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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JAN 20 2015

S.C. SUPREME COURT

RUSSELL SIMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2014-000639

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BRIEF FOR WRIT OF CERTIORARI

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PETITIONER

Russell Sims  
L.C.I. E/B-62  
P.O. BOX 205  
RIDGEVILLE, S.C.  
29472

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(1) Petitioner argues opposition to a missing witness charge where the missing witness has relevant information to add to case, and gave a desposition to the police reflecting their knowledge of the case, violating petitioner's 6th Amendment Constitutional Right.

(2) In violation of Petitioner's constitutional right to the effective assistance of counsel, trial counsel failed to object to the reading of the indictment and entering of the indictment into evidence for the jury to view during deliberation.

(3) In violation of Petitioner's constitutional right to the effective assistance of counsel, trial counsel failed to request that the jury be instructed that it could, but was not required to draw negative inference when party fails to preserve material evidence for trial where spoliation-of-evidence jury instruction was warranted.

CONCLUSION \* \* \* \* \* 8

ISSUES PRESENTED

- (1) Did the trial counsel's failure to subpoena missing witness, violate petitioner's 6th Amendment Constitutional Right?
- (2) Did trial counsel's failure to object to the reading of the indictment and entering of the indictment into evidence for the jury to view during deliberation violate petitioner's Constitutional Right?
- (3) Did trial counsel's failure to request that jury be instructed that it could, but was not required to draw negative inference when party fails to preserve material evidence for trial where spoliation-of-evidence was warranted violate petitioner's Constitutional rights?

## STATEMENT

On January 19, 2007, a Spartanburg County grand jury indicted Petitioner for burglary in the first degree (2006 – GS – 42 – 3064). App. 578 – 579. On August 24, 2006, a Spartanburg County grand jury indicted Petitioner for four counts of pointing and presenting a firearm (2006-GS-42-3065; -3067; -3068; -3073), murder and possession of a firearm during the commission of a violent crime (2006 – GS – 42 – 3066), attempted armed robbery (2006 – GS – 42 – 3070), and assault and battery with intent to kill (2006 – GS – 42 – 3072). On January 22, 2007, a Spartanburg County grand jury indicted Petitioner for armed robbery (2006 – GS – 42 – 3071) and assault and battery with intent to kill (2007 – GS – 42 – 205). App. 578 – 579; App. 581 – 582; App. 584 – 585; App. 588 – 589; App. 591 – 592; App. 594 – 595; App. 597 – 598; App. 600 – 601; App. 603 – 604; App. 606 – 607. The state, represented by Harold W. Gowdy, III and Alex R. Stalvey, called the case for trial on January 22, 2007 before the Honorable J. Derham Cole and a jury. William H. McPherson and Clay Allen represented Petitioner. App. 1. The jury found Petitioner guilty of murder, possession of a firearm during the commission of a violent crime, burglary in the first degree, armed robbery, attempted armed robbery, and four counts of pointing and presenting a firearm. Additionally, on the two charges of assault and battery with intent to kill, the jury found Petitioner guilty of the lesser-included offense of assault of a high and aggravated nature. App. 420, line 14 – App. 421, line 13. Judge Cole sentenced Petitioner to five years' imprisonment for each of count of pointing and presenting a firearm; five years' imprisonment for each count of assault with intent to kill; five years' imprisonment for possession of a firearm during the commission of a violent crime; twenty years' imprisonment for attempted armed robbery; thirty years' imprisonment for armed robbery; and life imprisonment for burglary in the first degree and murder. App. 426,

line 8 – 428, line 10; App. 580; App. 583; App. 586 – 587; App. 590; App. 593; App. 596; App. 599; App. 602; App. 605; App. 608.

Petitioner filed a timely notice of appeal which was perfected by Joseph L. Savitz, III. App. 430 – 438. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Sims, Op. No. 2010-UP-080 (S.C. Ct. App. filed February 2, 2010); App 565 – 566. Thereafter, Petitioner filed a petition for writ of certiorari seeking review in this Court. App. 472 – 479. On May 25, 2011, this Court denied certiorari. App. 505. Remittitur was issued on May 27, 2011. App. 506.

On August 15, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 507 – 513. The matter proceeded to an evidentiary hearing on November 15, 2013 before the Honorable Robin B. Stilwell. Christopher D. Brough represented Petitioner, and Suzanne H. White represented the state. App. 520. By an order filed on March 6, 2014, Judge Stilwell denied Petitioner relief. App. 569 – 577.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

Relevant facts - Evidence presented during trial : I petitioner, was dating Diane Jackson, who lived with her father Robert Jackson, and her two (2) daughters in a home in Campobello, South Carolina. App. 104, line(s) 1-19. I would often spend the night with them. App. 113, line(s) 7-25. On May 20, 2006, I petitioner, rode home with Diane and her kids, I pulled out my handgun and shot into a wooded area. App. 106, line(s) 19-20. When we arrived I went into the house to get my things, because I was told I was going to Spartanburg. App. 106, line(s) 24-25. While waiting on the driver to take me home, Robert began yelling and fussing at me. App. 107, line(s) 2-3. He then pulled out a shotgun from a hole on the side of his porch, pointed his gun at me I grabbed the barrel and we tussled over the gun. I held it long enough to pull my handgun and I fired not knowing where it hit, or if it hit. App. 298, line(s) 4-18; App. 300, line(s) 20-24. Diane gave me her money and keys and later said I robbed her. App. 108, line(s) 5-8; App. 132, line(s) 19-24. The police responded to the home and found Robert laying injured beside the couch. App. 96, line 23. He was admitted to Spartanburg regional Medical Center where he was treated. App. 235, line(s) 21-22. During the course of the testimony by Dr. David Wren:

Q:And how many gunshots did it appear that he had suffered?

A:One as far as I could tell. App. 259, line(s) 1-6.

Q:Doctor, when you were tracing the gunshot wound, I believe your report indicates that it had healed, is that correct?

A:Yes, sir. There was scar tissue there, and there was no evidence of an infectious process in that area.

Q:Okay, so as far as you could tell that wound in the neck had completely healed?

A:Yes, sir. App. 260. line(s) 3-10.

He further opined that the gunshot wound " definitely contributed" to his death. He admitted the deceased was not in "excellent health," but he traced his death to "the sequence of events that happened after he was shot . . . and what happened

shortly thereafter, including the surgery he went under." App. 259, line(s) 13-21.

After leaving the home of the deceased, I stopped at the home of Diane's cousin. I was charged and convicted of criminal offenses related to this incident as well. The issue raised in P.C.R. hearing do not concern the charges related to the offenses at the second home. Therefore, the facts surrounding those events are not recited here.

HOSPITAL NATURAL DEATH NOTIFICATION FORM

Need this form to show that grand jurors of Spartanburg County present upon their oath on August 24,2006, that petitioner did in Spartanburg County, on or about May 20,2006, feloniously, willfully and with malice aforethought kill one Robert Jackson, by shooting the victim with a gun, and that the said victim died as a proximate result thereof all in violation of §16-3-10. Cause if you look at the Death Notification form, you will see that on May 20,2006, that robert Jackson was still alive, petitioner claims that the indictment should be defective, because he was pronounced dead on July 8,2006.

## ARGUMENT 1

Petitioner would argue opposition to a missing witness charge where the missing witness has relevant information to add to the case, the missing witness has evidence favorable to the accused, and the missing witness gave a disposition to the police or signed a written statement reflecting their knowledge of the case. ( Coroner's investigation notes ) At 9:20am on July 8,2006. Gene Schuler spoke with nurses Susan Prince and Judy Keller, who advised him that victim was transferred to restorative care on June 13,2006 from Spartanburg Regional Medical Center, with three gunshot wounds to the neck area. Pathologist Dr. David Wren did an autopsy and indicated that there was only one bullet wound that had healed. Which is why petitioner argues in opposition, because Susan Prince and Judy Keller had information that would resolve a conflict. Where the law states if however the death was caused not by the wound or the injury that the deceased had, but was caused mainly by the gross erroneous treatment that is where a treatment was so gross, where a treatment was so deliberate, so willful that it was the cause of death. Then the defendant would not be liable.

## ARGUMENT 2

Counsel was ineffective for failure to object to the reading of the indictment and the entering of the indictment into evidence for the jury to view during deliberation. Indictment for murder must allege both assault and death, and also time and place of assault, and death. Where indictment stating county where shooting occurred, and alleging that defendant " then and there . . . did kill and murder," sufficiently showed place of deceased's death. Criminal procedure 1922 §93 ( Code 1942 §1007) The indictment failed to allege the place of death of deceased. Indictment to be preferred by grand jury as required by constitution must be one returned by legal grand jury, Constitution Art. 1 § 17. In murder prosecution, state must prove

not only assault and death, but also time of assault and time of death. In S.C., failure to object to charge, or failure to request an additional charge when opportunity is afforded constitutes waiver of any right to complain on appeal of alleged error in charge. Violating my Sixth Amendment, which is the right to be informed of the nature and cause of accusation. Although an indictment does not confer subject-matter jurisdiction, due process requires that a criminal defendant be properly served with a valid indictment. State v. Smalls, (S.C. 2005)364 S.C. 343,613 S.E.<sup>2d</sup> 754

### ARGUMENT 3

Counsel failed to request that jury be instructed that it could, but was not required to draw negative inference when party fails to preserve material evidence for trial where spoliation of evidence jury instruction was warranted in medical malpractice action; Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515,629 S.E.<sup>2d</sup> 675. There was evidence that patient's medical records were missing results, from blood test and floor nurse's chart detailing patient's vital signs on night before patient's death and both pieces of evidence that were missing would have helped to determine how the patient died. The defense did not discover the information in time to adequately use it at trial. Had evidence been disclosed to defense, result of proceeding would have been different. Trial judge should have granted a mistrial due to the state's failure to disclose impeachment evidence. Trial judge erred in failing to instruct the jury that it could draw a negative inference from the hospital's failure to preserve critical pieces of medical evidence.

CONCLUSION

Petitioner respectfully request this Honorable Court to reverse the decision of the lower court and grant petitioner relief from convictions and sentences.

Respectfully Submitted,

Russell Sims

Russell Sims, Petitioner

This, \_\_\_\_ day of January, 2015.

Russell Sims # 319755

L.S.1-EB62

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JAN 14 2015

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