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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

ORIGINAL

On Writ of Certiorari to Greenwood County
Brian M. Gibbons, Post-Conviction Relief Judge
Donald B. Hocker, Trial Court Judge

Appellate Case No. 2019-001220

ROBERT A. WRIGHT,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX VOLUME II OF II

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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1 THE COURT: Madam A.G., you can call the case.

2 MS. GREGORY: Yes, sir.

3 Before you is Robert Wright.

4 In August of 2014 Mr. Wright was indicted by the
5 Newberry County Grand Jury for accessory before the fact to
6 a felony, armed robbery and burglary and conspiracy.

7 On January 4th of 2016 Mr. Wright proceeded to a jury
8 trial before Judge Hocker. On January 7th of 2016 the jury
9 found Mr. Wright guilty of accessory before the fact and
10 burglary -- before the fact of burglary and guilty of
11 accessory before the fact of armed robbery but not guilty
12 of conspiracy. Judge Hocker sentenced Mr. Wright to 16
13 years concurrent on each charge.

14 On January 15th of 2016 Mr. Wright's defense counsel,
15 Mindy Zimmerman, filed a post -- filed post-trial motions
16 requesting the trial court grant a new trial based on lack
17 of subject matter jurisdiction, lack of competent evidence
18 and the solicitor's comments during his closing argument.
19 In an order issued May 6th of 2016 Judge Hocker denied Mr.
20 Wright's post-trial motions.

21 Mr. Wright did file a timely notice of appeal, and
22 Mindy Zimmerman did proceed to file the initial brief.
23 However, the appeal was later withdrawn.

24 The remittitur was issued November 29th of 2016.

25 Mr. Wright did file a timely application for post

1 conviction relief on September 22nd, 2017, alleging
2 numerous issues, which I believe they've narrowed down.
3 And I will let Mr. Wilkes enumerate those for the record.
4 And he is here and represented by Mr. Wilkes. Mr. -- I'm
5 sorry. Mr. Wright is here and represented by Mr. Wilkes.

6 THE COURT: All right. Thank you.
7 Mr. Wilkes.

8 MR. WILKES: Thank you, Judge. For the record, I'm
9 Jeff Wilkes. I represent Mr. Wright.

10 Judge, we're going to narrow down the focus of the
11 questions to potential plea offers, inducements, innuendo
12 to the codefendants to get them to testify and whether or
13 not any such -- that there may be, were or were not
14 released to the defense attorney.

15 The other thing I'll focus on is the closing argument
16 by the state and the prejudicial and prohibited comments
17 that were made throughout that argument.

18 And then I will focus on the advice overall given in
19 regards to the plea offers that were made that would allow
20 Mr. Wright to make an informed choice.

21 And then Mr. Wright will testify. But that's where
22 I'm going, but Mr. Wright will testify, and I'm thinking
23 that we'll stay focused on that. But if he raises
24 something else, I would certainly follow up on it if he
25 wishes me to.

Christopher Dale Scott
Direct examination by Mr. Wilkes

1 THE COURT: Okay. Are you ready to proceed?

2 MR. WILKES: I am.

3 THE COURT: All right. You may call your witness.

4 MR. WILKES: Call the solicitor Mr. Scott.

5 CHRISTOPHER DALE SCOTT, having
6 been first duly sworn, testified as follows:

7 DIRECT EXAMINATION BY MR. WILKES

8 Q Mr. Scott, did you handle the cases on Mr. Wright and
9 the two codefendants, Coleman and Jones?

10 A I did.

11 Q Did you have discussions with Mr. Coleman or Jones or
12 their attorneys prior to Mr. Wright's trial?

13 A Of course.

14 Q And in those discussions can you tell me what you
15 talked about as far as their testimony and, if they
16 testified, any benefit that they could possibly receive?

17 A Generally, what I'm prepared to testify to is my
18 policy in dealing with codefendants who choose to act as
19 cooperating codefendants against a principal and that I've
20 been a prosecutor since 2005, solely a prosecutor. I've
21 never done any other work.

22 I've dealt with a lot of cases involving codefendants
23 and I've dealt with cases where two of them wish to
24 cooperate and then the third doesn't. So it becomes
25 necessary at some point to use those codefendants to

1 testify against the principal, in this case Robert Wright.

2 My general policy is to never, ever, ever make an
3 offer of any kind to any codefendant prior to the trial of
4 the uncooperative codefendant. And I see you looking up.
5 Does that make any sense to you? Ever.

6 Q It makes -- very well articulated.

7 Now, my question is in the discussions with those
8 attorneys representing Coleman and Jones, not that you made
9 a plea offer, but was there any indication off the record
10 unofficially that it would benefit them in any way?

11 A Generally speaking -- and I'm trying to recollect.
12 This case was some four years ago. Something like that.
13 So I can't speak with specifics in this case. But what I
14 will tell you is, generally speaking, in these
15 situations -- of course the defense attorney wants to know
16 what benefit does my client get if he testifies. Right.
17 Any defense attorney would ask that.

18 If I make an offer on the front end -- well, of
19 course, you know, my codefendant who's testifying against
20 the principal gets beaten over the head. Well, you got
21 offered this or you got offered that. Then it essentially
22 becomes useless to me.

23 The defense attorney who does represent the
24 codefendant, again, will want to know what benefit their
25 client gets.

1 Essentially, my practice is to tell them I don't know
2 what your guy will testify to. If he's cooperative, that
3 will be taken into account when he does ultimately plead
4 guilty if that's what he decides to do.

5 As far as specifics, I never make any specifics
6 because, again, I don't know what they're going to testify
7 to. I don't know how they'll perform at trial.

8 So I do indicate that it will be taken into account if
9 they testify and are cooperative at the trial of the
10 principal.

11 Q Okay. Now, you have in your hand an email from the
12 solicitor's office to one of those defense attorneys,
13 correct?

14 A I do.

15 Q And do you believe that accurately reflects the
16 communication between your office and that defense
17 attorney?

18 A This is a -- an email from an assistant solicitor who
19 works with me, Taylor Daniel. He did work this trial with
20 me, and there is a communicated email that he has sent to
21 Joe St. Pierre. St. Pierre represented Lorenzo Jones who
22 is one of the cooperating codefendants. It would be
23 hearsay evidence and I'm prepared to read it into that
24 record if you wish me to.

25 Q Please.

1 A This is from Taylor Daniel, Wednesday, December 9th of
2 2015. My notes show Lorenzo Jones ultimately pled
3 September 15th of 2016.

4 "Joe, please serve this subpoena on your client in
5 reference to Robert Wright trial which is scheduled for the
6 January 4th term of court. Jones is Wright's codefendant
7 in this home invasion case, and we are" -- and this is all
8 caps -- "NOT officially extending a plea offer to Jones in
9 exchange for his testimony. Jones already gave a detailed
10 confession to law enforcement in this case where Jones
11 disclosed that he and Tarakus Coleman committed this armed
12 robbery at the behest of Robert Wright. Thanks." Signed
13 Taylor Daniel, Assistant Solicitor, Newberry County
14 Solicitor's Office.

15 Q Now, what -- what is -- what would be the purpose of
16 explaining that your office would not be extending
17 officially a plea offer? What -- why does it have to be
18 said officially? Is that what that says?

19 A This is what it says. This is a Taylor Daniel.
20 Taylor Daniel works under me. I'm his direct supervisor.

21 Now, Taylor, I hope -- and I'm not putting any -- any
22 words in your mouth -- I feel like I've taught him
23 primarily the bulk of his prosecution experience. Now, he
24 has worked under other solicitors as well, but he primarily
25 works with me. I believe just about every one of the

1 trials he's had, which are extensive, have been with me.

2 So that practice I described earlier, not offering any
3 kind of offer prior to the testimony or prior to the trial
4 of the principal, I feel he has adopted that practice
5 because that's what I tried to instill in him.

6 As far as why he wrote officially extending an offer,
7 I don't know. That may be a question for Mr. Daniel. But
8 I can speak to you under oath as an officer of the Court
9 there were no offers made to Tarakus Coleman or Lorenzo
10 Jones prior to this trial.

11 Q By you.

12 A By me. And I think I can speak comfortably by saying
13 Mr. Daniel did not either, because I was the lead
14 prosecutor in this case. I would hope that would have come
15 to my attention.

16 Q Okay.

17 A Anything else?

18 Q I'm just thinking. wheels turn slowly.

19 MR. WILKES: Nothing further of Mr. Scott.

20 THE COURT: Madam A.G.

21 CROSS-EXAMINATION

22 BY MS. GREGORY

23 Q Did you comply with the Rule 5 and Brady motions that
24 were filed in this case?

25 A I did. I've gone over some of the records, and I did

1 note judge Zimmerman had some follow-up questions as far as
2 the initial discovery packet and then some supplementals
3 that -- that she had inquired about that we did comply
4 with. And I feel like we completely complied with Rule 5.
5 I do.

6 Q If a plea deal had been made, would that have been
7 part of the discovery?

8 A Of course.

9 Q Regarding your closing arguments, do you recall your
10 closing arguments in this case?

11 A Not really. I looked at the transcript you sent.
12 Incidentally, we're in court this week. So I've had
13 limited time to look at it, but I did kind of peruse it.

14 Q Mr. Wright alleged that you shifted the burden in your
15 closing argument. Do you recall that happening at all?

16 A Well, no. It'd be a matter of opinion, I believe. I
17 certainly don't think I would have ever intentionally
18 shifted the burden. I understand the state's burden as
19 being the only burden present in a trial, that being to
20 prove the case beyond a reasonable doubt.

21 Q And was the jury instructed as to the state's burden
22 during the jury charges?

23 A I would hope -- yes. Judge Hocker, I would assure
24 you, had instructed them of that.

25 Q Did the Court review your closing arguments in any

1 posttrial motion?

2 A They did.

3 Q And what was their ruling during --

4 A I believe the judge ruled that -- he did not see it as
5 a shift in burden. And I don't know if you care for me to,
6 but do you -- do you care to hear my explanation of the --
7 what I understood what the allegations of burden-shifting
8 were?

9 Q That's fine.

10 MS. GREGORY: May I approach, Your Honor? I'll
11 provide you with the order from the posttrial motion.

12 THE COURT: What page are you referring to on the
13 transcript?

14 MS. GREGORY: Your Honor, this is in a posttrial
15 motion, so it probably will not be in that transcript.

16 THE COURT: Okay.

17 MS. GREGORY: It'll be in your packet though.

18 THE COURT: I've got them.

19 MS. GREGORY: Okay. And it's the very back of that,
20 Your Honor, is where the order is.

21 THE COURT: All right.

22 Q There are two allegations, right, Mr. Scott, regarding
23 his Fifth Amendment right being violated by your closing
24 argument?

25 A Right.

1 Q In addition to a burden-shift.

2 A Okay.

3 Q After your review of that, if you could, tell me what
4 the Court ruled.

5 A Okay.

6 THE WITNESS: Page four, Your Honor, is where Judge
7 Hocker -- I think it's the very last page.

8 A Burden-shifting. "In light of the fact this Court
9 does not find a violation of defense constitutional right
10 to remain silent the logical conclusion to make is that the
11 solicitor's closing did not shift the burden of proof to
12 the defendant."

13 So Judge Hocker ruled that he -- in his review of the
14 closing argument, did not in his opinion shift the burden.

15 Q Okay. Thank you.

16 MS. GREGORY: No further questions, Your Honor.

17 THE COURT: Any redirect?

18 MR. WILKES: No, Your Honor.

19 THE COURT: All right. Thank you, sir. You can step
20 down.

21 Call your next witness.

22 MR. WILKES: We'd call Mr. Taylor Daniel.
23
24
25

Taylor Wilson Daniel
Direct examination by Mr. Wilkes

1 TAYLOR WILSON DANIEL, having
2 been first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. WILKES

4 Q Mr. Daniel, did you send this email to one of the
5 codefendants in the case, to the attorney of the
6 codefendant?

7 A Yes, sir. I sent the email to Joe St. Pierre who was
8 representing codefendant Lorenzo Jones.

9 Q Does that accurately represent the email that you
10 sent?

11 A Yes, it does, December 9th of 2015, email to Joseph
12 St. Pierre.

13 MR. WILKES: Your Honor, we'd move that into evidence
14 as Applicant's 1.

15 THE COURT: Any objection?

16 MS. GREGORY: Your Honor, it's hearsay. So I would
17 believe it can't be admitted into evidence but...

18 THE COURT: It's his email?

19 MS. GREGORY: Yes, it is.

20 THE COURT: Okay. Overruled. Admitted into evidence.

21 (Emailed marked Applicant's Exhibit No. 1.)

22 Q Mr. Daniel, did you have communications with either
23 one of the codefendants' lawyers prior to Mr. Wright's
24 trial?

25 A To Joe St. Pierre. And I believe Charles Verner of

1 the public defender represented the second codefendant,
2 Tarakus Coleman.

3 Q Okay. And can you tell me what you represented to
4 them as far as any benefit that might come from their
5 clients' testimony?

6 A No benefit. I simply just made the comment here, "The
7 subpoena is for your clients and we are not offering any --
8 we're not extending any pleas offers in exchange for their
9 testimony."

10 And we do that for -- to limit impeachment purposes.
11 We don't want to offer them anything and the defense
12 attorney at trial use that plea offer to impeach them.
13 That's why we don't that. It's policy.

14 Q I understand. Read that line out of the email,
15 please.

16 A Read the entirety of this email?

17 Q Just the one that you -- you just referred to that you
18 weren't making any offers.

19 A All right. "Jones is Wright's codefendant in this
20 home-invasion case, and we are NOT" -- all caps in not --
21 "officially extending a plea offer to Jones in exchange for
22 his testimony."

23 Q Okay. Can you tell me if you're not officially
24 offering it, is there some unofficial representation as to
25 the benefit?

1 A No. Just I say that because I think a lot of times in
2 pop culture in a lot of defendants' minds they think, well,
3 I'm testifying, I'm getting something on the front end.
4 But that's why I am dispelling any notion of that.

5 Q Okay. So --

6 A I make it abundantly clear, and that's why I use that.
7 That's why I sent this email. Plus, that's -- that's how I
8 transmitted the subpoena to the attorney in this case.

9 Q All right. So you're saying that the terminology is
10 between we're not making any plea offer versus we're not
11 making any official plea offer, is meaningless.

12 A In fact, I don't think we extended a plea offer until
13 after the trial. We didn't have one to make.

14 Q Did both Jones and Coleman get approximately four or
15 five years after all of the credit for time served?

16 A Without reviewing the public index or anything like
17 that, or records, but that sounds about right.

18 Q And you made no representation at all, you're saying,
19 as to what they -- what benefit they might get. No
20 innuendo, no nothing.

21 A Correct. I don't want -- I didn't want our
22 codefendants to be compromised at Robert Wright's trial by
23 even suggesting that.

24 Q Very good.

25 MR. WILKES: No further questions, Your Honor.

1 THE COURT: All right. Ms. A.G.

2 CROSS-EXAMINATION

3 BY MS. GREGORY

4 Q Had you made any official or unofficial plea offer to
5 them, would you have disclosed that to opposing counsel?

6 A Absolutely. That would be a Brady violation if I did
7 not.

8 Q And you did not do that in this case because -- you
9 did not tell her about any plea offers because there
10 weren't any?

11 A Correct.

12 MS. GREGORY: No further questions, Your Honor.

13 THE COURT: All right. Thank you, sir. You may step
14 down.

15 Mr. Wilkes, you may call your next witness.

16 MR. WILKES: Thank you, Your Honor.

17 We'll call Mr. Robert Wright.

18 ROBERT ANTWON WRIGHT, having
19 been first duly sworn, testified as follows:

20 DIRECT EXAMINATION BY MR. WILKES

21 Q Mr. Wright --

22 A Yes, sir.

23 Q -- you were represented by Ms. Zimmerman on these
24 charges, correct?

25 A Yes, sir.

1 Q All right. Tell me how you initially came to see
2 Ms. Zimmerman.

3 A I was already represented on a previous case.

4 Q Okay. And tell me about going in and talking to
5 Ms. Zimmerman about these charges.

6 A I admitted, you know, to her the situation that had
7 happened, what went on to my knowledge of those guys doing
8 that robbery.

9 We basically did it off of ear, you know, as far as
10 what -- the notes and stuff that she got was things that
11 I've told her, you know.

12 And the first offer was -- I was offered zero to 15
13 years, open plea. The judge -- the judge would make the
14 decision without the solicitor's recommendation.

15 And, you know, I asked. I asked Ms. Mindy how is the
16 chances looking. I didn't -- how are my chances looking as
17 far as the case goes. And I wasn't -- we really didn't
18 speak over any pleas, not to specific, you know, but she
19 did bring pleas and showed me, you know, because that's
20 considered what the state made her do.

21 Q All right. So tell me. Tell me about the first plea
22 offer. Had you met with Ms. Zimmerman prior to that first
23 plea offer?

24 A Right. I mean, my mind was kind of cloudy,
25 Mr. Wilkes. We had -- it had other cases going on that was

1 involved in other things, which me and Ms. Mindy had
2 run-ins in her office to speak with Mr. Lominack on maybe
3 two different occasions.

4 And as far as the plea offer that was ran by me, you
5 know, she told me that it is only right that she show me
6 what they offer -- offer me as far as a plea.

7 I really didn't get no, really no, no details on it,
8 you know, but she did bring me -- bring me a zero-to-15
9 plea. That was one plea.

10 And I was offered another plea, I think, during trial.
11 It was written on me. It was written on a piece of paper
12 during trial and slid to me and, you know, asked me, like,
13 would you accept that plea.

14 And I -- we really didn't go into it. We was in the
15 middle of trial. I ain't sure if we talked about it at the
16 trial..

17 But me and Ms. Mindy talked, you know. Of course said
18 she's not sure about she can't sit there and say she can
19 win the case or, you know, but she kinda -- I think she
20 kind of thought her chances were strong. I think, you
21 know, both of us put together that it was just a case of
22 hearsay. It really wasn't, you know, much. Well, I mean,
23 well, we really didn't get into all of that not -- not as
24 far as me thinking of it to my knowledge, sir.

25 Q Okay. So the plea during the trial --

1 A Uh-huh.

2 Q -- did the trial stop for you to be able to talk to
3 her?

4 A I'm -- I'm not sure. I was offered that plea during
5 trial in the middle of those, them talking on the stand,
6 the judge or whatever like that. But I'm not sure if we
7 had a talk about it after the case.

8 Q Not after. When you were handed the plea offer on a
9 piece of paper did you have time to talk to Ms. Zimmerman
10 about it?

11 A No, sir, not to my knowledge.

12 Q Okay. What about the first one? Tell me what you
13 talked about with Ms. Zimmerman as far as what you were
14 told about the case. Did you go over the evidence?

15 A I mean, far as her concern or even my concern, it was
16 just, basically, he say, she said, you know. It really
17 wasn't -- we really didn't talk about any evidence. It was
18 just basically hearsay.

19 Q Okay. There's text messages and phone calls. Did you
20 talk about those?

21 A Oh, yes, sir. I -- I let her know that -- that I
22 knew. I let her know that those guys had contacted me.
23 One of them had contacted me and told me that he needed the
24 money, he was going to rob this guy, you know, my neighbor.
25 And I was -- I was honest with her all the way through

1 that.

2 I had -- I'm guilty of knowing about the crime, but I
3 didn't play no part in this crime, sir, and I -- and I felt
4 like, you know, the advisement, I could have got up and
5 testified, even said more. I felt like Ms. Mindy had to
6 defend on basically just what I was telling her. It really
7 wasn't -- you know, she was basically defending me off
8 things I have given her. You know, as far as the
9 investigation, I felt like it could have been investigated
10 a little bit more on a different situation.

11 Q Okay. Did Ms. Zimmerman ever give you an opinion as
12 to the strength of the case against you before you
13 considered the first plea offer?

14 A I -- I mean, it really -- basically, all we talked
15 about is just he say, she say, you know. It really wasn't
16 as far as I'm concerned, wasn't ever really that much
17 evidence. Just hearsay.

18 Q Okay.

19 A My word against theirs basically.

20 Q All right. So at the time the plea offer was
21 explained to you -- the first plea offer -- where were you?

22 A I think I had came to visit her on one of the payments
23 I was making.

24 Q Okay. And how long did you talk to her that day?

25 A She -- it'd probably been about 30 minutes or 45

1 minutes, something like that.

2 We just -- just go over anything that I can tell her
3 or let her know what I think as far as the case. And I
4 just stuck with the whole -- what I just told you, you
5 know. I knew those -- one of the guys called me before
6 that incident and he told me that he was going to rob my
7 neighbor, you know. And I didn't -- I should have -- no.
8 I didn't call the police. No. I didn't give them a
9 warning. I just kinda stayed out of the way. I -- I -- I
10 could have did more and --

11 Q All right.

12 A -- I just didn't really want -- I didn't -- you know,
13 didn't want anything to do with them.

14 Q Okay. So at the time that you were given the first
15 plea offer did you discuss the strength of the case?

16 A No, sir.

17 Q Okay.

18 A No, sir. That was -- that was when -- we never sat
19 down and talked about, oh, you know, this doesn't look good
20 or, you know, the evidence is strong.

21 We just -- basically, it was from my understanding
22 from that mistaken, Ms. Mindy, you know, I wanted to tell
23 the truth up here. Basically, just hearsay, just a bunch
24 of crap, you know, just he say, she say. It really wasn't.
25 No.

1 Q Okay. So if you had been told that the evidence
2 against you was strong and that the result would very
3 likely be a conviction, would that have changed your
4 decision on a plea offer?

5 A Of course it would have. I mean, me and my wife, we
6 both asked Ms. Mindy, you know, how -- you know, as far as
7 how is this case looking, you know, what do you think. And
8 she -- like she said, she's not going to sit there and say,
9 okay, yeah, I can win, no, it's not looking good.

10 We wasn't -- I wasn't advised on, okay, this right
11 here is looking bad for you or you got a lot of evidence on
12 you. It was just -- we just stuck with it. It was just
13 basically he say, she say, and roll with the dice, the only
14 chances of that.

15 Q And were you offered a zero-to-15 plea?

16 A Yes.

17 Q That was the first plea?

18 A Right.

19 Q Did you have a prior record?

20 A I -- I might've got a distribution a while back. I
21 mean, I completed probation. I -- I -- I had a 3-year
22 sentence awhile back for a probation violation. I got out.
23 I was on probation. Completed that and really had no
24 problem.

25 I was a working man, sir. I mean, Ms. Mindy herself,

1 you know, she -- she -- she gets automatic draft like child
2 support out of my checks, so.

3 Q where were you working?

4 A I worked for Kugler Construction.

5 Q How long had you been there?

6 A About a year and a half.

7 Q Okay. And you did not -- you're saying you did not
8 have an extensive record at that time.

9 A No, sir.

10 Q Okay.

11 A I think I had -- I think I got distribution charges.
12 That's just about it, you know.

13 Q And would you have accepted the plea --

14 A Of course.

15 Q -- if you knew that the evidence was strong against
16 you?

17 A Of course. I felt like -- I don't know. We didn't
18 really get into all that explaining the details of what
19 really evidence they had against me.

20 I felt like if I knew that or was advised of that,
21 that the evidence was strong and it wasn't looking good,
22 I -- I would've -- I would've asked for more details about
23 the plea, which I didn't follow up on the plea that was
24 offered even during trial because, you know, we was -- my
25 head was in the trial. I read the paper, and I read it.

1 We was -- I had got another charge right before trial,
2 and that kind of scared me up too. And they arraigned
3 that, I think, right before trial. And they kind of scared
4 me up.

5 The sentence that I carried already, I already had a
6 15 to life. And she said open plea for the judge to make
7 that decision from zero to 15 without the solicitor's
8 recommendation and I -- I was scared, you know.

9 Q I understand.

10 A I -- I asked what's our chances and let's go with it
11 and take it to trial and, you know, basically just hearsay.
12 I didn't know it was strong evidence. We really didn't get
13 into that type of discussion.

14 Q Very good.

15 Now, Mr. Wright, is there anything else that I haven't
16 asked you about that I needed to ask you? This is your one
17 chance at P.C.R.

18 A I felt like I could've got up and testified. Well,
19 no. It's nothing, but I would like to say something if you
20 don't mind.

21 Q Well, tell me about not testifying.

22 A She didn't want that Mr. Dale to increment me, which I
23 didn't -- yeah. I might have been in a little jam sometime
24 and sold a little drugs, but, you know, she didn't want him
25 to bring all of that up and make it look bad for me to a

1 jury. So she recommended I remain silent.

2 There's plenty of times where I wanted to get up and,
3 you know, testify or even defend myself and just -- you got
4 two guys who robbed my neighbor. They're at home right
5 now. I'm sitting in prison.

6 I never got to defend myself. I wish I could've
7 because Ms. Mindy played it off of ear of the information
8 that I gave her. And a lot of time when the solicitor was
9 talking, I could've got up there and defended myself. She
10 really had no defense on, you know.

11 Q Did you choose not to testify based on her advice?

12 A Right.

13 Q Yes or no?

14 A Yes, sir.

15 Q All right.

16 MR. WILKES: I have no further questions.

17 THE COURT: All right.

18 MS. GREGORY: Thank you.

19 CROSS-EXAMINATION

20 BY MS. GREGORY

21 Q So your testimony here today is that you would have
22 pled guilty to something you're claiming you're innocent of
23 if Ms. Zimmerman had told you about the plea offer --

24 A Yes, ma'am.

25 Q -- in more detail? So you would have pled guilty.

1 And do you recall the judge going over your Fifth Amendment
2 right to testify during the trial and that it was your
3 decision whether you testified or not?

4 A Yes, ma'am.

5 Q And do you recall telling him that you did not wish to
6 testify?

7 A It was still under, you know, the advisement, you
8 know, that it's best just to remain silent.

9 Q Okay. And you had other pending charges at the same
10 time, is that correct, that this trial was going on? Is
11 that what your testimony was, that you had other pending
12 charges?

13 A No, ma'am, not that -- no, ma'am.

14 Q Okay.

15 MS. GREGORY: No further questions.

16 THE COURT: Any redirect based on that?

17 MR. WILKES: None, Your Honor.

18 THE COURT: All right. Thank you, sir. You may step
19 down.

20 Mr. Wilkes, you may call your next witness.

21 MR. WILKES: Your Honor, I believe Ms. Zimmerman will
22 testify in their case, so I probably don't need to call her
23 in mine.

24 I do have the issue of the closing however that I need
25 to put on the record. It does not require a witness at

1 this time.

2 THE COURT: All right. Why don't we save that for
3 argument at the end?

4 MR. WILKES: Well, I need -- well.

5 THE COURT: You've proffered it at this point in time.
6 So, you know, you've made your -- and I've read the -- both
7 the transcript, as well as what was briefed in front of
8 Judge Hocker, posttrial motions. So I know what you're
9 talking about.

10 MR. WILKES: If I can just briefly.

11 THE COURT: Yes, sir. Go ahead.

12 MR. WILKES: The issue on the closing argument,
13 there's numerous improper statements and prejudicial
14 statements vouching throughout the closing argument, and I
15 have them easily referenced. I can go through them very
16 quickly.

17 THE COURT: Yeah. Go ahead.

18 MR. WILKES: I can do that in closing, but I just want
19 to make sure.

20 THE COURT: No. Let's go ahead and do it now. I'm
21 glad -- I didn't realize you had them actually tabbed.

22 MR. WILKES: Highlighted.

23 THE COURT: That's good.

24 MR. WILKES: If I may approach.

25 THE COURT: Yes, sir.

1 MR. WILKES: I gave Ms. Gregory --

2 THE COURT: You got a copy of that, Madam A.G.?

3 MS. GREGORY: I do.

4 THE COURT: Okay. This will be good. I have the
5 transcript then already as part of the judge's packet.

6 Mr. Wilkes, I'll note on the record. He has gone
7 through and highlighted his client's assertions as to
8 improper statements during closing.

9 Mr. Wilkes, I'll be glad to hear from you on that if
10 you'd like to say anything.

11 MR. WILKES: Thank you, Your Honor.

12 One of the issues -- I'll start with the transcript
13 itself.

14 One of the issues will come up on the failure to
15 object during the closing, arises out of the transcript at
16 pages 127 to 134. And on those pages there is discussion
17 about Ms. Zimmerman trying to keep Mr. Wright portrayed as
18 a drug dealer. The judge sustained that, struck the
19 initial running of it. And then the solicitor came back to
20 it, did it again, did it again, until he got it in. And
21 that will play into closing argument. I will flip to the
22 main part of it.

23 THE COURT: Yes, sir.

24 MR. WILKES: There was a lot of discussion about it,
25 and Ms. Zimmerman did well keeping it out for a while, but

1 then it ended up being in anyway without objection.

2 It's almost the same exact thing that came up and was
3 sustained by the judge and stricken by the judge.

4 The solicitor came back to it on page 133 starting at
5 line 23 and starts talking about, "Mr. Mayer, the victim,
6 that he sells drugs." And then he comes back and asked,
7 "Is there any other reason why he wanted you to rob him?"
8 And the answer this time, "Supposedly they got the same
9 cliental basically." Then there's an objection, a sidebar.

10 It kept coming back, because he's getting in the way.
11 And so the -- the intent -- well, regardless of the intent,
12 let's say that the outcome of the questioning clearly
13 implied that the victims were impeding in competition with
14 Ms. Wright. And that's what this solicitor was trying to
15 show that the judge had ruled he cannot show.

16 And I think Ms. Zimmerman initially argued it well in
17 saying that they had agreed that they weren't going to
18 paint either one of the people as involved in drugs, and
19 yet the solicitor did do that. So there is that in the
20 transcript. Now, that's going to be important as I go
21 through the closing arguments.

22 And I'm just going to run through them from the
23 beginning starting on page 200. There's a highlighted
24 portion at the bottom.

25 The solicitor begins to ask where is justice for the

1 Mayers. Those were the victims. And said that repeatedly.
2 That -- that is the call for action that is prohibited
3 under Von Dohlen, Tappeiner, Brown, State vs. Reese and a
4 number of other cases. And I'll give Your Honor the case
5 cites afterwards if that's okay.

6 THE COURT: Okay.

7 MR. WILKES: So the solicitor also goes on, and I
8 think that's where the burden-shifting in part comes from,
9 is repeatedly throughout the transcript or several times
10 throughout the transcript talks about evidence being
11 uncontested, which I believe would be a burden-shifting or
12 at least chipping away at the reasonable-doubt standard.

13 Going on down further, the solicitor in his closing
14 argument says, "His hands ain't clean. Let me tell you
15 that. He may stand back and say, well, I didn't get
16 anything. They didn't put me in the house."

17 That's just a combination of problems. The solicitor
18 throughout the transcript through the closing is making
19 personal representations to the jury, which is vouching for
20 the state's case, vouching for the witnesses. "Let me tell
21 you that is exactly one." That's State vs. Shuler.

22 He's also combined that with a Fifth Amendment
23 violation on Mr. Wright's right -- his right to remain
24 silent. He repeatedly says, "He may stand back and say,
25 well, I didn't get anything." So he's putting words in Mr.

1 wright's mouth that are not there. Mr. wright did not
2 testify, and he is arguing as though he did. And that is a
3 strange one. But I think it not only gets into
4 burden-shifting but it's also impinging on that right to
5 remain silent.

6 It goes on. Now, I've got page 203 and 202 backwards.
7 So you'll come first to 203, and it's really if you flip
8 over one, it'll be 202. I apologize for that. On 202 at
9 the top it says, "You know, to stand back and say, you
10 know, I'm sitting in my house, I didn't go in their
11 trailer, my hands are clean, you can't find me guilty,"
12 again, Mr. wright did not testify. And he's not only
13 commenting on that or putting words in his mouth. It just
14 highlights the whole thing that Mr. wright's pled the
15 Fifth.

16 If you go to the bottom of 202 the solicitor then
17 says, "And we know about those phone records."

18 And you have to go forward now to 203. "And aren't
19 those difficult for Mr. wright to explain -- those phone
20 records?" Mr. wright doesn't have to explain anything.
21 Mr. wright didn't explain anything. He chose to remain
22 silent.

23 So commenting in closing that it's so difficult for
24 Mr. wright to explain is bringing out, again, the Fifth
25 Amendment that he exercised, and it also is

1 burden-shifting. It's clearly burden-shifting.

2 Solicitor goes on down. I highlighted. He referred
3 to Mr. Wright several times as being a shot caller.
4 Clearly, derogatory in a way that appeals to the passion of
5 the jurors.

6 It goes down further, and at the bottom of 203
7 solicitor asked the jury, "Do you ever wonder if somebody
8 has the gall to do this to a neighbor what they could be
9 capable of?" That is clearly prohibited because that is
10 pushing out in calling not only just -- calling on the
11 passion of the jury, but it's calling on the jury to stop a
12 future crime. And that's been prohibited under -- both
13 Tappeiner recognizes it, and I think it's Brown vs. State
14 that Tappeiner specifically refers to. You just can't call
15 on the jury to step up and stop somebody of something they
16 may do in the future.

17 Now, I'll go on back to -- I think the next one is on
18 207. The solicitor continues the closing argument and
19 says -- and this is down -- well, it's highlighted. "But
20 there's not really a whole lot in my mind to argue about.
21 I think it's pretty crystal clear, and I don't think" --
22 well, that right there, Your Honor, is putting the power of
23 the state, the integrity of the office of the solicitor
24 behind the case. It is telling the jury what the solicitor
25 personally believes, there is not a whole lot to argue

1 about, and to him it is crystal clear, which is prohibited
2 under Simmons, Vaughn and a number -- a bunch of cases.
3 And I think that Tappeiner actually references those cases
4 as well.

5 Goes on. Interestingly, it goes on after that and is
6 somewhat, I guess, derogatory toward the defense attorney
7 saying, "I don't think a lot of lawyers give juries the
8 respect they deserve as free-thinking and educated and
9 logical people, but I do want to address something." And
10 then goes on to talk about what the defense attorney said
11 in closing argument.

12 Now, you -- you just can't mitigate that later by
13 saying, oh, I didn't really mean her in particular. The
14 way that reads is it just drives right at the defense
15 counsel's representation and the defense.

16 Again, on page 210 the uncontested comes back,
17 referring to facts as uncontested. Whether they are or not
18 still is a -- just an improper attack on the whole standard
19 of the burden that they carry with reasonable doubt.

20 Then on page 212, getting toward the end of argument,
21 the solicitor says, "I've got my idea of why this happened.
22 I think it's very shallow or a very shallow burial, just
23 under the layers, the intent of Mr. Wright, why we needed
24 him out of the way, why he needed his neighbor out of the
25 way. I'm going to respect you guys in coming up with that

1 on your own." And then specifically says, "Y'all heard
2 Lorenzo Jones' testimony yesterday, didn't you? I think
3 the inference is there, but we don't need to talk about it.
4 But I think we understand why he needed them out of the
5 way." And that is a reference right back to the whole drug
6 thing with Mr. Wright. So it's just a whole combination of
7 things, bringing in this whole drug thing.

8 One, it -- ultimately, it was not objected to, and it
9 still came in. But it was kept out repeatedly. And the
10 solicitor then got it in and then wove it into the end of
11 his closing argument in quite a powerful way.

12 It gets back to the whole thing of I've got my idea of
13 why this happened. I think it's -- and just putting a
14 personal representation, drawing the jury's attention to
15 the drug activity, claiming Mr. Wright's a drug dealer, is
16 just hugely preferential. It's bad -- prior bad acts,
17 character, passion. And that's State vs. Liberty, U.S. vs.
18 Monahan, U.S. vs. Hawkins and U.S. vs. Barr. And I have --
19 I have the Liberty case and I have the Tappeiner case for
20 Your Honor because it contains most of the other cites that
21 are relevant.

22 Again, going down further, he's -- the solicitor's
23 closing gets close to the end and says, "There's nothing
24 that justifies kicking in a door in the middle of the
25 night, holding a gun on somebody," which is not what

1 Mr. Wright was accused of. "But if you do that to your
2 neighbor, where does it stop?" Again, calling on the
3 passion of the jury to stop some future crime. To make him
4 out to be such a bad guy, it just inflames the jury to do
5 something and disregard reasonable doubt.

6 Again, in the middle of the page, the solicitor argues
7 "Do you have a reasonable doubt that Robert Wright is not
8 guilty of what I'm telling you he's guilty of?" That is
9 clearly another violation of Vaughn, Shuler, Matthews,
10 McKurely. It's -- it's just wrong, and it's wrong in a
11 prejudicial way that you just can't unbate something like
12 that.

13 Again, when he says I'm going to sit down, he says, "I
14 think y'all are firmly convinced, and I think there's only
15 one verdict," and says, "I think you ought to be the 12
16 united voices here speaking together and I think you ought
17 to go back there and deliberate and consider everything,
18 and I think y'all ought to come up with the only reasonable
19 conclusion. Hold him accountable. Define the third person
20 involved in this accountable. Hold him accountable. Find
21 him guilty."

22 That, again, is just -- just putting the office of the
23 solicitor, the integrity of the prosecution, into telling
24 the jury the solicitor believes he's guilty, they need to
25 find him guilty. And that's clear in those words.

1 And then I think it ends with, again, the solicitor is
2 ending right after that and saying, "Don't let him stand
3 back and say y'all didn't catch me in the house."

4 Again, he didn't say anything, and that is flipping
5 the focus back on him as though he did. It turns it around
6 on him when he has taken the Fifth Amendment.

7 So I have cited to the case law. I think I've covered
8 most of it, but Tappeiner and Liberta have multiple cites
9 within them. And I will give Your Honor those, I guess, at
10 the end of the case.

11 THE COURT: All right.

12 MR. WILKES: And the -- and that's all I need to say
13 now. I can argue a little bit later. Thank you.

14 THE COURT: Got you. Thank you Mr. Wilkes.

15 All right. And, Madam A.G., do you want to make
16 argument now in the closing argument or do you just want to
17 do it all at the end?

18 MS. GREGORY: Do it all at the end and I'm going to
19 request if we could do proposed orders in this case.

20 THE COURT: All right. Well, I'll get to that point
21 in a moment.

22 All right. Anything else on applicant's case at this
23 point in time?

24 MR. WILKES: I'm sorry, Your Honor?

25 THE COURT: Anything else on applicant's case before

1 you rest?

2 MR. WILKES: That's our case, Your Honor.

3 THE COURT: All right. Thank you. Applicant rests.
4 Madam A.G.

5 MS. GREGORY: Yes, sir. The state would call
6 Ms. Zimmerman.

7 THE COURT: All right.

8 MINDY WESTBROOK ZIMMERMAN,
9 having been first duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MS. GREGORY

11 Q How long have you been practicing law?

12 A Since 2006, so 13 years.

13 Q How much of that has been in criminal law?

14 A I started out in 2006 prosecuting, worked full time
15 for the Eighth Circuit Solicitor's Office until 2009.

16 At that time when I went out into private practice I
17 worked on a contract as a prosecutor for about another year
18 and a half. And then I did defense work until February of
19 2017.

20 Q And you have been appointed to a judge since this
21 case?

22 A Yes. February of 2017, I was appointed to the family
23 court bench.

24 Q Do you recall, were you appointed or retained in this
25 case?

1 A Retained.

2 Q Do you recall when you were retained?

3 A I signed the retrainner agreement with Mr. Wright on
4 June 16th of 2014. However, that was not the first time we
5 had contact about the case.

6 I had represented Mr. Wright previous. As a matter of
7 fact, I prosecuted Mr. Wright when I worked for the
8 solicitor's office, which is when we first encountered each
9 other. And then when I went into defense I represented him
10 on some other matters and represented some of his family.

11 So when he first learned that they were looking at him
12 in relation to this, he contacted my office. I got in
13 touch with the investigators. And when they obtained the
14 warrants I actually went with Mr. Wright to the detention
15 center for him to turn himself in and appeared at his bond
16 hearing.

17 I believe the retainer agreement was signed after all
18 of that happened.

19 Q How many times did you meet with him?

20 A I have the dates where we scheduled appointments.

21 Now, as he testified, a lot of times -- because he
22 made payments on this account -- so a lot of times when he
23 would drop payments off we would talk at various points.
24 But I have one, two, three, four, five, six, seven -- seven
25 different appointments that were scheduled specifically for

1 trial prep throughout 2015, because we were noticed for
2 trial in this case in October of '15, then in November of
3 '15, then in December of '15. And then it finally went to
4 trial in January of '16. So most of the trial prep was
5 actually late '15.

6 Q Did you have enough time to prepare this case?

7 A I believe so, yes.

8 Q What was he charged with?

9 A The -- he was only served initially with a warrant for
10 accessory before the fact to burglary and accessory before
11 the fact to armed robbery.

12 However, when the solicitor presented the indictments
13 in August of 2014, they presented two indictments. One was
14 the accessory before the fact to burglary and armed robbery
15 and one was an indictment for conspiracy to commit burglary
16 and armed robbery.

17 Q Okay. And were there plea offers in this case?

18 A As we got -- I cannot tell you the exact dates and
19 times, because the way this case worked, which is the way
20 most of my interaction with this particular solicitor's
21 office worked, is I went over to the courthouse and I
22 caught Dale or Taylor one in the middle of general
23 sessions. And you just talk to them about what you can get
24 offered.

25 And after we were noticed for trial one of the two

1 solicitors verbally told me that they would allow him to
2 plea straight up to the criminal conspiracy and dismiss the
3 accessory before the fact.

4 I believe that conversation happened with Mr. Scott,
5 but I couldn't tell you for certain of that. And we --
6 during our trial prep we sat down, we discussed that offer.

7 And then at some point after the jury selection that
8 same offer was made again, I believe, because we did the
9 jury strike, and then we did some pretrial motions, and
10 then came back and did testimony. I don't think we took
11 any testimony that first day.

12 And I believe that the second plea offer was right
13 after those motions, but I could not tell you that for
14 certain because it has been quite some time. But at some
15 point after the jury strike the same offer was re-extended.

16 Q So the second offer when it was re-extended, did you
17 discuss that with Mr. Wright?

18 A Yes.

19 Q He testified that it was during the trial and he was
20 passed it on a piece of paper. Is that accurate?

21 A I -- I don't believe that it was written on a piece of
22 paper, and the only reason I say that is yesterday I went
23 through my file -- this is only a portion of my file. It's
24 a rather large box. I reviewed the entire file. And I
25 have a folder that is all of the trial notes. It's on a

1 Newberry firehouse notepad, and I have the notes back and
2 forth. I've got my handwritten notes; I've got Mr.
3 Wright's; and I actually have notes from his wife as well.

4 None of those notes discuss a plea offer, but, I mean,
5 it is possible that we misplaced a note.

6 I don't know if at some point I asked him again, you
7 know, would you take this offer. But the only times that I
8 know of the solicitor extending it was before the trial and
9 then just after we started.

10 So, you know, if I wrote something to him in a note, I
11 imagine what it would have been is are you still
12 interested, you know, or are you still refusing to plea or
13 something like that so that if he was interested I could
14 have approached the solicitor again.

15 Q Did you discuss with him the terms of the plea and
16 advise him on whether he should take the plea or not?

17 A I did discuss with him the terms of the plea and I
18 discussed with him, you know, what was going on in this
19 case extensively, what the evidence was.

20 I made my recommendation to him, but I never said you
21 have to take this, you don't have to take this, you know,
22 because ultimately that's his decision.

23 Q What was the evidence against him?

24 A There was phone records that showed communication back
25 and forth between he and Mr. Jones. And, specifically, one

1 thing that the state harped on was one particular text
2 message that -- from Mr. Jones to Mr. Wright that I think
3 said should I kick the door in or I'm going to kick the
4 door in, something along those lines. And then aside from
5 that it was the testimony of the two codefendants.

6 Q Okay. And all plea offers, when you discussed those
7 with him, did you explain what the state would have to
8 prove in the elements of each crime that he was charged
9 with?

10 A I did. And we also have -- based upon what Mr. Wright
11 told me about his knowledge of this incident, all along it
12 seemed to me like the most appropriate charge was
13 misprision of a felony. I always thought that that fit
14 better than criminal conspiracy. And I talked to him about
15 that offense and the elements of that offense and whether
16 he would be willing to plea to that offense, because if he
17 would, then I would take that to the solicitor to try to
18 negotiate that.

19 I also have in my notes where I discussed misprision
20 with the solicitor to see if they would extend that offer,
21 and they would not. But I remember us having those
22 discussions. And, like I said, I have notes from where we
23 had those specific discussions because that seemed to be
24 the more appropriate charge for what we knew about this.

25 Q Was he pretty involved in you creating your defense?

1 was he involved in your, basically, putting your defense
2 together?

3 A Yes. And I on -- when I went back through my
4 calendar, on October 5th of 2015, specifically, which was
5 just prior to the first time it was scheduled for trial, we
6 actually -- I blocked out an entire day to meet with him
7 and go over all of the evidence and go over everything.

8 I did have a couple of different meetings with Garrett
9 Lominack who was the lead investigator on the case, and he
10 did not go with me to those meetings. But that was
11 intentional because I didn't want -- I didn't want him
12 there, Mr. Wright there, to make any comments that
13 Investigator Lominack could later use against him. So I
14 thought those meetings that I should have on my own. But,
15 yes, we did, you know, speak extensively about the case.

16 Q And whose decision was it to go to trial?

17 A Ultimately, his decision based upon my
18 recommendations, but, ultimately, yes.

19 Q Did you believe it was in his best interest to plead
20 guilty?

21 A Actually, I mean, it's easy now that he's been
22 convicted to look back and say he should have pled, but I
23 believed that we had a chance of beating this case. I
24 mean, I could never -- like he said, I would never
25 guarantee him that. I believe if we put this same case in

1 front of, you know, 12 different jurors, it could just as
2 easily have come out a very different way.

3 Q Did you file a Rule 5 and Brady motions in this case?

4 A Yes, and at least twice requested supplemental
5 discovery, specific items. I know one in particular once I
6 looked through, because the phone records is a massive
7 stack of phone records. And when we were looking through
8 the records I saw some missing pages. I think there were
9 some -- initially I didn't have -- I had redacted
10 statements from the codefendants, had all their identifying
11 information redacted. I had -- didn't have the criminal
12 histories initially on the codefendants and on the victims.

13 So I filed supplemental discovery that enumerated out
14 those specific things and did receive all of that prior to
15 going to trial.

16 Q Do you believe the solicitors complied with your Rule
17 5 and Brady motions?

18 A I don't know of anything that they kept back. I mean,
19 anything specifically that I asked for, I got.

20 I did ask about plea negotiations with the
21 codefendants and was told that there were none pretty
22 consistent with what they told today.

23 Q All right. Let's go back to the facts of the case.
24 What were the facts of the case that led to the charges?

25 A I guess the -- the ultimate allegation was that

1 essentially -- that's kind of a hard question to answer.
2 That the facts that came out at trial for the state's case,
3 the allegation from the state's case, was that Mr. Wright
4 reached out to Lorenzo Jones and that Mr. Wright told Mr.
5 Jones to go and commit this burglary and armed robbery.

6 The testimony at trial was that Mr. Wright told
7 Mr. Jones the house would have a substantial amount of
8 crack cocaine and \$8,000. And Mr. Jones then recruited
9 Mr. Coleman to assist him. So that was the ultimate trial
10 testimony.

11 Q And there was text messages indicating, like multiple
12 text messages indicating, the implication of the -- or of
13 Mr. Wright in that robbery and burglary.

14 A No. There was a text message that asked. I believe
15 it said should I kick the door in. Something about kicking
16 the door in.

17 There were multiple phone calls between Mr. Jones and
18 Mr. Wright. And of course we don't know the content of
19 that.

20 However, both men admitted -- and, well, Mr. Wright
21 admitted to me. Mr. Jones admitted on the stand that the
22 two of them were cousins, close friends, hung out
23 regularly.

24 Q Okay.

25 A But the only thing in the phone records that

1 specifically associated with this was the
2 should-I-kick-the-door-in.

3 Q Okay. That's the only text message. But the phone
4 calls were around the timeframe that the robbery was
5 occurring, is that correct?

6 A There were phone calls around that timeframe. Now,
7 like I said, the two of them had multiple different phone
8 calls over long periods of time. But, yes, there were
9 phone calls around that time.

10 Q And the independent investigation that you did in this
11 case, what did that entail?

12 A I tried to talk to the codefendants. Neither one --
13 you know, I reached out through their attorneys to them,
14 and both attorneys indicated that they would not discuss
15 anything with me.

16 Researched the file, reviewed all of the phone records
17 that came in, met with the lead investigator on three
18 different occasions, met with the solicitor.

19 I mean, as far as an independent investigation, the
20 allegation or the statements by my client was that he was
21 home alone when it happened. So it's not like that there
22 was an alibi to explore or, you know, some other defense
23 theory. I mean, this was purely a I-didn't-do-it-
24 and-y'all-don't-have-the-evidence-to-prove-I-did kind of
25 case. So the investigation into the case was what does the

1 state have here really.

2 Q Okay. Were there any possible defenses that you
3 discussed with Mr. Wright?

4 A I mean, essentially the holes in the state's case is
5 what we looked at.

6 Q It was not alibi defense?

7 A No.

8 Q Did Mr. Wright in your discussions ever tell you he
9 didn't understand something --

10 A No.

11 Q -- when you discussed the plea offers or anything like
12 that? Did he ever tell you he didn't understand something?

13 A No. Well, let me back up.

14 I don't -- he never expressed to me confusion about
15 what I was explaining to him.

16 Now, in candor, he did repeatedly say I don't
17 understand why the state's going after me and not my
18 codefendants, I don't understand the state's theory, I
19 don't understand their strategy in this case.

20 I think he has always been, just as he expressed
21 today, very frustrated with the fact that he seemed to be
22 the focus of the state's attention as opposed to the two
23 men that went in the house and actually committed the
24 crime. So in that sense, yes, he did express confusion,
25 frustration. But as far as my communications with him, no.

1 I don't -- he never expressed any confusion on what we
2 talked about.

3 Q Did you cross-examine all of the witnesses in this
4 case?

5 A The very first witness was the initial responding
6 officer who went to the scene who offered really little. I
7 did not cross-examine him. But the other witnesses, yes.

8 Q And you cross-examined the codefendants on any
9 potential pleas?

10 A Yes. And actually Mr. Coleman admitted during his
11 cross-examination. There was no plea offer, but he -- he
12 said to me and to Mr. Scott, absolutely, I'm up here
13 because I hope that I'm going to get out of the nine
14 charges I'm facing.

15 Q But that doesn't indicate that --

16 A No.

17 Q -- that was communicated to him in any way?

18 A No. And Mr. Scott -- after I crossed him on that
19 Mr. Scott got back up and said, wait a minute, something
20 along the lines of I know she asked a bunch of questions
21 fast, let's go back through. Nobody's promised you
22 anything. And he said no, that he was just hoping that.

23 Q Okay. Did you impeach the codefendants on their
24 criminal history?

25 A Yes.

1 Q And do you recall one of the codefendants alluding to
2 the idea that Mr. Wright was a drug dealer?

3 A Yes. So before we started -- I had several pretrial
4 motions.

5 We -- I think prior to the jury strike, sometime in
6 the process, had just sort of outlined for the Court here's
7 the motions that I'm going to be making kind of as a
8 scheduling matter.

9 And after we outlined for Judge Hocker what we were
10 going to be arguing the solicitor came to me and said I
11 think we don't have to necessarily argue all of these
12 things.

13 And one in particular was the drug-dealer reference.
14 And the reason that I wanted that on the record is because
15 all along the state's theory of the case had been that
16 Mr. Wright was some kind of major drug dealer and that his
17 neighbor was a drug dealer and they were in competition for
18 the same cliental. And of course my argument was that that
19 was improper impeachment.

20 So we stipulated that they were not going to get into
21 anything about his record, his history or any allegations
22 of him being a drug dealer. We put all of that on the
23 record prior to starting testimony and that's -- that's in
24 the transcript where we stipulated to that. Judge Hocker
25 clarified and said we're talking about criminal records and

1 any reference to him being a drug dealer. It's in the
2 transcript.

3 So then when Mr. Jones was testifying the solicitor
4 asked him what Robert Wright told him, and he went through
5 this whole thing about a bunch of drugs and the \$8,000.
6 And solicitor said, "Did Robert Wright tell you why he
7 wanted you to do this?" And he -- and Mr. Jones said --
8 again, all of this is in the transcript -- something like,
9 yeah, he wanted him out of the way. And I objected and we
10 argued. And I said, "Judge, you know, this has already
11 been stipulated to, we're not supposed to make any
12 reference to him being a drug dealer." And that was
13 outside of the presence of the jury.

14 Judge Hocker sustained that objection. And the
15 solicitor goes on a different path and then circles back to
16 that comment about him wanting him out of the way. And I
17 objected again, and Judge Hocker said, "We're not going to
18 reference him being a drug dealer. However, if he's saying
19 something that your client, the defendant, said he can
20 testify to what he said. He just can't testify to what he
21 meant by it."

22 So that ruling allowed him to say he -- you know, I
23 think the comment was that Mr. Wright said -- I'm sorry. I
24 talk with my hands. I think he said I wanted him out of
25 the way or something like that. So that statement the

1 judge allowed in, and draw your own implications.

2 Q Sorry. I'm writing all of the notes too.

3 And you asked for that testimony to be stricken from
4 the record, the part that he was not allowed to say
5 regarding wanting him out of the way -- or I'm sorry.
6 Regarding competition?

7 A Right, yeah, because the -- right after he said what
8 did he say, the solicitor goes into, well, what did that
9 mean, and that the judge did strike. But he allowed the
10 statement in.

11 Q Do you recall the closing arguments in this case?

12 A Yes. And I've reviewed the transcript yesterday to
13 that.

14 Q Do you recall any objectionable comments made by the
15 solicitor during that?

16 A I do. And of course I heard what Mr. Wilkes outlined.
17 You know, I believe that there was -- and I made this
18 in a posttrial motion --

19 Q Right.

20 A -- some things that made it sound as though Mr. Wright
21 had some sort of obligation or should have explained
22 something.

23 In particular, the comment that really struck me the
24 most was he said, you know, the one thing that's so pesky
25 for Mr. Wright was those phone records. And then he said

1 those are really hard for him to explain. And that implied
2 that he should have explained something.

3 And I've read in the transcript and I don't -- I mean,
4 again, this has been several years ago. I don't remember
5 when this was said, but I did hear Mr. Wilkes point out if
6 you would do this to your own neighbor, what else would he
7 do, you know. I mean, those things did sort of bug me.

8 Now, one thing is that I made my closing --

9 Q After?

10 A -- after Mr. Scott. So any comment that he may have
11 made about attorneys not giving juries credit, I don't
12 think could -- I mean, maybe it was going towards some of
13 the questions that I asked. But I don't think that was
14 going towards my closing because I hadn't made it yet.

15 Q Okay. And what were the results of those posttrial
16 motions?

17 A They were all denied.

18 Q And do you recall the jury instructions in this case?

19 A Yeah, from what I read from the transcript, yes.

20 Q Do you recall the judge telling the jury that the
21 burden of proof is on the state?

22 A I do. And I said that in my closing and Mr. Scott
23 also said it in his closing.

24 Q And do you recall the judge also instructing them on
25 Mr. Wright's Fifth Amendment right to remain silent?

1 A Yes.

2 Q And the presumption of innocence?

3 A Yes.

4 Q Did you move for a directed verdict after the state's
5 case?

6 A Yes.

7 Q Did you move for a new trial after the verdict?

8 A Yes.

9 Q Were you also retained to file an appeal in this case?

10 A I did file an appeal based upon Mr. Wright's
11 instruction to me.

12 There was no -- even though my retainer agreement says
13 that there needs to be a separate retainer agreement, there
14 never was. But I did file an appeal and filed initial
15 briefs.

16 And at some point in the drafting of the initial
17 brief either -- I think it was Mr. Wright's mother, but it
18 may have been his wife -- but somebody from his family
19 contacted me and told me that they had retained counsel to
20 file a P.C.R.

21 At that time I got in touch with Mr. Wright and said,
22 you know, if you're going to file a P.C.R., then you might
23 want to talk to that attorney about proceeding with the
24 appeal. And then after that at some point he asked me to
25 withdraw the appeal, so we --

1 Q okay.

2 A -- I think right after I filed the reply brief
3 dismissed the appeal.

4 Q Do you believe objecting during the state's closing
5 would have changed the outcome of this case?

6 A I try to watch the jury's reaction during opposing
7 counsel's closing. I feel like -- and I may be completely
8 wrong -- but I feel like a lot of times juries get annoyed
9 by lawyers. I feel like juries have an idea of how trials
10 should go and that closing argument is that lawyer's time.

11 And so unless I hear something that is just really
12 crazy egregious or unless I see something in the jury that
13 really appears to be reacting, I feel like that me standing
14 up and objecting is going to be -- what I don't want is to
15 do anything that's going to cause the jury to be frustrated
16 with our side, you know, so that's a -- it's a delicate
17 balance.

18 I have probably only objected during a closing in my
19 career a time or two. As to whether it would have changed
20 things, I don't know. You know, again, it's easy to sit
21 here now and say that I should have stood up and objected.

22 Q Do you believe that Mr. Wright was interested in any
23 of the plea deals that you communicated to him?

24 A I do not.

25 MS. GREGORY: No further questions, Your Honor.

1 THE COURT: All right. Let's take a quick recess,
2 about ten minutes. And then we'll commence the
3 cross-examine. Thank you.

4 You can step down.

5 (Whereupon, a recess was taken.)

6 THE COURT: All right. Mr. Wilkes, your witness.

7 MR. WILKES: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. WILKES

10 Q Judge Zimmerman, on that last time that you objected
11 and it appeared that you were -- it was sustained, but
12 looking through the record all the way from 129 to 130,
13 131, the ongoing battle you had with the solicitor, it
14 looked -- it looked like you prevailed, and I think you
15 did. However, if I'm not mistaken on page 132 -- let's
16 see. The testimony was stricken at that time, correct?

17 A Page 132?

18 Q Just at the bottom it says --

19 A Yes.

20 Q Okay. So he struck it. But then again down at the
21 bottom of 133 carrying over to 134 he gets back into the
22 whole thing about getting in the way.

23 Let's see. And at the top of 134 on line three the
24 solicitor -- well, just line one says. "Okay. And did he
25 say any other reason why he wanted you to rob him after

1 saying that they sell drugs?"

2 The answer comes out, "Supposedly they got the same
3 cliental, basically."

4 And, again, you objected, had a sidebar but no
5 curative instruction.

6 A Right.

7 Q Okay. And, again, he asks it again below, and he gets
8 to repeat because he's getting in the way again, right?

9 A Right.

10 Q So he -- he was effective in getting -- do you believe
11 looking at that that he was effective, the solicitor was
12 effective, in casting Mr. Wright as being a drug dealer to
13 the jury?

14 A I do believe he was effective and -- and the part --
15 when we were having the discussion back, looking back, at
16 page 131 and 132, the judge said, "He can ask him what
17 Mr. Wright said. He just can't ask him to explain it."

18 So, you know, that was the reason that I didn't feel
19 like that I could, or in order to preserve the issue even
20 needed to, continue to object to the statement calling in
21 competition.

22 It was just allowing Mr. Jones to explain it that he
23 didn't, you know. And I think that after the second time
24 Mr. Scott stopped that.

25 Now, I mean, I agree with you that he's absolutely

1 implying it in his closing argument. I mean, there's no
2 doubt that that's what he's implying.

3 Q And that's what he's implying back to right there, is
4 those multiple attempts to get Mr. Jones to say he's a drug
5 dealer and that's why he wants him out of the way.

6 A Right.

7 Q Okay. Now, the -- there was also -- I think you heard
8 me read the closing-argument part where he said Mr. Wright
9 can explain those phone records. Did the jury, in fact,
10 come back with a question wanting to see the phone records
11 that Mr. Wright did not offer?

12 A They sent a question back out asking for the full
13 phone -- because I -- they sent a question back out asking
14 for the full phone records. Maybe that's what they meant.

15 However, in my closing I talked about the shortcomings
16 in the state's investigation. And one of the things that I
17 pointed out is that the state never got Mr. Wright's phone
18 records. They only had Mr. Jones'. They only had one side
19 of it.

20 So I don't know if what they were asking for was the
21 rest of the phone records. I mean, you know, I took that
22 as they were asking for what I was saying the state never
23 gave them. But it could very well have been that they were
24 asking about those phone records.

25 Q That Mr. Wright could not explain and did not explain.

1 A Right. They -- what they didn't ask for was an
2 explanation though. They asked could we have all of the
3 phone records.

4 Q Right. Okay. Now, you had mentioned a recommendation
5 as to a plea offer.

6 A Yes.

7 Q Did you give him a recommendation? You said you
8 thought that the evidence was weak in this case.

9 A I did.

10 Q And you believed that there was a chance you could
11 win.

12 A I did.

13 Q Okay. No promises but that you could win it possibly.

14 A Right.

15 Q Okay. And --

16 A And I still believe that. I mean, I believe if we had
17 a different jury sitting here and retried this, I think it
18 could easily go a different way.

19 Q Is it possible then that if we took out some of the
20 solicitor's prejudicial closing arguments that that would
21 make that more likely?

22 A It's possible.

23 Q Okay. So in light of the plea offer believing that
24 the evidence was weak and you -- and you would still sum it
25 up the same way -- you tried the case, so.

1 A And I also think it's very important to note that I
2 had a client who was continuously maintaining his
3 innocence.

4 Q Right.

5 A I mean, the only thing he ever told me was they told
6 me they did this and I never reported it.

7 Q Right.

8 A So when your client is telling you I'm not guilty, I
9 can't tell him to stand up and say he is.

10 Now, I did discuss with the state the possibility of
11 an Alford plea and was told they would not agree to that.

12 Q Okay. So as far as -- you had said earlier a
13 recommendation about the plea. Did you give him a
14 recommendation as to the plea in context to the evidence?

15 A As to whether or not to accept it?

16 Q Whether you considered it worth considering.

17 A I'm not trying to be evasive. I want to make sure
18 that I answer this truthfully.

19 He -- I talked to him about what the evidence was and
20 what I thought our likelihood could be at trial. And I
21 told him if we go to trial and you're convicted you're
22 facing mandatory minimum time, this plea does not have
23 mandatory minimum time. You know, I mean, I advised him on
24 all of that.

25 Now, if you're -- I mean, like I said, ultimately,

1 it's his decision, but I did tell him that I thought he had
2 a good chance if he went to trial.

3 Q Okay. Very good.

4 MR. WILKES: No further questions.

5 THE COURT: All right. Any redirect?

6 MS. GREGORY: Just briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. GREGORY

9 Q I just want to reiterate. There was testimony that
10 was admitted during the codefendant's testifying that did
11 imply that he was a drug dealer, is that correct?

12 A The -- yes. The implication could be made. The
13 comment that -- that the judge allowed in was he allowed
14 Mr. Jones to say that he needed to get his competition out
15 of the way. What he -- what the judge did not allow in was
16 for Mr. Jones to explain, because the next question was
17 what did he mean by that. And the judge did not allow the
18 explanation.

19 Q And in your closing you didn't show that the state did
20 not grab Mr. Wright's phone records, correct?

21 A Yes.

22 Q And --

23 A I also pointed out that they -- they took D.N.A.
24 samples from the house and never submitted them to the lab
25 and that they took fingerprints and never submitted them to

1 comparisons. I mean, just generally, as most defense
2 attorneys do, here are the things that the state didn't do.

3 Q So you argued your version --

4 A Right.

5 Q -- of the evidence against Mr. Wright. And when the
6 jury came out, they did not ask for specific phone records.
7 They just asked for all phone records, is that correct?

8 A That's right. And, you know, a lot of the -- the
9 argument on why all of these missing things were so
10 relevant is because Mr. Coleman didn't implicate Mr. -- he
11 calls him Black Rob in his statement, but he didn't
12 implicate this Black Rob reference until his either fourth
13 or fifth statement. Lorenzo Jones didn't implicate Robert
14 Wright until his fourth or fifth statement.

15 There were other people that they implicated early on.
16 There was a reference to two other nicknames that I cannot
17 remember now. But there's two other people that they
18 implicated in their early statements, and law enforcement
19 never talked to those people, never got their statements.

20 So a lot of that was very relevant, and my sort of
21 theory of the case is basically they -- they didn't fully
22 investigate this. They took the story of the two guys that
23 admit they committed the burglary and wanted to dump it all
24 on my client.

25 Q And you cross-examined them on their other statements

Mindy westbrook Zimmerman
Recross-examination by Mr. wilkes

1 that were inconsistent with their testimony, correct?

2 A Yes.

3 MS. GREGORY: No further questions.

4 THE COURT: Recross?

5 RECROSS-EXAMINATION

6 BY MR. WILKES

7 Q Do you recall -- ask you again -- specifically whether
8 they, the jury, on that jury question asked for
9 Mr. Wright's phone records?

10 A I believe, and I believe it's in the transcript, so
11 that would be probably the best way to know for sure. But
12 I believe what they asked for was can we have all of the
13 phone records, I think was the statement, but I --

14 Q The record will speak for itself.

15 A Right. It's -- yeah. I can't tell you exactly. I
16 remember reading it in the transcript yesterday.

17 THE COURT: All right. Anything else?

18 MR. WILKES: Nothing further.

19 THE COURT: All right. Thank you, ma'am. You may
20 step down.

21 THE WITNESS: Thank you.

22 THE COURT: The state call its next witness.

23 MS. GREGORY: No further witnesses, Your Honor.

24 THE COURT: State rests.

25 Anything in reply?

1 MS. GREGORY: I'm sorry?

2 THE COURT: I was talking to Mr. Wilkes. He's talking
3 to his client. Anything in reply from an evidentiary
4 standpoint?

5 MR. WILKES: Yes, sir, Your Honor. It would serve no
6 purpose for my client to testify to his recollection of
7 what the note actually said. It may be verbatim in the
8 transcript; it may not. Can we incorporate that into the
9 record? It's locked in the evidence vault, I'm sure.

10 THE COURT: Yeah. I mean, any notes from the jury
11 would be part of the official record of the case. That'd
12 be a court exhibit. So you're right. So, I mean, to the
13 extent I need to issue any order opening that up, then for
14 me to look at it, then so ordered.

15 MR. WILKES: I appreciate it, Your Honor. And we'll
16 just incorporate a copy of it in our record if that's okay.
17 That's applicant's exhibit next.

18 THE COURT: All right. That'll be -- does the state
19 wish to be heard on that?

20 MS. GREGORY: No.

21 THE COURT: I think that's the best way to handle
22 that. So, obviously, I'm going to take my decision today
23 under advisement, and that'll give y'all time to get that
24 for me.

25 Madam A.G., I'll put you up to that task to get me

1 the -- any court exhibits which are filed.

2 MS. GREGORY: Sure.

3 THE COURT: I guess -- who the court reporter was.

4 Stacy Johnson was the court reporter, and then they were --
5 or they're in the evidence file, I guess, for the clerk of
6 court's office in Newberry.

7 All right. Let's hear closing arguments.

8 Yes, sir.

9 MR. WILKES: Your Honor, I've tried to lay out the
10 argument along with the closing argument, on the closing
11 argument.

12 I would like to pass up the two cases that I pulled
13 most of my cites from. There are so many more as far as --
14 there are of course so many more supporting the impropriety
15 of all of the arguments that I pointed out -- due process,
16 the Fifth Amendment.

17 But, in particular, the argument is hugely
18 prejudicial. It is all -- improper comments are all
19 throughout the closing argument. It's not just one thing.
20 If it'd be one thing, it'd be different. But there are so
21 many.

22 And I didn't even mention my favorite as far as
23 prejudice. On page 202 the solicitor brought up Charles
24 Manson in his closing argument. On line six, it's Charles
25 Manson and talks about Charles Manson. You -- you just

1 can't take that back and you can't say something about
2 Charles Manson and then say but I'm not really comparing
3 him to Charles Manson but I'm going to talk about it
4 anyway. You just can't undo things like that.

5 The prejudice is just throughout this closing
6 argument. And of course the standard by which the Court
7 must make a determination on the prejudice of argument as
8 to its affect on the case is whether or not there's
9 overwhelming evidence. If there's overwhelming evidence in
10 a case, then the applicant always loses.

11 But in this case there's -- there was not overwhelming
12 evidence. And even after trying the case defense counsel
13 believes that there's just not overwhelming evidence, that
14 given another jury and another go at it there could be a
15 different result. And when that is the evidence by which
16 they got a conviction on, then the amount of prejudice
17 throughout a closing argument just can't be ignored.

18 To present the power of the state and the integrity of
19 the state to say I know he's guilty and I know you need to
20 go back and find him guilty, in essence, is too powerful to
21 not overcome the jury as far as the holding the reasonable
22 doubt. It is just too much in here. It's too prejudicial.
23 And there's just simply not close to being the overwhelming
24 evidence that's required to offset that.

25 And so from the standpoint of the closing argument,

1 Your Honor, I think that the case law supports a reversal
2 on this on that basis. And I think I've laid out the rest
3 of my argument on the pleadings.

4 THE COURT: Yes, sir. Thank you Mr. Wilkes.

5 MS. GREGORY: Thank you, Your Honor.

6 Regarding the closing argument, defense counsel
7 testified that she did not believe objecting during the
8 state's closing would have made a difference in this case.
9 She had a valid trial strategy that she told you about for
10 that.

11 The Court performed a review of the state's closing
12 argument based on her posttrial motions and found that
13 there was no burden-shifting and that the state did not
14 comment on the -- on Mr. Wright's Fifth Amendment right.

15 THE COURT: Let me stop you there going to your
16 strategy argument.

17 Okay. Couldn't Ms. Zimmerman had objected, approached
18 the bench or requested that the jury go out and then put it
19 on the record so as not -- I understand the whole strategy
20 standpoint of trying the case and not making the jury mad
21 at you and that whole deal, the feel of the trial.

22 MS. GREGORY: Sure.

23 THE COURT: Certainly, I know the case law on looking
24 at P.C.R. applications. You -- the Court has to defer to
25 strategy arguments, that kind of thing. You know, one

1 simple objection, can we approach --

2 MS. GREGORY: Sure.

3 THE COURT: -- could have cured all of that.

4 MS. GREGORY: It could have, but she testified that
5 she doesn't believe objecting would have changed the
6 outcome of the trial. So you weigh that in the time of the
7 trial.

8 THE COURT: Based upon your review, if you have
9 reviewed appellate decisions that Mr. Wilkes has handed up
10 and that he cited when he was making his arguments
11 concerning closing arguments, don't you think that there
12 was a very good chance the defendant would have prevailed
13 on appeal from a conviction based upon the solicitor's
14 comments during closing arguments?

15 MS. GREGORY: I do not. I've actually written several
16 briefs recently on this issue.

17 THE COURT: All right. Go ahead.

18 MS. GREGORY: And I've cited Vasquez, State vs.
19 Vasquez, and State vs. Northcutt, and those are two very
20 strong cases that show the extreme way a solicitor would
21 have to violate that.

22 One of those cases, there was a Middle Eastern man who
23 was not even charged with terrorism or anything and the
24 solicitor likened that defendant to a terrorist from 9-11
25 in discussing the 9-11 attacks and all of that.

1 Additionally -- that was Vasquez. In Northcutt the
2 solicitor basically had a funeral for a child victim and
3 said that if they let the defendant go it's open season on
4 babies and that's the burden, like that's the line that
5 they would have to cross in order for them to succeed on
6 this kind of claim. And that's far from it in this case.
7 We are far from that.

8 THE COURT: You don't believe there's any
9 burden-shifting?

10 MS. GREGORY: I do not believe there's
11 burden-shifting. I believe the solicitor can state their
12 theory of the case. You know, the defense counsel, Ms.
13 Zimmerman, had the opportunity to also state her position
14 on the evidence. The jury was charged appropriately on
15 burden, on the presumption of innocence by the Court, which
16 would have cured any of that.

17 THE COURT: And she got to argue last.

18 MS. GREGORY: And she got to argue last, yes, sir.

19 So I don't believe that that -- they would have been
20 successful on that, and he withdrew that appeal. So the
21 higher court never got to review that argument from the
22 state. But in briefs that I've written recently it
23 certainly is far from that, the cases and this line on
24 appeals.

25 Again, defense counsel testified today that it was Mr.

1 Wright's decision not to plead guilty. She provided him
2 both of the plea agreements or the plea offers from the
3 state, and it was his decision not to plead guilty. She
4 proceeded to trial based on that.

5 And both solicitors testified that they did not have
6 any plea deals with either codefendant in this case and
7 they would have disclosed that to Ms. Zimmerman had they
8 done that.

9 So I don't believe that they -- excuse me -- I don't
10 believe Mr. Wright has met his burden today as set forth in
11 Strickland in showing that anything that Mr. Zimmerman or
12 Mr. Scott could have done differently to change the outcome
13 of this case.

14 THE COURT: All right. Coming back to you,
15 Mr. Wilkes.

16 MR. WILKES: I am not absolutely sure that I heard
17 Judge Zimmerman's testimony as the attorney general stated.
18 I don't think she said that it would have done no good to
19 make those objections.

20 I believe she testified something to the effect that
21 it very well could have made a difference given the
22 weakness of the state's case.

23 So I would ask the Court to maybe look at that to be
24 sure because my recollection clearly differs from the
25 attorney general.

1 And without really rehashing it, which I guess it is
2 rehashing it, but just because there was no babies to be
3 killed in this case doesn't change what the solicitor said
4 into being right.

5 There is a line. You don't have to say Mr. Wright is
6 going to kill babies. I mean, that's not the line. The
7 line is when it's prejudicial, period. And so prejudice in
8 this case comes from exactly what the judge said don't do,
9 and he did it. And then he got in closing argument and
10 referred back to what he did that he shouldn't have done to
11 say there's an inference here, ladies and gentlemen of the
12 jury. I trust you to figure it out. I know what it is, I
13 think I know what it is, but you'll figure it out. Things
14 like that are undeniably prejudicial.

15 The things that were said were inflammatory and
16 they're just all throughout that argument. So you can take
17 it cumulatively or each one individually, and there's
18 enough to prejudice Mr. Wright.

19 THE COURT: The cross here in this case, and I
20 indicated earlier, I am going to take my decision under
21 advisement. The cross here is for me are, you know, where
22 does -- I understand Judge Zimmerman's strategy in not
23 objecting during the closing argument, but, you know, I
24 think it's pretty clear from reading the record or
25 reviewing the way I did that the reason the direct appeal

1 was abandoned was because the closing-argument stuff wasn't
2 preserved, that no objection was made. So the best avenue
3 for the desired result of a new trial would be the P.C.R.
4 route where the failure to object, whether or not that, the
5 strategy -- y'all see what I'm thinking about. I'm trying
6 to think out loud, but that's your argument.

7 MR. WILKES: It is. I apologize for not pointing that
8 out to the Court. But if you -- the appellate stuff is in
9 there, and you can see that Judge Zimmerman did file an
10 appeal and the state immediately responded with the correct
11 argument it was not preserved. And it was obvious.

12 THE COURT: And I think it's clear that Judge
13 Zimmerman in her posttrial motions hit the nail on the head
14 as far as -- but by then you can't, you know. They weren't
15 preserved for appeal. So all right. Here is what we're
16 going to get.

17 what else do you want to say?

18 MS. GREGORY: Okay. The comment was used against him,
19 was allowed in because it was his statement in evidence.
20 So the inference that he's a drug dealer came from
21 Mr. Wright.

22 THE COURT: Right.

23 MS. GREGORY: So the state is allowed to comment on
24 the evidence during their closing argument, and that's what
25 they did. And she was allowed to comment on her version of

1 the evidence. And you'll see that in her closing statement
2 that she did a very good job as well.

3 THE COURT: Right. All right. Here's what I'm going
4 to do. I'm going to take it under advisement.

5 If y'all want to submit any additional memoranda --
6 I'm not ordering that you to do it -- but if you want to,
7 I'll leave the record open for y'all to do that.

8 When I say record, I mean my decision. I'm not going
9 to make any decision in haste, but I don't like to sit on
10 these things. Okay. So if you want to submit anything
11 additional, let's say let's do it -- what's today?
12 March 25th, I mean, February 26th. What is it? Friday is
13 too soon. How about March 15th? Will that give you enough
14 time, Mr. Wilkes, if you want to submit anything
15 additionally?

16 MR. WILKES: I'll work with any time you give me.

17 THE COURT: I know. I'm trying to be realistic.
18 You've got a private practice and she's juggling. How many
19 cases are you juggling right now, Madam A.G.?

20 MS. GREGORY: I have four circuits right now, sir.

21 THE COURT: Okay. All right. But this case is very
22 important to your client and is very important to Judge
23 Zimmerman as well. I don't want to sit on it too long.
24 Okay. So y'all try to get it. And if y'all want to add
25 anything additional just get it to me by March 15th. And

1 after that, after I've had plenty of opportunity to digest
2 everything, I will issue instructions for an order.

3 MR. WILKES: Thank you, Judge.

4 THE COURT: Thank you very much. That concludes this
5 hearing.

6 (Jury questions from trial marked Applicant's Exhibit
7 No. 2.)

8 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Newberry County, South Carolina, on the 26th day of February 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 30, 2019

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

Robert Wright,

MEMORANDUM OF APPLICANT

v.

State of South Carolina.

Applicant submits the following memorandum on the issue of closing argument as it involves a large number of cases and sub-issues. This is not intended as a waiver of other issues raised in the PCR. This issue includes the loss of the ability to raise issues on direct appeal due to a lack of issue preservation.

ISSUE OF IMPROPER CLOSING ARGUMENT

Counsel failed to object to improper argument by the prosecutor.

The state's closing argument was filled with improper statements that, due to the severity and number, resulted in prejudice to the Applicant rendering the verdict unsound and depriving the Appellant of due process. Despite the number and severity of the improper comments trial counsel failed to timely object.

At the PCR hearing trial counsel testified that she stays in her seat during closing argument and has only objected twice ever during a closing by the prosecutor. Trial counsel agreed that there would have been no harm, or less harm by lodging a proper objection rather than to allowing the improper argument. By way of a Rule 29 motion trial counsel raised the issue of the improper argument as being sufficient grounds for a new trial. At the Rule 29 hearing trial counsel admitted that the failure to object was an error on her part. P. 9. Trial counsel went on to explain that staying in her seat and not objecting during closing was a common courtesy. P. 9-10. Prejudice is established by trial counsel's testimony that her belief prior to trial was that the case could go either way. At the PCR hearing trial counsel, having heard the evidence and viewed the jury during the trial, was still of the opinion that the case could go either way. Given that trial counsel's admitted that the prejudice presented state's improper comments could have been the deciding factor in the Applicant's case.

The trial court denied relief under Rule 29 in part due to a lack of a contemporaneous objection to the solicitor's comments. (Order Rule 29). As to the findings by the trial court in its Rule 29 ruling that there was no prejudice, the Applicant was unable to appeal from those findings given the lack of a contemporaneous objection. Although trial counsel appealed and raised the issues, the initial brief the State argued the failure to object and preserve the issue for appeal. Counsel dismissed the direct appeal to allow the Applicant to proceed in the present action.

While the Court must consider the cumulative impact of all of the solicitor's improper comments, the most problematical involve the solicitor expressing his belief of Wright's guilt. The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that

the jury will "trust the Government's judgment rather than its own view of the evidence." See *United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985):

The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility,³ and the federal courts,⁴ have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3–5.8(b)(2d ed. 1980).

United States v. Young, 470 U.S. 1, 7–8, 105 S. Ct. 1038, 1042, 84 L. Ed. 2d 1 (1985).

The prosecutor's argument was improper and constitutes reversible error pursuant to U.S.C.A. Const.Amend. 14.:

"...So where is the justice for the Meyers? Isn't that why we are here? We spent a day and a half here listening to the testimony and listening to this horrible crime. It's uncontested that it happened..... So how about a little justice for the Meyers." pg. 200-201. "had a pistol held to their heads"..... His hands ain't clean, let me tell you that. He may stand back and say

¹A Golden Rule argument asking the jurors to stand in the shoes of the victim "tends to completely destroy all sense of impartiality of the jurors. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), cert. denied, 544 U.S. 943, 125 S.Ct. 1645, 161 L.Ed.2d 511 (2005); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901–02 (2006), overruled by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

²Facts not in record. A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998).

³*State v. Schuler* personal representations of prosecutor. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Furthermore, a prosecutor cannot vouch for a witness' credibility. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit

well, I didn't get anything, they didn't put me in the house.⁴ Because he was the puppet master, right? Let's hold the shock collar accountable too....⁵ 200-201

"...You know, to stand back and say, you know, I'm sitting in my house, I didn't go in their trailer, my hands are clean, you can't find me guilty, that is just a legal falsity.⁶ By no means do I compare the two, by no means do I compare the two, and by no means do I compare the crimes, but how many of us know Charlie Manson?⁷..."

personal assurances, or indicating that information not presented to the jury supports the testimony. *Id.*

⁴"Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right." *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987).

⁵Appeals to passion by characterizing the defendant as a shock collar.

⁶The solicitor commented on what the defendant said when he didn't testify at all. "Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right." *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)

⁷Unnecessary to make any point and highly prejudicial.

"A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998)." Only two cases reported in South Carolina have dealt with a Charles Manson reference and in both there was a timely objection and curative instruction. Here there was neither. See *State v. Livingston*, 282 S.C. 1, 7, 317 S.E.2d 129, 132 (1984) and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984); See also *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)

"However, "[s]olicitors are bound to rules of fairness in their closing arguments," as we have explained:

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981))." The present case is similar to *Vasquez* as the reference to Manson's murder case is improper where the present case did not involve a murder charge.

...And we know about those phone records. And aren't those difficult for Mr. Wright to explain, those phone records?...⁸ 202-203

...Do you ever wonder if somebody has the gall to do this to a neighbor what they could be capable of?...⁹

...You know, the Court allowed me two hours to stand up here and argue. I'm not gonna do that, and I know y'all are thankful for that, but there's not really a whole lot in my mind to argue about. I think its pretty crystal clear...¹⁰ 207

...I've got my idea of why this happened. I think it's very shallowly -- or a very shallow burial, just under the layers, of the intent of Mr. Wright, why he needed them out of the way, why he needed his neighbor out of the way. I'm gonna respect you guys in coming up with that on your own. Y'all heard Lorenzo Jones' testimony yesterday, didn't you? I think the inference is there, but we won't talk about it, but I think we understand why he needed them out of the way. 212...¹¹

...Nothing justifies that crime. Nothing justifies kicking in a door in the middle of the

⁸Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)

⁹Vilifies the defendant and urges the jury to convict to protect of future crimes

¹⁰Personal representations of the prosecutor as to evidence. "As a general premise, a prosecutor's repeated references to his or her personal opinion about a defendant may indeed be found improper." *U.S. v. Higgs*, 353 F.3d 281, 332 (4th Cir.2003), cert. denied, 543 U.S. 999, 125 S.Ct. 627, 160 L.Ed.2d 456 (2004); See also *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that the jury will "trust the Government's judgment rather than its own view of the evidence.)

¹¹Wrong in every possible way. It brings up the issue that the court specifically ruled would be inadmissible. It intentionally characterized the defendant as a drug dealer. The prosecutor gave his personal opinion that the crime stemmed from the defendant "need[ing] his neighbor out of the way." Evidence of bad character of the defendant when the defendant did not testify and the personal representation by the prosecutor as to evidence not in record. "What the prosecutor may not do is suggest a belief in the defendant's guilt that is not explicitly tied to the strength of the evidence, because such an argument may suggest to the jury that the prosecutor has independent knowledge of the defendant's guilt." 75A Am.Jur.2d Trial § 634 (Westlaw 2005); see *Pupo*, 841 F.2d at 1240.

night and holding a gun on somebody. If you do that to your neighbor, where does it stop?...¹²

...Do any of you have a reasonable doubt that Robert Wright is not guilty of what I'm telling you he's guilty of? Do any of you have a reasonable doubt that it didn't happen this way? Do any of you have a reasonable doubt that your mind and your eyes are fooling you when you look at those phone records? No. The answer is no...¹³

...I'm gonna sit down. I think y'all are firmly convinced and I think there is only one verdict¹⁴. And I think there ought to be twelve united voices here speaking together and I think y'all ought to go back there and deliberate and consider everything and I think y'all ought to come up with the only reasonable conclusion, and that is to find the third person involved with this accountable.¹⁵ Hold him accountable. Find him guilty. Don't let him stand back and say well, y'all didn't catch me in the house...¹⁶

¹²Asking the jury to convict to stop further crime rather than the crime charged.

¹³The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that the jury will "trust the Government's judgment rather than its own view of the evidence." See *United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)

"The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility,³ and the federal courts,⁴ have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3–5.8(b)(2d ed. 1980)." *United States v. Young*, 470 U.S. 1, 7–8, 105 S. Ct. 1038, 1042, 84 L. Ed. 2d 1 (1985)

¹⁴The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that the jury will "trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)

¹⁵The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that the jury will "trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)

¹⁶Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987); As a rule, a solicitor cannot comment directly or indirectly upon a defendant's failure to testify at trial. *Gill v. State*, 346 S.C. 209, 552 S.E.2d 26 (2001); see *Doyle v. Ohio*, 426 U.S.

Based on the number and nature of the improper argument, the Applicant's due process rights were violated.

Respectfully submitted,

s/J. Falkner Wilkes
J. Falkner Wilkes, 12893
Counsel for Applicant

610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding an accused has the right to remain silent and the exercise of that right cannot be used against him).

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Robert Antwon Wright,
SCDC # 334552

2017-CP-36-509

Applicant,

**RESPONDENT'S POST-HEARING
MEMORANDUM**

v.

State of South Carolina,

Respondent.

ISSUES PRESENTED

- I. Whether Applicant was prejudiced by defense counsel's failure to object to the State's closing argument, thus failing to preserve this issue for appeal?
- II. Whether the solicitors entered into a plea agreement with the co-defendants prior to the trial and failed to disclose the agreements to Counsel during discovery?
- III. Whether Counsel properly explained and advised Applicant of the State's plea offer?

ISSUE 1: TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Mindy Zimmerman, Esquire (Counsel) testified she did not believe objecting to the State's closing would have made a difference in the outcome of the trial. Counsel testified juries get aggravated by lawyers and she believed standing up and objecting would have caused the jury to be frustrated. Counsel testified she chose not to object because she did not want to alienate the jury. Counsel filed a post-trial motion raising several issues, including the State's closing shifted the burden from the State and violated Applicant's Fifth Amendment right to remain silent. After oral argument, the trial court issued an order denying Applicant a new trial.

PCR Counsel for Applicant at the hearing alleged Counsel was deficient for failing to object to the State's closing and alleged Applicant was prejudiced by her failure to object. PCR

Counsel cited State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) and Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) in support of his allegation. PCR Counsel highlighted the following segments of the State's closing as objectionable:

So where's the justice for the Mayers? Isn't that why we're here? Where's the justice for them? We spent a day and a half here listening to the testimony and listening to this horrible crime. It's uncontested that it happened. (Trial Tr. 200-201)

His hands ain't clean, let me tell you that. He may stand back and say well, I didn't get anything, they didn't put me in the house. Because he was the puppet master, right? Let's hold the shock collar¹ accountable, too. (Trial Tr. 201.)

You know, to stand back and say, you know, I'm sitting in my house, I didn't go in their trailer, my hands are clean, you can't find me guilty, that is just a legal falsity. (Trial Tr. 202.)

By no means do I compare the two, by no means do I compare the two, and by no means do I compare the crimes, but how many of us know Charlie Manson? Do you realize he never killed a person? He never killed one person. He was the puppet master in that case. And, again, I am not comparing these two people and I'm not comparing their crimes. I'm here to tell you that it is very possible to commit the crime of burglary first and armed robbery while sitting in the comfort of your own trailer fifty feet away. (Trial Tr. 202.)

And we know about those phone records. And aren't those difficult for Mr. Wright to explain, those phone records? Do you understand that that's not been contested? (Trial Tr. 203.)

What do I do, shock collar?² (Trial Tr. 203.)

Do you ever wonder if somebody has the gall to do this to a neighbor what they could be capable of? It's fifty feet away. It's his relative. (Trial Tr. 203.)

[T]here's not really a whole lot in my mind to argue about. I think it's pretty crystal clear. And I don't think a lot of lawyers give juries the respect they deserve as freethinking and educated and logical people[.] (Trial Tr. 207)

But it was uncontested. (Trial Tr. 210.)

¹ Deputy Solicitor Dale Scott has explained this is a typo and it should read "shot caller."

² This is a typo and should read "shot caller."

I've got my idea of why this happened. I think it's very shallowly – or a very shallow burial, just under the layers, of the intent of Mr. Wright, why he needed him out of the way, why he needed his neighbor out of the way. I'm gonna respect you guys in coming up with that on your own. Y'all heard Lorenzo Jones' testimony yesterday, didn't you? I think the inference is there, but we won't talk about it, but I think we understand why he needed them out of the way. (Trial Tr. 212.)

There's nothing that justifies kicking in a door in the middle of the night and holding a gun on somebody. If you do that to your neighbor, where does it stop? (Trial Tr. 213.)

Do any of you have a reasonable doubt that Robert Wright is not guilty of what I'm telling you he's guilty of? (Trial Tr. 213.)

I think y'all are firmly convinced and I think there is only one verdict. And I think there ought to be twelve united voices here speaking together and I think y'all ought to go back there and deliberate and consider everything and I think y'all ought to come up with the only reasonable conclusion, and that is to find the third person involved with this accountable. Hold him accountable. Find him guilty. Don't let him stand back and say well, y'all didn't catch me in the house. (Trial Tr. 214.)

ANALYSIS

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668 (1984). First, the applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive

relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). "The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion [and the] appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion." Id. at 548, 586 S.E.2d at 156. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

In support of Applicant's allegation, PCR Counsel cited Liberte, 336 S.C. 648, 521 S.E.2d 744, which is distinguishable from Applicant's case. In Liberte, the South Carolina Supreme Court held the solicitor's closing inappropriately appealed to the jury's emotions when the solicitor "induced the jury to identify with the law enforcement officers involved in the case." Id. at 653 n.

2, 521 S.E.2d at 747. The Court held the solicitor's closing argument also attacked the reasonable doubt standard as a "threat to law and order," which they found far more troubling than the solicitor's comments about law enforcement. Id. at 654, 521 S.E.2d at 747.

Here, the solicitor did not inappropriately appeal to the jury by asking them to put themselves in the shoes of the victims or law enforcement. The solicitor did not insinuate the drug issues in the community would be solved if they convicted Applicant, nor did the solicitor argue his conviction would restore civil order in the community. More importantly, the solicitor does not attack the reasonable doubt standard, but instead embraces it and even explains to the jury, "My standard is beyond a reasonable doubt. Everybody from California to New York that's ever been convicted by a jury has to be proven guilty beyond a reasonable doubt." (Trial Tr. 213.) The violations the Court found in Liberte did not occur in Applicant's case.

Applicant also cited Tappeiner, 416 S.C. 239, 785 S.E.2d 471, in support of his argument that the solicitor's closing was inappropriate. In Tappeiner, the Petitioner argued the solicitor's closing "vouched for the victim's credibility by implying the police and rape crisis counselors believed Victim, and not Tappeiner." Id. at 250, 785 S.E.2d at 476. During his closing, the solicitor asked the jurors if they would want Tappeiner – who was on trial for criminal sexual conduct with a minor – to babysit their children. Id. at 253, 785 S.E.2d at 478. The Court found the solicitor's vouching for the victim's credibility "incredibly prejudicial" because there was "no other evidence beyond Victim's testimony of the events that allegedly occurred that August evening." Id. at 254, 785 S.E.2d at 479.

A solicitor vouches for the credibility of a witness by placing "the government's prestige behind a witness by making personal assurances, or indicating that information not presented to

the jury supports the testimony.” Vaugh v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)). However, “[a] solicitor’s argument concerning the credibility of the State’s witnesses based on the record and its reasonable inferences is not error.” State v. New, 338 S.C. 313, 319-20, 526 S.C.2d 237, 240 (1999) (quoting State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (finding the solicitor’s remarks referencing credibility of State witnesses permissible and directly related to the evidence where biases of the witnesses were apparent from the record.)

Here, the solicitor did not vouch for the victims or any of their witnesses during his closing argument. In fact, during his opening statement, the solicitor stated, “And, you know, no disrespect to Mr. and Ms. Mayers, but sometimes we can’t choose, you know, a perfect victim, a victim who is completely innocent, victims who have real life issues. There might be drugs there.” Trial Tr. 52. The solicitor did not vouch for either of the co-defendants, but instead reiterated to the jury that both of the co-defendants would also be prosecuted for their role in the incident. Trial Tr. 201. The statements Applicant has highlighted where the solicitor calls Applicant the puppet master, or states “his hands ain’t clean” is proper argument by the solicitor on the reasonable inferences that could be drawn from the phone records or co-defendant’s testimony presented by the State during the trial.

The solicitor in this case was also able to present more evidence to the jury regarding Applicant’s guilt than the solicitor was able to present against Tappeiner. Here, the jury had the testimony of the victims, co-defendants, investigators, and phone records showing communication between Applicant – either by call or text – and the co-defendants at the time of the incident. The trial court also properly allowed one of the co-defendants, Lorenzo Jones, to testify regarding

statements Applicant made to him about the victims and why he wanted to target them. Trial Tr. 134.

The solicitor's argument in Applicant's case is far from the egregious conduct that would require reversal. In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the Supreme Court of South Carolina found the solicitor's closing argument warranted reversal of Petitioner's conviction. In their opinion, the Court highlighted three different examples of egregious conduct by the solicitor, none of which is present in Applicant's case. In their argument, Petitioner outlined the following issues with the solicitor's closing:

[T]he solicitor violated this well-established rule³ by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies"; (6) telling the jury he "expects" the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby's crib.

Id. at 223, 641 S.E.2d at 882. The court found three of the solicitor's arguments outlined by the appellant required reversal. First, the solicitor's comment declaring an "open season on babies"; second, the solicitor's comment that he "expects" the death penalty; and third, the solicitor's production of a baby carriage covered in a large black shroud during a staged funeral procession in the courtroom. Id. at 223, 641 S.E.2d at 881. The court found, "Any one of these three miscues requires reversal of Appellant's sentence" because the solicitor was "overly zealous in his argument." Id. at 223, 641 S.E.2d at 881-882.

³ S.C. Code Ann. §16-3-25(C)(1) (2003).

In Applicant's case, the solicitor did not exhibit any of the conduct that was found to be inflammatory or prejudicial in Northcutt. Applicant argued the solicitor's two comments regarding Applicant being the neighbor of the victims rises to the same egregious conduct as what was displayed in Northcutt, however, in Applicant's case the solicitor did not cry, did not tell the jury it *expects* them to return a guilty verdict, did not threaten the jury by stating a not guilty verdict creates an open season on neighbors or the community, and did not insinuate that returning a not guilty verdict would additionally harm the victims. The solicitor's comments in this case, especially when viewed in light of the entire record and Counsel's closing argument, do not rise to the egregious conduct that would have deprived Applicant of a fair trial.

In Vazquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), the Supreme Court also found the solicitor's comments were inappropriate. In Vazquez, the solicitor referred to Petitioner as a Sunni Muslim, a domestic terrorist, and provided extensive references to the September 11th attacks on the United States. This Court stated:

Although this Court on several occasions has found no reversible error in a solicitor's singular inflammatory characterization of a defendant, we find the solicitor's comments in the instant case clearly exceed the bounds this Court has established with respect to this type of comment. . . . We find the solicitor's statements improperly evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury.

Id. at 460, 698 S.E.2d at 567 (internal citations omitted). Vazquez, who was not charged with terrorism, was compared to a terrorist by the solicitor. The solicitor used Vazquez's religion to draw on the jurors' fear and trauma from the September 11th attacks to implore the jury to find Vazquez guilty and sentence him to death. Here, as Applicant has pointed out, the state mentioned "Charlie Manson" during their closing to illustrate how someone can be responsible for a crime

even if they are not the ones who physically commit the crime. Trial Tr. 202. Unlike the solicitor in Vazquez, the solicitor in Applicant's case stated *five times* during his brief analogy that he is not comparing Applicant to Charles Manson, nor is he comparing their crimes. Trial Tr. 202. The solicitor's brief analogy was utilizing a famous case to illustrate to the jury his theory that, although Applicant did not physically commit this crime, he is still just as responsible as his co-defendants. The solicitor mentioned Charles Manson *one time* during his closing; he did not make the comparison continuously throughout his closing argument. Applicant has failed to show how this brief analogy – especially with the solicitor's numerous disclaimers – “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” DeChristoforo, 416 U.S. at 643. Furthermore, upon review of such comments, “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its more damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” Id. at 647. Unlike in Vazquez, the solicitor's comments here did not improperly evoke the jury's passions or prejudices and were not so egregious, as Applicant argued, as to warrant a new trial.

Prejudice Analysis

Applicant has isolated several passages in the solicitor's closing that he believes to be objectionable comments by the solicitor, however, it is inappropriate to evaluate closing arguments in isolation. In Rudd, the Supreme Court has held the solicitor's closing argument should be reviewed in context of the entire record. Id. at 543, 586 S.E.2d at 153. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument.

Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (citing DeChristoforo, 416 U.S. at 643).

Here, viewing the solicitor's comments in context of the entire record, the jury was able to consider and weigh the testimony of the victims, co-defendants, law enforcement, and phone records during their deliberations. Additionally, Counsel was able to cast doubt on the State's case. In her closing, Counsel also expressed she wanted justice for everyone involved. Trial Tr. 215. Counsel did not dispute the phone records and conceded that Applicant spoke to Jones on the date of the incident. Trial Tr. 215. Counsel also argued the credibility of the co-defendants and their varying statements to law enforcement during the investigation. Counsel argued the co-defendants testified favorably in the hopes that the State would help them with their pending charges. Trial Tr. 218, 219. Counsel also questioned the investigation and highlighted the failure of law enforcement to submit the forensic evidence once the co-defendants were identified or obtain Applicant's phone records. Trial Tr. 220-223. Counsel also explained the burden of proof was on the State and agreed with the solicitor that the jury "needed to do what is just" and asked them to return a not guilty verdict. Trial Tr. 223.

Following closing arguments, the trial court properly instructed the jury on the burden of proof, stating at least eight times the State must prove their case beyond a reasonable doubt. The jury also received proper instructions on Applicant's right to remain silent and presumption of innocence prior to their deliberations.

During deliberations, the jury sent out a note stating, "Can we get official phone records / phone numbers and phone providers." This request would indicate the jury was not so swayed by

the solicitor's closing argument that they failed to consider and weigh the evidence presented during trial. There is no evidence the jury reached their verdict based on emotions or biases, rather than the evidence presented during trial. Counsel raised issues regarding the phone records and the failure of law enforcement to obtain Applicant's records during her closing argument, which may have led to the jury's request for the "official" phone records during their deliberations.

After the verdict, Counsel filed a post-trial motion, which included an issue regarding the solicitor's closing argument. After oral argument and review of the record, the trial court found the solicitor's closing argument did not violate Applicant's due process rights or Applicant's right to remain silent. The trial court also found the solicitor's closing argument did not shift the burden to Applicant and denied Applicant a new trial.

"A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. We must review the argument in context of the entire record." Northcutt, 372 S.C. at 222, 641 S.E.2d at 881 (citing State v. Patterson, 324, S.C. 5, 17, 482 S.E.2d 760, 766 (1997)). Based on the trial court's post-trial review of the solicitor's closing argument, it is clear the trial court did not find issue with the solicitor's closing and, even if Counsel had objected, would have allowed the solicitor to proceed with his argument. Additionally, Counsel was able to provide the last closing to the jury and the trial judge properly charged the jury regarding the law, burden of proof, and the presumption of innocence afforded to Applicant. As such, Applicant has failed to show how the outcome of a new trial would be different, as the solicitor's closing argument, when viewed in context of the entire record, was proper and Applicant has failed to show how Counsel's failure to object would not have changed the outcome of his trial.

ISSUE 2: TESTIMONY PRESENTED AT PCR HEARING

Solicitor Dale Scott testified he has been prosecuting cases since 2005 and has dealt with numerous cases involving principles and their co-defendants. Mr. Scott testified he complied with discovery motions made by Counsel in this case. Mr. Scott testified it is their policy to never make offers to co-defendants or their attorneys because he does not know what the co-defendants will testify to. He explained, however, if the co-defendants testify, their testimony will be taken into account. Mr. Scott presented an email from Taylor Daniel, who was the other solicitor in this case, to one of the co-defendant's defense attorneys, which indicated the solicitor's office is not officially extending a plea offer in this case to his client. Mr. Scott testified he does not know why Mr. Daniel used the word "officially," but testified he trained Mr. Daniel and, as the lead prosecutor in this case, he did not extend a plea offer to either co-defendant prior to trial.

Mr. Daniel also testified at the PCR hearing. Mr. Daniel testified he sent the email to the attorney for one of the co-defendants. Mr. Daniel testified the use of the word "officially" was meaningless and he made it abundantly clear the State was not going to extend an offer to either co-defendant until after the trial. Mr. Daniel testified he absolutely would have disclosed any plea offers extended to either co-defendant prior to trial to Counsel, because not doing so would have been a violation of the discovery rules.

Counsel testified she filed initial Rule 5, SCR CRIMP, and Brady⁴ motions and then filed two supplemental motions for discovery while preparing Applicant's case. Counsel testified she believes the State complied with discovery. The record also shows Counsel cross-examined both co-defendants on their pending charges and whether they had been promised anything from the

⁴ 373 U.S. 83 (1963).

State. One of the co-defendants, Coleman, testified he was testifying with the hope the State would show some favor on his pending charges. Trial Tr. 117. Counsel also cross-examined Jones, the other co-defendant, who testified he was not expecting any favors from the State on his pending charges. Trial Tr. 155. The jury was aware both co-defendants had pending charges and, during her cross-examination, was able to question both co-defendants on their motivation for testifying.

Based on the record and testimony from both solicitors, Applicant has failed to meet his burden to show how Counsel was deficient in her representation of Applicant or any resulting prejudice from the alleged deficiency.

ISSUE 3: TESTIMONY PRESENTED AT PCR HEARING

Applicant has alleged Counsel failed to properly communicate and advise him on the plea offers from the State. "Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance of counsel." Collins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018). However, the applicant must provide some evidence, even self-serving testimony, to establish prejudice. Davie v. State, 381 S.C. 601, 610-11, 675 S.E.2d 416, 421 (2009), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Applicant testified Counsel did tell him about the initial plea offer from the State for conspiracy with a sentence of 0-15 years. Applicant testified he received a second plea offer during the trial. Applicant testified Counsel told him it was a hearsay case. Applicant testified Counsel did not tell him she could win the case. Applicant testified he would have accepted the plea if he had been told by Counsel the evidence was looking bad. Applicant testified he was charged with another crime right before trial and was scared to take a 0-15 plea without a recommendation, so he decided to take his case to trial.

Counsel testified the State offered Applicant a plea for conspiracy, and she attempted to obtain a plea for misprision of a felony, which the State would not entertain. Counsel testified she explained the plea offer to Applicant when the State originally offered it before trial and again when the State offered it during the trial. Counsel testified she believed Applicant had a chance to beat the case but did not guarantee it. Counsel testified it was Applicant's decision not to take the plea offer and proceed with the trial.

Based on the testimony at the PCR hearing, it is clear Counsel communicated both pleas to Applicant, and it was Applicant's decision to go forward in the trial. Applicant has failed to show how Counsel was deficient on this allegation or any resulting prejudice from her alleged deficiencies.

CONCLUSION

Consequently, Applicant has failed to meet his burden to show how Counsel was deficient in her representation or any prejudice resulting from the alleged deficiencies. Therefore, this application should be denied and dismissed with prejudice.

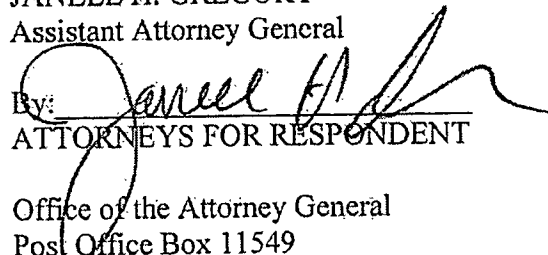
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3/15, 2019

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Robert Wright, 00334552

v.

State of South Carolina.

IN THE COURT OF COMMON PLEAS
8TH JUDICIAL CIRCUIT

ORDER GRANTING POST-
CONVICTION RELIEF

2017-CP-36-00509

FILED
2018 MAR 22 PM 4:14
CLERK OF COURT

This matter comes before the Court by way of an application for post conviction relief (PCR) filed September 22, 2017. The Respondent filed a return on March 22, 2018. An evidentiary hearing was held on February 26, 2019, at the Greenwood County Courthouse, the Hon. Brian M. Gibbons, presiding. Linda Moffitt was the Court's reporter for the proceedings. The Applicant was present and represented by J. Falkner Wilkes. The State was represented by Janell H. Gregory, Assistant Attorney General.

The Applicant's trial counsel, the Applicant, Deputy Solicitor Dale Scott, and Assistant Solicitor Taylor Daniel testified at the PCR hearing. The Court had before it the transcript for the trial, the transcript for the motion for a new trial, records of the Newberry Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, the Respondent's return, and the appellate records. Also before the Court were post trial memorandums submitted by the parties at the Court's request.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Newberry County Clerk of Court. The Applicant was indicted at the August 2014 term of the Newberry County Grand Jury. Applicant was indicted for two counts of accessory before the fact to a felony (burglary first degree and armed robbery) (2014-GS-36-528) and criminal conspiracy (2014-GS-36-530) arising from an incident that occurred on



April 30, 2014. The case was tried in Newberry County before the Honorable Donald B. Hocker, by jury, beginning on January 4, 2016. Applicant was represented by Mindy Zimmerman. The state was represented by Christopher Dale Scott, Deputy Solicitor and Taylor Daniel, Assistant Solicitor for Newberry County. On January 6, 2016, the jury returned a verdict of not guilty as to the criminal conspiracy, and guilty on both counts of accessory before the fact of a felony. On January 7, 2016, the Hon. Donald B. Hocker sentenced the Applicant to sixteen years incarceration. The Applicant timely filed post trial motions seeking relief from the conviction. On May 6, 2016, Judge Hocker issued an order denying the requested relief. The Applicant filed a timely notice of appeal which was subsequently withdrawn by the Applicant. The court of appeals issued an Order of Dismissal on November 26, 2016.

ALLEGATIONS

In his application the Applicant, through counsel, alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.

Trial counsel failed to properly investigate the case and prepare an adequate defense based on the evidence in the case; Trial counsel failed to request a continuance in order to allow her to properly investigate the case and prepare an adequate defense; Trial counsel failed to move for the suppression of statements and evidence; Trial counsel failed to make necessary objections during the trial or otherwise properly raise and/or preserve issues for appeal; Trial counsel failed to effectively cross-examine the State's witnesses during the trial; Trial counsel failed to introduce relevant evidence in the defense case in chief, or proffer evidence when necessary; Trial counsel failed to state and/or argue relevant facts and law to the jury in his statements and arguments to the jury. Trial attorney failed to properly explain, convey, and advise client on plea offer; Failed to properly convey, review and advise as to the charges, potential sentences and the evidence;

2. Ineffective assistance of appellate counsel.

Appellate counsel failed to properly raise and argue viable issues on appeal.

3. The State failed to provide discovery materials that were in its possession or which were known or should have been known to the State.

Incorporated into the application is an Amendment and Memorandum prepared by the Applicant alleging:

Amendment One: Ineffective assistance of trial counsel for failing to move to quash the indictments based on a failure to sufficiently allege the elements of the offenses charged.

Amendment Two: Ineffective assistance of trial counsel for failing to move to quash the indictments based on the allegations being overly broad.

At the PCR hearing the Applicant proceeded on four issues; 1) Ineffective assistance of counsel for failing to adequately cross-examine the state's witness; 2) Ineffective assistance of counsel for failing to object to references that the Applicant was a drug dealer; 3) Ineffective assistance of counsel for failing to object to prejudicial comments made by the solicitor during closing argument, and; 4) Ineffective assistance of counsel for failing to adequately advise Applicant as to plea offers. The Applicant waived all other issues at the hearing and therefore the Court finds those issues to be abandoned.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Counsel - Failure to Object to Improper Argument



The Applicant alleges ineffective assistance of counsel based on counsel's failure to raise contemporaneous objections to numerous improper comments made by the solicitor in closing argument. This Court agrees.

In a PCR action "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence of the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052).

Comments by the Solicitor During Closing Argument

Throughout closing the solicitor phrased his comments in a way that could only be interpreted by the jury as an expression of personal knowledge or opinion on the evidence and guilt of the Applicant: "You know, the Court allowed me two hours to stand up here and argue. I'm not gonna do that, and I know y'all are thankful for that, but there's not really a whole lot in my mind to argue about. I think its pretty crystal clear." (T. p. 207, 1.6-10). The solicitor then went on to reverse the burden of proof and outright state to the jury that he was telling them that the Applicant was guilty: "Do any of you have a reasonable doubt that Robert Wright is *not*



guilty of what I'm telling you he's guilty of? Do any of you have a reasonable doubt *that it didn't happen this way*? Do any of you have a reasonable doubt that your mind and your eyes are fooling you when you look at those phone records? No. The answer is no." (T. pg. 213, l. 12-15). This was quickly followed by: "I'm gonna sit down. I think y'all are firmly convinced and I think there is only one verdict. And I think there ought to be twelve united voices here speaking together and I think y'all ought to go back there and deliberate and consider everything and I think y'all ought to come up with the only reasonable conclusion, and that is to find the third person involved with this accountable. Hold him accountable. Find him guilty." (T. p. 213, l. 22-p. 214, l. 4).

The expression of a prosecutor's personal opinion about the guilt of a defendant creates a risk that the jury will "trust the Government's judgment rather than its own view of the evidence." See United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985):

The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980).

United States v. Young, 470 U.S. 1, 7-8, 105 S. Ct. 1038, 1042, 84 L. Ed. 2d 1 (1985) *footnotes omitted*. Here the solicitor not only expressed his personal opinion as to guilt, he clearly stated that he was telling them that the Applicant was guilty, and that he believed that the jury "ought"



to agree with him and find the Applicant guilty. This is precisely the type of overzealous conduct that is prohibited under Young.

Imbedded in the repeated expressions of his personal belief as to the Applicant's guilt the solicitor also reversed the burden of proof by asking the jury whether any of them had a reasonable doubt that Robert Wright is not guilty of what he was telling them the Applicant was guilty of. In doing so the solicitor not only called on the jury to trust and rely on his judgment as to guilt, but reversed the burden of proof as well. This was not a simple misstatement, as the solicitor repeated it to make the point again, asking the jury if any had any reasonable doubt that it did not happen he had stated. These comments could only be interpreted by the jury as allowing them to convict if the evidence failed to prove beyond a reasonable doubt that the Applicant was not guilty. The burden of proof as to guilt is never on a defendant in a criminal case. Although the trial court later charged the jury on reasonable doubt, no curative instructions were requested or given to correct any confusion or misdirection arising from the solicitor's comments. Here the solicitor's comments "tended to 'overthrow the presumption of innocence.'" United States v. Smith, 500 F.2d 293, 297 (6th Cir. 1974) *quoting* Pierce v. United States, *supra*, 86 F.2d at 953.

The solicitor then went on to imply that, although he couldn't outright say it, he personally knew important incriminating information not presented to the jury [that the Applicant was a drug dealer and wanted the victims robbed because they were his competition]: "I have my own idea I've got my idea of why this happened. I think it's very shallow -- or a very shallow burial, just under the layers, of the intent of Mr. Wright, why he needed him out of the way, why he needed his neighbor out of the way. I'm gonna respect you guys in coming up



with that on your own. Y'all heard Lorenzo Jones' testimony yesterday, didn't you? I think the inference is there, but we won't talk about it, but I think we understand why he needed them out of the way." (T. p. 212, l. 14-22). This was a clearly an improper reference to evidence that had been the subject of a suppression motion and later an objection during trial and excluded by the court. (T. pp. 127-133). "A solicitor may not rely on statements not in evidence during closing argument." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). These comments also improperly indicated to the jury that the solicitor had personal knowledge of facts proving the Applicant's guilt that were not presented. "What the prosecutor may not do is suggest a belief in the defendant's guilt that is not explicitly tied to the strength of the evidence, because such an argument may suggest to the jury that the prosecutor has independent knowledge of the defendant's guilt." 75A Am.Jur.2d Trial § 634 (Westlaw 2005); see Pupo, 841 F.2d at 1240." United States v. Smith, 441 F.3d 254, 264 (4th Cir. 2006)

The solicitor's comments also included inflammatory statements about the Applicant's character. After finding a reason to bring up Charles Manson, the solicitor improperly called upon the jury to ponder the Applicant's potential to commit future crimes: "Do you ever wonder if somebody has the gall to do this to a neighbor what they could be capable of?" (T. p. 202, l. 6; T. p. 203, l. 19-21). And again: "But let me tell you because I was talking about justice is blind. Nothing justifies that crime. There's nothing that justifies kicking in a door in the middle of the night and holding a gun on somebody. If you do that to your neighbor, where does it stop?" (T. p. 212, l. 23-T. p. 213, l. 2). Clearly this was a play to the jurors passions. "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks 'so as not to



appeal to the personal biases of the jury' or "arouse the jurors' passions or prejudices."

Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) *quoting* Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors." State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Here, the solicitor's comments of what else the Applicant was capable of clearly was intended to arouse the jurors' passions and thus improper.

The solicitor's closing also improperly called on the jury to bring about justice for the victims: "So how about a little justice for the [victims]? (T. p. 201, l. 5). Again, the solicitor's argument improperly called on the jurors' passions. *See* Brown, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). The solicitor also made additional improper comments calling on the jury to convict the Applicant based on the guilt of the co-defendants. Although neither had actually been convicted at the time of the Applicant's trial, the solicitor stated: "Justice is coming for those two. But why not hold them all accountable? Make it three for three." (T. p. 201, l. 6-15).

Throughout closing argument the solicitor made numerous improper remarks to the jury. In addition to the potential impact of each comment singularly, this Court also considers the cumulative effect of such remarks. "Although prejudice may be magnified by the cumulative effect of repeated improper conduct, *e.g.*, Volkmar v. United States, 13 F.2d 594 (6th Cir. 1926), we have recognized that even a 'single misstep on the part of the prosecutor may be so



destructive of the right of the defendant to a fair trial that reversal must follow.' Pierce v. United States, *supra* 86 F.2d at 952. Pharr v. United States, 48 F.2d 767 (6th Cir. 1931)." United States v. Smith, 500 F.2d 293, 297 (6th Cir. 1974).

Despite numerous objectionable and prejudicial comments by the solicitor, defense counsel failed to raise a single contemporaneous objection, or request curative instructions. In reviewing the decisions of trial counsel courts must strongly presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. 2052; Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Here, counsel apparently recognized at least some of the solicitor's comments as objectionable as she raised a burden shifting argument as part of a written post trial motion. At the post trial motion hearing, and again at the PCR hearing, trial counsel characterized her practice of staying in her seat and not objecting during closing argument as a common courtesy rather than being part of any defense strategy. (PTH T. p. 9, l. 25-T. p. 10, l. 3). At the PCR hearing, trial counsel agreed that timely objection to the solicitor's repeated remarks would not have harmed the defense strategy in the Applicant's case. At the post trial hearing counsel stated that the failure to object to the solicitor's improper argument was an error in judgment on her part. (PTH T. p. 9, l. 23-25). Based on the foregoing I find that trial counsel was deficient in failing to object to the solicitor's improper argument.

Having found the solicitor's comments improper, and trial counsel's failure to object deficient, the next step of review focuses on whether such deficiency prejudiced the Applicant.



In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Vaughn, 362 S.C. at 169-70, 607 S.E.2d at 75 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744. This requires consideration of the record as a whole. Appellate courts must consider the impropriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt. State v. Simmons, 331 S.C. 333 at 338, 503 S.E.2d 164 at 166 (1998); Tappeiner v. State, 416 S.C. 239, 252-53, 785 S.E.2d 471, 478 (2016).

In reviewing the entire record this Court has carefully considered trial counsel's testimony at the PCR hearing. Counsel testified that prior to and during the trial she believed that the case could go either way. At the time of the PCR hearing, counsel stated that she still believed that the Applicant's case could go either way if tried again. Counsel's evaluation of the state's case is supported by the record. The trial transcript shows that the State's case was made largely on the testimony of two co-defendants that had entered plea agreements to cooperate. Neither had pled guilty at the time of the Applicant's trial. Tarakus Coleman stated that he was testifying against the Applicant hoping that some of his nine charges "would go away". (T. p. 117, l. 2-9). When asked "And is that why you are telling the story that you're telling today about [Applicant] being involved?" Coleman responded "Yes." (T. p. 117, l. 9-13). Lorenzo Jones admitted that he had given multiple versions of the events and that he initially implicated two other individuals, not the Applicant, as having participated in the burglary and robbery of the victims. Jones testified that he didn't name the Applicant as being involved until

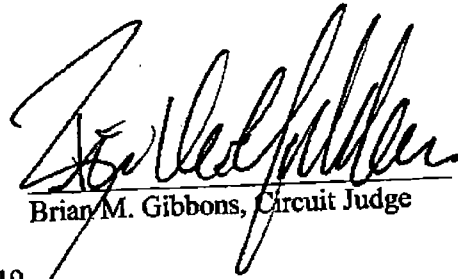
investigators specifically mentioned the Applicant and asked Jones how the Applicant was involved. (T. p. 153). While the state introduced the Applicant's cell phone records and text messages, on their face the records themselves did not rule out other possible exculpatory explanations as to their meaning. At the PCR hearing, the Applicant testified that he was aware of the plan of Jones and Coleman, but that he had no part in it and actually attempted to discourage them. The cell phone records and text messages are not inconsistent with the Applicant's testimony at the PCR hearing. The bulk of any incriminating content of the calls or text messages came by way of the testimony of Jones and Coleman. While inconsistent verdicts are not prohibited, it is also noteworthy that the jury found the Applicant not guilty of the criminal conspiracy charge. Given the record as a whole, this Court finds that evidence of the Applicant's guilt is not overwhelming.

Considering the propriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt, I find that the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The Applicant is therefore entitled to the relief requested on that ground. As to all other issues raised in the Application and amendments that were not presented at the hearing, I find those to be waived, and to those other issues presented at the hearing, whether raised in the Application or tried by consent, I find that the Applicant has failed to carry his burden as to error and prejudice under the Strickland analysis.

It is therefore the Order of this Court that the Applicant's convictions be hereby reversed and a new trial granted on both counts of the indictment.

A handwritten signature, possibly reading "S. 11", is written in dark ink.

SO ORDERED.


Brian M. Gibbons, Circuit Judge

Signed this _____ day of 5/14, 2019,
Carla, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Robert Antwon Wright, #334552,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

2017-CP-36-509

MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)

This matter comes before the Court by way of an application for post-conviction relief filed September 22, 2017. Respondent made its return on March 22, 2018. An evidentiary hearing was held on February 26, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by J. Falkner Wilkes, Esquire. Respondent was represented by Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office. This Court issued an order granting post-conviction relief filed May 17, 2019, however, was never served on Respondent. Respondent located the filed order on the public index on May 28, 2019, and is submitting this motion within ten days of receipt of the filed order pursuant to Rule 59(e), SCRCP. Respondent now respectfully moves for the Court to reconsider its order granting PCR based on the following:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Newberry County Clerk of Court. Applicant was indicted at the August 2014 term of the Newberry County Grand Jury for accessory after the fact to a felony (burglar, first degree) (2014-GS-36-0528), accessory after the fact to a felony (armed robbery) (2014-GS-36-0528), and conspiracy (2014-GS-36-0530). Mindy Zimmerman, Esquire, (Counsel)

represented him. Deputy Solicitor Christopher Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office prosecuted the case. On January 4-7, 2016, Applicant proceeded to a jury trial before the Honorable Donald Hocker after which he was found guilty of accessory after the fact to a felony (burglary and armed robbery) but not guilty of conspiracy. He was sentenced to imprisonment for sixteen years on each charge. Both sentences were to run concurrently.

On January 15, 2016, Applicant filed a motion for a new trial alleging the trial court lacked subject matter jurisdiction in violation of S.C. Code § 16-1-50 because Applicant was tried and convicted of accessory after the fact when he was not tried with the principal felon, nor was his trial after the principal's conviction. Applicant moved to renew and reconsider the denial of Applicant's motion for a directed verdict, or in the alternative, for a new trial based upon a lack of competent evidence. Finally, Applicant moved for a new trial based on the assistant solicitor's comments during his closing argument on Applicant's right to remain silent.

A hearing was held on March 3, 2016, before Judge Hocker. Applicant was present and represented by his trial counsel. On May 6, 2016, Judge Hocker denied and dismissed Applicant's post-trial motions. Judge Hocker dismissed Applicant's subject matter jurisdiction claim, citing State vs. Blakely, which held "[t]oday, the accessory's culpability no longer shadows that of the principal. Accordingly, an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted." State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013). The court dismissed Applicant's motion for new trial based on lack of evidence and Applicant's renewal of directed verdict motion based on the oral rulings made on the record at trial. The court dismissed Applicant's motion for new trial based on the solicitor's closing argument finding no prejudice resulted when the court gave the jury the standard charge for it not

to consider Applicant's failure to testify. The court also found the solicitor's argument was, in part, based upon the evidence in the case. The court further found the solicitor's closing did not shift the burden of proof to the defendant.

Applicant filed a notice of appeal and was represented by Counsel. Applicant asserted grounds similar to his post-trial motion. Applicant and Respondent submitted briefs. On November 7, 2016, Applicant submitted a consent order signed by himself, Counsel, and Respondent that indicated an agreed dismissal of Applicant's direct appeal. The Court of Appeals dismissed the appeal by an order filed November 9, 2016. The remittitur was sent November 29, 2016.

Applicant filed a timely application for post-conviction relief alleging:

1. Ineffective Assistance of Trial Counsel

- a. "Trial counsel failed to properly investigate the case and prepare an adequate defense based on the evidence in the case;
- b. Trial counsel failed to request a continuance in order to allow her to properly investigate the case and prepare an adequate defense;
- c. Trial counsel failed to move for the suppression of statements and evidence;
- d. Trial counsel failed to make necessary objections during the trial or otherwise properly raise and/or preserve issues for appeal;
- e. Trial counsel failed to effectively cross-examine the State's witnesses during the trial;
- f. Trial counsel failed to introduce relevant evidence in the defense case in chief, or proffer evidence when necessary;
- g. Trial counsel failed to state and/or argue relevant facts and law to the jury in his statements and arguments to the jury;
- h. Trial attorney failed to properly explain, convey, and advise client on plea offer;
- i. Failed to properly convey, review and advise as to the charges, potential sentences and the evidence."
- j. "Trial Counsel ineffective for failing to move for pretrial quashing, or post-trial motion for arrest of judgment, of the Conspiracy and Accessory Before the Fact indictments on the grounds the indictments fail to sufficiently allege the critical elements of the offenses..."
- k. "Trial counsel ineffective for failing to move for pretrial quashing, or post-trial motion for arrest of judgment, of the Conspiracy and Accessory Before

the Fact indictments on the grounds the indictments are unconstitutionally overbroad and vague...”

2. Ineffective Assistance of Appellate Counsel

- a. “Appellate counsel failed to properly raise and argue viable issues on appeal.”

3. “Failure of the State to adequately comply with the rules of discovery”

- a. “The State failed to provide discovery materials that were in its possession or which were known or should have been known to the State or its agents.”

A post-conviction relief hearing was convened on February 26, 2019, at the Greenwood County Courthouse where applicant proceeded on four issues: 1) ineffective assistance of counsel for failing to adequately cross-examine the state’s witness; 2) ineffective assistance of counsel for failing to object to references that the Applicant was a drug dealer; 3) ineffective assistance of counsel for failing to object to prejudicial comments made by the solicitor during closing argument, and; 4) ineffective assistance of counsel for failing to adequately advise Applicant as to plea offers.¹

On May 14, 2019, this Court signed Applicant’s proposed order granting post-conviction relief. This order was filed by the Greenwood Clerk of Court on May 17, 2019. Respondent was not served with a copy of the signed and clocked order, however, discovered the filed order on May 28, 2019. This motion to reconsider, alter, and amend follows.

¹ According to Respondent’s notes from the hearing, Applicant went forward on three allegations, not four as the current order states. According to Respondent’s notes, Applicant did not go forward on allegation two.

II. Argument in Support of Altering or Amend the Order

Respondent respectfully moves this Court to alter or amend the final order based on the following reasons:

Failure to address each issue presented at the post-conviction relief hearing

Respondent submits the order signed by this Court did not fully address the issues presented by Applicant during the hearing. The order states Applicant went forward on four issues: 1) Ineffective assistance of counsel for failing to adequately cross-examine the state's witness; 2) Ineffective assistance of counsel for failing to object to references that the Applicant was a drug dealer; 3) Ineffective assistance of counsel for failing to object to prejudicial comments made by the solicitor during closing argument, and; 4) Ineffective assistance of counsel for failing to adequately advise Applicant as to plea offers.² This Court granted Applicant relief based on the evidence presented at the hearing on the third issue, but denied relief as it pertained to the remaining allegations. Although the order addresses the third issue granting post-conviction relief at length, it fails to address the other allegations in detail as to why relief was not granted.

The Uniform Post Conviction-Relief Act states in part, "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. §17-27-80 (1991). In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), the South Carolina Supreme Court found the order signed by the PCR Court did not address all of the allegations raised by Applicant at the post-conviction relief hearing and vacated the order remanding Applicant's matter back for a new hearing. In their holding, the South Carolina Supreme Court said, "Even after the order is filed, counsel has an obligation to review the order

² According to Respondent's notes from the hearing, Applicant only went forward on three allegations, not four as the current order states.

and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by §17-37-80 and Rule 52(a), SCRPC.” Id. 310 S.C. at 256, 423 S.E2d at 128.

The current order does not provided specific findings of fact or conclusions of law for the allegations where relief was denied. Respondent would request this Court alter or amend the current order to provide such findings pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. §17-27-80.

Failure to address this Court’s findings that Applicant prevailed because Counsel failed to preserve issue for appeal

This Court, through his law clerk, provided Applicant and Respondent with his ruling on Applicant’s matter via e-mail on March 29, 2019. In that e-mail, this Court said,

After further review and deliberation, Judge Gibbons respectfully Grants the Applicant’s Request for Post-Conviction Relief solely on the issue of trial counsel’s failure to object to improper closing arguments. Counsel’s failure to object did not preserve this matter for appellate review, and as such the Applicant has satisfied the requirements set forth under the Strickland analysis. Applicant is entitled to a new trial.

Although this Court found Applicant satisfied his burden set forth in Strickland because Counsel failed to object to the State’s closing argument thereby failing to preserve it for appeal, this finding was not addressed in the order. Additionally, the order fails to use the appropriate standard for granting relief on a claim of failure to preserve an issue for appellate review set forth in McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). In McHam, the South Carolina Supreme Court states, “. . . to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability.” Id., 404 S.C. at 475-476, 746 S.E2d at 47.

Respondent submits the order should be amended to include specific findings that Applicant prevailed on the allegation that the State's closing argument was improper because Counsel failed to object, which failed to preserve the issue for appeal. Further, this Court's finding should address whether Applicant's underlying claim regarding the State's closing argument was a meritorious appellate issue and was reasonable probable to have resulted in reversal on appeal had it been preserved.

III. Argument in Support of Reconsideration

Respondent submits the Court erred as a matter of law in finding Counsel was ineffective for failing to object to the State's closing argument thereby failing to preserve the closing arguments for appellate review.

In the order, this Court isolated the following passages from the State's closing argument:

You know, the Court allowed me two hours to stand up here and argue. I'm not gonna do that, and I know y'all are thankful for that, but there's not really a whole lot in my mind to argue about. I think its pretty crystal clear. (Trial Tr. 207.)

Do any of you have a reasonable doubt that Robert Wright is not guilty of what I'm telling you he's guilty of? Do any of you have a reasonable doubt that it didn't happen this way? Do any of you have a reasonable doubt that your mind and your eyes are fooling you when you look at those records? No. The answer is no. (Trial Tr. 213.)

I'm gonna sit down. I think y'all are firmly convinced and I think there is only one verdict. And I think there ought to be twelve united voices here speaking together and I think y'all ought to go back there and deliberate and consider everything and I think y'all ought to come up with the only reasonable conclusion, and that is to find the third person involved with this accountable. Hold him accountable. Find him guilty. (Trial Tr. 213.)

This Court found the above comments were improper because the solicitor inappropriately expressed his personal opinion as to Applicant's guilt, which this Court found to be prohibited

conduct under United States v. Young, 470 U.S. 1 (1985). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (“[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.” (citations omitted)).

This Court found the solicitor reversed the burden of proof by asking the jury whether they had reasonable doubt that Applicant was not guilty of what he was telling them Applicant was guilty of, which this Court says put the burden of proof on Applicant. (Order 6.) However, the solicitor's comments throughout the closing argument reiterated that the State had the burden of proof and even explained, “My standard is beyond a reasonable doubt. Everybody from California to New York that's ever been convicted by a jury has to be proven guilty beyond a reasonable doubt.” (Trial Tr. 213.) Additionally, the trial judge properly instructed the jury on the State's burden of proof during his jury charge. (Trial Tr. 230)

This Court also found the State made improper reference to evidence that had been excluded by the trial court. The State said:

I've got my idea of why this happened. I think it's very shallowly – or a very shallow burial, just under the layers, of the intent of Mr. Wright, why he needed him out of the way, why he needed his neighbor out of the way. I'm gonina respect you guys in coming up with that on your own. Y'all heard Lorenzo Jones' testimony yesterday, didn't you? I think the inference is there, but we don't

talk about it, but I think we understand why he needed them out of the way.³ (Trial Tr. 212.)

Although trial counsel was successful in getting some comments from the State's witness stricken from the record, the State was still able to properly elicit the following testimony from Lorenzo Jones, one of Applicant's co-defendants:

State: All right, Lorenzo, let me ask you – I want to know what Robert Wright said to you, okay? Not what you, you know, kind of assumed he meant, but what he said to you. What did he tell you about [the victims]?

Jones: That's somebody for you to rob.

State: Say again.

Jones: I've got somebody for you to rob.

State: Okay. And why did he tell you to rob them?

Jones: Because he's getting in his way.

(Trial Tr. 134.) The State's comment during closing was properly referring to the inferences that could be drawn from the properly elicited testimony of Jones during the State's direct examination. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)).

This Court also found the State improperly appealed to the passions and prejudices of the jury and isolated the following statements:

Do you ever wonder if somebody has the gall to do this to a neighbor what they could be capable of? (Trial Tr. 202.)

But let me tell you because I was talking about justice is blind. Nothing justifies that crime. There's nothing that justifies kicking

³ This Court's Order does not accurately quote this comment from the trial transcript. The Order adds, "I have my own idea" to the beginning of the quotation, which is not in the trial transcript.

in a door in the middle of the night and holding a gun on somebody.
If you do that to your neighbor, where does it stop? (Trial Tr. 212.)

So how about a little justice for the [victims]? (Trial Tr. 201.)

The Court cites to Tappiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016), in supporting its finding that the State's comments aroused the jurors' passions or prejudices. In Tappeiner, the petitioner argued the solicitor's closing "vouched for the victim's credibility by implying the police and rape crisis counselors believed Victim, and not Tappeiner." Id. at 250, 785 S.E.2d at 476. During his closing, the solicitor asked the jurors if they would want Tappeiner – who was on trial for criminal sexual conduct with a minor – to babysit their children. Id. at 253, 785 S.E.2d at 478. The Court found the solicitor's vouching for the victim's credibility "incredibly prejudicial" because there was "no other evidence beyond Victim's testimony of the events that allegedly occurred that August evening." Id. at 254, 785 S.E.2d at 479. Here, this Court found "the solicitor's comments of what else the applicant was capable of clearly intended to arouse the juror's passions and thus improper." (Order 8.) However, these two isolated statements are far from the egregious conduct that has led to reversal by the South Carolina Supreme Court. Additionally, the State was able to present more evidence against Applicant during his trial than the State was able to present against Tappeiner during his trial, which further distinguishes the two cases.

In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the South Carolina Supreme Court found the solicitor's closing argument warranted reversal of Petitioner's conviction. In their opinion, the Court highlighted three different examples of egregious conduct by the solicitor, none of which are present in Applicant's case. In their argument, Petitioner outlined the following issues with the solicitor's closing:

[T]he solicitor violated this well-established rule⁴ by (1) crying numerous times throughout the argument; (2) telling the jury “we will kick the baby some more” if they returned a life sentence; (3) dehumanizing Appellant (“I don’t even call him a person”); (4) threatening the jury (“it will be on your heads if he kills someone else [during his life sentence in prison]”); (5) declaring an “open season on babies”; (6) telling the jury he “expects” the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby’s crib.

Id. at 223, 641 S.E.2d at 882. The court found *only three* of the solicitor’s arguments outlined by the appellant required reversal. First, the solicitor’s comment declaring an “open season on babies”; second, the solicitor’s comment that he “expects” the death penalty; and third, the solicitor’s production of a baby carriage covered in a large black shroud during a staged funeral procession in the courtroom. Id. at 223, 641 S.E.2d at 881. The court found, “Any one of these three miscues requires reversal of Appellant’s sentence” because the solicitor was “overly zealous in his argument.” Id. at 223, 641 S.E.2d at 881-882. If the South Carolina Supreme Court did not believe telling the jury “we will kick the baby some more” if a life sentence was awarded; dehumanizing the defendant; or telling the jury it is on their heads if the defendant kills someone else during his life sentence was sufficiently prejudicial or improper to warrant reversal in Northcutt it is unreasonable to believe the State’s isolated comments about justice for the victims or questioning what else Applicant and his co-defendants are capable of would warrant reversal. Here, the solicitor’s conduct is *far* from the conduct displayed by the solicitor in Northcutt; and when the closing is properly viewed in light of the entire record, it is clear the solicitor’s comments would not warrant reversal on appeal.

The State’s closing argument should be reviewed in context of the entire record. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). Improper comments do not automatically require

⁴ S.C. Code Ann. §16-3-25(C)(1) (2003).

reversal if they are not prejudicial to the defendant, and the petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (citing DeChristoforo, 416 U.S. at 643). Here, taking the State's closing argument in context of the entire record, it should be noted that Applicant had the last closing argument prior to jury deliberations and during deliberations the jury requested Applicant's phone records, which was an issue Counsel raised during her closing argument. (Trial Tr. 222-223.) Counsel also echoed some of the State's allegedly improper comments during her own closing telling the jury, "The Mayers deserve justice, my client deserves justice." (Trial Tr. 222.)

Applicant has also failed to meet the prejudice prong of the Strickland analysis as well. This Court found Applicant was prejudiced by trial counsel's failure to object to the State's closing argument. However, Counsel testified she did not object to the State's closing argument as part of her trial strategy because, in her reading of the jury, she did not believe the jurors were being persuaded by the solicitor. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

It is clear the jury was not so swayed by the State's closing argument that they rushed to a verdict in Applicant's case. During deliberations, the jury asked for Applicant's phone records, which was most likely provoked by Counsel's closing argument regarding the lack of investigation by law enforcement into Applicant's case. Additionally, the jury returned a verdict that found Applicant not guilty of one of his charges, which, had they been so swayed by the State's closing argument, would not have been the result.

This Court also found Applicant was prejudiced because Counsel raised the issue regarding the State's closing argument in a post-trial motion. However, the trial judge's ruling on the post-trial motion indicated he did not see any issue with the State's closing argument, which would reasonably indicate a contemporaneous objection on Counsel's part during the closing argument would not have been sustained and would not have led to any change in the solicitor's closing. Absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court's ruling in regard to a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("Ordinarily, a trial court's rulings on closing arguments will not be disturbed."). Therefore, even if Counsel had preserved the allegedly improper comments for appellate review, Applicant has failed to show that raising this issue on appeal would be reasonably likely to result in reversal of his conviction.

For these reasons, the record and testimony before the Court clearly shows Counsel was not deficient and there was no resulting prejudice from any alleged deficiency. Accordingly, this Court should deny post-conviction relief.

IV. Conclusion

For the reasons explained above, Respondent submits post-conviction relief was improperly granted and respectfully requests this Court to alter its judgment and deny Applicant's application for post-conviction relief.

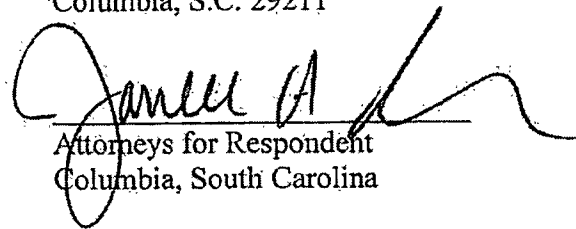
Respectfully submitted,

ALAN WILSON
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Attorneys for Respondent
Columbia, South Carolina

June 4, 2019

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

2017-CP-36-0509

ROBERT ANTWON WRIGHT, #334552

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

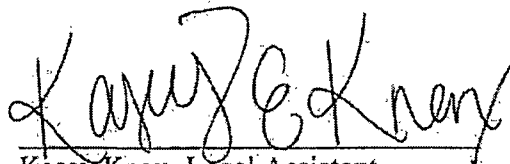
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend Pursuant to Rule 59(e)** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

DATED this the 4th day of June, 2019.


Kasey Knox, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

Robert Antwon Wright, #334552)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

IN THE COMMON PLEAS COURT
FOR THE EIGHTH JUDICIAL CIRCUIT

C.A. #: 2017-CP-36-509

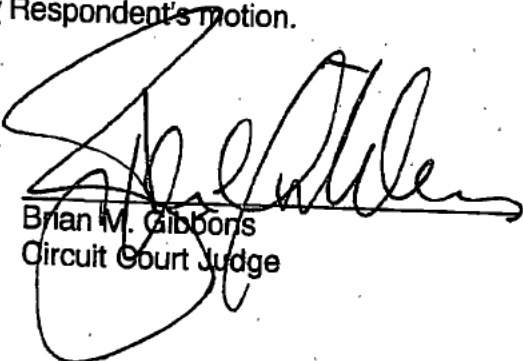
**ORDER DENYING RESPONDENT'S
MOTION TO ALTER OR AMEND**

After having considered Respondent's motion to alter or amend the Order Granting for Post-Conviction Relief in this case and after reviewing all of the submissions and the Court's notes, applicable statutory law, case law and evidence presented, I respectfully deny Respondent's motion.

AND IT IS SO ORDERED.

Chester, SC

June 18, 2019


Brian M. Gibbons
Circuit Court Judge

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP3600509**

Robert Antwon Wright

Souh Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/Brian M Gibbons
Circuit Court Judge

Judge Code

06/18/2019
Date

For Clerk of Court Office Use Only

This judgment was entered on **June 24, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **June 25, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

J. Falkner Wilkes 114 Whitsett St. Greenville, SC 29601

Janell H Gregory Attorney General's Office P.O.Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Elizabeth P Folk (jt)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
