ALAN WILSON
ATTORNEY GENERAL

June 5, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **Shaun W. Wiles v. State of South Carolina**
Appellate Case No: 2013-000729

Dear Mr. Shearouse:

Enclosed for filing is the original **Return to the Petition for Writ of Certiorari** and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/tb
Enclosures

cc: Wanda H. Carter

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000729

Shaun Wayne Wiles, ... 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

1. Did the PCR judge correctly find that Petitioner failed to meet his burden to prove counsel was ineffective in representation regarding the restitution hearing?

2. Did the PCR judge correctly find Petitioner failed to meet his burden to prove counsel was ineffective for failing to object to alleged illegal sentence?

STATEMENT OF THE CASE

The Saluda County Grand Jury indicted Petitioner for assault and battery with intent to kill (2004-GS-41-0091) and failure to stop for a blue light (2006-GS-41-0078). (App.pp.374-75). Adrian Falgione, Esq., represented Petitioner.

After the State called the case to trial, Petitioner was found guilty of failure to stop for a blue light and on the lesser included offense of assault and battery of a high and aggravated nature. On March 8, 2006, the Honorable William P. Keesley sentenced Petitioner to a ten (10) year term of imprisonment for ABHAN and a three (3) year term of imprisonment for failure to stop for a blue light. The sentences were to be served consecutively. (App.pp.1-331).

A notice of appeal was filed at the South Carolina Court of Appeals. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Wiles, Op. No. 2007-UP-318 (filed on June 14, 2007). A petition for hearing was filed on June 24, 2007 and denied on August 24, 2007. A further petitioner for certiorari with the South Carolina Supreme Court was filed on November 26, 2007. The South Carolina Supreme Court affirmed Petitioner's convictions and sentences by order. State v. Wiles, Op. No.26674, (filed on June 22, 2009). The remittitur was issued on July 8, 2009.

Petitioner filed an application for post-conviction relief (PCR) on March 2, 2010. (App.pp.332-33). A hearing was convened at the Lexington County Courthouse on February 4, 2011. (App.pp.344-64). Petitioner was present and represented by Nick Riley, Esq. A West Lee, Esq., of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Lawton McIntosh denied relief in an order

dated January 3, 2012. (App.pp.365-74). This appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where Petitioner presented no legitimate reason why counsel should have objected to the manner his restitution hearing was convened and where Petitioner failed to make prima facie showing of how counsel's representation on the matter was ineffective.

The entire record supports the PCR judge's finding that Petitioner failed to prove that counsel was ineffective in the manner he represented Petitioner at sentencing hearing. 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 proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Petitioner's deficiency argument is in part facially without merit where statutory law and the prevailing authority allows for a circuit judge to conduct a restitution hearing within a sentencing hearing at the conclusion of trial. S.C. Code §17-25-322(A) states:

> When a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court

> must hold a hearing to determine the amount of restitution due the victim or victims of the defendant's criminal acts. The restitution hearings must be held unless defendant in open court agrees to the amount due, and in addition to any other sentence which it may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages. The defendant, the victim or victims, or their representatives or the victim's legal representative as well as the Attorney General and the solicitor have the right to be present and be heard upon the issue of restitution at any of these hearings.

Id. "Before a court may order any reparation to a victim, it must hold a hearing and determine the actual amount of damages." State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (1998). This Court in State v. Gulledge held "A restitution hearing is part of the sentencing proceeding." State v. Gulledge, 326 S.C. 220, 487 S.E.2d 594 (1997).Therefore any objection regarding the manner in which the trial judge convened the restitution hearing is without merit where the matter was sufficiently disposed of as a part of the sentencing hearing. Furthermore, the proper parties were present and Petitioner was afforded the opportunity to be heard.

The record shows counsel honored Petitioner's desire to forgo post-trial motions. (App.p.323). Counsel is under no duty of clairvoyance to anticipate would change his mind years later. After being convicted, Petitioner stated that he was "happy with the verdict." (App.p.322). Regardless further discussion regarding counsel's representation at the sentencing hearing is unwarranted where Petitioner entirely failed to make a prima facie case at the PCR hearing that counsel's performance prejudiced him required by Strickland's second prong. Notably, Petitioner failed to even testify that facts of conviction did not support the restitution hearing; he also failed to challenge the valuation

amount. Simply, Petitioner presented no legitimate reason why counsel should have objected to the trial judge's order of restitution.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

II.

Certiorari is not warranted where Petitioner failed to meet his burden to prove counsel was ineffective for failing to make a meritless objection to the imposition of Petitioner's sentence where the trial judge did not abuse his discretion in sentencing Petitioner.

The PCR judge correctly denied this allegation where any objection to the valid sentence would have been without merit. Petitioner contends counsel failed to object to the alleged illegal sentence imposed by the trial judge where he was sentenced to maximum, consecutive sentences on the two charges in addition to restitution costs. Again, Petitioner's substantive argument is without merit.

Petitioner was sentenced on both charges in accordance with the statutory guidelines, which at the time set forth maximum sentences of ten (10) years imprisonment and/or a fine in the discretion of the Court for an ABHAN conviction, and three (3) years imprisonment for failure to stop for a blue light conviction. Applicant received consecutive ten and three year sentences, both the maximum allowed under the statute. The power of a trial judge in General Sessions Court to impose restitution as part of a criminal sentence to reimburse the victims for pecuniary losses is derived from S.C.

Code § 17-25-322. Regarding the judge's ability to use his discretion in ordering restitution when a straight sentence is imposed, under S.C. Code § 24-23-110 "[j]udges of the Court of General Sessions may suspend the imposition or the execution of a sentence **and** may impose a fine and a restitution without requiring probation." (emphasis added). Further, the South Carolina Supreme Court has found that "section 16-3-1530(D)(3) complements section 17-25-125 by allowing the trial judge to order restitution when he imposes the maximum sentence." Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Although no charges for unlawful taking or receiving of or malicious injury to another property (as listed in section 17-25-125) were presented for the jury's consideration, the statute and South Carolina Supreme Court both plainly state that a trial judge may order non-probationary restitution even when a maximum straight sentence is imposed. Therefore, the trial judge properly used his discretion to impose restitution while sentencing Petitioner to a maximum straight prison term.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

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By: _____
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

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Appeal from Saluda County
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SHAUN W. WILES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

Wanda H. Carter
Office of Appellate Defense
1330 Lady St, Ste. 401
Columbia, SC 29201

This 5th day of June, 2014

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent