

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County
D. Craig Brown, Circuit Court Judge

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S.C. SUPREME COURT

Fred Halcomb,

Petitioner,

vs.

The State of South Carolina,

Respondent.

Appellate Case No. 2019-000476

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. Petitioner failed to show a double-hearsay statement by a prolific jail house informant was material under Brady because the statement was consistent with the prosecution's theory of the case and Petitioner failed to meet his burden of showing a reasonable probability the result of the trial would have been different if the statement was disclosed to trial counsel.

II. Because Petitioner's codefendant was on death row and an escape risk, and the defendants were collectively suspected of arson and three murders, and because of the security issues inherent in the older, smaller courthouse, the enhanced security was reasonable.

III. Counsel was not ineffective for declining to object to Petitioner wearing a stun belt during trial because the stun belt was not visible.

STATEMENT OF THE CASE

Petitioner was indicted during the November 2004 term of the Marion County Grand Jury for murder. Scott Bellamy, Esquire, represented Petitioner. Then Fifteenth Circuit Solicitor Greg Hembree and Fran Humphries, Esquires, represented the State. Petitioner was jointly tried with his co-defendant, Luzenski "Allen" Cottrell. The jury found Petitioner guilty of murder on September 1, 2005. The Honorable J. Michael Baxley sentenced Petitioner to life imprisonment.

Petitioner appealed the conviction and sentence, and was represented by Robert Dudek, Esquire. The Court of Appeals affirmed by opinion dated March 11, 2009. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). This Court denied Petitioner's petition for writ of certiorari on April 8, 2010.

Petitioner filed an application for post-conviction relief (PCR) on October 12, 2010. An

evidentiary hearing was held on May 29-30, 2018, before the Honorable Craig D. Brown. Judge Brown denied the application by order dated February 14, 2019. Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP on March 4, 2019. The motion to reconsider was denied on March 22, 2019. Petitioner appealed the denial of relief and filed a petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

The State's theory of the case was in December 2002, the victim, Jonathan Love, was buried in the grave he dug with Petitioner's co-defendant, Luzenski "Allen" Cottrell, in an isolated plot of wooded land in rural Marion County. Petitioner, along with Diane Lawson, joined Cottrell and Love while they dug the hole. Cottrell shot Love at the gravesite while Petitioner and Diane Lawson waited back at Petitioner's car. See App. p. 149.

The State's theory for motive was on December 14, 2002, working at Petitioner's behest, Love and Cottrell unsuccessfully attempted to burn Brett Smalls' house down. The State's theory was Love became a liability and so Petitioner directed Cottrell to murder Love. App. p. 149.

Lawson testified she was Petitioner's girlfriend in 2002. App. p. 212. She testified about her knowledge of the intended arson. App. pp. 217-18. She testified she was present in the living room of the Cherry Grove house when, "[Petitioner] asked that Allen [Cottrell] go take Donnie [Morgan] with him to burn their house down, to kill them." App. p. 219, lines 2-4. The house belonged to someone she knew as Brett, whose house they visited before. App. p. 219. She later overheard in a telephone call by Petitioner that Jon-Jon [Love] would commit the arson and Donnie would get a gas can from Wal-Mart. She saw Cottrell and Donnie leave the house. App. pp. 221-22. After they left,

she was in the bedroom when Petitioner received a call from a person he referred to as “Black” (Cottrell’s nickname). In the first call, she heard Petitioner instructing Cottrell that Love should take the gas can and pour it around the house, then fill the bottle and put a piece of cloth in it and throw it in the window so it would blow from inside out. App. p. 224. Lawson recalled a second conversation in which Petitioner continued to talk about the planned arson. App. p. 224, lines 14-15. In the third conversation, Petitioner was upset because he didn’t know if it was done right. Petitioner told her to get dressed and they drove by the house to see if the arson was successful. She said there were fire trucks but no smoke “like nothing happened.” App. pp. 225-27. Petitioner was upset and complained “Allen couldn’t do anything without him” and “that [Love] was a liability.” App. p. 227, lines 3-4. Petitioner was still angry when everyone returned to the house. Cottrell told Petitioner “it had blown up,” but Petitioner didn’t think the arson was done right. App. p. 228.

Subsequently, she learned Petitioner “wanted for Allen to take [Love] to Highway 9 and get rid of him because he was a liability to him.” App. p. 229, lines 5-7. Lawson explained she later learned about their efforts to carry it out when she heard Petitioner on a telephone call with Cottrell the next day. Petitioner said he was upset “because Allen couldn’t do anything without him.” App. 230. Petitioner told her he might have to get rid of Cottrell also. App. p. 230, lines 16-20.

She testified that a few days later, Petitioner took her to a remote rural property Petitioner previously discussed buying. She testified one time Petitioner invited her former boyfriend to this property to target shoot with him. But she had never been to the property herself until this tragic night. App. pp. 230-33. It took a long time to get there and she was unfamiliar with the area. They went up a dirt road and Petitioner pulled in behind Donnie Morgan’s car. They walked from the car

into the woods where Cottrell and Love were digging a hole. Petitioner inspected the hole and told them they needed to corner it off. He showed them how with a shovel. App. pp. 232-37. Love and Cottrell continued digging while Lawson and Petitioner walked further into the woods. Petitioner pulled out his gun and told her he could never be too careful. Fighting the cold chill running up her neck, Lawson pleaded for Petitioner to take her back to the car; she promised she would never say anything. App. pp. 236-37.

Back at the car, Petitioner used a cloth to wipe a gun Cottrell gave him. Petitioner gave the gun back to Cottrell when Cottrell and Love returned for a smoke break. Cottrell and Love walked back towards the hole while she remained in the car. Petitioner opened the door and asked her to tell him if she heard anything. She then heard several gunshots. Petitioner opened the door again and asked her if she heard anything and she told him yes. Petitioner closed the door and walked back into the woods. She was by herself. Petitioner and Cottrell returned an hour later carrying shovels they put in the trunk of Morgan's car, Love did not return. App. pp. 239-40; pp. 295-97.

Petitioner told her to turn on the headlights if she saw anyone while he was gone. Petitioner told her she was not allowed to talk to anyone about it, including Cottrell. After they returned to the house, Petitioner told her "he had to go get rid of the evidence" and left with Cottrell for a while. Cottrell said she should have seen the smoke coming from Love's head "like a mushroom cloud" and Petitioner said Love gurgled as they covered him up. App. pp. 240-43.

Lawson cooperated with police when she was arrested and she drew a map for law enforcement to try and help find Love, but she did not even know what county the property was in.

She traveled with law enforcement twice to try to locate the body, but was unsuccessful finding her way to the plot of land. App. pp. 244-47.

Pathologist Dr. Allen Bennett performed Jonathan Love's autopsy on May 9, 2003, which was complicated by decomposition. Love received four gun-shot wounds, and two of the wounds – to the lung and the head – were fatal. Dr. Bennett recovered a projectile from the chest. App. pp. 301-12. A .357 revolver was found during Cottrell's arrest. App. pp. 473-76; pp. 483-84. Testimony by SLED Agent Vello Paavel established the projectile recovered from Love's body was fired from the .357 found during Cottrell's arrest. App. pp. 487-92.

Horry County Fire Chief Kenny Todd responded to a fire at Small's house on December 14, 2002. Based on the smell of gasoline and a positive indication from a combustible gas meter, Todd opined the fire was caused by arson. App. pp. 337-343. Small, who testified he was acquainted with Petitioner and Cottrell, confirmed burn damage to his house in December 2002. App. pp. 351-52.

Lindsay Bolton testified she met Cottrell in 2001 and was his live-in girlfriend. She recalled Petitioner showed her two new blue-handled shovels in the garage area in December 2002 at Petitioner's house. Bolton said the next time she saw the shovels, she was with Petitioner's fiancée, Alison, who threw the shovels in a dumpster sometime after Christmas in 2002. App. pp. 357-58.

Importantly, Bolton corroborated Lawson's testimony concerning Petitioner's involvement in the failed arson. She testified one night in mid-December 2002, she received a telephone call from Cottrell asking her to ride past the airport and see if there were any lights. She said he did not explain why, but told her to just to do it. She complied with the request and described to him that she saw nothing. Later, she also received a call and told both Cottrell and Petitioner that she saw

nothing by the airport, and they both got angry. She said she was sent back out after the second call and she saw an ambulance and fire truck. App. pp. 358-61.

During this time period, Bolton testified Cottrell would return home late at night, muddy and dirty. Cottrell complained the ground was not settling. After Cottrell's arrest, Bolton visited him at the Detention Center. During a visit, Cottrell laughed when he told her Love "used the bathroom on himself . . ." when Cottrell killed him. App. p. 363; p. 374.

Bolton played a significant role in solving the case. She was able to provide the first name of the owner, Doug, and Doug's address. App. p. 366. Subsequently, law enforcement found Love's body on Douglass Newman's rural property in Marion County in a grave. Newman confirmed he took Petitioner, Cottrell, and Alison Nelson to the property one time and gave them permission to visit the property whenever they wanted. App. pp. 396-400.

Detective Nathan Johnson testified Love's body was located in May 2003 on Douglas Newman's property. App. pp. 412-13. He testified about the three earlier trips with Diane Lawson to find the grave, but they were unable to locate the body. App. pp. 417-22. However, Lieutenant Scott Norton testified Lawson's drawing of the location was accurate with the only significant discrepancy that involved a fork in the dirt road. App. pp. 426-32.

STANDARD OF REVIEW

Appellate courts will uphold the PCR court's finding if supported by probative evidence. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. In a post-conviction relief action, an applicant bears 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).

The second and third issues raise claims of ineffective assistance of counsel. In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

ARGUMENT

I. Petitioner failed to show a double-hearsay statement by a prolific jail house informant was material under Brady because the statement was consistent with the prosecution's theory of the case and Petitioner failed to meet his burden of showing a reasonable probability the result of the trial would have been different if the statement was disclosed to trial counsel.

Petitioner alleges the PCR court erred in denying his claim of a Brady violation because the prosecution failed to turn over a statement by a noted jailhouse informant, Vander McCray. McCray did not testify at trial, although he was on the State's witness list. App. p. 21, line 6. The statement, contending Cottrell said he was alone when he shot Love, was consistent with the prosecution's theory of the case that Cottrell shot Love by the grave in the woods while Petitioner waited with Lawson by his car. Even assuming the statement was potentially exculpatory, it was not material. In response to a question posed by Petitioner's counsel, trial counsel testified it was "very speculative" the outcome of the trial would have been different if the notes of the interview were disclosed. App. p. 1117, lines 17-24.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963).

Brady is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: 1) the evidence was favorable to the accused, 2) it was in possession of or known to the prosecution, 3) it was suppressed by the prosecution, and 4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The prosecution has the duty to disclose Brady evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97, 107 (1976).

“Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense.” Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). “[T]he materiality element of a Brady claim requires a collective assessment of whether introduction of the exculpatory evidence might have affected the outcome of the trial.” See Winston v. Kelly, 592 F.3d 535, 556 (4th Cir. 2010). The mere possibility that an item of undisclosed information may be helpful to the defense in its own investigation is insufficient to establish constitutional materiality under Brady. United States v. Agurs, 427 U.S. 97, 109-10 (1976). The materiality standard constitutes a higher standard than “the customary harmless error standard.” Id. at 111-12.

Evidence is exculpatory and favorable if it “may make the difference between conviction and acquittal” had it been “disclosed and used effectively.” United States v. Bagley, 473 U.S. 667

(1985). “Evidence is material if it is likely to have changed the verdict.” United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010) (citation and internal quotation marks omitted).

The United States Supreme Court explained:

This special status explains both the basis for the prosecution’s broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term “Brady violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so called “Brady material” – although strictly speaking, there is never a real “Brady violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Strickler v. Greene, 527 U.S. 263, 281 (1999).

Petitioner claims the State committed a Brady violation by not disclosing notes of an interview by the Solicitor’s investigator, Dale Long, of Vander McCray. The report, dated March 25, 2004, attempts to memorialize an interview from March 11, 2004, and was accompanied by a cover memorandum from Investigator Long indicating Long interviewed McCray and, “MCCRAY stated he has been in Maximum Security with COTTRELL for several months, and that COTTRELL has confided a great deal in him, yet he was very thin with details.” App. p. 1155.

The statement indicates the following:

MCCRAY reported LUZENSKI had given approximately one-ounce of marijuana to Jonathon Love, which LOVE used and never paid for. MCCRAY stated LUZENSKI acted friendly towards LOVE so he would not be afraid. LUZENSKI then lured LOVE to an area in Marion County and had him to dig a grave for someone he was going to kill. MCCRAY reported that LUZENSKI admitted he shot LOVE in the head and chest once LOVE had dug the grave. MCCRAY stated LUZENSKI admitted that only he and LOVE were present when LOVE was murdered.

App. p. 1135.

Both Humphries and Senator Hembree testified that while the document was something they normally would disclose, both adamantly believed the statement was not exculpatory, although they both testified it was not intentionally withheld. Senator Hembree explained the statement was actually inculpatory because it supported Lawson's testimony that she and Petitioner were away from the grave site and out of eyesight when Cottrell shot Love. App. p. 917; p. 1034-35. As to the contention that Cottrell's motive to kill Love was over marijuana, Senator Hembree and Humphries both noted that was not exculpatory because Cottrell and Petitioner were confederates involved in drug transactions together. Senator Hembree explained no other evidence corroborated the claim about a dispute over Love failing to pay for marijuana. App. pp. 921-22; p. 928-29; pp. 1035-37; pp. 1046-47. Petitioner was found in Texas with fifty pounds of marijuana he planned to sell a few months prior to Love's murder. App. p. 881, lines 17-20. Humphries also noted because Love knew Cottrell, it "was beyond the pale" that Love would not pay Cottrell for marijuana. App. p. 929. Even Petitioner, in his petition, claims the statement is only "potentially exculpatory." Pet. p. 9.

Petitioner claims, "Certainly, an admission that the Applicant's co-defendant did precisely what the Applicant contended he did can be nothing less than material evidence." Pet. p. 9. However, the reality is the statement is an admission that Cottrell did precisely what **the prosecution** contended he did. Like the prosecution's theory of the case and the evidence presented, Cottrell – not Halcomb – lured Love to Marion County and had Love dig his grave. Further, consistent with the State's case, Cottrell – not Halcomb, shot Victim. Further, Halcomb was not present, and neither

was Lawson, when Cottrell shot Love – they were back at the car.¹ The Statement is not material because it is consistent with the State’s case.

Petitioner’s interpretation, that the McCray statement is exculpatory because it claims Petitioner was not present at the murder, is contrary to the remainder of the record. Under Petitioner’s interpretation, if Cottrell was alone in Marion County with Love, then Lawson would not be present either. However, the evidence overwhelmingly corroborated Lawson’s account that put her in Marion County at the gravesite as events unfolded. Lawson’s testimony is corroborated significantly by (1) Cottrell’s admissions to Bolton that he shot Love; (2) forensic evidence linking the gun found in Cottrell’s car to the bullet recovered from Love; (3) Bolton’s account of a phone call with Cottrell and Halcomb who were both mad when she did not see evidence of a successful arson; (4) Bolton’s testimony that she saw Halcomb with two brand new shovels; (5) Bolton’s testimony that Halcomb’s fiancé discarded the shovels in a dumpster after Christmas, 2002; (6) evidence that she knew Victim was buried in a rural plot before the body was found; (7) evidence from the land owner that Petitioner and Cottrell visited the same rural plot on a previous occasion; and (8) law enforcement’s testimony that Lawson’s map of the immediate area of the plot was mostly accurate. As trial counsel argued to the jury during closing argument, “Now, let me tell you this, Dianne Lawson knew something about what happened in Marion County ain’t no doubt about it.”

¹ Trial counsel’s closing argument underscores the statement’s consistency with the State’s case: “[T]he evidence is that at the time of the killing the only evidence produced by the state is that my client was in another location out of eyesight, could not see where the murder happened with the only witness who was there.” App. p. 523, lines 4-8. Counsel argued Lawson’s testimony only established mere presence and argued the evidence only showed Petitioner led her away from the scene while “Cottrell went back into the woods and some shots were fired.” App. p. 523, lines 14-25.

App. p. 581. The statement does not support Petitioner's interpretation unless the contention was Lawson lied by placing herself at the scene of murder, a rather counterintuitive supposition.

For his part, trial counsel testified that in his view, the statement was open to both interpretations and believed the document should have been turned over, although he noted he never had any discovery issues before with either of the prosecutors. App. p. 1080.

Counsel testified he would have liked the opportunity to investigate the statement, but noted, "Now, as to could I have used it, would I have used it, I can't really say. There would certainly have been problems with Mr. McCray on some credibility issues because of his history and some other things." App. p. 1080, lines 2-17. Counsel admitted without knowing what McCray might actually say, he was unable to determine if he could use the statement or call McCray to testify. Counsel explained, "[C]learly he was in a position of looking for some sort of assistance from the government, which I obviously could not give him." App. p. 1082, lines 5-11. Counsel expounded on that point further, "[A]s the solicitor Mr. Humphries indicated, you know, you get these letters, hey, I've got information, you know, you get these letters, hey, I've got information, I've got information and I want to go home, you know. I didn't get a letter from him saying, hey, I want to help Mr. Halcomb. So I don't know if he would have any willingness to help me or not." App. p. 1082, lines 12-18.

In Long's interview, the report indicated McCray also claims he spoke to Cottrell about the shooting of Officer Joe McGarry in Horry County. McCray claims Cottrell said he was driving and pulled over in a traffic stop and that Cottrell was holding a pistol by his leg when he approached the vehicle. App. p. 1135. Testimony from both prosecutors highlighted factual inaccuracies in

McCray's statement regarding the McGarry murder. Both prosecutors and Petitioner testified the murder did not occur during a traffic stop. Instead, McGarry entered Dunkin Donuts as Cottrell and Petitioner walked out the store. McGarry approached Cottrell and asked for his identification. Cottrell retrieved his gun from his waistband, not by his leg as stated in the McCray statement. Senator Hembree testified there was no evidence McGarry was following Cottrell and taking photographs, as claimed in the interview. App. pp. 888-89; p. 918; pp. 1035-36; p. 1135.

The State introduced a letter into evidence at the PCR hearing addressed to Solicitor Hembree, from McCray, dated April 31, 2004 – after the interview with Dale Long. The letter informs Hembree, “Well I have some more info on the Joe McGary [sic] Case plus I have more info about these two guys, Mr. Contrell [sic], Mr. Fred. I talk to Mr. Fred and he told me the hole [sic] story about what had happen that night he stated that.” App. pp. 1158-59.

The letter provides a new set of facts describing the McGarry murder which more closely track the actual events of that case. The letter further reads, “the reason that [I] told that guy what I told him is because I was scared these guys have pull with some big people” App. p. 1158. The letter concludes under McCray's signature, “There is a lot to these guys and I'm willing to put you down and I will take your little test.” App. p. 1159.

Trial counsel observed McCray appears to “back up” in this letter on the statement McCray previously gave to Investigator Long. McCray is continuing to ask the prosecutors for help. Counsel also expressed concern over a statement in the letter that McCray claimed to have been talking with Petitioner. Counsel explained, “Because potentially the concern is he's got – he's looking to give information on maybe Mr. Halcomb as well. Probably his main thought is, you got a guy who's

killed a police officer, but I've also got this other guy with two murders, maybe I can give information on both of them. And that would be a concern." App. p. 323, line 24 – p. 324, line 5.

McCray was well known to the prosecutors. Humphries testified McCray "was always looking for a deal." App. p. 924, lines 2-5. Senator Hembree later echoed this observation. App. p. 1037. Senator Hembree explained, "He was forever reaching out trying to get somebody to give him a deal and to try to get him to – you know, I want to help you, I want to give you information." App. p. 1037, lines 11-14.

Senator Hembree explained, "Even though we knew Vander McCray, and we kind of knew he wasn't a credible guy and probably nobody that we would use, we still wanted – you know, we wanted to go out and at least check it out. And that's what Dale Long did here." App. p. 1038, lines 6-14. Senator Hembree noted jailhouse informants often will "get one fact or they might read about it in the newspaper, they might hear it from – they might hear a guy say something, you never know. But they might see it on the news or hear it from their cousin. And then all of a sudden they take that one fact and they weave the rest of the story around it, and they got something to say." App. p. 1039, lines 3-11. Senator Hembree explained, "Well, this is pretty classic, a lot of inaccurate facts weaved in with one or two accurate facts. But it's a pretty common pattern, I mean among inmate snitches." App. p. 1039, lines 12-15.

Petitioner's PCR testimony impeached McCray's April 2004 letter. Petitioner claimed at the hearing that he never met McCray before. App. pp. 815-816, p. 817, lines 15-17, p. 889, lines 8-10. Petitioner changed his answer again to admit they were in the same dorm for a month when Petitioner went to prison after Petitioner was convicted, but he claimed he never talked to McCray.

App. p. 889, lines 11-23. Petitioner testified that if McCray claimed he had a conversation with Petitioner, that would be a lie. App. p. 890, lines 17-19. Note the tone of the April 2004 letter which suggests McCray is claiming to hold incriminating – not exculpatory – information about Petitioner. App. pp. 1158-59.

Asked on cross-examination if it was possible the outcome of the trial could have been different if the notes of the McCray interview were disclosed, trial counsel commented, “The word possible is such a big word. I mean, it’s possible, you know, that we have an earthquake tonight or today or a tsunami, but it’s not – it’s too speculative for me to give a definitive answer. I guess anything is possible, but without knowing the specifics of Vander McCray’s full statement and those sort of things, it’s just – **it’s very speculative.**” PCR Tr. p. 357, lines 17-24.

The PCR court found Investigator Long’s report of his interview with McCray was not disclosed and noted that although it believed the non-disclosure was not intentional, the fact disclosure was non-intentional did not change the analysis. App. p. 1199. The PCR court noted it agreed with the prosecutors that “the statement was not inconsistent with the State’s evidence at trial, although it certainly would be preferable such a document would have been turned over, as the prosecutors acknowledge.” App. p. 1199.

The PCR court found Petitioner failed to prove his claim because he failed to show “the statement was material in that there is any reasonable probability it would lead to useful evidence or affect the outcome of trial.” App. p. 1200. The PCR court concluded as follows:

. . . The statement itself represents an out of court statement by Investigator Long as to an out of court statement by McCray, as to alleged admissions by Cottrell. McCray did not testify at this hearing, so this Court would need to speculate on whether McCray would

have truly provided testimony that was exculpatory to Applicant and that such testimony would be credible. This Court could not possibly know on the evidence presented if McCray was indicating Applicant [sic] was alone because the others were back at the car, or if Cottrell, as filtered through McCray, was claiming to be truly all alone in Marion County. This Court notes McCray's reputation for seeking a deal from prosecutors, the letter in the prosecution's file seemingly recanting some of his previous statement, and inconsistencies in the statement itself about the McGarry murder, that are all additional factors that weigh even further against the likelihood McCray would offer helpful information for Applicant's benefit if he testified at trial. This Court finds Applicant failed to meet his burden to establish the interview report constituted material exculpatory information under Brady and denies this allegation.

App. p. 1200.

Petitioner relies on this Court's recent case of Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019). However, in that case, counsel was found ineffective for failing to elicit testimony from Martin's mother, an alibi witness, as to specific timelines found in mother's statement in counsel's file. No explanation was offered for why the testimony was not elicited. This Court found sufficient evidence of prejudice even though the mother did not testify at the PCR hearing. Id.

In the instant case, unlike Martin, there were numerous credibility issues with McCray's statement and questions over how McCray's statement could be interpreted. The statement was consistent with the State's theory of the case. The PCR court did not just rely on Petitioner's failure to call McCray as grounds for his failure to prove materiality, but pointed to numerous other problems with the statement. Counsel admitted in the instant case that it was highly speculative the statement could have led to a different result and there were a number of flags raised in assessing the potential for the statement to lead to useful evidence for his client.

Probative evidence supports the PCR court's conclusion. Buried in the multiple levels of hearsay that constitutes the McCray statement is a problem Petitioner never resolved – what did it mean in the writing when it claimed Cottrell said he was alone when he killed Love? The prosecution's interpretation that the statement was consistent with their theory of the case was simply not refuted by Petitioner who bears the burden of proof. Further, because the statement is so fraught with obvious inaccuracies, the reliability of the statement is highly questionable – especially when compared to McCray's subsequent retraction in his letter to Senator Hembree. As counsel observed, absent any clarification from McCray himself, the statement is too speculative to be deemed material under Brady and therefore, the PCR court correctly denied relief.

II. Because Petitioner's codefendant was on death row and an escape risk, and the defendants were collectively suspected of arson and three murders, and because of the security issues inherent in the older, smaller courthouse, the enhanced security was reasonable.

Petitioner complains counsel should have objected to what he described as the heavy presence of law enforcement both inside and outside the courtroom. The witnesses gave differing accounts about the level of courtroom security. Petitioner called Magistrate Barker, at the time of trial a probation agent, who estimated as many as twenty officers were present in the courtroom, which included officers not in uniform. App. p. 1008. On the one hand, Barker admitted there was added security, but then later testified, "Everybody had their duties and their positions and covered the courtroom pretty well. But it wasn't increased from a standard trial." App. p. 1007, line 25 – p. 1008, line 2. Senator Hembree, during his testimony, commented that 15-20 officers sounded too high to him, that perhaps there were a dozen officers present. App. p. 1012.

Several reasons for heightened security were presented at the hearing. Petitioner was transported from the J. Rueben Long detention center and was accompanied by Horry County personnel. Sheriff Thompson explained it was standard practice in such a situation to use three vehicles for transportation in case there was difficulty. Sheriff Thompson also explained while five of his deputies were dispatched with Petitioner to take him to Marion, all five would not have been with him at the same time. App. pp. 950-52. Co-defendant Cottrell was in the custody of the Department of Corrections after being sentenced to death for the McGarry murder. He was accompanied by Department of Corrections personnel. App. p. 1009, lines 9-14. Sheriff Richardson explained he was responsible as Sheriff for courtroom security. He had about eight to ten deputies available for courtroom security. He requested Horry County to provide assistance with security and recalled five officers from Horry County escorted Petitioner to the courthouse. He explained two officers would be positioned at the entrance by the metal detector. App. pp. 999-1002.

Several witnesses provided testimony about Cottrell's status on death row. Further, Petitioner and Cottrell were not only defendants in Love's murder, but suspects in a separate murder in Horry County. App. p. 903. Senator Hembree testified that prior to trial in this case and Cottrell's death penalty trial, he requested the Department of Corrections to take Cottrell in pre-trial protective custody because of his conduct at the J. Reuben Long detention center. App. pp. 1015-16. Cottrell was discovered with a homemade rope fashioned from prison clothes. App. pp. 903-04. Further, he fashioned a wire to use for picking the lock on handcuffs. He used it to slip out of belly chains and physically attack another inmate. App. p. 1015. Cottrell threatened officers during a recorded jail conversation. Senator Hembree identified and explained the affidavit he executed and provided to

the Department of Corrections when he requested Cottrell to be transferred to the Department of Corrections. One of the assertions made in the affidavit was the concern Cottrell had contacts with criminal elements in Horry County that could conspire to assist Cottrell to escape. Senator Hembree confirmed Cottrell and Petitioner were closely associated with each other and Petitioner would have the same contacts with criminal elements in Horry County. He testified that within the Solicitor's office they discussed the possibility of an outside escape attempt. He described Halcomb as an intelligent long-term thinker who could make plans and recruit people to carry out plans, making him unusually dangerous in comparison with most criminal defendants. App. pp. 1017-20.

Senator Hembree noted the courthouse was a small, older courthouse not designed for modern security needs. Senator Hembree indicated they were concerned about security prior to trial due to Cottrell's actions. While both prosecutors noted the heightened security at the courthouse, both felt it was appropriate under the circumstances of the case. App. p. 938; pp. 1012-15.

Petitioner acknowledged a possession of contraband charge while in pre-trial detention and confirmed a knife was found in his cell, but testified two other inmates were in his cell and the charge was dismissed. He claimed the knife was found in another mattress, not his. App. p. 885.

Trial counsel likewise noted heightened security but did not believe it was inappropriate in the instant case. He testified he would not have objected unless he felt his client was prejudiced. He noted Cottrell was on death row and explained the courtroom was a historic, smaller courtroom not designed for modern security concerns. Inmates did not come through a secure entrance, but through the public entrance. App. pp. 1088-89. Counsel testified one of the Horry County officers told him they felt one of the defendants might try to escape, although counsel did not know the basis for that

belief. App. p. 1097, line 19 – p. 1098, line 2. The PCR court found “the prosecutors and trial counsel, all who have a duty to ensure Petitioner received a fair trial, provided credible testimony that shows enhanced security was necessary under the circumstances, but it was not of the nature that impeded Petitioner’s right to a fair trial.” App. p. 1187. The PCR court also found Petitioner exaggerated the level of security and found his testimony was not credible. App. p. 1187.

The PCR court further found the following

[T]he co-defendant was on death row and a significant escape risk, [Petitioner] and co-defendant collectively were accused of three murders and an attempted arson that seemed to be an attempted murder, they both had contacts with the criminal elements of their county and, as Senator Hembree points out, [Petitioner] had the ability to recruit people for his criminal plans. The court room, the same one which this PCR hearing was held in, is a small courtroom that was not designed with modern security concerns in mind. Under these circumstances, heightened security was warranted. However, based on the evidence presented, this Court does not believe it impacted Applicant’s ability to receive a fair trial;

App. p. 1187.

The PCR court’s ruling is supported by probative evidence. Petitioner’s codefendant was sentenced to death for the police shooting and was a clear escape risk. Petitioner and Cottrell were collectively suspected in three murders and an arson. Both were in contact with criminal elements and worked closely with each other. The trial took place in a small courtroom lacking security features, and therefore, heightened security was required to compensate for this deficiency. See State v. Gore, 257 S.C. 330, 185 S.E.2d 826 (1971) (finding counsel’s objection to courtroom security, in which thirty-six officers were present, twenty-four of whom were uniformed, was not excessive. Gore was jointly tried with his codefendant, both already serving life sentences for murder, and a

witness was also serving a life sentence for murder. Solicitor also received information about a possible rescue attempt). In the instant case, the PCR court found Petitioner's claims of excessive security outside the courtroom not credible and Petitioner's claims were not substantially corroborated. See State v. Moore, 257 S.C. 147, 184 S.E.2d 546 (1971) (affirming the trial judge's denial of a motion for mistrial based on the defendants being seen in shackles by jurors while being prepared to be returned to the county jail. The trial judge noted jurors would know some defendants are in custody and need to be transported back and forth from the county jail to the courthouse).

III. Counsel was not ineffective for declining to object to Petitioner wearing a stun belt during trial because the stun belt was not visible.

Petitioner claims counsel was ineffective for failing to object or request the trial court to make an on record finding as to whether Petitioner should have been required to wear a stun belt during trial. Several witnesses testified the stun belt was not visible. App. p. 905; p. 1020; p. 1095; p. 1097. Petitioner claims the stun belt inhibited his ability to assist trial counsel. Petitioner also claimed he declined to testify at trial because of the stun belt. However, trial counsel and both prosecutors provided testimony refuting this assertion. App. pp. 905-06; p. 1021; pp. 1095-96. The PCR court found Petitioner's testimony was not credible and rejected his claim that the stun belt affected his decision to testify. App. pp. 1189-90.

In Deck v. Missouri, 544 U.S. 622, 624 (2005), the United States Supreme Court held routine use of visible restraints violates due process and may be used only if "justified by an essential state interest" such as security. The Court concluded, "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial judge's determination, in the exercise of

his discretion, that they are justified by a state interest specific to a particular trial” including “potential security problems and the risk of escape at trial.” Id. at 629.

Deck emphasizes its holding is limited to the use of **visible** shackles: “Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation.” Id. at 634; see also Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010) (finding defendant’s restraints did not violate due process because the defendant was not subject to visible restraints).

The PCR court correctly noted neither the Fourth Circuit nor South Carolina courts have held Deck applies to the use of a stun belt that is not visible to the jury. App. pp. 1188-89. Trial counsel testified absent something that was visible, he did not think he needed to request a finding from the trial court and he did not think the stun belt was prejudicial. App. p. 1096, lines 10-22.

Case law has found the protections of Deck do not extend to use of a stun belt. For instance, in Mungo v. United States, 987 A.2d 1145, 1150 (D.C. Ct. App. 2010), the D.C. Court of Appeals found trial counsel was not ineffective for not requesting the trial judge to make detailed findings before requiring Mungo to wear a stun belt. The D.C. Court of Appeals held, “[C]ritical to our analysis, neither the United States Supreme Court nor this court has ever held that a stun belt qualifies as a type of physical restraint whose use is subject to the strictures that the Supreme Court set out in Deck.” In 2009, the Sixth Circuit Court of Appeals found no error in requiring the defendant to wear a stun belt during trial because the stun belt was not visible to the jury. Earhart v. Konteh, 589 F.3d 337, 347-48 (6th Cir. 2009). In Commonwealth v. Lopez, 854 A.2d 465, 469-70 (Pa. 2004), the Pennsylvania Supreme Court rejected a claim the defendant’s rights were violated

because he was forced to wear a stun belt that was not visible to the jury, noting evidence supporting concerns he would attempt to escape.

As this Court has noted, Strickland does not requires attorneys to be clairvoyant and anticipate changes in the law. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law. . . .” *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); *see also* Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995)). At the present time, no case law from this state, federal circuit, or the United States Supreme Court has held the strictures of Deck apply to use of a stun belt that is not visible to the jury.

Petitioner testified he was told by codefendant Cottrell that the stun belt Cottrell wore went off in a court proceeding in Horry County. Because of this, Petitioner claimed he was worried the stun belt would go off by accident. He also claimed he worried it would go off if he did something the deputies watching over him did not like, and he felt he did not know under what circumstances they would cause him to be shocked. App. pp. 838-43.

However, both prosecutors noted Petitioner appeared able to assist his attorney. They noted he spoke with his counsel incessantly during trial and took plenty of notes. App. p. 906; p. 1021. Counsel verified Petitioner took notes during the trial and spoke to counsel during the trial. The stun belt did not appear to impede his ability to assist counsel. App. pp. 1095-97.

Petitioner claims he did not testify because of the stun belt. However, Petitioner admitted he did not tell the trial court about his concerns regarding the stun belt when the trial court advised and questioned Petitioner about his right to testify even though he did ask the trial court a question about

prior convictions. App. pp. 845-48; pp. 872-73; see App. pp. 505-12 (colloquy at trial concerning Petitioner's right to testify).

The PCR court correctly found counsel was not ineffective for declining to object to the stun belt. Counsel testified in his view the stun belt was not prejudicial, and no binding authority extended the holding of Deck to a nonvisible stun belt. Accordingly, the PCR court's findings are supported by probative evidence.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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December 2, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 02 2019
S.C. SUPREME COURT

CERTIORARI TO MARION COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2019-000476

Fred Halcomb,

Petitioner,

v.

State of South Carolina,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 2nd day of December, 2019


KASEY KNOX
Legal Assistant for Respondent