial to the prosecution's case. During closing argument, the Solicitor argued:

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. What makes her credible? You heard from Willie Jennings. 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 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?

A. 1392-93 (emphasis added).

The PCR Court concluded this argument was "neither objectionable nor improper vouching." This Court, however, consistently holds:

A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. 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.

State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (internal citation omitted).

The prosecutor's argument expressed a personal opinion about the credibility of Consuelo Casey and Willie Jennings. By ***begging*** the jurors to believe these two

witnesses, the prosecutor placed her prestige behind their accounts. Trial counsel was ineffective for not objecting to this argument. Crocker was prejudiced because Consuelo and Jennings were the two key witnesses for the prosecution. Their “credibility was crucial to the government’s case.” *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (state improperly vouched for witness’s credibility in its opening statement and prejudice clearly flowed from counsel’s erroneous failure to object to opening statement).

This Court should grant the writ and consider the question.

Question XV

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

At trial, Crocker testified he knows Jeff McInnis, a professional basketball player in the N.B.A., and they operated a summer basketball camp together. A. 1235.

Pringle’s role for the defense included interviewing and presenting character witnesses. At the PCR hearing, she testified there were character witnesses that were available that she did not call as witnesses. A. 2108. *And see* A. 1476-77 (Trial Counsel stating more character witnesses were available).

Cynthia McInnis is Jeff McInnis’ mother. She had known Crocker “for about five years, saw him quite a bit with the Hoop Family Summer League.” She could have testified about how Crocker dressed, including the “jewelry he wore,” and “her opinion about his reputation and nonviolence.” Pringle thought McInnis would be a good witness. A. 2208, line 16 – 2209, line 11; 2134, line 21 – 2135, line 15; 2466.

Former NBA star Jeff McInnis²⁵ testified at the PCR hearing that no one from Crocker's defense team contacted him. Had he been contacted, McInnis would have been very willing to testify as a character witness. A. 2223-25.

Crocker wanted Cynthia and Jeff McInnis to be character witnesses during his jury trial. A. 1841. Pringle recalled speaking to Cynthia McInnis but not Jeff McInnis. At the PCR hearing, she could not recall who Jeff McInnis was. Both witnesses lived in North Carolina, and Pringle testified she would not have been able to subpoena witnesses from out of state *in time for trial*. A. 2219, line 11 – 2221, line 12. The order of dismissal, however, states, "This Court also notes that most of Applicant's desired witnesses lived outside South Carolina and, therefore, could not be subpoenaed by trial counsel." A. 2529. This conclusion of law overlooks the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," S.C. Code Ann. § 19-9-10 *et. seq.*

Trial counsel had duty to interview Jeff McInnis and Cynthia McInnis, but no one interviewed Jeff McInnis. *Ard, supra* ("counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case" (emphasis original)). Trial counsel also had a duty to secure attendance of the witnesses at trial, but no one subpoenaed Jeff McInnis or Cynthia McInnis. *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650–51 (2008) ("petitioner clearly was prejudiced by Newell's failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial").

²⁵ Information about McInnis' N.B.A. career is located at <http://www.basketball-reference.com/players/m/mcinnje01.html> (last viewed Aug. 14, 2016).

Jeff McInnis would have been a significant witness. By testifying for Crocker, McInnis placed his reputation and, therefore, his N.B.A. career on the line.

This Court should grant the writ and consider the question.

Question XVI

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

At the PCR hearing, Crocker attempted to introduce an affidavit from Cynthia McInnis. Ms. McInnis had a doctor's appointment and other family obligations that prevented her from attending the evidentiary hearing. The PCR judge sustained the State's objection. A. 1941-42. Ms. McInnis' affidavit should have been admitted pursuant to S.C. Code Ann. § 17-27-80. *See e.g. Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) (PCR court did not abuse its discretion by allowing defendant to introduce over forty depositions and some twenty-two affidavits into evidence in lieu of live testimony); *Beckett v. State*, 278 S.C. 223, 294 S.E.2d 46 (1982) (judge did not abuse his discretion in considering an affidavit from the guilty plea hearing judge).

This Court should grant the writ and consider the issue.

Question XVII

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

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered "the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present

mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”²⁶

This Court has never before explicitly applied a cumulative prejudice analysis. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). This Court declined to do so in *Green* because Green failed to meet the threshold requirement of showing error. Specifically, this Court held that “[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect.” 351 S.C. at 197, 569 S.E.2d at 325. While the application of the cumulative error doctrine is an unsettled issue in this state, South Carolina recognizes the doctrine in other contexts. The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial.” *State v. Johnson*, 334 S.C. 78, 93, 512

²⁶ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. See, e.g., *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (“[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.”).²⁷

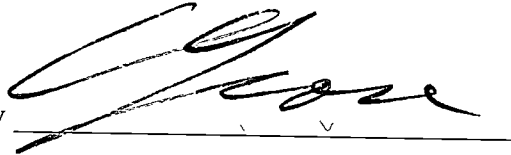
This Court should grant the writ and consider the question.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and consider the questions presented in this petition.

Respectfully Submitted,

By



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Attorney for Phillip Crocker, III

August 22, 2016
Greenwood, South Carolina

²⁷ The South Carolina Supreme Court denied the state’s petition for writ of *certiorari* on October 7, 2000. After granting Blurton’s cross petition for writ of *certiorari* on April 26, 2001, the Supreme Court ordered a new trial for Blurton on an additional ground. *State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY

James R. Barber, III, Circuit Court Judge

Appellate Case Number: 2014-001774

RECEIVED

AUG 24 2016

SC SUPREME COURT

Phillip H. Crocker, III

Petitioner,

v.

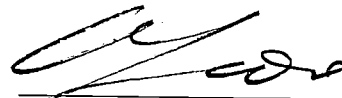
State of South Carolina

Respondent.

Certificate of Service

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

Megan Harrigan Jamison, Esquire
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August 22, 2016

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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AUG 24 2016

SC SUPREME COURT

Re: *Phillip H. Crocker, III vs. State of South Carolina*
Appellate Case No. 2014-001774

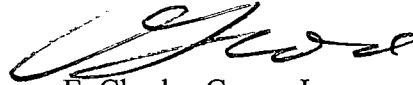
Dear Mr. Shearouse:

Enclosed for filing, please find the original and six copies of Mr. Crocker's Petition for Writ of *Certiorari*, along with certificate of service. The six volume Appendix will be filed by separate cover letter.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Megan Harrigan Jameson, Esquire