STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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Appellate Case No. 2013-001686

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CHRISTOPHER WOODY, 309141,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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## QUESTIONS PRESENTED

### I.

Did Petitioner's original appointed attorney violate his right to counsel by failing to be present at Applicant's bond hearing?

### II

Did Petitioner's Trial Attorney fail to use readily available documentation to support the defense in the Jackson v. Denno hearing where Court documents established that Petitioner had been appointed Counsel, at his request, prior to being questioned by law enforcement and before his statement was issues?

### III.

Were Petitioner's rights to Discovery of potentially exculpatory material violated where the State failed to turn over documents relating to the appointment of counsel in petitioner's case?

### IV

Did Trial Counsel fail to conduct sufficient pretrial research and investigation to adequately evaluate and challenge the State's gunshot residue testimony?

### V.

Did Trial Counsel fail to provide Petitioner effective assistance of counsel in that he neglected to request jury instruction on the lesser included offense of voluntary manslaughter where the evidence adduced at trial supported a charge on the lesser-included offense.?

## STATEMENT OF THE CASE

Applicant filed his application for Post-Conviction Relief (PCR) on August 2, 2010. The case was heard by the undersigned on the 13th day of May 2013. The State of South Carolina was represented by J. Rutledge Johnson, Esquire, and the Applicant was represented by harry Devoe, Esquire.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the February 2005 term of the York County Grand Jury for Murder (2005-GS-46-0858), Possession of a Firearm During the Commission of a Violent Crime (2005-GS-46-0858A), Criminal Conspiracy (2005-GS-GS-46-0859), and Unlawfully Carrying a Pistol (2005-GS-46-0860). Mr. Woody was represented by John Delgado, Esquire. From May 2-6, 2005, the Applicant proceeded to a jury trial and was found guilty of all charges. The Honorable Lee S. Alford sentenced the Applicant to life without parole for murder, five (5) years for possession of a firearm, five (5) years for conspiracy, and one (1) year for the unlawful carrying of a pistol, all running concurrent.

A Notice of Appeal was filed on the Applicant's behalf, and an appeal was perfected by Joseph L. Savitz, III, Esquire. The S.C. Court of Appeals affirmed. *State v. Woody*, 2008-UP-534 (filed Sept. 11, 2008). The Petition for Rehearing was denied by Order dated December 19, 2008. The S.C. Supreme Court denied the Applicant's Petition for Writ of Certiorari by Order dated November 4, 2009. The Remittitur was issued on November 9, 2009.

Following the May 13, 2013 evidentiary hearing, Attorney Devoe submitted for the consideration of the PCR judge a Memorandum in Support of Application for Post-Conviction Relief which contains the handwritten notation that if was "mailed 5/31/13". App. pp. 1118-1126. Correspondence from the PCR judge, dated June 3, 2013, indicates that this memorandum

was received by the Court after the Order of Dismissal in this case was issued on May 22, 2013. App. p. 1127. The Order of Dismissal was filed on May 24, 2013. Thereafter, PCR Counsel served and filed a Motion to Alter or Amend said order pursuant to Rule 59(e) SCRCP on June 7, 2013. App. pp. 1128-1140. The Motion filed by PCR Counsel essentially repeated the arguments advanced in his earlier Memorandum. Respondent submitted its Return to Petitioner's 59(e) Motion on June 25, 2013. App. pp. 1141-1144.

In his *pro se* Application for Post-Conviction Relief, the Petitioner alleged the following in support of his claim that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated in the trial court and on direct appeal:

> **The Applicant's Right to "Effective Assistance of Counsel, "As Guaranteed by the Sixth Amendment to the United States Constitution and South Carolina Law was Violated By the Following Failures And/Or Omissions Made by Trial Counsel:**
>
> **Issue 1.** Trial Counsel failed to adequately research constitutional and legal issues material to the trial he prepared and to prudently preserve those material legal issues for Direct Appeal.
>
> **Issue 2.** Trial Counsel failed to conduct sufficient pretrial research and investigation to adequately evaluate and challenge the State's gunshot residue testimony.
>
> **Issue 3.** Trial Counsel failed to interview the Applicant's co-defendant's pretrial. Thus, Counsel was unable to anticipate and prepare to counter, through targeted research and investigation, the difficulties and problems likely to arise through his attempts to introduce "exculpatory" and corroborative evidence from those witnesses.
>
> **Issue 4.** Trial Counsel failed to present readily available evidence pertaining to the alleged Victim's known reputation for violence. The evidence available was based on incidents that the Police were aware of involving the deceased acting in criminal/drug related matters associated with violence.
>
> **Issue 5.** Trial Counsel failed to take exception to the overly complex and confusing self-defense jury charge.

**The Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and South Carolina Law was violated by Appellate Counsel's failures to appeal the following issues:**

**Issue 6.** The Directed Verdict Motion made relative to the conspiracy to commit murder offense.

**Issue 7.** The trial judge's abuse of discretion by excluding co-defendant's exculpatory statements from the defense's case-in-chief. The trial judge's decision was a (reversible) prejudicial error of law, as he declared those statements to be "testimonial hearsay" that was inadmissible under any circumstances.

**Issue 8**. A new non-retroactive watershed rule of law holding that; (A jury charge explaining that "Malice Aforethought" may be inferred by the use of a deadly weapon is an unconstitutional charge of law when "Self Defense: has been properly and legitimately raised at trial).

**The Applicant's Rights to Due Process and Equal Protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina Law was violated based on prosecutorial misconduct due to the State's acquisition of indictments by methods encompassing the following specific acts:**

**Issue 9.** The Solicitor/Assistant Solicitor acquired the indictments used to prosecute the Applicant by way of a total non-compliance with a mandatory statue chat is jurisdictional in nature.

**Issue 10.** The Solicitor/Assistant Solicitor acquired the indictments used to prosecute the Applicant by way of both "intrinsic and extrinsic" fraud.

**Issue 11**. The Solicitor/Assistant Solicitor acquired the indictments by acts of "perjury" as defined by State Law.

**Issue 12.** The Solicitor/Assistant Solicitor acquired the indictments by acts of defined as "Criminal Conspiracy" by State Law.

**Issue 13.** Facts have arisen that implicate whether the Trial Court properly had either "personal" and/or "subject matter" jurisdiction to render judgments and sentences against the Applicant based on the improper and illegally obtained indictments.

**Issue 14.** Solicitor/Assistant Solicitor's acts of perjury and/or which caused Applicant to miss making contemporaneous objection to the grand jury and its indictment, and/or moving for void judgment after conviction.

An additional claim of ineffective assistance of trial counsel raised in the Amended Application was that:

> **Issue 15.** Trial Counsel failed to request jury instruction on the lesser included offense of voluntary manslaughter.

An Amended PCR Application was filed by the PCR Counsel on behalf of Petitioner on April 29, 2013. App. pp. 952-956. In that Amended Application the Petitioner raised the following claims:

> **Issue 16.** Applicant asserts that on the 28, June, 2004, he was then appointed Bryson Barrowclough, Esquire, as counsel in his criminal proceedings by the York County Clerk's Office. On June 28, 2004, Applicant was brought before the City of Rock Hill Municipal Judge, Ray Jay, for his bond hearing. Applicant asserts that he said appointed counsel, Bryson Barrowclough, had failed to be present at Applicant's bond hearing.
>
> **Issue 17.** Applicant asserts that when he was being arrested, he requested counsel and repeated that request at the City of Rock Hill County Jail, city county jail, to the Rock Hill Police department personnel. Applicant asserts that this request was ignored and denied while at the City of Rock Hill Jail, and even during arrest and, before questioning, this constitutes as a violation of his Constitutional right imposed by law, and the statement(s) that when received by detective(s), without Applicant's voluntariness or waiver of his rights, must be deemed as void and null in the interest of justice.
>
> **Issue 18.** Applicant asserts that by the failure of trial counsel to motion the court on a specific self-defense or lesser included offense of voluntary manslaughter instruction on "appearances" and "retreat", where Applicant or Witnesses testified that Applicant viewed a gun, and the victim would have killed him, is cause enough for such motion to be made on record, and trial counsel should have requested such instructions.
>
> **Issue 19.** Applicant asserts that trial counsel was ineffective for failure to make meaningful objection to the statement(s), testimony(s), the prosecution with-holding evidence, and/or suppressing evidence pending that would have establish Applicant's innocence, and evidence counsel knew was false.
>
> **Issue 20.** Trial Counsel was ineffective for failing to secure the Applicant a plea bargain.

**Issue 21.** Trial Counsel was ineffective for failing to question Susan Cromer about the bullet(s) found at crime scene and witness people over victim's body.

**Issue 22.** Trial Counsel was ineffective for failing to call the EMS that was at the crime scene and witness people over the victim's body.

**Issue 23.** Trial Counsel was ineffective for failing to object to the Trial Judge improperly making evidence unavailable at trial.

**Issue 24.** Trial Counsel was ineffective for ineffective for failing to place on record that Applicant's clothes were not submitted to SLED for the necessary testing.

**Issue 25.** Trial Counsel was ineffective for failing to motion the Court to have the prosecution conduct necessary testing and investigation on all the evidence that was submitted to the jurors.

**Issue 26.** Trial counsel was ineffective for failing to conduct a pretrial investigation and properly bring forth a meaningful closing argument on behalf of Applicant.

**Issue 27.** Trial Counsel was ineffective for failing to question the police/detective(s) about the whereabouts of the other gun at crime scene when bullet(s) were found.

**Issue 28.** Trial Counsel was ineffective for failing to question the victim's father and/or girl friend on the whereabouts of victim's phone, when it was said that victim had made call prior to the crime at hand.

**Issue 29.** Trial Counsel was ineffective for failing to question the two co-defendants.

**Issue 30.** Trial Counsel was ineffective for failing to impeach the witnesses whose statements were changed from that on which they gave under oath as opposed to those given to police/detectives.

**Issue 31.** Trial Counsel was ineffective for failing to prepare for trial on behalf of Applicant.

**Issue 32.** Trial Counsel was ineffective for failing to motion the court for a mistrial based on the jurors had complained of people talking to them about the trial outside the presence of the defense, prosecution, and judge.

**Issue 33.** Trial counsel was ineffective for failing to place on the trial record that the victim had a criminal record that related to violence and gun charges.

At the outset of Petitioner's PCR hearing held on May 13, 2013, before the Honorable John C. Hayes, III, PCR Counsel was asked by the Court to ***" tell [the Court] what the issues are that you plan to present testimony regarding and we will move forward."*** App. p. 961, ll. 6-8. PCR Counsel began to articulate Petitioner's grounds for the Court, but was cut off after addressing only a few of the allegations set forth in the original PCR Application and the Amended Application. App. p. 961, l. 9- p. 962, l. 16. Thereafter the Petitioner is directed to begin presenting his witnesses without PCR Counsel finishing his presentation concerning what issues were to be presented and argued at the PCR hearing. App. p. 962, l. 15- p. 964, l. 15.

The issues that were articulated by PCR Counsel were as following:

A) I guess the first issue is I raise, Your Honor, is the fact that we see an ineffective *Jackson v. Denno* case situation hearing in front of the hearing judge in the trial. Some issues was [sic] some information in that case was not presented to the attorney representing Mr. Woody. ... At the *Jackson v. Denno* hearing Mr. Delgado was no presented with some information from the State that might have changed the outcome of the *Jackson v. Denno* hearing. App. p. 961, ll. 10-21. The PCR Court described this allegation as "discovery issues". App. p. 961, l. 22-24.

B) And going on from there we find that the gunshot residue situation in that case was vital to the case and it was handled by the State and that Mr. Delgado did not attempt to obtain an expert to counter the State's testimony in that case. Essentially the defense of the case was a self defense and at the conclusion of the expert for Mr. Woody basically striped Mr. Woody's defense of that defense.
Let me go on about the situation where the gun shots and the pathology either was not provided to Mr. Delgado and not properly and defended him properly. [sic] App. p. 961, l. 25- p. 962, l. 10.

The PCR Court interrupted Plea Counsel while he was stating the issues to be presented, as had been requested by the Court, and asked the State if they wish to say anything before Plea Counsel called his first witness. App. p. 961, ll. 2 – 8 and App. p. 962, ll. 13 – 16. PCR Counsel did not ask to be heard further following this interruption. At the conclusion of the PCR hearing, ***PCR Counsel argued that Trial Counsel was ineffective for failing to get records relevant from***

***the cell phone that was in possession of the victim on the night of this shooting. App. p. 1089, l. 10 – p. 1092, l. 1.*** During re-direct examination of Trial Counsel, PCR Counsel attempted to question him concerning why he never asked for a jury charge on a lesser included offense. The State objected to this line of questioning as being outside the scope of their cross-examination of this witness. That objection was sustained. App.p. 1012, ll. 16 – 20. Later in re-direct examination of Trial Counsel, PCR Counsel attempted to question concerning whether he had ever sought cell phone records for the phone used by the victim on the night he was killed. An objection by the State to that line of questions being outside the scope of their cross-examination was likewise sustained. App. p. 1013, ll. 7 – 14. After hearing brief arguments by both sides, the PCR judge took Petitioner's case under advisement. App. p. 1083, l. 25- p. 1093, l. 6. The PCR hearing record does not reflect that PCR Counsel requested permission to submit either a memorandum or a proposed order. Likewise, the record does not indicate that memoranda were requested by the Court.

In the Order of Dismissal filed on May 24, 2013, the PCR Court reduced the allegations raised by Petition to the following summary;

> In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons;
>
> 1. Ineffective assistance of trial counsel
> 2. Ineffective assistance of appellate counsel
>
> Applicant's PCR counsel stated the underlying issues for the Court's consideration as to the general Ineffective Assistance of trial counsel claim were:
>
> 1. Discovery Failures
> 2. Trial Attorney failed to hire gunshot residue expert to counter State [sic]
> 3. Trial Attorney failed to hire pathology expert

> The Applicant alleges he received ineffective assistance of counsel. The Application lists fifteen (15) issues; however, because the Applicant bears the burden of proving allegations made in his Application, only those addressed in the hearing, listed above, will be considered by the Court. See *Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).* Additionally, only arguments in regards to the ineffective assistant of trial counsel were heard. Therefore, ineffective assistance of appellate counsel will not be considered by the Court.

***Order of Dismissal filed May 24, 2013, pg.2, App. p. 1112.***

As previously noted, the Order of Dismissal in this matter was filed on May 24, 2013. Petitioner's Memorandum in Support of Application for Post-Conviction Relief was mailed to Judge Hayes on May 31, 2013. Petitioner's Motion to Alter or Amend was served on June 5, 2013 and filed on June 6, 2013. Said Motion was denied by Order filed July 16, 2013 and received by PCR Counsel on July 18, 2013. PCR Counsel filed a Notice on behalf of Petitioner on August 6, 2013. Said Notice references the date of the Order denying the Rule 59(e) motion, however, it is clearly intended to appeal the Order of Dismissal entered in this matter which began final with the denial of the Motion to Alter or Amend by Order filed July 16, 2013. This PCR Appeal follows.

## EVIDENCE BEFORE THE LOWER COURT

At the hearing, the Petitioner testified on his own behalf. Also testifying were Petitioner's Trial Counsel, John Delgado, Esquire and Public Defender, B.J. Barrowclough, Steven Howard, Esquire, who was qualified as an expert in gunshot residue, and Doctor Adel Shaker, a pathologist, who was also qualified as an expert in gunpowder residue. This Court also had before it a copy of the transcript of the proceedings against the Petitioner, and the exhibits introduced during that proceeding, the records of the York County Clerk of Court, and the Petitioner's records from the South Carolina Department of Corrections

## ARGUMENT

### Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Petitioner must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; ***Johnson v. State,*** *325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).* A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. ***Ard v. Catoe****, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).*

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. ***Roseboro v. State****, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)*; ***Stokes v. State****, 308 S.C. 546, 419 S.E.2d 778 (1992).* On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of ***Ingle v. State****, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)*, the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis added)(Citations omitted).

**Question I, II and III**

**Issue 16 and Issue 17**

**As articulated in Amended Application for Post-Conviction Relief at App. p.p. 952 – 953.**

> Applicant asserts that on the 28, June, 2004, he was then appointed Bryson Barrowclough, Esquire, as counsel in his criminal proceedings by the York County Clerk's Office. On June 28, 2004, Applicant was brought before the City of Rock Hill Municipal Judge, Ray Jay, for his bond hearing. Applicant asserts that he said appointed counsel, Bryson Barrowclough, had failed to be present at Applicant's bond hearing.
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> Applicant asserts that when he was being arrested, he requested counsel and repeated that request at the City of Rock Hill County Jail, city county jail, to the Rock Hill Police department personnel. Applicant asserts that this request was ignored and denied while at the City of Rock Hill Jail, and even during arrest and, before questioning, this constitutes as a violation of his Constitutional right imposed by law, and the statement(s) that when received by detective(s), without Applicant's voluntariness or waiver of his rights, must be deemed as void and null in the interest of justice.

The PCR testimony of B. J. Barrowclough, public defender, established that his office was appointed to represent Petitioner and his two co-defendants on ***June 28, 2004.*** Petitioner's statement was taken on ***June 29, 2004*** by Sergeant Blackwell the following day. App. p. 965, l. 3- 967, l. 5. The Public Defender submitted a conflict affidavit on July 6, 2004, and an order was filed appointing Attorney Adrian Cooper on July 12, 2004. App. p. 967, ll. 9-22. Trial Counsel, John Delgado was thereafter substituted as counsel in this matter.

During the *Jackson v. Denno*[1] hearing Sergeant Charlene Blackwell testified that she initially became involved in this investigation on the evening of June 26th and the early morning hours of June 27th. App. p. 87, l. 1-24. Desmond Campbell, one of Petitioner's two co-defendants voluntarily came to the Rock Hill Police Department, with two other witnesses; Kim Brown and Omar Hall. App. p. 89, ll. 13-21. Desmond Campbell gave a statement about these crimes in which he implicated Debrezio Campbell and an individual he knew only as Woody. App. p. 90, ll. 10-24. The morning of June 27th the Petitioner's vehicle, which had Virginia license tags, was searched pursuant to a search warrant and found to contain a .45 caliber weapon. App. p. 94, l. 22- p. 97, l. 20. Petitioner was questioned for the first time on June 29th. He was advised of his rights for the first time prior to that interview. He had not been advised of his rights at the time of his arrest. App. p. 98, l. 10- p. 99, l. 24.

According to the trial testimony of Sergeant Blackwelder, Petitioner ***"provided me with a verbal statement."*** She indicated that she typed as Petitioner told her what happened. Subsequently, Petitioner signed that statement with Detective Burris as a witness. App. p. 99, l. 5- p. 100, l. 7. Sergeant Blackwell testified that to her knowledge Petitioner did not have a lawyer, nor had he asked for one, at the time his statement was taken. App. p. 107, l. 22- p. 108, l. 4. *See also,* App. p. 229, ll. 2-18. Petitioner's trial testimony during his *Jackson v. Denno* hearing asserted that he asked for a lawyer when he first saw the police and on the day he was arrested. He asserted that he repeated that request to Officers Hutchinson and Blackwell while he was being held at the Rock Hill Jail and to the judge at his bond hearing. App. p. 113, l. 10- p. 115, l. 5. App. p. 115, ll.9 – 19.

In his PCR testimony Trial Counsel did not dispute having been shown by PCR Counsel, an Order from the York County Clerk of Court's Office dated June 28, 2014 in which

[1] *Jackson v. Denno*, 378 U.S. 368 (1964)

an attorney was appointed for Applicant. He acknowledged that this document ***"could have"*** helped him in his representation of Petitioner during the *Jackson v. Denno* proceeding. He declined however, to say that the Solicitor's Office had not given him a copy of that document. He testified that he could not recall whether he had been given that document in discovery and he stated that he could not recall ***"whether he had that or whether I got that."*** App. p. 7 – p. 998, l. 14.

Petitioner now asserts that his Sixth Amendment right to counsel was violated when he was forced to appear at his bond hearing without counsel. He further asserts that his trial counsel was obviously not proved with a copy of the Order of the Court appointing a lawyer to his case inasmuch as Trial Counsel has clearly stated that the document in question would potentially have been useful in the *Jackson v. Denno* hearing held in this case. No mention of this document was made at the *Jackson v. Denno* hearing. It is fair to infer from that fact that Trial Counsel was not in possession of this document at the time of the Petitioner's trial. Inasmuch as Trial Counsel has testified that this document might have helped the defense in the hearing concerning Petitioner's statement, the failure of the State to turn this document over with the discovery materials in this case would constitute a violation of Petitioner's rights pursuant to *Brady v. Maryland, 373 U.S. 83 (1963)*, and refined in *United States v. Bagley, 473 U.S. 667 (1985)* and *Kyles v. Whitley, 514 U.S. 419 (1995)*. If, as Trial Counsel appears to suggest, he may have had this document at the time of Petitioner's trial, then Trial Counsel's failure to utilize this evidence, in the face of his own admissions that this document might have strengthened Petitioner's position in the *Jackson v. Denno* hearing, would constitute ineffective assistance of counsel. Petitioner was prejudiced by the fact that this document was not introduced at trial inasmuch as it would have corroborated his claim that he had requested counsel before he gave his statement to the police.

## IV

**Issue 2**, Original Application for PCR

**Did Trial Counsel fail to conduct sufficient pretrial research and investigation to adequately evaluate and challenge the State's gunshot residue testimony?**

PCR Counsel extensively questioned Trial Counsel as to why he had not consulted independent experts concerning the gunshot residue found on the victim's palm. Trial Counsel admitted that his theory of defense was self-defense, although, he opined that it was an imperfect self-defense claim in his opinion. App. p. 974, ll.12. At trial one of the co-defendants, Desmond Campbell, testified that he worked with Petitioner and that one day when Petitioner gave him a ride home to Stone Haven Apartments after work when he ran into the victim. His testimony revealed that he tried to get the victim, known to him as a drug dealer, to "front him" some crack cocaine. He admitted that he sold drugs, although he denied using them personally. His testimony established that the Victim was his supplier. He testified that after the Victim promised to "holler" at him when he had more drugs, Petitioner drove him home. He further testified that his brother, Debrezio, had been dealing drugs for years and the victim was his supplier as well. App. p. 603, l. 19 – 610, l. 5. According to Desmond Campbell, on the day of the shooting he went to his brother Debrezio's apartment in Stone Haven Apartments. When he got there he saw that Petitioner was on the balcony. He was informed that Debrezio had borrowed Petitioner's car "to make a drop off". App. p. 617, l. 24 – p. 620, l. 23. When Debrezio returned to the apartment the three of them drank heavily for awhile from two bottle of Crown Royal Debrezio had brought home with him. Desmond Campbell testified that he knew

his brother was armed because he always carried a gun when he was "hustling". He indicated that he had seen a gun in Petitioner's car. He indicated that Petitioner always kept his gun out in the open where it could be seen because he said he could get a charge if he had a weapon concealed. App. p. 622, l. 9, - p. 624, l. 10. Desmond described how the three of them went to an apartment complex called Paces River Apartments. He said his brother, Debrezio, had asked Petitioner to give him a ride over to see his man. Desmond said Debrezio would use the expression "my Man" to describe a friend. Desmond testified that to his knowledge, Petitioner did not know who Debrezio was referring to. He testified that he knew that his brother was referring to the guy he got his drugs from, App.p. 624, l. 21 – p. 625, l. 25. Debrezio directed them to Pacers Apartments and he showed them where the Victim's apartment was once they got there. Desmond admitted that both he and Debrezio sold drugs thy got from the Victim and that he would sometimes serve as the Victim's bookkeeper. Desmond said that Debrezio was in possession of what he said was $2,700 to give to the Victim. He claimed that Petitioner questioned Debrezio about why he hadn't done that earlier like Petitioner was lead to believe he was going to do. Debrezio told them that when he came by earlier Debrezio was not there. He recalled that Debrezio ran upstairs to the apartment but, the Victim was not there and Troy did not want to take the money from Debrezio because "it wasn't all there." As they were leaving, the Victim was coming back in. App.p. 626, ll. 5- 25. The victim motioned for them to turn around and they did. At one point they saw a female and stopped the car right by her. Debrezio hopped out of the car, he Walked down and he yelled back at Woody, Woody, come on, man. Woody gave a deep breath like, huh, and got out of the car and ran toward Debrezio. After they were "down there" fifteen or twenty minutes, Desmond heard shots. App. p. 629, l.7 - p. 630, 16. After hearing the shots, Desmond started Petitioner's car and started in the direct where they were. They came running and jumped in the car. When his brother got in the car, something like

fifteen to twenty seconds after the shots were fired, Debrezio said when he gave the Victim the money he threw it back in his face. Desmond then advanced toward the Victim, but as he did he saw the Victim drop whatever he had in his hand and reach behind his back. Debrezio said he then heard a shot. After hearing the shot, he pulled his gun out of his pocket and started running and shooting. App. p. 633, l. 14 – p. 637, l. 18. Desmond testified that he had previously seen the Victim carry a gun "behind his back". App. p. 638, l. 6 – 8. Debrezio described Petitioner as really nervous after they got back into the car. He said Petitioner kept on drinking and said he could have been killed. App. p. 640, l. 1 – 21. and App. p. 641, ll. 1 – 5. Desmond asserted that he plead to something that wasn't true to Desmond Campbell could not even say for certain that Petitioner knew Debrezio was going to drop off drug money to the Victim. App. p. 643, l. 25 – p. 644, l. 24. On cross-examination, Desmond testified, without objection from Defense Counsel, that all three of them had been popping ecstasy pills and doing a little powder cocaine in addition to drinking prior to this shooting. App. p. 655, ll. 5 – 25. He also testified that Debrezio actually owed the Victim $5,000.00 at the time of this shooting. App. p. 657, l. 12 – p. 658, l. 1. Desmond testified that he did not know whether Petitioner knew that he sold drugs but, he asserted Petitioner knew Debrezio did. He also testified that he had told Detective Hutchinson that the he was selling drugs after the Detective implied that he knew he had to be because "he knew [the Victim]. And knew he was "doing it". App. p. 660, l. 14 – p. 661, l. 22. Desmond's testimony recalls how as they jumped back into the car, Debrezio and Petitioner were telling him to turn the car around and saying "he's shooting". App. p. 670, ll. 11 – 13. At least two times during his testimony, Desmond stated that he head two more shots *after* Debrezio and Petitioner got back in the car as the three of them were leaving the scene. App. p. 633, ll. 14 - `9 and App. p. 670, ll. 12 – 23. As they were leaving, Desmond said he looked back and saw someone "running towards us." He said he was driving too fast to tell whether the guy was

shooting at them and it was too dark for him to see the man's face. App. p.671, ll. 3 – 13.

The trial record makes no mention of a gun being found at the scene with the victim. What it does contain is an admission by the patrol officer on the scene that EMS personnel called him over to the Victim because a man "was right there, he was in the way." He testified that while EMS was attempting to perform CPR on the Victim, his father was attempting to go through his pockets. App. p. 274, ll. 5 – 20. The State's trace evidence expert, Jennifer Stoner, testified that she performed a GSR analysis on a GSR evidence kit from the Victim and " found that the quantity of metals found on the left palm may be associated with gunshot residue." App/. p. 505 , ll. 10 – 24. She testified that although the residue could have been the result of firing a weapon, it was consistent with handling a gun that had been fired. App.p. 510, ll. 11 – 19.

In his PCR testimony, Trial Counsel testified that the only forensic expert he talked to about this case was the female expert presented by the State. In his PCR testimony Trial Counsel opined that the problem with his defense was that he couldn't find anyone who could testify to the Victim being left handled or even using his left hand for nay purpose. He also testified that another problem with their defense was that the only people who had reported seeing the Victim reach toward this back as though he was retrieving a weapon were Petitioner and Desmond who quoted his brother Debrezio as saying the same thing. App. p. 987, l. 20 – p. 989, l. 7.

At trial, the State presented testimony from James Louis Maynard, pathologist who conducted the Victim's autopsy. App. p.291, l.22 – p. 295, l. 24. He described gunshot would Number 1, as being found in the left chest. Dr. Maynard went on to describe in detail the destruction to the victim's internal organs found in the path of the bullet that caused Wound Number 1. He said that two-thirds of the Victim's blood supply was found in his chest cavity as a result of massive internal bleeding. App. p.299, l. 15 – p. 300, l. 21. . He indicated that the

bullet taken from the body that was associated with that wound was a .25 caliber bullet.. App. p.302, l. 21. Gunshot wound Number 2, was located in the right posterior buttocks or lower back of the Victim and described in the testimony as a .45 caliber wound. App. p. 309, ll. 3 – 13. The bullet from that shot did not make contact with any vital organs and only impacted muscle and soft tissue. App. p. 306, ll. 2 – 19. Gunshot Wound Number 3 was described by Dr. Maynard as being located in the left forearm, the lateral forearm, outside of the forearm. App. p.311, ll. 20 – 25. The exit would from this shot was on the inner side of the forearm. Only fragments of that bullet were located in the Victim's body and the core of the bullet was never recovered. App. p. 312, l. 4 -12. Notwithstanding this fact, Dr. Maynard expressed the opinion that this wound was made by a .45 caliber bullet. App.p. 312, l. 22 – p. 313, l. 4. He went on to agree, in layman's terms, that the bullet entered the back of the arm and existed the front of the forearm. App .p. 314, ll. 1 – 7. He testified that neither gunshot wound number one, nor number two were fatal wounds. App. p. 314, ll. 13 – 16. Gunshot wound Number 4 was described as entering the back of the head and, while not perforating the skull, doing massive brain damage by crushing the skull inward. The projectile from that would was recovered at autopsy sticking out of the scalp. It was a .45 caliber bullet. App. p. 315, l. 15 – p. 316, l. 8. This wound was described as a fatal injury. App. p. 318, l. 24 – p. 319, l. 11. Dr. Maynard testified that both the .25 caliber wound to the chest( GS Wound No. 1) and the .45 caliber wound to the head (GS Wound Number 4) were fatal injuries. App. p. 319, l. 12 – 14.

On cross-examination by the State, Trial Counsel agreed with the State that the only evidence that the victim had a gun at the scene of this shooting was the testimony of a co-defendant that the victim was reaching behind his back as if he were going for a weapon and the Applicant's statement that he "could have been killed out there". App. P. 1003, ll. 16 – 23. When asked if Petitioner had told him that the Victim was reaching behind his back as though to

reach for a weapon, Trial Counsel said that Petitioner may have said that to him but , "that wasn't in the police report." App. p. 1005, l. 13 - He went on to say that he sure wished Petitioner had been able to say something more specific noting, "you know affirmative motion with the same hand towards the back which could have indicated that he had-that Bagley (Victim) had some sort of weapon on him. " App. p. 1005, ll. 19 – 24. Ultimately, however, Trial Counsel was forced to admit that Petitioner's July 29th statement to the police stated that he pulled his weapon and fired when he saw the Victim reaching behind him and backing up. App.p. 1009, l. 18 – p. 1010, l. 10.

The testimony of Steven Howard indicates that the residue found on the Victim's left palm could have been tested with a more sophisticated testing method using a Scanning Electron Microscope (SEM) it could have been determined conclusively whether the residue on the victim's left palm was in fact gun shot residue as opposed to being a substance which "may be associated with gunshot residue". As testified to by Jennifer Stoner, the State's trace evidence witness. App. p. 1031, l. 20 – p. 1036, l. 9. The Order of Dismissal indicates that Petitioner introduced no evidence in his PCR proceeding to back up his claim that Trial Counsel should have explored using an independent pathologist in Petitioner's defense. Petitioner did in fact introduce testimony from Doctor Adel Shaker, who is a pathologist. Dr. Shaker was qualified by the Court as an expert in the field of gunshot residue, however his testimony indicates that he is a licensed physician in ten states. He is double-board certified in both Anatomic Pathology and Forensic Pathology. App. p. 1042, l. 18 – p. App. p. 1048, l. 24. His testimony indicates that ninety-five percent of the time he is used as an expert witness for the prosecution and very rarely testifies for the defense. A fair reading of this record reveals that Dr. Shaker was actually a little uncomfortable testifying for the defense. App. p. 1049, l. 12 – 23. Doctor Shaker's testimony would have substantiated the position of the defense that the Victim was reaching backwards for

a gun when the shot in the left forearm occurred and as such would have been extremely beneficial to the defense. App. p.1056, l. 24 – p. 1058, l. 21.

Petitioner respectfully submits that he has met his burden of proof with regard to this issue.

## V.

### Issue 15., Original PCR Application.

**Did Trial Counsel fail to provide Petitioner effective assistance of counsel in that he neglected to request jury instruction on the lesser included offense of voluntary manslaughter where the evidence adduced at trial supported a charge on the lesser-included offense?**

In his pro se Application for PCR, the Applicant clearly asserts that his trial attorney was ineffective for failing to request a jury charge on this lesser included offense. During the evidentiary hearing held in this matter PCR Counsel fails to ask Trial Counsel anything about this crucial omission until, as noted, *supra*, his re-direct examination of Trial Counsel at which time the State's objection is sustained on the ground that the inquiry was outside the proper scope of redirect. Yet, in both his Memorandum, submitted after the Order of Dismissal was entered, and in the subsequent Rule 59(e) motion, PCR Counsel argues this allegation as a basis for relief. See, Memorandum, App. p. 1119 – p. 1121 and App. p. 1129 – p. 1131. The Order denying Petitioner's Motion to Alter or Amend makes note that his issue was addressed in the Petitioner's Amended Application for PCR. See, App. p. 1148. The Respondent's Return to the Rule 59(e) motion acknowledges this issue being raised in the Amended PCR Application as well. App. p. 1142, item 1. It was in fact raised in his original *pro se* PCR Application. *See*, App. p. 938, see handwritten addition, Allegation number 15.

The PCR Court's Order denying Petitioner's Rule 59(e) motion contains a very thoughtful and thorough analysis of this issue. Petitioner is grateful for the Court's finding that the lower court ***"very well may have afforded Applicant a charge on voluntary manslaughter, as the evidence supports a jury finding that the victim reached behind his back, as if for a weapon, prior to Applicant's co-defendant firing the first shot."*** App. p. 1150. Petitioner would argue that the case for his receipt of such a charge was all the more compelling in light of Desmond Campbell's testimony that his brother reported that a shot was fired before he pulled his weapon and fired. *See,* App. p. 636, l. 8 – p. 637, l. 18.

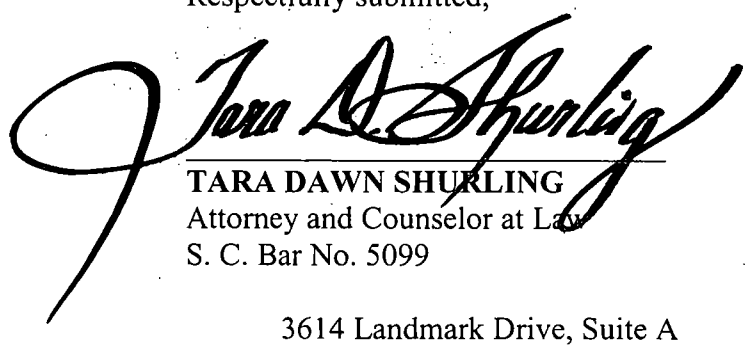
Likewise, the PCR Court's harmless error analysis fails on two fronts. First, it assumes that the jury would not have found the Applicant guilty of the lesser-included offense because of the verdicts they reached on other offenses. This logic would deprive most PCR Applicants of the opportunity for a new trial. One simply can't assume the jury would not have found the lesser-included to be the proper verdict if it had been presented for their consideration. And, given this option, they well have acquitted Petitioner on the conspiracy charge had they been properly instructed on the options for the homicide charge. The Court's analysis also fails to consider the fact that the jury in Petitioner's case came back during its deliberations with questions about the law as it applies to self-defense. App. p. 831, l. 12 – p. 833, l. 20. That factor strongly indicates that this jury was seriously struggling with the question of Petitioner's liability for murder. That being the case, it is reasonable to conclude that they may very well have found Petitioner guilty of the lesser-included charge had that option been presented to them.

Counsel for Petitioner is mindful of this Court's ruling in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) wherein this Honorable Court found that the holding in Martinez v. Ryan, ---U.S. ---, 132 S.Ct. 1309 (2012) has no application in state court proceedings in South Carolina. As this Court is aware, Counsel herein did not represent Petitioner in the circuit court proceedings. Had she done so, there would be many more issues before this Court in this appeal. PCR Counsel in this matter abandoned virtually all of Petitioner's claims in the circuit court and many of those he did raise for Petitioner were left unsupported by available evidence at the PCR hearing. Those matters may now be left for analysis under *Martinez* at a later date, in another Court. But this issue is not presented out of thin air. It was in Petitioner's pro se application, it was repeated in the Amended Application filed by PCR Counsel. No doubt realizing that he had inadvertently neglected to question Trial Counsel about this important issue during his direct examination, PCR Counsel attempted to raise this issue on re-direct. Petitioner now prays that this Court might in its wisdom and in the exercise of judicial economy, either review this issue on its merits or remand this matter for further hearing at which Petitioner would have the opportunity to more fully develop the record on this claim.

## CONCLUSION

For the reasons stated, Petitioner asks this Honorable Court to dispense with further briefing and grant him a new trial. Alternatively, he asks that the Court grant the writ and allow full briefing of the issues summarized herein. Should this Court deem it necessary and appropriate, Petitioner would ask for the remand of his PCR case to the circuit court for further hearing.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 10th day of September, 2014.

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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Appellate Case No. 2013-001686

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CHRISTOPHER WOODY,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel this the 10th day of September, 2014, by depositing in the U.S. Mail, postage prepaid, one (1) copy properly addressed to:

Rutledge Johnson
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

Tara Dawn Shurling

**TARA DAWN SHURLING**
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 10th day of September, 2014.

Sharon H. McAllister (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan 16, 2014

LAW OFFICE OF

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September 4, 2014

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Christopher Allen Woody, 309141 v. State of South Carolina
Appellate Case No. 2013-001686.

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and the original Certificate of Service in the above-captioned case. I would appreciate you returning one (1) clocked copy of the Petition for Writ of Certiorari and Certificate of Service to me in the envelope provided. The Appendix was hand delivered for filing on July 7, 2014. Thank you for your assistance in this matter. I remain,

Sincerely yours,

Tara D. Shurling

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures
cc: Rutledge Johnson, Assistant Attorney General (w/enclosures)
Christopher Allen Woody, 309141 (w/enclosures)
Regina Moore (via email)