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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO HORRY COUNTY  
Court of Common Pleas  
Paul M. Burch, Circuit Court Judge

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Appellate Case No. 2016-001820

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Michael Tompai,

Petitioner,

v.

State of South Carolina,

Respondent.

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**BRIEF OF RESPONDENT**

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## **RESPONDENT'S ISSUES PRESENTED**

Did the PCR court properly deny relief from Counsel's failure to object to witness testimony comparing Petitioner's appearance to images captured on video surveillance, where there is no evidence the video was maliciously lost, where Counsel opened the door to such testimony, and where the witness' testimony was merely descriptive and did not affirmatively identify Petitioner?

## STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the May 2013 term of the Horry County Grand Jury for armed robbery (2013-GS-26-02087). William Thomas Floyd, Esq. represented Petitioner, and Scott Hucks, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On June 10, 2013, Petitioner proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Petitioner guilty as indicted on June 11, 2013. Judge Hyman sentenced Petitioner to imprisonment for a term of 17 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Tompai, Op. No. 2014-UP-276 (S.C. Ct. App. filed June 30, 2014). The Remittitur was issued on July 16, 2014.

Petitioner filed his application for post-conviction relief on May 11, 2015 (2015-CP-26-03502). He alleged the following grounds for relief in his application:

1. "My attorney Thomas Floyd was ineffective for failing to object to Joseph Cusick testifying that he observed a video of the armed robbery at the Kangaroo gas station at the end of Forestbrook and Dick Pond Road, and to what he said he viewed on that video. (See page 80, section 20 and page 81, sections 11-21 of trial transcript for more information)."
2. "My attorney Thomas Floyd was ineffective for failing to present character witnesses, and witnesses that were at my house with me Michael Tompai, when they said I armed robbed the Kangaroo gas station at the end of Forestbrook and Dick Pond Road. (See witness list in my discovery)."
3. "My attorney Thomas Floyd was ineffective for failing to investigate into my mental health background, mental state, and to request a psychiatric report be done."
4. "The state failed to disclose the video of the armed robbery at the Kangaroo gas station at the end of Forestbrook and Dick Pond Road, that they said I, Michael

Tompai robbed, which was potentially exculpatory evidence, regardless if they didn't have actual possession of the video, because it was known by officer Joseph Cusick who was acting on the government's behalf and said he observed the video. (See page 80, section 20 of trial transcript)."

5. "The trial court judge Larry Hyman violated my right to due process of law when the jury asked for him to clarify reasonable doubt for them and during that stated that if they have reached a verdict that goes beyond any reasonable doubt that the defendant may not be guilty, then you should return a verdict that say's this defendant is guilty. J (See page 144, section's 5-9 of trial transcript)."

Respondent made its return on February 2, 2016, and an evidentiary hearing into the matter was convened on May 11, 2016, before the Honorable Paul M. Burch. Petitioner was present at the hearing and represented by James K. Falk, Esq. Jessica E. Kianrd, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated August 11, 2016, and filed August 25, 2016, Judge Burch denied and dismissed the application.

## STATEMENT OF THE FACTS

On September 9, 2012, Richard Corrado was working as a store clerk at a Kangaroo convenience store at the corner of Dick Pond Road and Forestbrook Road in Socastee, South Carolina. (Appx. 71, ll. 3-16). Petitioner entered the store “from the forested side of the establishment,” which Corrado found odd, and immediately went to the restroom. (Appx. 71, ll. 21-24; Appx. 72, ll. 4-15; Appx. 76, ll. 19-25). Petitioner emerged, exited the store, and returned moments later armed with a gun and demanded money and cigarettes. (Appx. 71-72). Petitioner left with the money from the register and a carton of Marlboro Lights.

Corrado testified he had “[a]bout three or four minutes” of time to observe Petitioner before the robbery, and about as much time during the robbery itself, for a total of “[s]ix to eight minutes” of observation. (Appx. 72, ll. 11-20; Appx. 76, ll. 16-18). Corrado further testified he had received training to focus on specific details of a perpetrator’s physical description during a robbery, including “hair color, their eye color, their height, their weight, their build, their color, everything that matched their physical description.” (Appx. 72-73). Corrado described the perpetrator as five foot, four inches tall, 125 pound, brown-haired, white male, wearing a red hoodie and blue plaid shorts. (Appx. 77, ll. 16-19; Appx. 80, ll. 15-17). Corrado identified Petitioner from a six photo line-up and again in the courtroom at trial. (Appx. 74-75). When questioned about his certainty in identifying Petitioner, Corrado responded he was sure “[o]ne hundred percent beyond a doubt.” (Appx. 75, ll. 6-8).

The Kangaroo was equipped with video surveillance, but it was not available at the time of trial. Counsel first raised the question of a surveillance video during cross-examination of Corrado:

Q. All right, sir. Now, the Kangaroo store there, is it equipped with a video?

A. Yes sir.

Q. All right. And was there video taken of this incident?

A. To the extent of my knowledge, yes.

Q. What happened to it?

A. I'm not in control of the video, sir.

Q. Did you turn it over to the police?

A. Again, I'm not in control of that.

Q. Who was in control of the video?

A. My manager at the time.

(Appx. 77-78). Officer Joseph Cusick, of the Horry County Police Department, who first responded to the scene, testified his understanding was that the next shift of law enforcement would retrieve the video from the Kangaroo's manager when he could make it available. (Appx. 82, ll. 1-9). Cusick did not know why it was not picked up or what happened to it. (Appx. 82, ll. 10-16).

Cusick did, however, have an opportunity to observe the store surveillance while responding to the scene. (Appx. 81, ll. 5-8). Cusick first testified he was provided a suspect description and searched the area for a "white male, red hoodie, and blue plaid shorts." (Appx. 80, ll. 15-17). Cusick thereafter testified:

The part of the video that I viewed was a person matching the description that we were given, a white male, could be short in stature, a very small frame, from what I could tell, wearing a red hoodie.

I believe he had a hat on, which I believe -- it was hard to tell the color, but the design of the pants did seem to indicate plaid, and some dark-colored shoes, and I could tell that he was a white male as well. Approached the counter, point the gun at Mr. Corrado. There was an exchange of money and I think a carton of cigarettes, and then the subject left the store.

(Appx. 81, ll. 11-21). The solicitor shortly thereafter asked Cusick to compare the description he saw on the video to that provided by Corrado and that of Petitioner:

Q. And did the Defendant, Mr. Tompai, match the description of the person you saw on the video robbing that store?

A. Yes. That description I was given matched what I saw on the video.

Q. And does that match him?

A. Yes, as far as I can tell.

(Appx. 82, ll. 17-23). Counsel offered no objections to this testimony, nor did he cross-examine Cusick. (Appx. 82-83).

Petitioner was developed as a potential suspect by way of coincidence—Officer Jodi Ridgeway, HCPD, who “retired” to the area a year-and-a-half prior after 16 years of experience in law enforcement in Sumter, recalled responding to a civil dispute between Petitioner and his roommate six or seven weeks prior to the robbery. (Appx. 83-84; Appx. 89, ll. 4-17). Petitioner and his roommate were arguing over whether Petitioner had paid his share of the rent. (Appx. 84, ll. 18-20). When Ridgeway spoke to Petitioner, he “threw his roommate under the bus” and indicated the roommate had prior involvement with armed robbery. (Appx. 13, ll. 1-7; Appx. 84, ll. 20-25). Weeks later, after the Kangaroo robbery, Ridgeway suggested Petitioner as a possible suspect based on his similarities to the physical description of the perpetrator and the close proximity of his residence to the scene of the crime. (Appx. 85, ll. 3-23). Upon her suggestion, Detective Todd Cox, HCPD Major Crimes Section, independently observed Petitioner’s close proximity to the crime scene and physical description similar to the suspect description, and ordered a photo line-up including Petitioner. (Appx. 91-94; Appx. 98-101). On September 27, 2012, Detective Brian Wilson, HCPD, administered the line-up to Corrado who, as previously

indicated, confidently identified Petitioner as the robber. (Appx. 104-08). A search warrant subsequently executed on Petitioner's home produced no evidence. (Appx. 97, ll. 7-23).

In closing argument, Counsel argued the description provided was "very generic," that Petitioner did not have brown hair, but black hair, and that Corrado was mistaken in his identification. (Appx. 127, ll. 12-25). Counsel downplayed Cusick's recollection of the surveillance tape:

Because Officer Cusick testified that he's the only person that saw that video before it magically disappeared. He didn't testify it was six to eight minutes. He actually – I don't believe he even gave the time. He just said I observed his kind of clothing. I said at the start of this case that they're wrong about Michael Tompai being at the Kangaroo store that night. There's no straight line here, none at all. It criss-crosses.

(Appx. 128, ll. 13-20). Counsel further emphasized Corrado had no prior experience in dealing with Petitioner. (Appx. 129, ll. 5-12).

Only Counsel testified at the PCR evidentiary hearing. (Appx. 192-219). Counsel indicated he was unable to review the surveillance video because "[n]obody knew where the video was." (Appx. 196, ll. 5-13; Appx. 208, ll. 6-15). Counsel affirmed he knew prior to trial the video was missing. (Appx. 196, ll. 14-16). Counsel noted that he directed the investigator for the public defender's office to try and find a copy of the video, but as implied by his prior testimony, the investigator was unsuccessful in that effort. (Appx. 199, ll. 13-17). When asked if the State failed to prove the video was lost, Counsel expressed confusion as to the question and again affirmed "[n]obody knew where the video was." (Appx. 201, ll. 10-13). Counsel did express his opinion that he should have objected and indicated there was no strategic reason for his lack of objection. (Appx. 200, ll. 14-21).

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

## ARGUMENT

### I. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL HAD NO BASIS FOR OBJECTION UNDER THE BEST EVIDENCE RULE OR LAY OPINION RULE WITHOUT SOME BASIS TO ALLEGE THE VIDEO WAS MALICIOUSLY LOST, WHERE HE OPENED THE DOOR TO TESTIMONY ON THE VIDEO, AND WHERE THE TESTIMONY WAS MERELY DESCRIPTIVE AND NOT AN AFFIRMATIVE IDENTIFICATION.

The PCR court properly denied relief and found neither deficiency on the part of Counsel, nor any prejudice from his alleged deficiency, because there was no basis for objection and because the testimony in question was merely cumulative to other descriptions of the perpetrator, rather than to the Petitioner's identity. The validity of Counsel's conduct with respect to Cusick's testimony on the convenience store surveillance video is the *only* issue properly raised to this Court and, as such, this brief will not substantively address the wholly irrelevant and unpreserved appeal issues implicitly complained of in the Brief of Petitioner, such as remarks by the prosecution in opening and closing arguments, the vague reference to criminal conduct of Petitioner's former roommate, and the cured jury instructions. See State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) (quoting Langehans v. Smith, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal."); see also Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Buckson v. State, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018) (declining to consider the State's argument strategic reasoning was articulated to foreclose a finding of ineffectiveness where the issue statements said nothing about strategic considerations of counsel).

- a. Counsel was not deficient in failing to object under the “best evidence rule” because there was no basis for objection where the video recording was lost, where there was nothing to show it was lost in bad faith, and where Counsel opened the door to testimony on the video.**

First, Cusick’s testimony as to the content of the surveillance video was permissible in light of the loss of the video. Typically, “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required[.]” Rule 1002, SCRE. However, “[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]” Rule 1004(1), SCRE. In order to exclude evidence of the contents of a lost writing, recording, or photograph, there must be some evidence to show the original was destroyed through some bad faith of the proponent—exclusion of such evidence without evidentiary support for a finding of bad faith would be reversible error. State v. Halcomb, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct. App. 2009).

The video was indisputably lost, and there is no evidence in the record to show otherwise. To the contrary, Counsel made an independent effort prior to trial to locate the tape by way of an investigator, who apparently found nothing. Petitioner does not allege, and no evidence exists in the record, to show that the surveillance video was lost or destroyed in bad faith. The record exclusively shows the video was inexplicably lost and nobody knows what happened to it. In light of the evidence the video was lost, and the total lack of any allegation that it was lost in bad faith, let alone any evidence to support any such allegation, the State was entitled to offer other evidence of the contents of the surveillance video under Rule 1004(1), SCRE, in the form of Cusick’s testimony, as he had personally reviewed the video at the convenience store. Accordingly, there is sufficient evidence in the record to support the denial of relief by the PCR court.

Additionally, even if the video was otherwise objectionable, Counsel had already opened the door to testimony on the surveillance video, such that he could not thereafter object.<sup>1</sup> “[W]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially[.]” State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). The first testimony on the record regarding the video was elicited by Counsel while cross-examining Corrado. (Appx. 77-78).<sup>2</sup> Counsel’s cross-examination brought into issue the question of the video’s existence, what happened to it, and the nature of its content, so the State was entitled to elicit testimony from Cusick regarding the video and no basis for objection by Counsel there existed. Accordingly, though not relied upon by the lower court, Counsel’s opening of the door provides an additional sustaining ground upon which to affirm the PCR court’s denial of relief.

**b. Counsel was not deficient in failing to object to Cusick’s lay opinion comparing the description of the perpetrator to the surveillance video of the perpetrator to the Petitioner because it was a valid lay opinion as to the descriptions of the perpetrator, and not the perpetrator’s identity.**

Second, Cusick’s testimony comparing the description provided by Corrado, to the description he observed on the video, to the appearance of Petitioner in the courtroom, was valid and unobjectionable lay opinion not of the identity of the perpetrator, but his appearance. The South Carolina Rules of Evidence provide that:

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<sup>1</sup> Respondent concedes this basis for denying relief was not raised below, nor in the Return to the Petition for Writ of Certiorari, which focused primarily on arguing the testimony was merely cumulative. However, “[u]nder the present rules, a respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” I’On., L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

<sup>2</sup> Despite arguing numerous complaints about portions of the trial not raised in the Statement of the Issues, Petitioner has at no point taken exception to Counsel’s cross-examination of Corrado.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Rule 701, SCRE. Law enforcement officers regularly testify and compare persons, vehicles, and objects to descriptions thereof developed in the course of criminal investigation. See, e.g. State v. Blassingame, 338 S.C. 240, 246, 525 S.E.2d 535, 538 (Ct. App. 1999) (establishing probable cause to search defendant by testifying defendant matched the description of the suspect, and reason to arrest by testifying a utility knife matched the description of the suspect's weapon); State v. Jones, 273 S.C. 723, 728, 259 S.E.2d 120, 123 (1979) (establishing reasonable grounds to justify warrantless arrest by testimony matching defendant and his automobile to descriptions provided by the victim); Robinson v. State, 407 S.C. 169, 183, 754 S.E.2d 862, 869 (2014) (establishing reasonable suspicion to prolong a traffic stop by testimony matching vehicle passengers to approximate description provided in a BOLO); State v. Frazier, 394 S.C. 213, 220, 715 S.E.2d 650, 653 (Ct. App. 2011) (establishing probable cause to arrest by testimony matching defendant to general description of suspect).

Cusick never testified Petitioner was the person on the video, but only testified that Corrado's *description*, the description Cusick perceived on the video, and Petitioner's appearance all matched. Cusick so testified based on his own perception (he heard the description and viewed the video), the testimony was helpful to determining a fact in issue (increased the likelihood Petitioner was in fact the perpetrator), and did not require any special knowledge, skill, experience, or training (anybody can visually compare persons and things). Accordingly, the testimony was an admissible lay opinion of a law enforcement officer, and there was no basis for objection on the part of Counsel.

Petitioner zealously argues the law as it pertains to the *identification* of a person in a surveillance video, photograph, or recording, but the State didn't not ask Cusick to identify Petitioner as the perpetrator on the video and there was no such identification made by Cusick. Cusick merely compared descriptions, and testimony that descriptions matched is not tantamount to an identification. Compare New Oxford American Dictionary 863 (3d ed. 2010) (defining "identify" as a verb meaning to "establish or indicate who or what (someone or something) is" of mid-17<sup>th</sup> century origin definition "in the sense of 'treat as being identical with'"); Black's Law Dictionary 813 (9th ed. 2009) (defining "identify" as a verb meaning "[t]o prove the identity of (a person or thing)"); with New Oxford American Dictionary 353 (3d Ed. 2010) (defining "compare" as a verb to mean "estimate, measure, or note the similarity or dissimilarity between" or to "point out the resemblances to, liken to"). Stated simply, testimony that "X is the perpetrator" is very different from "X *looks like* the perpetrator," and the law which governs the former does not circumscribe the latter—the latter is probative but the former may well be dispositive. As such, Petitioner's exhaustive dissertation on the subject, is wholly irrelevant to the case at bar. Cusick merely compared descriptions, there was no basis for objection, and accordingly there is evidence to support the PCR court's denial of relief.

- c. **Even if Counsel should have objected, Petitioner was not prejudiced by the testimony as it was merely cumulative to the description of the perpetrator, not the perpetrator's identity, and because Counsel relied upon that description in challenging the State's case.**

Even if this Court determines that Cusick's testimony as to the content of the surveillance video was objectionable, and that Counsel had not opened the door to it and should have objected, there was no prejudice to Petitioner because it was merely cumulative to other descriptions of the perpetrator and ultimately formed a substantial portion of Counsel's defense.

The admission of inadmissible evidence is not reversible if the evidence is merely cumulative and therefore harmless. Sligh v. Johnson, 288 S.C. 364, 367, 342 S.E.2d 620, 623 (Ct. App. 1986); State v. Vick, 384 S.C. 189, 199-200, 682 S.E.2d 275, 280 (Ct. App. 2009) (in the context of hearsay); see also Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 399 (1938) (defining cumulative evidence “as additional evidence of the same kind to the same point.”); but see State v. Doctor, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) (“When a witness’ testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative.”); Thompson v. State, 423 S.C. 235, 248-49, 814 S.E.2d 487, 494 (2018) (quoting State v. Barrett, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989)) (“[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”).

In the present case, as previously discussed, Cusick did not identify Petitioner as the perpetrator, but merely described the perpetrator he witnessed on the lost surveillance video, and compared that description to the consistent description provided by the victim and that of Petitioner’s appearance. The jury already knew the perpetrator was a short, slight, white male wearing a red hoodie and blue plaid shorts—Corrado had already testified to that effect and, additionally, Cusick himself had already testified to that exact description recalling what was provided in the BOLO. Ridgeway testified after Cusick and also explained that she specifically suggested Petitioner as a person of interest based on his match to the description, the proximity of his residence to the crime location, and his need for rent money. Cox testified Petitioner matched the suspect description based on his own investigation in preparing the photo lineup from which Corrado ultimately identified Petitioner. Throughout the brief trial, law enforcement witnesses properly set forth the suspect description they were working with, and observed

Petitioner matched the description in order to justify the steps taken in the course of the investigation.

Finally, Counsel himself turned the description on its head in closing argument and identified it not as a strike against his client, but as a weakness in the State's case, criticizing it as generic. To the extent the PCR court denied relief simply because the error complained of did not rise to a level as to show a "reasonable probability" that the outcome would have been different, Counsel's reframing of the description as a point in favor is evidence to show that point—the description is specific, but sufficiently common that there is no reasonable probability the outcome at trial would have been different had it been excluded. That Petitioner is physically similar to the perpetrator was a given as that was the impetus to put him in the photographic lineup. Petitioner was not convicted because Cusick testified he looked like the perpetrator in the lost surveillance video—he was convicted because the jury was convinced by the firmness of Corrado's identification.

Petitioner's argument that Cusick's testimony constituted vouching and "placed the imprimatur of law enforcement on the identification" is entirely without factual or legal support. As to the "vouching," improper bolstering<sup>3</sup> occurs when one witness explicitly testifies to the truthfulness of another victim. See Briggs v. State, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017) (in the forensic interviewer context). Testifying to observations which are consistent with other testimony is not improper bolstering. Cusick never expressed an opinion as to Corrado's truthfulness. As to the "identification," as explained above, Cusick did not identify Petitioner as the perpetrator, but only noted he matched the descriptions available to him.

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<sup>3</sup> "Vouching" and "improper bolstering" are different concepts. When a witness speaks to the truthfulness of another witness, it is improper bolstering. See Briggs. When the prosecuting solicitor speaks to the truthfulness of a witness based on something outside the record, such as the solicitor's personal opinion or appeals to the prestige of the State, it is vouching. See Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016).

For all of these reasons, the record contains more than adequate evidence to support the PCR court's finding of no ineffectiveness of counsel, and its concordant denial of post-conviction relief.

### CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's denial of post-conviction relief, or otherwise dismiss certiorari as improvidently granted.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

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By:   
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*20 Sept.*, 2018

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

The Honorable Paul M. Burch Circuit Court Judge

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Appellate Case No. 2016-001820

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Michael Tompai, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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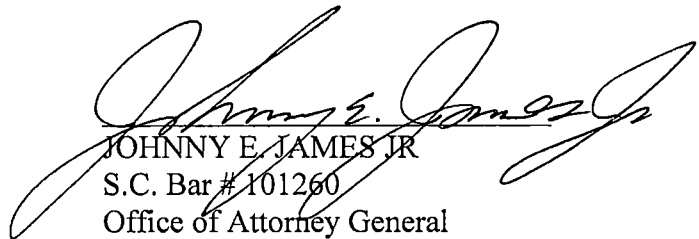
**CERTIFICATE OF SERVICE**

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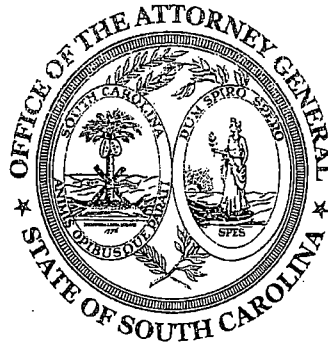
I, Johnny E. James Jr, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

**Susan B. Hackett, Esquire**  
**SC Commission on Indigent Defense**  
**Division of Appellate Defense**  
**Post Office Box 11589**  
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 20<sup>th</sup> day of September, 2018.



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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

September 20, 2018

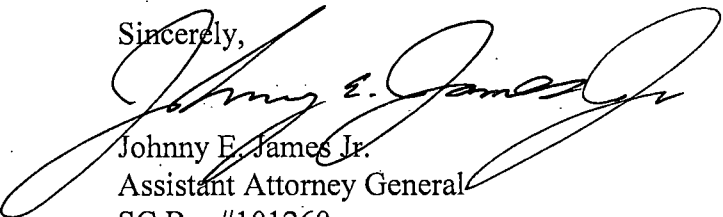
The Honorable Daniel E. Shearouse  
Clerk of Court — SC Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Michael Tompai v. State of South Carolina**  
**Appellate Case No. 2016-001820**  
**Lower Court Case No. 2015-CP-26-3502**

Dear Mr. Shearouse:

Attached are the original and fourteen (14) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,



Johnny E. James Jr.  
Assistant Attorney General  
SC Bar #101260

JEJ/mm

cc: Susan B. Hackett, Esquire  
Victim Advocacy Division (without enclosure)