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October 16, 2013

**RECEIVED**

OCT 16 2013

**S.C. Supreme Court**

*Via Hand Delivery*

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

**RE: Santiago Rios v. State of South Carolina  
Circuit Court Case No: 2011-CP-42-5461  
Appellate Case No.: 2012-213256**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White  
Assistant Deputy Attorney General

SHW/aam  
Enclosures

cc: Susan B. Hackett, Esquire (w/enclosure)

STATE OF SOUTH CAROLINA  
In The Supreme Court

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OCT 16 2013

S.C. Supreme Court

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2012-213256

Santiago Rios, ..... Petitioner,

v.

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

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## **QUESTION PRESENTED**

Did the PCR Court properly deny relief when Petitioner failed to demonstrate that the outcome of the proceedings would have been different, but for Counsel's failure to request a jury instruction on self-defense?

## STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the January 2008 term of General Sessions for murder (2008-GS-42-0170). David M. Collins, Esquire, and N. Douglas Brannon, Esquire, represented the Petitioner. On May 1, 2008, Petitioner was convicted as indicted by a jury. The Honorable Roger L. Couch sentenced Petitioner to thirty (30) years for murder.

A timely Notice of Appeal was filed on Petitioner's behalf by Ricky H. Harris, Esquire, and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Rios, 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010). The Remittitur was issued on July 30, 2010.

The Petitioner subsequently filed a PCR application on October 13, 2010. The Respondent made its Return on or about April 27, 2011. An evidentiary hearing into the matter was convened on September 19, 2011, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Susannah C. Ross, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following the hearing, The Honorable J. Mark Hayes, II denied the PCR application by written Order dated January 17, 2012. Petitioner filed a Motion to Alter or Amend the Judgment and a hearing was held on that Motion. Following the hearing, Judge Hayes denied the Motion by written Order on October 2, 2012. A timely Notice of Appeal was then filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**I. The PCR Court properly denied relief when Petitioner failed to demonstrate that the outcome of the proceedings would have been different, but for Counsel’s failure to request a jury instruction on self-defense.**

Petitioner was charged with murder, following an incident in which Petitioner’s wife (“Hernandez”) was shot and killed in their home on November 23, 2006. The night of the shooting, Petitioner told a responding police officer that three black male intruders robbed their home and shot Hernandez. (App. Vol. I p. 182). Initially, Petitioner maintained that intruders shot Hernandez. However, Petitioner later changed his story and told investigators he and Hernandez got into an argument that led to a physical confrontation and a struggle between them for the gun. (App. Vol. I p. 354). According to Petitioner’s own statement, the physical altercation started when he shoved Hernandez after she refused to fix him Thanksgiving dinner. (App. Vol. I p. 417). Petitioner then told investigators Hernandez pulled his hair and the medallion around his neck. (App. Vol. I p. 417). Petitioner stated he followed Hernandez into their bedroom, where she grabbed a gun and pointed it at him, at which time the two struggled with the gun and it fired. (App. Vol. I p. 418). Petitioner alleged Counsel was ineffective for failing to preserve the request for a jury instruction on self-defense and that the PCR court erred

in denying Petitioner relief, because the PCR court held Counsel's deficient performance was not prejudicial to Petitioner.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner 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.

Petitioner testified at the evidentiary hearing that he was trying to defend his life on the day his wife was killed. (App. Vol. I p. 790). Petitioner also stated he gave a statement to police in Spanish while at the police station. (App. Vol. I p. 792). However, Petitioner testified there

was no third-party involvement during the incident, contrary to his 911 call and original statement. (App. Vol. I p. 801). Additionally, Petitioner testified he remembers all of the events leading up to and the actual shooting of his wife, but was unable to remember what happened to the gun. (App. Vol. I p. 804).

David Collins (“Counsel”) testified he acted as first chair on the case shortly after being hired by Petitioner’s family in 2006. (App. Vol. I p. 856). Counsel testified that the work load was split up with Douglas Brannon (“Co-Counsel”), where Counsel would do the opening and the more scientific witnesses. (App. Vol. I pp. 856-57). Co-Counsel was in charge of the closing and the police officers. (App. Vol. I p. 857). Counsel testified Petitioner understood what was happening at all of their meetings because he hired a translator to be present. (App. Vol. I p. 863). Counsel testified that at no point did Petitioner ever acknowledge that he did the shooting, which led accident to be the theme of the story from the very beginning. (App. Vol. II p. 858; p. 875). Counsel testified that his understanding at the time was that for there to be a self-defense charge, there had to be an acknowledged shooting, but the information provided by Petitioner only supported accident. (App. Vol. II p. 875).

Counsel testified that this case was a frustrating case because it was very difficult to pin down what the story and truth was and what they could argue to the jury. (App. Vol. II p. 859). Counsel also testified they searched for, but had no evidence to support that Petitioner’s wife ever had a weapon or had been violent towards him in the past, and no witnesses could be produced to corroborate what Petitioner said happened in the bedroom. (App. Vol. II pp. 860-61). In fact, Counsel testified that the evidence indicated that there was no gunshot residue on either the victim or Petitioner, but Petitioner would have had the opportunity to remove the residue, while the victim would not. (App. Vol. II p. 881-2). Respondent submits that this

evidence is in direct contradiction to Petitioner's claims that the victim had a hold of the gun when it went off.

Co-Counsel testified that throughout his time working on the case, Petitioner made it known the masked men was not true and this was an accident case. (App. Vol. II p. 822). Co-Counsel also testified that there was physical evidence of a struggle that go out of hand, which also supported the accident theory. (App. Vol. II p. 826). Co-Counsel testified that they were going to attempt to show that there were signs of a struggle, to show that there was a dispute between Petitioner and his wife, but other than that and the Petitioner's one statement that it was self-defense, "that was it." (App. Vol. II p. 834). Co-Counsel testified that Petitioner had never said that he shot Hernandez in any manner, but rather that there was a struggle over the gun. (App. Vol. II p. 833). Co-Counsel testified that Petitioner's story was that the argument between he and his wife started at the front door of the house and ended in the bedroom where his wife grabbed the gun and Petitioner and his wife struggled over the gun. (App. Vol. II p. 836). Additionally, Co-Counsel testified that Petitioner also told Co-Counsel and Counsel that the shooting was a suicide by his wife, but he could not let it be a suicide or she would be "damned to hell." (App. Vol. II p. 850).

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068-69, 80 L. Ed. 2d 674 (1984). Further, the court determining prejudice must ask if the [Applicant] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984). Prejudice may be "demonstrated by establishing, by a reasonable probability that, 'but

for counsel's unprofessional errors, the result of the proceeding would have been different.”

Gibbs v. State, 403 S.C. 484, 492, 744 S.E.2d 170, 174 (2013)

The PCR court was correct in finding that although evidence in the record may support the legal requirement of a self-defense charge; the evidence was not enough for the court to conclude that a different outcome in the proceeding was either likely or probable if a self-defense charge was preserved. (App. Vol. II p. 918). As Co-Counsel testified, he and Counsel were most concerned with having the jury charge of accident presented to the jury. (App. Vol. II p. 833). Co-Counsel initially asked the trial court for charges of accident, self-defense, voluntary manslaughter, and involuntary manslaughter. (App. Vol. II p. 605). However, the jury was ultimately provided with instructions on murder, accident, and voluntary manslaughter. (App. Vol. II p. 615-6). In the discussion regarding charges, the trial court indicated that in looking at the elements of self-defense, the court found no evidence to support that the victim was the primary aggressor or that the victim and the Petitioner were not engaging in mutual combat, which both are exclusions to self-defense. (App. Vol. II p. 614). Further, the court indicated that the evidence supported a charge for accident and voluntary, but that there was no evidence to support Petitioner killing victim in self-defense. (App. Vol II p. 615). After these discussions, Counsel and Co-Counsel conferred and Co-Counsel asked the court to charge accident and voluntary manslaughter. (App. Vol. II p. 615). The jury only deliberated for a little over an hour before returning a verdict of guilty on the murder charge. (App. Vol. II p. 673).

When reviewing the trial as a whole, issues of evidence and credibility, and the jury charge as a whole, the PCR court properly found that Co-Counsel's failure to request self-defense, although deficient, was not prejudicial to the Petitioner. "In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed 'in

its entirety and not in isolation.”” Gibbs v. State, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013). Respondent submits that the PCR court was correct in finding that Petitioner was not prejudiced by Counsel’s actions because it had no effect on the outcome of the proceedings. The Order signed by Judge Hayes clearly and accurately discusses the overwhelming evidence against Petitioner and how the outcome would not have changed if an instruction for self-defense was given. Furthermore, given the quality of the evidence presented which established the guilt of the Petitioner, there was no prejudice. Therefore, the Petitioner failed to meet his burden of establishing that he was prejudiced as a result of the failure of his counsel to request a self-defense charge.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court’s denial of his post-conviction relief application.

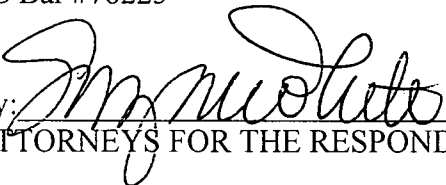
**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

SUZANNE H. WHITE  
Assistant Deputy Attorney General  
SC Bar #78225

By:   
ATTORNEYS FOR THE RESPONDENT

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October 16, 2013

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Circuit Case No.: 2011-CP-42-5461  
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SANTIAGO RIOS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


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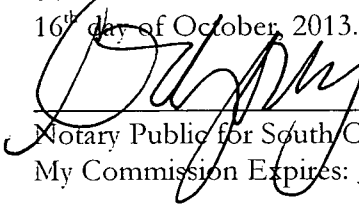
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Susan B. Hackett, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 16<sup>th</sup> day of October, 2013.

  
\_\_\_\_\_  
Anne A. Mueller  
Legal Assistant for Respondent

SWORN to before me this  
16<sup>th</sup> day of October, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina.

My Commission Expires: 10/28/2014