STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

HONORABLE D. CRAIG BROWN
ALLENDALE COMMON PLEAS (PCR)

ERIC HEMINGWAY . . . . . PETITIONER,

V.

THE STATE . . . . . RESPONDENT

APPELLATE CASE NUMBER 2013-001465

PRO SE SUPPLEMENTAL JOHNSON PETITION

Eric Hemingway
Eric Hemingway, (PRO SE)
Lieber. Corr. Inst
P.O. BOX 205
Ridgeville, SC 29472

ISSUES PRESENTED

1. PETITIONER WAS DENIED HIS FULL BITE AT THE APPLE AT HIS INITIAL PCR HEARING AND COULD NOT EFFECTIVELY ALLEGE AND PROVE SIXTH AMENDMENT VIOLATION OF EFFECTIVE ASSISTANCE OF COUNSEL AS HIS PCR COUNSEL DID NOT PROVIDE ANY MEANINGFUL ASSISTANCE OF PRESENT WINNING ISSUES. INCLUDING BUT NOT LIMITED TO:

(A.) PETITIONER WAS CONVICTED OF MURDER AND C.S.C. (FIRST) WITHOUT ANY PROOF ALIUNDE OF THE CORPUS DELECTI.

(B.) TRIAL COUNSEL FAILED TO OBJECT TO THE "BURDEN SHIFTING JURY INSTRUCTIONS" WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THEY COULD ACCEPT OR REJECT THE INSTRUCTIONS THAT MALICE IS IMPLIED FROM THE USE OF A DEADLY WEAPON AND THAT A HAND IS A DEADLY WEAPON.

(C.) TRIAL COUNSEL FAILED TO OFFER EXPERT TESTIMONY OF A DEFENSE FORENSIC PATHOLOGIST TO ELICIT FACT THERE WAS NO PROBATIVE EVIDENCE TO SHOW VICTIM WAS STRANGLED TO DEATH OR RAPED AND THAT CORONER HAS NOT YET A OPINION AS TO CAUSE OF DEATH AS REQUIRED BY SC. LAW.

STATEMENT

PETITIONER WAS CONVICTED OF MURDER AND CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AFTER A JURY TRIAL BEFORE HONORABLE MICHELLE CHILDS ON APRIL 23-26, 2007 IN ALLENDALE COUNTY AND WAS SENTENCED TO SENTENCES OF 30 AND 15 YEARS. STEPHEN PLEXICO (ESQ) WAS TRIAL COUNSEL.

APPLICANT DIRECT APPEAL WAS DENIED. STATE V. HEMINGWAY OP. NO. 2009-UP-563 PETITIONER FILED PCR WITH BRIEFS AND RULE 15(C) A HEARING WAS HELD SEPT. 1, 2011 AND HE WAS MISREPRESENTED BY JOHN L. PINCKNEY (ESQ)

ON OCT. 6, 2011 JUDGE BROWN ISSUED A ORDER DENYING RELIEF. WRIT OF CERTIORARI IS PENDING.

THE PRO SE SUPPLEMENTAL BRIEF IS ATTACHED.

PETITIONER OBJECTS TO WRIT OF CERTIORARI COUNSEL BEING RELIEVED, AND IS SEEKING A REMAND TO RECIEVE HIS DUE PROCESS "FULL BITE AT THE APPLE." AND ASSISTANCE OF COUNSEL TO RAISE THOSE ISSUES. SCRCP 71.1 (d)

ARGUEMENT

PETITIONER WAS DENIED HIS FULL BITE AT THE APPLE AT HIS INTIAL PCR HEARING, AND COULD NOT EFFECTIVELY ALLEGE AND PROVE SIXTH AMENDMENT VIOLATION OF EFFECTIVE ASSISTANCE OF COUNSEL, AS HIS PCR COUNSEL DID NOT PROVIDE ANY MEANINGFUL ASSISTANCE TO PRESENT 'WINNING ISSUES' INCLUDING BUT NOT LIMITED TO.

(A) PETITIONER WAS CONVICTED OF MURDER WITHOUT ANY 'PROOF ALIUNDE OF THE CORPUS DELECTI' THAT A MURDER OCCURED.

PETITIONER WAS CONVICTED OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT WITHOUT ANY 'PROOF ALIUNDE OF THE CORPUS DELECTI' THAT A SEXUAL ASSUALT EVER OCCURED.

PETITIONER WAS AQUITTED OF BURGULARY FIRST DEGREE AS THERE WAS 'NO PROOF ALIUNDE OF THE CORPUS DELECTI"

IT IS WELL SETTLED LAW THAT A CONVICTION CANNOT BE HAD ON THE EXTRA JUDICIAL STATEMENT OF A DEFENDANT UNLESS IT IS COOROBORATED BY PROOF ALIUNDE OF THE CORPUS DELECTI STATE V. OSBOURNE, 516 S.E. 2d. 201 (SC 1999)

IF THERE IS NO EVIDENCE TO PROVE CORPUS DELECTI THE DEFENDANT IS ENTITLED TO A DIRECTED VERDICT STATE V. EPES. 39 S.E. 2d. 769 (SC 1946)

> THE STATE EVIDENCE CONSISTED OF MICHAEL WILLIAMS STATING THAT DEFENDANT SAID HE KNOCKED ON THE DOOR, SHE CAME TO THE DOOR. HE KNOCKED HER DOWN AND HE WAS CHOKING HER AND RAPING HER. AND HER LITTLE SON CAME OUT OF THAT ROOM. AND HE WAS LIKE EVERYTHING IS ALRIGHT GO BACK TO BED. (ROA. 199 L. 3-9)

ON CROSS EXAMINATION WILLIAMS TESTIFIED HE KNEW VICTIM. AND. HE GOT HIGH AND DRUNK THE NIGHT OF THE ALLEGED EVENT AND HE DID NOT REPORT ALLEGED 1:00 a.m. CRIME ON SUNDAY, UNTIL FOLLOWING WEDNESDAY, (ROA. 199-204 L. 4) (4 DAYS AFTER EVENT). HIS TESTIMONY IS SUSPECT AND SELF-SERVING. THE STATE DID NOT HAVE ANY INDEPENDENT EVIDENCE ATTESTING TO THE CAUSE OF DEATH; OR WHETHER VICTIM DIED OF A ANEURYSM (P.B 191 L. 4-6).

> 4: Q. OKAY. AND THIS COULD VERY WELL HAVE BEEN JUST A NATURAL DEATH, COULD IT?
>
> (A) THAT --- THAT IS POSSIBLE.

(CROSS EXAMINATION OF DR. CYNTHIA SCHANOL) (FORENSIC PATHOLOGIST)

IN FACT, A AUTOPSY WAS NOT PERFORMED ON THE VICTIM UNTIL AFTER THE BODY WAS EMBALMED. THE CORONER NEVER STATED WHAT CAUSE OF DEATH WAS - DR. SCHANDLER TESTIMONY IS NOT SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE. THE CORONER KIMBERLY STILL TESTIFIED THAT SHE NOTICED NO SEXUAL TRAUMA ON THE BODY. NO SIGNS THE BODY WAS BEATEN. NO SIGNS THE BODY WAS CHOKED (ROA. 129 L. 10-25) (SEE CHAIN OF CUSTODY ISSUE). NO EVIDENCE OF FOUL PLAY.

Q. SO, THEREFORE, IT WAS A NATURAL DEATH CORRECT?
A. AS FAR AS WE WERE CONCERNED AT THAT TIME (ROA. 129. L:6-9) SEE ROA. P. 651.

THUS, THE CORONERS NOTES SHE TOOK '13 TIMES' THE AMOUNT OF MEDICINE SHE WAS ON, VASCULAR EXPANDERS (ROA. 129. L. 15) (ROA. 185 L. 3-8) (ROA. 190-195 L. 25).

Q. . . . COULD THOSE VASCULAR EXPANDERS CAUSE A ANUERYSM OR STROKE?
A. YES SIR (ROA. 129 L. 24-25.

CLEARLY BY FAILING TO MOVE FOR A DIRECTED VERDICT TRIAL COUNSEL REPRESENTATION FELL WELL BELOW A OBJECTIVE REASONABLE PROFESSIONAL NORMS, AND THAT COUNSEL DEFICIENT PERFORMANCE PREJUDICED THE DEFENDANT THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSELS UNPROFESSIONAL ERRORS THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. STRICKLAND V. WASHINGTON, 104 SCT 2052 (1984).

USE OF VASCULAR EXPANDERS COUPLED WITH STRENOUS SEX MAY HAVE WELL BEEN CAUSE OF DEATH.

SC LAW REQUIRES CORONER LIST CAUSE OF DEATH AND THIS CASE IT COULD NOT BE DONE WITH A REASONABLE MEDICAL CERTAINTY. HOWEVER CLEARLY STATE FAILED TO PROVE THE MOST ESSENTIAL ELEMENT OF THE OFFENSE WHICH WOULD BE MALICE. NO PROOF OF MALICE WAS EVER PRESENTED THUS CONVICTION FOR MURDER IS VOID.

TRIAL COURT HAS DUTY TO DIRECT A VERDICT WHEN THERE IS ABSENCE OF EVIDENCE OF A MATERIAL ELEMENT OF THE OFFENSE. STATE V. GORE, 456 S.E 2d. 419 (SC 1995) RE: WINSHIP 90 SCT (1970).

IN THIS CASE, THE STATE FAILED TO SHOW ANY EVIDENCE OF MALICE AND ANY ACT OF CRIMINAL SEXUAL CONDUCT. AND CORPUS DELECTI OF THESE PARTICULAR OFFENSES OCCURED, STATE V. OSBOURNE, SUPRA. RE: WINSHIP 90 SCT (1970) (STATE MUST PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT:) AND PCR COUNSEL FAILED TO RESEARCH, PRESENT OR ARTICULATE THIS "PARTICULAR DEFICIENT PERFORMANCE" STRICKLAND V. WASHINGTON. SUPRA.

SC LITIGANTS PURSUANT TO ODOM V. STATE, 523 S.E 2d 723 (1999) APPLICANT HAS THE DUE PROCESS RIGHT TO ONE BITE AT THE APPLE, APPLYING THE REASONING OF MARTINEZ V. RYAN, 132 SCT 1399 (2012). COUNSEL AT PCR WAS THE PROXIMATE CAUSE OF THE DENIAL OF A FULL BITE AT THE APPLE.

B.) TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY HIS COMPLETE FAILURE TO OBJECT TO THE BURDEN SHIFTING INSTRUCTION THAT WAS CLEARLY IN VIOLATION OF SANDSTROM V. MONTANA, 422 U.S. 510 (1979) AND FRANCIS V. FRANKLIN, 471 U.S. 307, 317 (1985) IN RE: TO MALICE INSTRUCTION OF USE OF MALICE TO IMPLY USE OF DEADLY WEAPON.

AT APPLICANT TRIAL THE 40 YEAR OLD BODY OF HARRIET WASHINGTON WAS FOUND HALF-NUDE AND DECEASED. THERE WERE NO SIGNS OF CHOKING INJURIES, OR SEXUAL TRAUMA, NO PHOTOS, OR RAPE KIT EVEN SUGGESTED THAT THERE WAS ANY TRAUMA AT ALL.

BASED SOLELY ON MICHAEL WILLIAMS TESTIMONY APPLICANT ADMITTED TO OFFENSE, THERE WAS NO INDEPENDENT EVIDENCE TO CONCLUDE MURDER/CSC OCCURED; LATER, A OFTEN TESTIFYING WITNESS FOR 14TH CIRCUIT SOLICITOR OFFICE.

THERE WAS NO PROBATIVE EVIDENCE OF MALICE WHATEVER, AND THE INSTRUCTION THAT MALICE MAY BE "IMPLIED" FROM CONDUCT SHOWING A TOTAL DISREGARD FROM HUMAN LIFE. IMPLIED MALICE MAY ALSO ARISE WHEN THE DEED IS DONE FROM A DEADLY WEAPON.

(ROA.590 L.13-15) THIS "BURDEN SHIFTING INSTRUCTION" IS CONTRARY TO SANDSTROM V. MONTANA, FRANCIS V. FRANKLIN, SUPRA. AND TRIAL COUNSEL HAD A AFFIRMATIVE DUTY TO RAISE THIS ISSUE. (SEE: ATTACHED SUPPLEMENTAL EXHIBIT 1) FULL BRIEFING OF SELF SAME ISSUE KNOWN TO PCR COUNSEL, THUS, PCR COUNSEL WAS GROSSLY NEGLIGENT FOR FAILING TO RAISE THIS ISSUE AT PCR ON BASIS OF FEDERAL LAW, CITED ABOVE U.S. SUPREME COURT PRECEDENTS SC HAS HISTORICLY DEFIED TO APPLY THIS LEGAL REASONING YATES V. AIKEN 500 SCT 391, 401 (1991) REMANDED 3 TIMES BEFORE US SUPREME COURT ENFORCED BURDEN SHIFTING INSTRUCTIONS APPLICANT DENIED EFFECTIVE ASSISTANCE OF PCR COUNSEL (E.G.) STATE V. BELCHER, 685 S.E.2d 802 (A CHANGE IN SC JUNSPRUDENCE WHERE SC FINALLY ACKNOWLEDGED SANDSTROM BURDEN SHIFTING INSTRUCTION PROHIBITION)

THAT IS GROUNDED IN EXISTING PRECEDENT, AND PCR COUNSEL ACTION DEPRIVED HIM OF HIS FULL BITE AT THE APPLE ODOM V. STATE

TRIAL COUNSEL FAILED TO RETAIN SERVICES OF EXPERT FORENSIC PATHOLOGIST FOR THE DEFENSE. TO ELICIT THAT THERE WAS NO EVIDENCE TO SHOW THAT VICTIM WAS STRANGLED OR RAPED AND THAT CORONER DID NOT ISSUE A OPINION AS TO CAUSE OF DEATH WHICH IS REQUIRED IN SOUTH CAROLINA IN ORDER TO SUBJECT THE STATE CASE TO ADVERSARIAL TESTING PROCESS.

THE CORONER STATED SHE COULD NOT DETERMINE A CAUSE OF DEATH. THE BODY WAS THEN EMBALMED AND A SECOND WITNESS PURPORTED FORENSIC PATHOLOGIST TESTIFIED THERE WAS POST FACTO EVIDENCE OF STRANGULATION, SUPPOSEDLY DISCOVERED AFTER BODY WAS EMBALMED.

COUNSEL HAD A AFFIRMATIVE DUTY TO INVESTIGATE THE CASE STRICKLAND, AND TO CALL A DEFENSE EXPERT ON THIS MATTER STATE V. BAILEY WITHOUT A DEFENSE EXPERT IT WOULD BE IMPOSSIBLE FOR THE DEFENSE TO COUNTER THIS PARTICULARLY DAMAGING EXPERT OPINION BY THE STATE, AND HOW IT WOULD BE IMPOSSIBLE TO MAKE THESE FINDINGS AFTER THE BODY HAD BEEN EMBALMED AND THUS TAMPERED WITH.

(I.E.) THE STATE CLAIM THE VICTIM SCRATCHED HER ASSAILANT BUT NO SKIN WAS TAKEN FROM UNDER HER FINGERNAILS TO SUPPORT THIS STATEMENT. A DEFENSE FORENSIC PATHOLOGIST COULD HAVE STATED IT WAS GROSSLY IRREGULAR PRACTICE TO NOT TAKE SKIN SAMPLE FROM UNDER THE FINGERNAILS OF VICTIM. CROA. 643 DELINATES PCR COUNSEL WAS AWARE OF FAILURE TO SHOW NO DNA OF APPLICANT UNDER VICTIMS NAILS SOLICITOR STATED SCRATCHED APPLICANT THIS WAS A CRUCIAL PIECE OF EVIDENCE TO EXONERATE APPLICANT. NO PHOTOS OF INJURIES.

IN SHORT, WITHOUT A FORENSIC PATHOLOGIST FOR THE DEFENSE COUNSEL COULD NOT SUBJECT THE STATES CASE TO THE "ADVERSARIAL TESTING PROCESS" STRICKLAND.

AND PCR COUNSEL UTTERLY FAILED TO ARTICULATE THE PREJUDICE OF TRIAL COUNSEL FAILURE TO DO SO. APPLICANT ASSERTS PUR. TO U.S AND SC CONSTITUTION (S) AND PROCEDURAL DUE PROCESS WHEN PCR COUNSEL REPRESENTATION IS SO DEFICIENT THAT IT DEPRIVES APPLICANT OF THE ABILITY TO RAISE FOR THE FIRST TIME① TO ASSERT A SIXTH AMENDMENT VIOLATION PUR. TO STRICKLAND AND DEPRIVES HIM OF HIS BITE AT THE APPLE: ODOM V. STATE. SUPRA

① IN SC I.A.C. CLAIMS MUST BE RAISE AT PCR NOT DIRECT APPEAL.

RELIEF / CONCLUSION

THE PETITIONER HAVING BEEN DENIED ANY REPRESENTATION AT THE PCR MANDATES PUR. TO ODOM V. STATE, SUPRA, AND THE REASONING OF MARTINEZ V. RYAN THIS MATTER SHOULD BE REMANDED BACK FOR A NEW PCR HEARING.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 12th DAY OF December
2013.
Ludrecan Bryant
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES May 26, 2020

RESPECTFULLY SUBMITTED,
s/ Eric Hemingway
Eric Hemingway

IN THE SUPREME COURT
STATE OF SOUTH CAROLINA

HON. D. CRAIG BROWN, CIRCUIT
JUDGE ALLENDALE COMMON PLEAS

ERIC HEMINGWAY

V.

STATE

PRO SE SUPPLEMENTAL APPENDIX TO JOHNSON BRIEF

EXHIBIT (1)

ISSUE (c) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE BURDEN-SHIFTING JURY INSTRUCTIONS WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THEY COULD "ACCEPT OR REJECT" THE INSTRUCTIONS THAT "MALICE IS IMPLIED FROM THE USE OF A DEADLY WEAPON?"

FACTS

Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to object to the Trial Court's jury instructions that "malice is implied from the use of a deadly weapon". This instruction created a mandatory presumption since the Court failed to instruct the jury that they could "accept or reject" that malice is **implied** from the use of a deadly weapon.

Evidentiary presumptions must be charged as permissive inferences with specific instructions that the jury may "accept or reject them." In the instant case the Trial Court gave the following instructions to the jury without objection from counsel, as was recorded:

> Malice may be implied from conduct showing a total disregard for human life. Implied malice may also arise when the deed is done with a deadly weapon."
>
> A deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.
>
> A hand is not normally considered a deadly weapon; however, under some circumstances, the wounds inflicted and other relevant facts, a hand may be considered a deadly weapon. It is for you to decide in this case beyond a reasonable doubt whether or not a hand is a deadly weapon. [Tr.p.590, L.13-25, p.591, L.1].

The Trial Court's failure to instruct the jury properly denied Petitioner his Fourteenth Amendment right to a fair trial. Petitioner was further denied his Sixth Amendment right to the effective assistance of trial counsel when counsel failed to object when the Court failed to instruct the jury they could accept or reject the presumption that malice is implied from the use of a deadly weapon.

DISCUSSION

In a criminal trial in this Country, it is an elementary principle of due process that every element of the crime must be proven by the prosecution beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 520 (1979). An instruction that tells a jury to presume any element of a crime without evidence is unconstitutional, for the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element of the crime charged." Id, 442 U.S. at 527 (Rehnquist, J. concurring).

The United States Supreme Court has made clear that an instruction that a jury should presume malice from the use of a deadly weapon falls under this constitutional prohibition. Yates v. Evatt, 500 U.S. 391, 401-02 (1991); Francis v. Franklin, 471 U.S. 307, 317 (1985); see also Houston v. Dutton, 50 F.3d 381, 385 (6th.Cir.1995). A mandatory rebuttable presumption is equally unconstitutional. Francis, 471 U.S. at 317.

In the instant case Petitioner asserts that the charge given

was unconstitutional and became a mandatory presumption when the Trial Court "failed" to instruct the jury they could [accept or reject] the charge that "malice is implied from the use of a deadly weapon." This Court has long held that burden-shifting presumptions are unconstitutional. See State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985). Specifically, a charge that a prima facie case may be rebutted by other evidence is also impermissible. State v. Key, 282 S.C. 413, 319 S.E.2d 338 (1984).

Evidentiary presumptions "mus[t] be charged as permissive inferences with specific instructions that the jury may [accept or reject] them." See State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987); accord State v. Peterson, supra.

In reviewing the instructions given in the instant case the record is replete the Trial Court "failed" to instruct the properly instruct the jury in this case. (emphasis supplied).

The judge's instructions to the jury as to the law and how evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities in our legal system. Houston, supra at 385. In the instant case Petitioner asserts that the Trial Court's failure to charge the jury they could [accept or reject] the instructions that "malice is implied from the use of a deadly weapon" violated Petitioner's right to a fair trial and for counsel failing to object to the unconstitutional jury instructions, Petitioner was also denied his Sixth Amendment guarantee to the effective assistance of counsel.

Petitioner should receive a new trial.

EXHIBIT (2)

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE Eric Hemingway, Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2010-CP-03-15 MEMORANDUM IN SUPPORT OF APPLICANT'S PCR APPLICANTOIN AS AMENDED AND SUPPLEMENTED

TO: Assistant Attorney General Matthew J. Friedman, of Columbia, for Respondent.

NOW COMES Eric Hemingway, the Applicant in the above captioned case, in support of his PCR Application, as amended, and submits the following:

INTRODUCTION

Further summation is not required other than to state that this PCR court must apply the familiar two-part "*Strickland* test" to the facts of this case and answer the following questions: a) can the Applicant prove that trial counsel's performance was deficient; and, if so, b) has trial counsel's performance 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.

FACTS

The Applicant is incarcerated with the South Carolina Department of Corrections in connection with indictments against him at the December 2005 term of General Sessions for Allendale County Grand Jury for murder (2005-GS-02-139) and criminal sexual conduct – first degree (2005-GS-03-143).

After entering a plea of not guilty, he was tried and convicted on both indictments on April 23 – 26, 2007. Thereafter, he was sentenced by the Honorable J. Michelle Childs for 30 years on the murder indictment and 15 years on the criminal sexual conduct indictment, said sentences to run concurrently. The Applicant was represented at trial by Steven Plexico, Esquire, of the Allendale Public Defender's Office.

A timely Notice of Appeal was filed on behalf of the Applicant and an appeal was perfected. Robert M. Dudek of the South Carolina Commission on Indigent Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) (basically, the Anders brief serves to notify the court that counsel has determined that the appeal is wholly frivolous, furnishes the court with a brief of anything in the record arguably supporting the appeal, and allows the court to fully review the case to find any legal points supporting appointment of other counsel). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Hemingway, Op. No. 20090-UP-563 (S.C. Ct. App. filed November 23, 2009). The Remittitur was issued on December 9, 2009.

BASIS FOR SECOND AMENDED AND SUPPLEMENTAL PCR APPLIATION

Trial Counsel's performance did not pass the "*Strickland* test" as applied to the facts of this case because, under the requirements recently declared by the South Carolina Supreme Court's five to zero decision in *State v. Bostick*, 703 S.E.2d 774, 392 S.C. 134 (2011), trial counsel did not successfully argue to the trial court, via a directed verdict motion or otherwise, that the State's evidence only raised a *suspicion of guilt* from which no trier of fact could convict the Applicant with guilt and beyond a reasonable doubt, and trial counsel did not successfully argue to the trial court, via a directed verdict motion or otherwise, that the State only provided circumstantial evidence which was not the required *substantial circumstantial evidence.*

The *Bostick* Court was met with the following cursory facts at issue:

merely raises a suspicion of guilt. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Therefore, we find the circuit court erred in failing to direct a verdict in favor of Bostick.

The Bostick Court traces these referenced "settled principles" by using analogous facts from the following three cases, all of which pre-date the case at bar, each case raising only a *suspicion of guilt* without *substantial circumstantial evidence* which, as in the case at bar, was not successfully argued to the trial court by trial counsel:

1. *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984).

   The South Carolina Court of Appeals agreed that a directed verdict should have been granted by the circuit court when Defendant's admission as to having smoked the same Marlboro brand cigarettes located at the scene, test run by the FBI did not indicate that the Defendant had smoked the butts found and, therefore, did not equal admission of facts sufficient to place Defendant at crime scene at the time of the crime.

2. *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004).

   There was no substantial evidence to submit the case to the jury and a directed verdict of acquittal should have been granted when Defendant not placed at the crime scene even when with finger prints of Defendant on a coffee lid on the center console of the BMW, which car constituted the crime scene, and even when evidence showed Defendant borrowed the victim's BMW on same care on same day of crime, but nothing linked Defendant to the time of the crime.

3. *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000)

   Defendant was entitled to a directed verdict when Defendant's finger print on screen at crime scene home was only evidence linking Defendant to the burglary.

The case at bar has analogous facts to those of Bostick and the above three cases. Although trial counsel's performance includes pointing out the following facts to the trial court when requesting a directed verdict, trial counsel did not effectively argue the settled principles of law espoused in *Bostick* to support a directed verdict for having facts providing only *suspicion of guilt* without *substantial circumstantial evidence,* as follows:

1. **Failure to Place Defendant at the Crime Scene at the Time of the Crime**. Trial counsel failed to effectively argue the settled principles under *Bostick (that a mere*

- Roger Bostick was put on trial for murder for the death of Sarah Polite who actually died from carbon monoxide while her house caught fire but also had been struck in the head with a blunt force object.

- Two days after the fire, investigators discovered the following items belonging to the victim, Sarah Polite, in a burn pile at a neighboring house belonging to Bostick's mother.

- DNA analysis of blood found on Roger Bostick's jeans came back inconclusive even though ninety-nine percent of the population could be excluded as contribution to the sample from Sarah Polite.

- The jury found Bostick guilty of Polite's murder, and the circuit court sentenced him to thirty years imprisonment.

Analyzing the evidence presented by the State in the light most favorable to it, the Bostick Court believed that the State's evidence raised only a suspicion of guilt of Roger Bostick because no direct evidence linked Bostick to the crime scene or the items found in the burn pile. In relevant part, with emphasis added, here is the Bostick Court's analysis:

> Analyzing the evidence presented by the State in the light most favorable to it, we believe the State's evidence here raised only a suspicion of guilt by Bostick. No direct evidence linked Bostick to the crime scene or the items found in the burn pile. Moreover, there was no testimony tending to establish that Bostick had control over the burn pile. When the State closed its case against Bostick, the following pieces of circumstantial evidence of his guilt had been presented: (1) Polite's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the **[392 S.C. 142]** burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to Polite's DNA. In addition, the weapon used to beat Polite in the head was never introduced into evidence. Finally, no evidence was introduced concerning Bostick's knowledge that Polite may have had money in the briefcase or if indeed any money was in the briefcase on that particular Sunday. The evidence presented by the State raised, at most, a mere suspicion that Bostick committed this crime. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented

suspicion of guilt without *substantial circumstantial evidence requires the trial court to direct the verdict without regard to the Jury's verdict. Specifically,* during directed verdict stage, Trial Counsel did not mention Bostick despite the fact that the Applicant's skin, hair, blood, or in the alternative, Applicant's DNA was not found under the fingernails of the deceased and no other facts of this case are sufficient to place Defendant at crime scene at the time of the crime. Defendant's DNA apparently was not found in the clippings nor was he included or excluded.

2. Failure to Find Defendant Guilty of the Predicate Charge of Burglary. Trial Counsel failed to effectively argue that because the Defendant was not found Guilty of the burglary charge, *a fortiari*, the Defendant could not be found guilty of the murder charge on mere *suspicion of guilt and* without *substantial circumstantial evidence* under the law of Bostick.

BURDEN OF PCR-APPLICANT

The initial burden is on the PCR Applicant to prove allegations in application under Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), which reiterates the following two-pronged test of *Strickland v. Washington* test, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984):

> **Prong One** – Counsel's performance was deficient with a required showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.
>
> **Prong Two** - Counsel's performance prejudiced the defense with a required showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Under this *Strickland* test, the Applicant's burden is set against a "strong" presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Put another way, the proper measure of counsel's performance remains whether he has provided representation within the range of competence

required of attorneys in criminal cases. As applied in *Strickland*, the above test is an "outcome-determinative" test such that the alleged error by counsel must have affected the outcome of the case for the applicant's PCR case to have merit.

Although the Applicant must overcome the strong presumption in order to receive relief, the Applicant need not pass Strickland's outcome-determinative test with absolute certainty because a mere reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" suffices. Cherry v. State 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the reasons discussed above, Applicant would respectfully oppose Respondent Return and request that this court find in favor of the Applicant. Applicant would also incorporate all of the arguments contained in the Applicant original and first Amended Application for PCR which are filed of record in this matter.

RESPECTFULLY SUBMITTED,

THE LAW OFFICE OF DEAN B. BELL, LLC

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ATTORNEYS FOR APPLICANT

Ridgeland, South Carolina
February 20, 2013

Certificate of Service

I certify that on February 20, 2013, I caused to be mailed or delivered a copy of the foregoing document(s) to each counsel of record.

_____

John J. Pinckney
Attorney for Applicant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

D. Craig Brown , Circuit Court Judge

Case No. 2010-CP-03-15

Eric Hemingway,

Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Eric Hemingway appeals the order of the Honorable D. Craig Brown dated October 6, 2011. Appellant received written notice of entry of this order on June 18, 2013.

July 3, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

D. Craig Brown , Circuit Court Judge

Case No. 2010-CP-03-15

Eric Hemingway,

Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE FOR NOTICE OF APPEAL

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2013, addressed to its attorney of record, Ashleigh R. Wilson, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211.

July 3, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

D. Craig Brown , Circuit Court Judge

Case No. 2010-CP-03-15

Eric Hemingway,

Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Eric Hemingway appeals the order of the Honorable D. Craig Brown dated October 6, 2011. Appellant received written notice of entry of this order on June 18, 2013.

July 3, 2013

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