

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2014-002623

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S.C. Supreme Court

RICHARD KEVIN PATTERSON, 270085,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did Trial Counsel provide Petitioner ineffective assistance of Counsel in his handling of matters relating to Petitioner's statements to law enforcement immediately following the victim's death and his failure to secure an opportunity for Petitioner to give another statement at a later date?

II.

Was trial Counsel ineffective for failing to develop and present a defense of accident, and failing to request a jury charge on that defense, where that defense fit the physical evidence in this case, was entirely consistent with Petitioner's position concerning the events that lead to his girlfriend's death and would have enabled Trial Counsel to defuse the prosecution's claim that the physical evidence was inconsistent with suicide?

III.

Was Trial Counsel was ineffective for withdrawing his request for a jury instruction on the charge of involuntary manslaughter where under at least one possible interpretation of the Petitioner's testimony the jury may have believed that he struggled with the deceased for the weapon under circumstances which showed wanton and willful disregard for the victim's safety?

IV.

Was Trial Counsel ineffective in his handling of matters relating to the publication of crime scene photographs in Petitioner's case?

V.

Was Trial Counsel ineffective in the manner in which he handled the sudden appearance and introduction of evidence the defense had previously been told was missing and unavailable?

VI.

Was Trial Counsel ineffective for failing to object to portions of the State's closing arguments which either misstated the evidence adduced at trial or commented on matters not in evidence and in personally characterizing the death of Petitioner's girlfriend as a suicide where that description did not match Petitioner's position and where this characterization opened the door

for the State to argue that the physical evidence did not match Petitioner's claim of suicide?

VII.

Was trial Counsel ineffective for failing to hire an expert to introduce expert testimony concerning shock and post-traumatic stress and their possible impact on the likelihood that the Applicant might make inconsistent statements and/or false admissions in response to police interrogation and what effect witnessing a violent suicide by a loved one might have had on Petitioner's his ability to adequately proofread and adopt by incorporation a statement written by a third party.

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Anderson County Grand Jury indicted Petitioner for Murder (2000-GS-04-1043) and Possession of a Firearm During the Commission of a Violent Crime (2000-GS-04-1042). Petitioner was represented on the charges by James Brehm, Esquire¹. On October 9-13, 2000, Petitioner went to trial by jury and was found guilty as indicted. The Honorable J. C. Nicholson, Jr. sentenced Petitioner to confinement for a term of life for murder and for a concurrent term of five (5) years on the weapons conviction.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tara Dawn Shurling, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Patterson, Opinion No. 2003-UP-143 (S.C. Ct. App. filed February 19, 2003)*. The South Carolina Supreme Court denied Petitioner's Petition for a Writ of Certiorari by written Order dated May 13, 2004.

Petitioner's Application for Post-Conviction Relief² was filed on July 26, 2004 and an

¹ Hereafter, Trial Counsel.

² Hereafter PCR.

Amended Application was filed on June 18, 2009. The State filed its Return on May 21, 2007. An evidentiary hearing was convened on June 18, 2009³ and was completed on February 26, 2013⁴. Petitioner was present at both proceedings and was represented at both hearings by Tara Dawn Shurling, Esquire. The State was represented by Assistant Attorney General, A. West Lee at the first hearing and Assistant Attorney General David Spencer at the second hearing.

In his PCR action, Petitioner has alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim he has raised the following general allegation in his original PCR Application:

1. Trial Counsel failed to adequately investigate the case prior to trial.
2. Trial Counsel failed to adequately prepare and present witnesses at trial.
3. Trial Counsel failed to recognize and present objections to errors which occurred during trial.
4. Trial Counsel failed to develop and present viable defenses to the charges against the Applicant prior to and during his trial.

In his subsequent Amended PCR Application Petitioner raised the following additional allegations:

1. Defense counsel was ineffective for failing to object to arguments by the Solicitor in which she attempted to bolster the credibility of State's police witnesses by impermissibly vouching for their credibility by stating, "*but, isn't it interesting the police officers get it right.*"
2. Defense counsel was ineffective for failing to renew his Motion for a Mistrial following the curative charge given by the trial court in response to an emotional outburst in the courtroom prompted by the

³ References to the record of this proceeding will be cited as PCR I.

⁴ References to the record of this proceeding will be cited as PCR II.

State's introduction of gruesome crime scene photographs which had a prejudicial impact on the Applicant's ability to receive a fair trial.

3. Defense counsel was ineffective for failing to ask to review any photographs the prosecution intended to introduce in advance, and for failing to make an appropriate motion *in limine* to suppress those photographs, whose probative value was far outweighed by their potential for appealing to the passions and prejudices of the jury.
4. Trial counsel was ineffective for failing to ask that friends and family be given warning in advance of the display of gruesome crime scene photographs and for failing to ask that those present in the courtroom be told that if anyone anticipated having difficulty remaining composed during the display of crime scene photographs of the victim, they should either position themselves so that they were insulated from viewing them or remove themselves from the proceeding while the photographs were being displayed.
5. Trial counsel was ineffective for failing to adequately challenge the admissibility and reliability of the statements allegedly made by the Applicant to the police following the death of the victim and for failing to sufficiently highlight factors which supported his claim that the statements in question were taken when he was not competent to know what he was saying and when he was not competent to prove statements written by a third party for accuracy.
6. Trial counsel was ineffective for failing to introduce expert testimony concerning shock and post-traumatic stress and their possible impact on the likelihood that the Applicant might make inconsistent statements and/or false admissions in response to police interrogation.
7. Trial counsel was ineffective for failing to introduce expert testimony concerning shock and post-traumatic stress and what effect witnessing a violent suicide by a loved one might have on his ability to adequately proofread and adopt by incorporation a statement written by a third party.
8. Trial counsel was ineffective for failing to make an adequate proffer for the record to demonstrate the degree of the emotional response from the gallery following the display of enlarged gruesome crime scene photographs by projector during the Applicant's trial.
9. Trial counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the solicitor argued matters not in evidence, and, in effect, gave expert ballistics testimony by

asserting that the only explanation for the victim not having gunshot residue on her hands was for the Applicant to have wiped off the gun before he put the weapon in her hand after the shooting, where she was not a witness in this case and had not been qualified as an expert in the field of ballistics.

10. Trial counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the solicitor argued matters not in evidence, and, in effect, gave expert ballistics testimony by making assertions concerning the operation of the weapon used in this case and by giving a demonstration as to the proper operating procedure for the weapon in question, where she was not a witness in this case and had not been qualified as an expert in the field of ballistics.
11. Trial counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the solicitor argued a critical matter not in evidence by asserting as a known fact that the weapon which killed the deceased *was not loaded* until the Applicant loaded it with malice aforethought and by improperly stating that the Defendant took the safety off this weapon before the victim was shot.
12. Defense counsel was ineffective for withdrawing his request for a jury instruction on the charge of involuntary manslaughter where under at least one possible interpretation of the Applicant's testimony the jury may have believed that he struggled with the deceased for the weapon under circumstances which demonstrated a wanton and willful disregard for the life and safety of the deceased.
13. Defense counsel was ineffective for failing to point out to the jury that although the prosecution had introduced testimony and evidence designed to demonstrate that the physical evidence in this case was inconsistent with suicide, that same evidence was not inconsistent with the Applicant's testimony that the gun went off while he was struggling with the victim for the weapon in an effort *to keep her from* shooting herself.
14. Defense counsel was ineffective for failing to adequately cross-examine witnesses concerning whether the testimony and evidence introduced by the prosecution to demonstrate that the physical evidence in this case was inconsistent with suicide was in fact not inconsistent with the shooting having taken place when the gun went off while the Applicant was struggling with the victim for the weapon in an effort *to keep her from* shooting herself.

15. Defense counsel was ineffective for failing to request a jury instruction on the defense of accident when the facts as set forth in the Applicant's testimony clearly asserted that he gun went off while he was struggling with the victim in an attempt to stop her from committing suicide.
16. Defense counsel was ineffective for failing to clearly argue to the jury that the Applicant's position was that the victim was shot when the weapon he was attempting to take away from her discharged during their struggle for control over the weapon.
17. Defense counsel was ineffective for consistently failing to clearly argue the distinction between the victim committing suicide and the Applicant's actual testimony which was that she was shot while he was struggling with her for control over a weapon which he believed she was about to use to commit suicide. Counsel's error in this regard being highly prejudicial to the defense where both the awkward angle of the gun shot and absence of gun powder residue around the wound were more consistent with a discharge during a struggle for a weapon than with an unimpeded suicide by handgun.
18. Defense counsel was ineffective for characterizing the victim's death as a suicide to the jury when the facts of the shooting as conveyed in the Applicant's trial testimony were consistent with the accidental discharge of the weapon during a struggle for the gun while the Applicant was trying to stop the victim from killing herself.
19. Defense counsel was ineffective for failing to object to arguments by the State concerning the inconsistency of the physical evidence in this case from that normally found in suicide shootings where the actual testimony of the Applicant was that the gun discharged while he and the deceased were struggling over the weapon; a scenario far more consistent with the physical evidence in this case.
20. Defense counsel was ineffective for neglecting to subpoena as a witness for the defense the deceased's former husband, Steve Pearson, to testify to a previous incident where he had to take a gun away from the victim in order to prevent her from committing suicide in a sudden and unexpected manner.

During the evidentiary hearings held in this PCR matter Petitioner also developed testimony

which addressed the following failures of Trial Counsel.⁵

21. Trial Counsel was ineffective for neglecting to make arrangements for the Applicant to make another statement to law enforcement after the initial shock of this traumatic event.
22. Trial Counsel was ineffective for neglecting to make an appropriate objection when evidence the Applicant had previously been told was missing and unavailable, a hair sample from around the fatal wound, suddenly appeared in the courtroom and was introduced into evidence at trial as State's Exhibit No. 37.
23. Trial Counsel was ineffective for neglecting to make Motion for a Mistrial when evidence the Applicant had previously been told was missing and unavailable, a hair sample from around the fatal wound, suddenly appeared in the courtroom and was introduced into evidence at trial as State's Exhibit No. 37.
24. Trial Counsel was ineffective for failing to, at minimum; make a request for a recess to enable the Applicant's expert, Dr. Ward, to examine the hair sample that suddenly appeared at trial after the defense had been denied access to this evidence for review by their independent expert.

At the outset of the first evidentiary hearing held in this case, Petitioner was sworn by the Court and affirmatively waived his right to raise any claims of ineffective assistance of appellate counsel. The record reveals that Petitioner was thoroughly advised of his right to raise claims of ineffective assistance of counsel against appellate counsel and entered a knowing and voluntary waiver of that right. App. p. 874 l. 12 – p. 877, l. 16.

An Order of Dismissal denying Petitioner relief was on filed June 6, 2014. Petitioner subsequently filed a timely Motion to Alter or Amend said order pursuant to Rule 59(e), SCRCP, on June 30, 2014. That motion was denied by Order dated November 26, 2014. Petitioner's timely Notice of Appeal from said orders was filed on December 8, 2014. He now respectfully

To avoid confusion, these allegations have been numbered sequentially with the specific claims raised in Petitioner's Amended Application.

asks that the Writ be granted and that he be granted a reversal of the Order of Dismissal and a new trial based upon the arguments and authorities presented herein. In the alternative, he seeks the opportunity to fully brief the issues summarized in this petition.

ARGUMENT

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raised 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). In Post-Conviction Relief proceedings, the Petitioner has the burden of proof to establish that he is entitled to relief by a preponderance of the evidence. Rule 71.1(e), S.C.R.Civ.P.

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).

This Honorable Court has found that 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 Court found, 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.

QUESTION I

Original Allegations 1 and 2

Amended Allegations 5, 6 and 7, and Hearing Allegation 21.

Did Trial Counsel provide Petitioner ineffective assistance of Counsel in his handling of matters relating to Petitioner's statements to law enforcement immediately following the victim's death and his failure to secure an opportunity for Petitioner to give another statement at a later date?

Petitioner respectfully submits that the lower court erred in denying him relief where he met his burden of proof concerning his claims that Trial Counsel failed to adequately challenge the admissibility of statements attributed to him, failed to introduce expert testimony which would have supported the suppression of the statements in question and which, even if the statements were admitted by the trial judge, would have aided the jury in deciding whether in their judgment the statements were knowingly and voluntarily entered. Trial Counsel additionally was deficient for failing to make appropriate arrangements for Petitioner to make another statement to law enforcement once he was no longer in shock following the shooting death of his girlfriend.

In his PCR action, Petitioner specifically alleged that Trial Counsel was ineffective for failing to adequately challenge the admissibility and reliability of the statements allegedly made

by Petitioner to the police following the death of the victim and for failing to sufficiently highlight factors which supported his claim that the statements in question were taken when he was not competent to know what he was saying and when he was not competent to proof statements written by a third party for accuracy. He further argued that Trial Counsel was ineffective for failing to introduce expert testimony concerning shock and post-traumatic stress and their possible impact on the likelihood that Petitioner might make inconsistent statements and/or false admissions in response to police interrogation. Trial counsel was ineffective for failing to introduce expert testimony concerning shock and post-traumatic stress and what effect witnessing the violent death of a loved one might have on his ability to adequately proofread, and adopt by incorporation, a statement written by a third party. In addition, Petitioner argued that Trial Counsel was ineffective for neglecting to make arrangements for Petitioner to make another statement to law enforcement after the initial shock of this traumatic event.

In his Motion to Alter or Amend the Order of Dismissal issued in his case, Petitioner asked the lower court to issue an amended Order where the Order of Dismissal failed to reference his Amended Application for PCR and the specific allegations raised therein. With regard to these particular allegations, Petitioner noted the Order of Dismissal failed to make finding of fact and ruling of law pertaining to the following:

1. In the portion of the Order of Dismissal captioned "Expert on Post-Traumatic Stress Disorder" this Court finds that relief is not appropriate where Applicant failed to present expert testimony that he was actually suffering from post-traumatic syndrome at the time of the offense. Applicant respectfully submits that this factual finding overlooks the fact that Trial Counsel had the opportunity, and indeed the duty, to obtain such an expert at a time more contemporaneous with the event. Applicant is not to blame for the fact that Trial Counsel failed to do so at the appropriate time. As a result of Trial Counsel's failure to have him evaluated right after the shooting, the best Applicant could do was prove how post-

traumatic stress disorder might have affected his behavior and his ability to make a reliable statement.

2. With the regard to the Applicant's allegations concerning Counsel's failure to obtain an expert on post-traumatic stress disorder, allegations No. 6 and 7 from the Amended Application, the analysis of this Court focuses on Trial Counsel's PCR testimony that he thought the Applicant "was better served by hiring the pathologist, Dr. Ward". Order of Dismissal filed June 16, 2014, page 9. App. p. 1131. The order however does not address Counsel's admission that he never considered having his client declared an indigent and requesting state funding for a psychiatric expert in addition to the pathologist. Further, the Order of Dismissal fails to address the degree to which the testimony of Dr. Thomas Martin explained how many of the behavioral facts referenced by the Court in this section of its order could be explained by the general known effects of shock and post-traumatic stress. In addition, the order fails to address the testimony of Dr. Thomas Martin, presented in the form of a deposition, concerning the ways in which shock and post-traumatic stress may have impacted the Applicant's statements to the police in the immediate aftermath of witnessing the violent death of a loved one.

App. p. 1173. Petitioner's Motion for a more complete Order was denied. App. p. 1179. Petitioner therefore argues that he has taken every available measure to insure that the Order of Dismissal fully addressed the allegations put forth in this Petition.

According to his PCR testimony, Trial Counsel, James Brehm, was hired by Petitioner's family on March 20, 2000. The victim was shot and killed on March 10, 2000. After Trial Counsel was hired, Petitioner was released on bond under the terms of which he was on house arrest at his parent's home. App. p. 891, ll. 1-11, App. p. 890, l.13 – p. 891, l. 3, App. p. 891, l. 10-13.

In his PCR testimony, Trial Counsel acknowledged that Petitioner had made at least four statements to law enforcement before he was hired. The first statement was made in the context of the 911 call Petitioner placed in this case. The second statement attributed to Petitioner was

made to an officer in the front yard of the home he shared with the victim. Petitioner then gave two written statements with additional oral remarks between the two written statements. App. p. 891, l. 18- p. 892, l. 13. Petitioner was initially interviewed by the police when they responded to a 911 call reporting the victim's suicide. At that time, Petitioner reiterated that the victim had shot herself. That statement was reduced to writing. Petitioner was thereafter taken to the law enforcement center in a police car after members of the victim's family became hostile towards Petitioner. Petitioner was questioned at length and was challenged on his version of the facts leading to the victim's death before he supposedly made a spontaneous admission of guilt. Petitioner was not given *Miranda* warnings until after he had allegedly made the oral statement admitting shooting the victim. Trial Counsel initially challenged the admissibility of all the inculpatory statements attributed to Petitioner. The Solicitor subsequently announced that the State would not attempt to introduce the oral statements attributed to Petitioner. In response to that announcement, Trial Counsel abandoned all challenges to the legality of the circumstances under which this oral statement was made. App. p. 901, l. 13- p. 905, l. 22. Trial Counsel acknowledged that as soon as the Solicitor agreed not to go into the oral confession, App. p. 65, ll. 11-15, the focus of his motion to suppress became the written statement given by Petitioner *after* the oral statement. Trial Counsel admitted that if the Solicitor had not announced that she wouldn't try to introduce the oral confession, he would have gone forward with his argument that the oral admissions were inadmissible inasmuch as they were the product of a custodial interrogation held in the absence of *Miranda* warnings. He hesitantly admitted that if the oral inculpatory statement was taken in violation of Petitioner's rights then he should have argued that the subsequent written statement, that memorialized that oral statement, was the fruit of the original constitutional violation. App. p. 908, l. 3- p. 909, l. 25. He ultimately conceded that on

the facts of this case, Petitioner needed to argue the illegality of the information extracted from Petitioner *before* he was *Mirandized* in order to effectively argue the admissibility of the written statement issued after a *Miranda* waiver. App. p. 910, ll. 1-8.

Trial Counsel admitted that once the trial judge ruled that Petitioner's inculpatory written statement was admissible, he fully expected the prosecution to harp on it. App. p. 913, l. 10 - p. 914, l. 5. He further acknowledged that once they knew the so-called written confession was coming in, the only hope for Petitioner was to demonstrate that the statement was not reliable. App. p. 914, ll. 8-24. When asked why he did not hire an expert in the field of psychiatry to testify to the known effects of shock in the aftermath of extreme trauma, Trial Counsel said he was trying to prioritize and allocate available resources. He testified that he concluded it was more important to hire a Dr. Ward, a forensic pathologist and an investigator. Trial Counsel acknowledged that Petitioner was not a minor, and that he had no financial resources with which to pay for legal fees and expenses. As previously noted, Petitioner's parents hired Trial Counsel. Trial Counsel claimed that he was aware he could petition the Court to authorize funding from the Office of Indigent Defense to pay for a psychiatric expert, but stated that he never followed through with such a request. App. p. 914, l. 25 - p. 921, l. 16.

Petitioner initially told the police that the victim committed suicide. After being hammered by the police about the fact that the evidence didn't fit a suicide, he supposedly admitted that he shot her. App. p. 921, l. 19 - p. 922, l. 11. At trial, Petitioner testified that the victim was talking about suicide and had a pistol in her lap when he saw her begin to raise the gun. According to his trial testimony, he grabbed the gun to try and get it away from her. As he tried to take the gun from her, it went off, and she was killed. Trial Counsel acknowledged that, although Petitioner's testimony was not consistent with the statements made by him in the

immediate aftermath of this tragedy, it was entirely consistent with what he had told Trial Counsel from the outset of his representation in this case. App. p. 922, l. 16 - p. 923, l. 20. Trial Counsel admitted that he never even considered taking his client to the police and asking to make another clarifying statement once he was no longer under the immediate psychological effects of this horrible incident. His failure to do so resulted in the State being able to argue at trial that Petitioner's trial testimony was the first time he had ever asserted that the gun went off while he was struggling with the victim for the weapon. App. p. 923, l. 21 - p. 924, l. 15. In his PCR testimony, Trial Counsel testified that, "*if they would have allowed me to do that*" it would have been beneficial for him to have taken Petitioner in to make another statement when Trial Counsel was hired approximately ten (10) days after the shooting.⁶ App. p. 924, l. 16 - l. 21.

A confession is inadmissible for all purposes, including impeachment, where it is involuntarily made. *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993). An involuntary, incriminating statement is inadmissible for any purpose including impeachment. *State v. Victor*, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (S.Ct. 1989); *State v. Hook*, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001). It is a well established principal in South Carolina that the admissibility of repudiated confessions is a question to be first determined by the trial judge and then, finally decided by the jury. *State v. Harris*, 212 S.C. 124, 46 S.E.2d 682, 689 (1948); *State v. Miller*, 211 S.C. 306, 45 S.E.2d 23, 26 (1947). In ruling on the admissibility of a confession the trial judge is required to apply a preponderance of the evidence standard. *State v. Smith*, 268 S.C. 349,354, 234 S.E.2d 19,21 (1977); *State v. Neeley*, 271 S.C. 33, 40, 244 S.E.2d 522,526 (1978). See also, *Colorado v. Connelly*, 479 U.S. 515 (1986); *Lego v. Twomey*, 404 U.S.

⁶ Trial Counsel did not explain why he believed the police might refuse Petitioner's request to make another statement. Likewise, he apparently did not consider that *the fact of such a refusal* would itself have had evidentiary value had it occurred.

477 (1972). The jury however, must be instructed to apply a beyond a reasonable doubt standard in determining whether a confession was voluntarily made. *State v. Washington*, 296 S.C. 54, 370 S.E.2d 611, 612 (1988). *State v. Peake*, 291 S.C. 138, 352 S.E.2d 487 (1987); *State v. Drayton*, 287 S.C. 226, 337 S.E.2d 216 (1985); *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981). "Where the voluntariness of a statement is in dispute, the jury must be instructed to determine whether, beyond a reasonable doubt, the statement was voluntarily given under the totality of the circumstances." *Drayton*, 337 S.E.2d at 217 (1985). Petitioner argues that Trial Counsel should have challenged the admissibility of his oral inculpatory statement on the ground that it was secured in violation of Petitioner's rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and that he was not competent to give a reliable statement at the time the statement was taken.

It is clear from the record below that Trial Counsel intended to challenge that statement on the ground that the statement was secured under circumstances which amounted to custodial interrogation and Petitioner had not been properly advised of his rights pursuant to *Miranda*. Counsel admittedly totally abandoned that challenge once the prosecution indicated that they would not attempt to introduce Petitioner's oral statements. This decision by Trial Counsel totally overlooked the argument that Petitioner's subsequent inculpatory written statement was the fruit of the poisonous tree. *State v. Boswell*, 391 S.C. 592, 707 S.E. 2d 265 (2011); *State v. Copeland*, 321 S.C. 318, 323, 468 S.E. 2d 620, 624 (1996), *Wong Sun v. United States*, 371 U.S. 471 (1963). Counsel admitted that he did not consider this argument when abandoning his challenge to oral inculpatory statement made by Petitioner. In addition, Trial Counsel failed to use expert testimony to demonstrate that Applicant may not have been competent to either waiver his rights or to give a reliable statement.

During the direct examination of Trial Counsel at the February, 2013 PCR hearing,

Petitioner introduced, without objection, the deposition taken from Dr. Thomas V. Martin, M.D., taken on August 5, 2010. This deposition, marked as Applicant's Exhibit No. 2, was proffered as the type of expert testimony that would have been beneficial to the defense in this case. App. p. 1014, l. 25 – p. 1016, l. 10. In his deposition, Dr. Martin, an expert in the field of forensic psychiatry, addressed the many physical and mental effects of shock in the aftermath of a traumatic event. He explained, for example, the role emotional guilt might have on the reliability of a statement made by an individual suffering from shock and post traumatic stress. His deposition reveals the fact that many of the actions of Petitioner immediately after this shooting may have been explained by shock. Further, he provided that often people in shock after a very traumatic event will experience blanks in their memory which they will attempt to compensate for through what is known in his field as confabulation. He further explained that someone who is experiencing guilt over the circumstances of an event might engage in non-volitional confabulation which reflected unfounded guilt. While he expressed the fact that the term of shock will vary from case to case, Dr. Martin stated that in his professional experience, you can expect it to be at its worst within 24 hours after an event. He opined that he would have been in a far better position to evaluate the degree to which shock may have impacted Petitioner's ability to make voluntary decisions and to give reliable statements concerning this event if he had been hired contemporaneously with Petitioner's arrest back in 2000.

At the second PCR hearing held in this case, Trial Counsel added to the explanation he gave at the first proceeding for not hiring a psychiatric expert to address the impact of shock on Petitioner's ability to give a reliable statement in the immediate aftermath of the victim's death. At the June, 2009 hearing, Trial Counsel testified that the decision not to hire such an expert was purely a matter of resource allocation. As previously noted, he claimed he was aware that he

could have asked to have Petitioner declared indigent and could have requested funding from the Office of Indigent Defense for such an expert, but he simply didn't follow through with that. App. p. 915, l. 14 – p. 919, l. 1. By the time of the February 26, 2013 proceeding, Trial Counsel claimed that his decision not to hire an expert and present such testimony *“could have opened the door to some more damaging evidence on testimony coming in.”* App. p. 1007, ll. 4-17. Trial Counsel was initially unable to give specific examples of what evidence he was concerned about opening the door to. App. p. 1008, ll. 4-22. He subsequently indicated that the prosecutor had a file, that she would not let him see, which she referenced as supporting her desire to put Petitioner *“in jail for the rest of his life.”* He also indicated that accusations came out of the bond hearing that caused him to *“[say] whoa, this ... there's a lot more to this than I knew at the time.”* App. p. 1010, ll. 6-9. While Trial Counsel went on to allude to matters he didn't want to *“open the door to”*, he initially cited to nothing specific, but rather made a vague reference to Petitioner's military service and his assertion *“that there were things that I didn't want her to be able to get into in that regard.”* App. p. 1010, ll. 21-25; App. p. 1011, ll. 1-8. On cross-examination, Trial Counsel clarified that he wasn't afraid of any testimony that might come in about Petitioner's military service. He testified that his pre-trial conversations with the prosecutor indicated that she was prepared to use the fact that Petitioner had firearms training in the military against him, and Trial Counsel indicated that he didn't want to introduce expert psychiatric testimony for fear of *“going down that path.”* App. p. 1041, l. 23- p. 1042, l. 18. He subsequently admitted however, that there was nothing about the shooting in this case which required special firearms training. App. p. 1071, l. 4 – p. 1072, l. 2.

During the second PCR proceeding in this case, the Respondent asked Trial Counsel to verify that the investigator he used in the case had gotten some information that Petitioner's

wife⁷ was afraid of him. Trial Counsel testified that was “*right*”, but went on to comment on the fact that the wife who was supposedly afraid of Petitioner “*took him back*” multiple times. App. p. 1039, l. 10- p. 1040, l. 16.

In his PCR testimony, Trial Counsel agreed that the Solicitor in this case was an enthusiastic prosecutor in all her cases. He admitted however, that regardless of her pre-trial threats, this zealous prosecutor made no attempt whatsoever to introduce any prior bad act evidence under Rule 404, SCRE, or traditional *Lyle*⁸ analysis. App. p. 1011, l. 13- p. 1012, l. 10. He did continue to assert that he didn’t want evidence about Petitioner’s military service to come in, and noted that he feared the State might respond to expert psychiatric testimony concerning shock with evidence of a history that would enable the prosecutor “*to argue that it’s going to be less traumatic on someone that’s done stuff like that in the past on numerous occasions....*” App. p. 1012, l. 19- p. 1013, l. 22. He did not however, testify to any factual basis the State could have used to support such a claim. Petitioner respectfully asks this Honorable Court to specifically note that, although Trial Counsel repeatedly asserted that he didn’t want to open the door to such testimony, he himself asked Petitioner a direct question that could not have been designed to do a better job of opening the door to such testimony. During his direct-examination of Petitioner at trial, Trial Counsel asked, “*Can you equate the time period that you left, with anything, is there anything you can compare it to, have you ever been in that situation before?*” App. p. 622, ll. 7-9. It is significant that following Petitioner’s negative answer to this question, the State did not attempt to introduce any evidence to refute that position.

⁷ Petitioner was separated from his wife at the time of this incident. The deceased was Petitioner’s girlfriend with whom he was living at the time of her death.

⁸ State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

In addition to his failure to obtain and present an expert witness on the subject of shock following a major trauma and its possible effect on Petitioner's statements made immediately following this incident, it is apparent that Trial Counsel did not entertain the idea of introducing expert testimony designed to demonstrate that Petitioner was not competent to waive his right to silence or the right to counsel at the time both his oral and written inculpatory statements were made. The deposition of Dr. Martin in this matter demonstrated that his testimony at Petitioner's trial, or the testimony of an expert similarly qualified, would have contributed substantially to Petitioner's argument that his written inculpatory statements were not the product of a voluntary and intelligent waiver of his right to silence or the right to counsel. Testimony like that proffered by way of Dr. Martin's deposition would have gone a long way toward convincing the trial court that Petitioner was neither competent to waive his rights, or to give a reliable statement, at the time of his interrogation by the police before or after *Miranda* warnings were given.

Even if the lower court had admitted Petitioner's written "*confession*" after hearing such expert testimony, the jury would still have had the opportunity to decide, beyond a reasonable doubt, whether Petitioner was competent at the time his *Miranda* waiver was executed based on the totality of the circumstances. The testimony of a psychiatrist concerning the effects of shock may very well have carried the day with a jury charged with deciding whether Petitioner knew what he was doing when he waived his right, or indeed whether he was competent to give a reliable statement period. For these reasons, Petitioner asserts that the lower court erred in failing to find that he had met his burden of proof with regard to his claim that he received ineffective assistance of counsel, prior to and during his trial, with regard to the manner in which he handled Petitioner's challenge to the admission of his statements to law enforcement, and in his failure to obtain the testimony of an expert on this crucial issue.

Likewise, Petitioner has asserted that Trial Counsel was ineffective for failing to advise his client concerning the wisdom of making another statement to law enforcement once he was hired. Trial Counsel was hired ten (10) days after this shooting. He has admitted that from the beginning Petitioner's story, as conveyed to him, about the events surrounding his girlfriend's death had been consistent. He further testified that the version of the facts relayed to him by Petitioner from the beginning was totally consistent with his eventual testimony at trial. When asked why he did not request that law enforcement take another statement from his client after the immediate shock from this traumatic event had passed, Trial Counsel appeared to believe that the police would not have allowed his client to make another statement. His testimony suggests that he did not believe it was even possible to ask the police to take another statement from his client. He recognized, however, that Petitioner's recollections of the events of the fateful evening were totally inconsistent with the statements he knew the prosecution would no doubt attribute to Petitioner as "*confessions*" at trial. He also recognized that, absent such a clarifying statement to law enforcement, it was virtually inevitable that the State would hammer Petitioner for coming up with his story for the first time in his trial testimony. Trial Counsel's testimony clearly admits that a statement setting forth Petitioner's recollections from the evening in question, made around the time Counsel was hired ten (10) days after the shooting, would have been very helpful. He maintained his skepticism concerning whether "*they would have allowed*" such a statement to be made. Petitioner would respectfully point out that Trial Counsel's logic on this point simply does not withstand scrutiny. Obviously, if Petitioner had come forward and offered another statement to law enforcement, the police would have been hard pressed *not* to allow him to make one. In the unlikely event that law enforcement had declined to take another statement from Petitioner, in the presence of his counsel, they would have opened the door for Petitioner to demonstrate their refusal to hear him

out at trial. Thus, Petitioner asserts that he demonstrated that trial Counsel was deficient in this regard as well.

Given the circumstances of his case, the failure of Trial Counsel to make arrangements for Petitioner to make another statement opened the door for the State to argue that Petitioner's testimony represented a recent fabrication. Perhaps even more damaging, this argument left room for the jury to infer that Petitioner's version of the facts was one which he did not "*come up with*" until after he had the assistance of counsel to help him design a defense. We know from the testimony of Trial Counsel during these PCR proceedings that this simply is not true. Trial Counsel's testimony established that, from his first contact with Petitioner, his story remained consistent with the version of the events he eventually testified to at trial. He respectfully argues that the lower court erred in failing to grant him relief on these grounds and in failing to grant his request for an Amended Order of Dismissal in which the Court made accurate findings of fact and rulings of law concerning these allegations.

Question II

Original Allegations 1 and 4,

Amended Allegations 13, 14, 15, 16, 17, 18 and 19

Was trial Counsel ineffective for failing to develop and present a defense of accident, and failing to request a jury charge on that defense, where that defense fit the physical evidence in this case, was entirely consistent with Petitioner's position concerning the events that lead to his girlfriend's death and would have enabled Trial Counsel to defuse the prosecution's claim that the physical evidence was inconsistent with suicide?

Petitioner asserts that he lower court erred in failing to grant his application for PCR were he met his burden of proof with regard to Trial Counsel's failure to develop and pursue a reasonable defense strategy which better fit Petitioner's position concerning the events which lead to his girlfriend's death and was entirely consistent with the physical evidence in this case. Trial Counsel was clearly deficient for approaching Petitioner's entire defense from the perspective of suicide rather than present the defense of accident. Not only did he fail to develop and present this logical defense, he failed to request a jury charge on this applicable defense, where it was entirely consistent with Petitioner's trial testimony, even without any effort by Trial Counsel to present the defense in any other way. Because the evidence in this case was susceptible to the interpretation that this weapon discharged accidentally while Petitioner attempted to disarm his girlfriend whom he feared was about to commit suicide, he was entitled to assert the defense of accident and have it submitted to the jury where he acted without intent to harm the deceased and without reckless disregard for her safety. *State v. Brown*, 205 S.C. 514, 32 S.E.2d 825 (1945). Petitioner was entitled to this defense where there was no evidence that he was acting unlawfully at the time the weapon accidentally discharged. *State v. McCaskill*, 300

S.C. 256, 259, 387 S.E.2d 268, 270 (1990) This defense fit the physical evidence in this case whereas Trial Counsel's insistence on characterizing the death of the deceased as a suicide enabled the prosecution to argue that the physical evidence in this case was not consistent with death by a self-inflicted pistol wound. Trial Counsel's dogged insistence on this so-called strategy no doubt resulted in him failing to point out that the prosecution's theory that the physical evidence refuted a claim of suicide was misleading and inaccurate where the Applicant's position was that he was trying to stop the deceased from committing the act of suicide at the second the shot was fired; a scenario vastly different from a completed suicide.

The Order of Dismissal filed in this case failed to address certain aspects of these allegations and made finds of fact with regard to others that were erroneous in light of the evidence adduced at Petitioner's trial. In his Motion to Alter and Amend, Petitioner asked for an Amended Order of Dismissal noting that the Order as filed was deficient in the following particulars.

3. The Order of Dismissal in the section captioned "Accident" found that there was no evident of accident introduced at trial. Applicant respectfully asks this Honorable Court to reconsider that factual finding, and to grant him an amended order finding Trial Counsel ineffective for failing to request a jury charge on accident. The testimony adduced at trial indicated that Applicant was struggling with the Victim for control over the weapon while she was attempting to commit suicide. Applicant's testimony and the physical evidence were consistent with the accidental discharge of the weapon while Applicant was attempting to prevent the Victim from using the pistol to kill herself. Therefore, Applicant respectfully submits he is entitled to relief on this ground; Amended Application for Post-Conviction Relief, Allegation No. 15.
4. Applicant respectfully submits the Order of Dismissal issued in this matter neglects to make findings of fact and rulings of law pertaining to Applicant's Allegations 16- 18 from his Amended Application for Post-Conviction Relief filed June 18, 2009. As established by the Applicant during the PCR hearings held in this

matter, Defense Counsel failed to clearly and consistently argue Applicant's position that the Victim was shot when the weapon he was attempting to take away from her discharged. In addition, the record reflects that Defense Counsel repeatedly characterized the Victim's death as a suicide without clarifying the Applicant's actual position which was that the Victim was shot while Applicant was struggling for control of the gun which he believed the Victim was about to use to commit suicide. Counsel's reference to the shooting as a suicide, and his failure to clarify the circumstances under which the weapon discharged in his arguments to the jury, was highly prejudicial to Applicant where the physical evidence in this case was not consistent with a suicide, but was arguably consistent with the discharge of the pistol during a struggle for the weapon.

5. Lastly, Applicant respectfully submits that the Order of Dismissal entered in this matter does not make findings of fact and rulings of law concerning Applicant's Allegation No. 19, Amended Application for Post-Conviction Relief in which he alleged that Defense Counsel was ineffective for failing to object to arguments by the State concerning the inconsistency of the physical evidence in this case from that normally found in suicide shootings. In his PCR action Applicant argued that his actual testimony was that the gun discharged while he was trying to stop the deceased from using the weapon to kill herself; a scenario far more consistent with the physical evidence in this case. Throughout Applicant's trial the State, and Defense Counsel, referenced Applicant's position as being that the Victim committed suicide. This position was factually inaccurate and it irreparably prejudiced Applicant where the physical evidence was not consistent with a gun shot suicide unless one factored in the effect Applicant's attempt to seize the weapon would logically have had on the trajectory of the fatal shot.

App.pp. 1173 - 1178. This motion was denied. App. p. 1179. Petitioner therefore respectfully asserts that he has taken every available opportunity to insure that these allegations were fully addressed in the Order of Dismissal. He asserts that he met his burden of proof with regard to these allegations in the lower court. He respectfully argues that the lower court erred in failing to grant him relief on these grounds and in failing to grant his request for an Amended Order of

Dismissal in which the Court made accurate findings of fact and rulings of law concerning these allegations.

III.

Original Allegation 4

Amended Allegation 12

Was Trial Counsel was ineffective for withdrawing his request for a jury instruction on the charge of involuntary manslaughter where under at least one possible interpretation of the Petitioner's testimony the jury may have believed that he struggled with the deceased for the weapon under circumstances which showed wanton and willful disregard for the victim's safety?

During Petitioner's trial, Trial Counsel requested a jury charge on the lesser included offense of involuntary manslaughter. He subsequently withdrew that request. App. p. 718, ll. 14-25.⁹ Trial Counsel asserted that he originally asked for the involuntary manslaughter charge after a Reply witness called by the State had "*really hurt*" the Applicant. He stated that he subsequently withdrew the request because "*it didn't tie in with our theory of the case. ... The State's theory of the case was Mr. Patterson pulled the trigger. My theory of the case was she pulled the trigger.*" App. p. 975, ll. 6-15. Trial Counsel's PCR testimony went on to reveal his belief that in order for involuntary manslaughter to apply Petitioner would be "*pulling the trigger.*" App. p. 976, l. 21- p. 977, l. 8. Still later Trial Counsel testified that *both* involuntary manslaughter and a defense of accident would require that "*he has to pull the trigger...accident and involuntary manslaughter just didn't apply to that because our theory was that Mr. Patterson did not pull the trigger.*" App. p. 983, l. 20 - p. 984, l 4.

In his trial testimony, Petitioner recalled statements by the deceased at the time of this

⁹ This PCR hearing transcript reflects that PCR Counsel stated that this request to charge was withdrawn "prior to the jury being sworn." That reference is obviously a typographical error or a misstatement by PCR Counsel. The record shows that this charge request was withdrawn before the jury was charged *not* before they were sworn. App.p.

shooting, coupled with the deceased's history of suicidal behavior, as his reason for believing she was about to shoot herself. Given the fact that the deceased was not alleged to have expressly stated that she was about to kill herself, the jury in this case could have concluded that Petitioner while acting lawfully, nevertheless acted with "reckless disregard for the safety of others" when he attempted to take control of the weapon from her. Thus, he was entitled to a charge on involuntary manslaughter. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

Trial Counsel's concern that a request for this charge, or a charge on accident, would not fit, because the defense did not acknowledge that Petitioner "*pulled the trigger*", was misplaced and inaccurate. A careful review of Petitioner's trial testimony clearly was susceptible to the conclusion that this gun went off during a struggle for control over the weapon. App.p.612, l. 22 – p. 620, l. 16.. The fact that this struggle may have produced a situation where sufficient pressure was put on the trigger to cause it to discharge the weapon is a reasonable conclusion under one logical interpretation of Petitioner's trial testimony and the balance of the evidence in this case. This Court has recognized that evidence of a struggle between a defendant and a victim over a weapon is sufficient to support the submission of an involuntary manslaughter instruction to the jury. *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (S.Ct., 2008); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991).

Petitioner asserts that he met his burden of proof in the circuit court in establishing that Trial Counsel should not have withdrawn his request for a jury instruction on this lesser-included offense. The record below does not reflect that Petitioner was a party to this decision at trial App.p. 613, ll. 14 – 25. Petitioner argues that, on the facts of his case, there exists a reasonable probability that the outcome of his trial may have been different had the jury received an instruction on this lesser-included offense.

IV.

Original Allegation 4

Amended Allegations 2, 3, 4 and 8

Was Trial Counsel ineffective in his handling of matters relating to the publication of crime scene photographs in Petitioner's case?

Petitioner respectfully asserts that the lower court erred in denying his Application for PCR where Trial Counsel failed to renew his Motion for a Mistrial following the curative charge given by the trial court in response to an emotional outburst in the courtroom prompted by the State's publication of gruesome crime scene photographs on a large screen monitor during Petitioner's trial. In addition, Petitioner asserts that Trial Counsel was ineffective for neglecting to make an adequate objection to the admission of the photographs in question on the record. Likewise, Trial counsel was ineffective for failing to ask that friends and family be given ample advance warning of the display of gruesome crime scene photographs in the courtroom on a large television monitor. He argues Trial Counsel should have taken measures to insure that those present in the courtroom were also instructed that if anyone anticipated having difficulty remaining composed during the display of these photographs, they should either position themselves so that they were insulated from viewing them or remove themselves from the proceeding while they were being displayed. Lastly Petitioner submits that he has demonstrated that Trial Counsel was ineffective for failing to place a full and accurate description of this outburst on the record after, in his own opinion as reflected by his PCR testimony, the arguments of the Solicitor, and the rulings of the Court, minimized the incident on the record.

In the Motion to Alter or Amend filed in this case, Petition argued the following in **Item 3** of said motion,

In the portion of the Order of Dismissal captioned "Mistrial Motion for Emotional Outburst" this order neglects to address Applicant's allegation No. 4, as found in his Amended Application. Specifically, the Order of Dismissal does not make findings of fact and rulings of law concerning Applicant's allegation that Trial Counsel was ineffective for failing to request that friends and family be given advanced warning of the display of gruesome crime scene photographs, and for neglecting to ask that those present in the courtroom be told that they should either position themselves so they were insulated from viewing the photographs or, alternatively, remove themselves from the proceeding while the photographs were being displayed.

The motion pursuant to Rule 59(e) was denied and no amended order was entered.

Multiple photographs of the deceased were introduced during the Petitioner's trial. Trial Counsel did not make a motion *in limine* concerning the introduction of these photographs however, he did expressly object at trial to two particularly gruesome photographs which were ultimately introduced as State's Exhibits No. 21 and 22. In his PCR testimony, Trial Counsel acknowledged that his entire argument for the exclusion of these highly inflammatory photographs was simply, "*prejudice to both.*" App. p. 943, l. 4- p. 945, l. 5; App. p. 2260, l. 4. Trial Counsel explained that the limited content of his objection was due to the fact that there had already been discussions with the trial judge concerning these photographs *in chambers* and the judge had been informed of his intent to object to these two photographs coming into evidence. He asserted that when he made his objection on the record, the trial judge cut him off. App., p. 945, l. 17-p. 946, l. 11. He acknowledged however, that Petitioner's ability to make a viable argument on appeal was dependant on him making his legal arguments for the suppression of this evidence on the record. App. p. 946, l. 12- p. 947, l. 9.

Trial Counsel initially testified that he had no warning that the State intended to publish these gruesome photographs of the victim on a large screen in the courtroom. He ultimately admitted however, that once it became apparent the State was about to display these images on

that screen, he should have objected to it based on the fact that the publication of the photographs in that manner would exacerbate the potential for prejudice. App. p. 947, ll. 10-25. Trial Counsel admitted that he was not caught completely off guard by the prosecutor publishing the crime scene photographs on the projection television. He acknowledged that the equipment was in place in the courtroom. App. p. 1066, l. 6- p. 1068, l. 11.

Trial Counsel noted that he made an objection once the photographic display began on the screen and there was an outburst among the victim's family and friends. Trial Counsel noted on the trial record that there had been an outburst from the victim's family and friends and they had to be escorted out. In response to efforts by the prosecution to minimize the degree of the reaction from the gallery, Trial Counsel put a very limited description of the event on the record. App. p. 231, ll. 2 - 21; App. p. 948, l. 1-p. 949, l. 23. Trial Counsel did renew his objection to the photographs in question after the outburst and made a motion for a mistrial. After the motion was denied, a curative charge was given. Trial Counsel candidly testified that it did not occur to him to review his mistrial motion following the curative charge. He further admitted that he had no strategic or tactical reason for not arguing that the curative charge was insufficient to remove the taint caused by this emotional outburst. App. p. 950, l. 1- p. 951, l. 18. The Court of Appeals found that Counsel's failure to renew his Motion for a Mistrial following the curative charge given, procedurally barred a decision on the merits of Petitioner's challenge to the trial court's failure to grant a mistrial on appeal. . *State v. Patterson, Opinion No. 2003-UP-143 (S.C. Ct. App. filed February 19, 2003)*. Petitioner's subsequent Petition for Writ of Certiorari on this issue was denied on May 13, 2004.

Trial Counsel further acknowledged that he never considered taking precautionary measures to insure that this trial wasn't disrupted by the publication of these inflammatory

photographs by asking that those present during the trial be given notice when such photographs were about to be displayed. App. p. 951, l. 19- p. 952, l. 6. In his testimony on cross-examination by the State, Trial Counsel testified that the emotional outburst that occurred in the courtroom when the prosecution displayed crime scene photographs was more substantial than it was described by the trial judge when he denied Petitioner's Motion for Mistrial. Trial Counsel testified that the Court's factual basis for that ruling was incorrect and acknowledged that he should have pointed that out for the record. App. p. 1025, l. 20- p. 1026, l. 17.

Although Trial Counsel testified that he had never seen a prosecutor display photographs on a projection screen in the courtroom, he admitted that he could have anticipated what she was about to do. He admitted that he has dealt with that situation differently since that experience. App. p. 1026, l. 22- p. 1027, l. 24. In recalling the impact of the outburst in the courtroom, Trial Counsel stated, *"You do this for long enough, you can tell when something impacts the jury as much as that."* App. p. 1026, ll. 11-13.

Petitioner respectfully argues that the lower court erred in failing to grant him relief on these grounds where he met his burden of proof by establishing that,

- Trial Counsel was ineffective for failing to make an adequate objection to the introduction of the photographs in question at trial.
- Trial Counsel was ineffective for failing to preserve the issue of whether Petitioner's Motion for a Mistrial should have been granted by renewing that motion after the curative charge issued by the trial judge.
- Where, as Trial Counsel testified during this PCR action, the descriptions of the event given on the record by the Solicitor, and the trial judge, were inaccurate; Trial Counsel was ineffective for failing to object to the accuracy of those descriptions, and for neglecting to proffer his own detailed account of the outburst on the record.

Petitioner has established that the outburst in the courtroom which followed the publication of these photographs on a large projection television, may have been avoided had

Trial Counsel taken appropriate steps to be certain that these photographs, if admitted, were published in a manner that did not enhance their potential for prejudice by provoking a prejudicial outburst from the gallery. Trial Counsel's earnest assessment of the impact of the publication of these photographs, in the manner in which they were displayed, evidences the fact that the outcome of the Petitioner's trial may well have been different had this emotional outburst not happened. Likewise, Petitioner has met his burden of proof with regard to his assertion that there is a reasonable probability that the outcome of the Petitioner's direct appeal would have been different if Trial Counsel had:

- 1) Fully argued the legal and factual basis for his objection to the introduction of the photographs in question;
- 2) Renewed his motion for a mistrial following the curative charge given in response to the outburst in the courtroom; and
- 3) Put a detailed description of the outburst that followed the publication of these photographs on the record along with his observations concerning the jury's reaction to this emotional disruption of Petitioner's trial.

As the Court of Appeals noted in its opinion in Petitioner's direct appeal, a party seeking a mistrial must not only show error, he must demonstrate prejudice. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). Trial Counsel failed to establish for the record the full scope of the outburst in question, and neglected to document the jury's intense reaction for the record. The sparse nature of Counsel's initial objection to the introduction of these photographs failed to sufficiently articulate why their probative value was substantially outweighed by their potential for prejudicing the jury. Similarly, Trial Counsel argued no basis for the Trial Court, or the appellate courts thereafter, to conclude that the probative value of the matter depicted in these particular photographs was cumulative to other evidence and testimony introduced at during Petitioner's trial or for finding that their evidentiary value was outweighed by their obvious

potential for appealing to the passions and prejudices of the jury. Petitioner's ability to effectively perfect his challenge to the trial court's failure to grant a mistrial in response to this event was procedurally barred on direct appeal due to Trial Counsel's acquiescence to the error by failing to renew his motion for a mistrial following the curative charge. Accordingly, Petitioner now argues that he has clearly demonstrated that he was prejudiced by Trial Counsel's failure to fully develop and argue this issue at trial. Petitioner submits that Counsel's failures in this regard definitely deprived him not only of the right to be fully heard on this objection and motion at trial, but additionally deprived him of the chance to have this issue considered on its merits on appeal.

For all these reasons articulated above, Petitioner asserts that he met his burden of proof concerning each of these related allegations on collateral review and therefore, that the PCR Court erred in denying him a new trial on these grounds. He additionally submits that the lower court erred in failing to grant his Motion to Alter or Amend and in failing to issue an Amended Order of Dismissal making finds of fact and rulings of law on the matters not addressed in the Order of Dismissal.

V.

Allegations 22, 23 and 24

Was Trial Counsel ineffective in the manner in which he handled the sudden appearance and introduction of evidence the defense had previously been told was missing and unavailable?

Petitioner respectfully submits that the lower court erred in denying him relief on collateral review where,

- Trial Counsel was ineffective for neglecting to make an appropriate objection when evidence Petitioner had previously been told was missing and unavailable, a hair sample from around the fatal wound, suddenly appeared in the courtroom at trial and was introduced into evidence as State's Exhibit No. 37.
- Trial Counsel was ineffective for neglecting to make Motion for a Mistrial where Petitioner had previously demanded access to the evidence in question, and been told it could not be found,
- Trial Counsel was ineffective for failing, at minimum, to make a request for a recess to enable Petitioner's expert, Dr. Ward, to examine this hair sample where the defense had been denied access to this evidence for review by their independent expert.

At trial, the State's pathologist testified to the absence of soot or stippling at the wound site and therefore, that the shot was "probably" fired from a distance of more than three to six inches from the deceased's head. App. p. 316, l. 24 – p. 317, l. 3. The evidence custodian for the Sheriff's Department testified that hair taken from the victim was sent to SLED¹⁰ for testing only to subsequently be informed that SLED was no longer testing hair samples. App. p. 402, ll. 17-19. During the PCR hearing, Trial Counsel testified that his defense expert, Dr. Ward, asked to examine the hair sample from the victim. Trial Counsel confirmed that he requested access to the sample and was told it was not available. He went on to recall that he had raised his demand for access to the hair sample during a hearing on a continuance motion made before an earlier trial date. During the PCR hearing Trial Counsel testified that, when the case actually went to trial, the hair sample suddenly appeared and was being introduced as State's Exhibit No. 37. App. p. 941, l. 1- p. 942, l. 6. Trial Counsel testified that he did not consider making a Motion for a Mistrial based upon this issue. He admitted that he wished he had and affirmatively acknowledged that he had no tactical or strategic reason for not doing so. App. p. 942, l. 7- p. 943, l. 3. The record actually reflects that he did not even object to the introduction of this

¹⁰ South Carolina Law Enforcement Division

evidence. App. 362, ll. 7 – 15. At trial, Dr. Ward testified that if he had performed the autopsy he would have had the hair sample analyzed for the presence of gunpowder. App. p. 464, ll.18 – 23. Trial Counsel offered absolutely no explanation for his failure to request an opportunity for his witness to examine this evidence once its existence was revealed at trial.

In his PCR testimony, Trial Counsel admitted that he should have made a Motion for a Mistrial when the missing hair sample was brought up during Petitioner's trial and introduced into evidence. When asked if he considered at least making a request for a recess long enough to permit Dr. Ward to examine the hair sample, Trial Counsel said that possibility was discussed *at sidebar*. He did not however, preserve that objection on the record. App. p. 1084, l. 18- p. 1085, l. 24.

Petitioner now argues that the lower court erred in denying him relief on these related allegations where the record establishes that he met his burden of proof concerning his claims that Trial Counsel was ineffective for failing to make an appropriate objection to the introduction of the hair sample in question, and to any testimony concerning the fact that there was no gunpowder residue on the hair sample, once it became apparent that this sample which the defense had specifically requested access to was in fact available. Further, Petitioner has established that Trial Counsel should have asked that a mistrial be declared once the existence of this sample became known where the State had already introduced evidence concerning the examination of the hair sample before it became apparent that the defense had been misled concerning the availability of this evidence. Although Trial Counsel could have, and should have, asked for that testimony to be stricken, Petitioner asserts that it would have been very difficult for the jury to ignore testimony they had already heard. At the very least, Trial Counsel should have asked for a recess to afford his own expert the opportunity to examine this evidence.

He was clearly ineffective for failing to do so. If as he recalled in his PCR testimony, this possibility was raised with the Trial Judge at sidebar and denied, Trial Counsel was clearly ineffective for failing to put this request and the Trial Court's ruling on the record. Having failed to do so, he deprived Petitioner of the opportunity to have this issue addressed on appeal. Inasmuch as the State argued extensively that this forensic evidence disproved Petitioner's version of the facts surrounding the shooting death of the deceased, Petitioner was clearly prejudiced by Trial Counsel's failures concerning this evidence. Therefore, Petitioner argues that he met his burden of proof with regard to these issues and that he has demonstrated that there exists a reasonable likelihood that these errors of Trial Counsel affected the outcome of his trial and/or the outcome of his subsequent direct appeal.

VI.

Allegations 9, 10, 11 and 19

Was Trial Counsel ineffective for failing to object to portions of the State's closing arguments which either misstated the evidence adduced at trial or commented on matters not in evidence and in personally characterizing the death of Petitioner's girlfriend as a suicide where that description did not match Petitioner's position and where this characterization opened the door for the State to argue that the physical evidence did not match Petitioner's claim of suicide?

Petitioner respectfully submits that he met his burden of proof in his PCR action concerning his allegations that Trial Counsel was ineffective in the following particulars,

- Trial counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the State argued matters not in evidence, and, in effect, gave expert ballistics testimony by asserting that the only explanation for the victim not having gunshot residue

on her hands was for Petitioner to have wiped off the gun before he put the weapon in her hand after the shooting, where she was not a witness in this case and had not been qualified as an expert in the field of ballistics.

- Trial counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the State argued a critical matter not in evidence by asserting as a known fact that the weapon which killed the deceased *was not loaded* until Petitioner loaded it with malice aforethought and by improperly stating that Petitioner took the safety off this weapon before the victim was shot.
- Trial Counsel was ineffective for failing to object to arguments by the State concerning the inconsistency of the physical evidence in this case from that normally found *in suicide shootings* where Petitioner's actual testimony was that the gun discharged while he and the deceased were struggling over the weapon; a scenario far more consistent with the physical evidence in this case.
- Trial Counsel was ineffective for repeatedly characterizing the death of Petitioner's girlfriend as a suicide where that characterization was not on all fours with Petitioner's actual position and opened the door for the State to argue that the physical evidence did not match Petitioner's claim of suicide.

Petitioner would note that in his Motion to Alter or Amend pursuant to Rule 59(e), SCRCR, he argued the following in Item 7 of that motion,

Applicant respectfully submits the Order of Dismissal issued in this matter neglects to make findings of fact and rulings of law pertaining to Applicant's Allegations 16- 18 from his Amended Application for Post-Conviction Relief filed June 18, 2009. As established by the Applicant during the PCR hearings held in this matter, Defense Counsel failed to clearly and consistently argue Applicant's position that the Victim was shot when the weapon he was attempting to take away from her discharged. In addition, the record reflects that Defense Counsel repeatedly characterized the Victim's death as a suicide without clarifying the Applicant's actual position which was that the Victim was shot while Applicant was struggling for control of the gun which he believed the Victim was about to use to commit suicide. Counsel's reference to the shooting as a suicide, and his failure to clarify the circumstances under which the weapon discharged in his arguments to the jury, was highly prejudicial to Applicant where the physical evidence in this case was not consistent with a suicide, but was arguably consistent with the discharge of the pistol during a struggle for the weapon.

In Item 8 of that 59(e) motion Petitioner argued the following,

Lastly, Applicant respectfully submits that the Order of Dismissal entered in this matter does not make findings of fact and rulings of law concerning Applicant's Allegation No. 19, Amended Application for Post-Conviction Relief in which he alleged that Defense Counsel was ineffective for failing to object to arguments by the State concerning the inconsistency of the physical evidence in this case from that normally found in suicide shootings. In his PCR action Applicant argued that his actual testimony was that the gun discharged while he was trying to stop the deceased from using the weapon to kill herself; a scenario far more consistent with the physical evidence in this case. Throughout Applicant's trial the State, and Defense Counsel, referenced Applicant's position as being that the Victim committed suicide. This position was factually inaccurate and it irreparably prejudiced Applicant where the physical evidence was not consistent with a gun shot suicide unless one factored in the effect Applicant's attempt to seize the weapon would logically have had on the trajectory of the fatal shot.

Said motion was subsequently denied and no amended Order of Dismissal was issued. App.p. 1179.

During his PCR testimony, Trial Counsel was specifically asked why he didn't object to portions of the State's closing argument wherein the Solicitor argued that the *only* reason the victim didn't have gunshot residue on her hands was because Petitioner had taken the gun to the kitchen and cleaned it off. Trial Counsel claimed that he didn't object to this assertion by the prosecution because there was, as he recalled during his PCR testimony, some testimony that Petitioner *could* have wiped residue off the gun. App. p. 965, l. 10 - p. 968, l. 1; App. p. 751, ll. 12-13, App. p. 753, ll. 19-23; App. p. 764, ll. 2-5.

Kimberly Black, the SLED agent who tested the gunshot residue kit taken from the victim, expressly admitted on cross-examination that if the deceased's hand was completely covered by someone else's hands at the time the gun was fired, she wouldn't expect to find any gunshot residue on her hands. App. 453, ll.17 – 18. See also, Petitioner's testimony at App.p. 618, ll. 22 – 24. This witness further acknowledged that the movement of the victim's hands by

EMS responders may have affected the presence of gunshot residue on the deceased's hands. App. p. 454, l. 1. Given the presence of this testimony, Trial Counsel should have objected to the State's erroneous assertion that the *only* explanation for the lack of gunshot residue on the deceased's hands was that Petitioner had taken the gun to the kitchen and cleaned it off.

During the closing argument to the jury, the prosecutor stated, “... *if you are looking at malice aforethought, this gun was unloaded.*” App. p. 762, ll. 16-17. The State went on to argue that, “*even if the magazine is already loaded, you’ve got to put it in. got to ratch the gun, you got to take off the safety, and you got to pull the trigger. That’s what you call malice aforethought.*” App. p. 762, ll. 18 – 21. Despite the fact that there was nothing in evidence which established that this gun was unloaded or that the safety had been set on it, Trial Counsel offered no valid reason for failing to object to this argument as making assertions not supported by the evidence adduced at trial. On cross-examination, the Respondent asked Trial Counsel if there had been testimony that the gun was in a dresser drawer and that it was not loaded. Trial Counsel responded, “*Right.*” App. p. 1030, ll. 11-16. Ultimately, however Trial Counsel admitted that, *at most*, the testimony in question established that the gun was *ordinarily* stored unloaded. He acknowledged that, contrary to the Solicitor's claims, the testimony at trial did not establish that the weapon was unloaded on the date in question. App. p. 1058, l. 18- p. 1063, l. 10. Petitioner now argues that the lower court should have granted Petitioner relief on this ground where he met his burden of proof concerning his claim that Trial Counsel should have objected to these closing arguments in which the prosecution asked the jury to find a key element of murder, malice aforethought, based upon inaccurate claims concerning what the evidence introduced at trial proved; that the gun was unloaded and that the safety was set on the weapon such that Petitioner would have to have deliberately taken the safety off to fire this weapon.

In addition, as mentioned above, the prosecution argued at length that the evidence adduced at trial was not consistent with Petitioner's claim that the deceased died as a result of a suicide. Petitioner asserts that Trial Counsel should have objected to those portions of the State's closing argument where Petitioner's testimony did not claim that the deceased committed an unimpeded act of suicide. Petitioner recognizes the State's likely position that these arguments may not have been objectionable in light of Trial Counsel's own characterization of the shooting in this case as a suicide. He would argue, however, that by the time closing arguments were presented by the State, Petitioner's own testimony had been presented and neither the State nor, Petitioner's own lawyer, had a foundation for describing Petitioner's position as an unqualified description of events constituting a suicide. Where Petitioner's testimony clearly asserted that he was trying take control of the gun from the deceased in order to prevent her from committing suicide, Trial Counsel was clearly ineffective for failing to object to the improper characterization of Petitioner's testimony by the State. App.p.612, l. 22 – p. 620, l. 16.¹¹ He would argue additionally, however, that Trial Counsel's own insistence on characterizing the deceased's death as a suicide was not only improper in light of Petitioner's true position on this issue, but opened the door for the State to argue that the forensic evidence was not consistent with Petitioner's claim of suicide. This was gross error by Trial Counsel where Petitioner in fact never claimed the deceased completed the act of suicide. See, Closing argument by Trial Counsel, App.p. 750, ll. 20 – 22 and App.p. 751, ll. 9 – 11. As previously noted, Petitioner's testimony unequivocally indicated that, after hearing his girlfriend make statements about how *"maybe everybody would be better off if she wasn't around"* he was trying to pull the weapon

¹¹ Petitioner notes that Trial Transcript pages 513 – 516 are out of order in the Appendix. Page 516 appears after page 513, and before page 514, rather than after page 515 as it should. Petitioner apologizes for this printing error and notes that record citations to the Appendix page numbers include any portion of the testimony referenced.

away from her when it discharged and further, that his hands were around her hand on the weapon the time it discharged. App. p. 616, ll.20 – 22 and App.p. 618, ll. 22 – 24. In his opening remarks to the jury, Trial Counsel acknowledges that Petitioner initially described what had happened as a suicide. His description of the actual events that lead to the deceased being shot, however, reflects a clear understanding of his client's true position that the gun went off while Petitioner was attempting to disarm her. App. p. 127, ll. 1 – 21. While the distinction between these two characterizations may initially sound insignificant, it was monumental in light of the difference it made in the consistency of the physical evidence to Petitioner's version of the events that left his girlfriend dead. While it may have been understandable for Petitioner while in the throws of shock, having just been through this terrible experience, to have described his girlfriend's death as a suicide when he meant she was shot while she was trying to commit suicide, Trial Counsel should have been familiar enough with the forensic evidence in this case to know that the distinction between these two characterizations was critical to the defense. Petitioner respectfully asserts that the lower court erred in denying him relief based upon Trial Counsel's failure to object to each of the closing arguments addressed herein. He has additionally demonstrated that Trial Counsel's own characterization of the facts surrounding this killing as a suicide, was deficient where he knew that was not an accurate description of Petitioner's true position concerning what resulted in the deceased being shot. Lastly, he submits that, in light of Petitioner's own testimony, Trial Counsel should have objected to arguments wherein the State repeatedly argued that the evidence did not fit suicide as claimed by Petitioner. Petitioner respectfully submits that the lower court erred in failing to grant relief on these grounds and in failing to grant his request for an Amended Order which more fully addressed each of these claims.

VII.

Amended Allegations 6 and 7

Was trial Counsel ineffective for failing to hire an expert to introduce expert testimony concerning shock and post-traumatic stress and their possible impact on the likelihood that the Applicant might make inconsistent statements and/or false admissions in response to police interrogation and what effect witnessing a violent suicide by a loved one might have had on Petitioner's his ability to adequately proofread and adopt by incorporation a statement written by a third party.

In the Rule 59(e) motion filed in this matter, Petitioner expressly pointed out, in Item 5, that the Order of Dismissal entered in this matter failed to address the following,

With the regard to the Applicant's allegations concerning Counsel's failure to obtain an expert on post-traumatic stress disorder, allegations No. 6 and 7 from the Amended Application, the analysis of this Court focuses on Trial Counsel's PCR testimony that he thought the Applicant "was better served by hiring the pathologist, Dr. Ward". Order of Dismissal filed June 16, 2014, page 9. The order however does not address Counsel's admission that he never considered having his client declared an indigent, and requesting state funding for a psychiatric expert in addition to the pathologist. Further, the Order of Dismissal fails to address the degree to which the testimony of Dr. Thomas Martin explained how many of the behavioral facts referenced by the Court in this section of its order could be explained by the general known effects of shock and post-traumatic stress. In addition, the order fails to address the testimony of Dr. Thomas Martin, presented in the form of a deposition, concerning the ways in which shock and post-traumatic stress may have impacted the Applicant's statements to the police in the immediate aftermath of witnessing the violent death of a loved one.

Petitioner's Rule 59(e) motion was denied and no Amended Order of Dismissal was ever issued by the lower court. Petitioner now respectfully submits that the lower court erred in failing to grant Petitioner relief on these grounds, where the deposition of Dr. Thomas Martin, MD, introduced by Petitioner as his Exhibit No. 2 during his PCR hearing, established what the clear value of this type testimony would have been in Petitioner's case. In addition, as noted in the Rule 59(e) motion filed in this case, the Order of Dismissal fails to address Petitioner's clear showing of the value of such testimony to the defense. Furthermore, the Order of Dismissal fails

to address Trial Counsel's apparent view that he had to chose between an expert in pathology and experts in other disciplines. It is clear from Trial Counsel's testimony that he was totally unaware that he could petition the Court for funding for additional experts where Petitioner was an indigent and Trial Counsel's fees and other trial expenses were being paid by his parents and other family members who had no legal obligation to pay his legal expenses inasmuch as he was not a minor at the time of this incident or the subsequent trial.

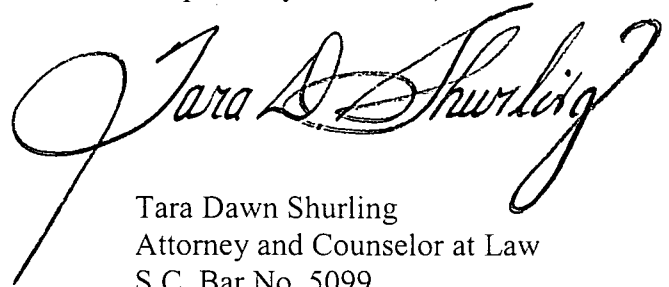
A fair reading of this trial record readily demonstrates how crucial it was to have a valid strategy to attack statements attributed to Petitioner which were made in the immediate aftermath of this horrific event. Petitioner respectfully submits that he has met his burden of proof with regard to his claims concerning Trial Counsel's failure to take measures to obtain and present expert testimony which would have addressed the likely impact of Post-Traumatic Stress and shock on Petitioner immediately following this incident and the manner in which these factors could have affected any statements he may have made while under the effects of shock. In addition, this testimony would have addressed the effect of PTSD and shock on Petitioner's ability to adequately proof and analyze statements written out by a third party, and signed off on by him, while still operating under the immediate effects of PTSD and shock. The lower court erred in denying Petitioner relief on these claims and in failing to issue and Amended Order of Dismissal in response to Petitioner's Rule 59(e) motion.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully asserts that he met his burden of proof with regard to 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, was violated prior to and during his jury trial. Petitioner has set forth in great detail the manner in which he has met his burden of proof and established that he was improperly denied relief in the lower court. Accordingly, Petitioner prays that the Writ be granted and that his judgment and sentence be reversed and his case is remanded to the Anderson County Court of General Sessions for a new trial. Alternatively, he asks that the Writ be granted and that he be afforded the opportunity to file a brief more fully presenting each of the issues addressed herein.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER

This 13th day of April, 2015.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2014-002623

RICHARD KEVIN PATTERSON, 270085,

PETITIONER,

v.

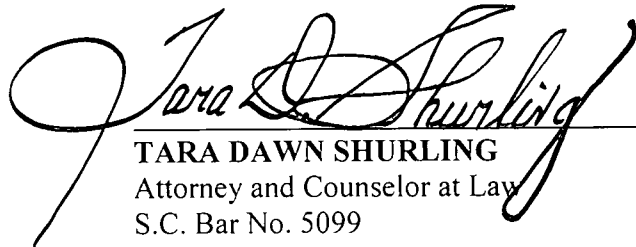
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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 13th day of April, 2015 by mailing one (1) copy in a stamped envelope properly addressed to:

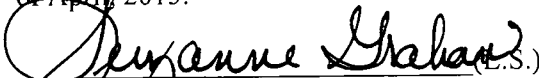
David Spencer
Senior Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211



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

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 13th day
of April 2015.



Dyanne Graham (S.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF



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April 13, 2015

RECEIVED

APR 16 2015

S.C. Supreme Court

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

RE: Richard Kevin Patterson, 270085 v. State of South Carolina; 2014-002623.

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and the Certificate of Service in the above-captioned case. I would appreciate you returning one (1) clocked copy of the Petition for Writ of Certiorari to me in the envelope provided. The Appendix was served and filed on April 8, 2015. Thank you for your assistance in this matter. I remain,

Sincerely yours,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive style with a long, sweeping tail on the letter "g".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures

cc: David Spencer, Senior Assistant Attorney General (w/enclosures)
Richard Kevin Patterson, 270085 (w/enclosures)
Billy and Barbara Patterson (w/enclosures)