

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-002511

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MAY 29 2016

SC SUPREME COURT

LEMONDE C. HOLLAND,

v.

THE STATE OF SOUTH CAROLINA,

PETITIONER,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the PCR Court err in reversing its original decision to grant Petitioner a new trial where the record below supported Petitioner's allegation that Trial Counsel was ineffective for failing to adequately cross-examine State witness, Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the Victim?

II.

Did the PCR Court err in reversing its original decision to grant Petitioner a new trial where the record below supported Petitioner's allegation that Trial Counsel was ineffective for failing to recall State witness, Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the Victim, after the testimony of eyewitness Jeffrey D. Bennick where the testimony of witness Bennick provided factual information which would have been instrumental in soliciting opinion testimony from this expert witness which would have been substantially favorable to the defense?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In April, 2006, the Horry County Grand Jury indicted Petitioner for Murder (2006-GS-26-2014), Assault and Battery with Intent to Kill (2006-GS-26-2013), and Possession of a Weapon During the Commission of a Violent Crime (2006-GS-26-2012). Robert N. Richardson, Jr., Esquire (“trial counsel”) and Jeffery E. Johnson, Esquire, represented Petitioner. On June 11, 2007, Petitioner proceeded to trial before the Honorable John L. Breeden, Jr. and a jury. On June 13, 2007, the jury found Petitioner guilty as indicted. Judge Breeden sentenced Petitioner to concurrent terms of fifty (50) years for Murder and twenty (20) years for Assault and Battery with Intent to Kill. Judge Breeden issued a consecutive sentence of five (5) years for Possession of a Weapon During the Commission of a Violent Crime. Petitioner filed a timely Notice of Appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner’s conviction on August 18, 2009. *State v. Holland*, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). The Court of Appeals denied Petitioner’s Petition for Rehearing on September 17, 2009, and the South Carolina Supreme Court denied Petitioner’s Petition for a Writ of Certiorari on February 9, 2012. The Remittitur was returned to the circuit court on February 10, 2012.

This matter came before the Court of Common Pleas by way of an Application for Post-Conviction Relief filed January 18, 2013. Respondent made its Return on or about April 16, 2013. The Court convened an evidentiary hearing into the matter on February 3, 2015 at the Horry County Courthouse, before the Honorable G. Thomas Cooper, Jr., presiding circuit judge. Petitioner was present at the hearing and represented by Ralph J. Wilson, Sr., Esquire. Joshua L.

Thomas, then a Staff Attorney with the South Carolina Attorney General's Office, represented Respondent. In addition to his own testimony, Petitioner presented testimony from Dr. Edward L. Proctor. Testifying on behalf of Respondent was Robert N. Richardson, Jr., Petitioner's lead trial counsel. In addition to the PCR testimony, the Court had before it a copy of the trial transcript, the records of the Clerk of Court regarding the subject convictions and sentences and Petitioner records from the South Carolina Department of Corrections.

In his application, Petitioner alleged he is being held in custody unlawfully on the grounds of ineffective assistance of counsel. Specifically:

1. "That I am not guilty and my trial lawyers failed to investigate and present my defense to the Court."
 - a. "My attorneys failed to investigate my defense."
 - b. "My attorneys failed to competently present my defense to the Court."
 - c. "The combination of their failure to fully investigate my defense and to competently present my defense caused me to be found guilty."

At the evidentiary hearing Petitioner proceeded on the allegations of ineffective assistance of counsel for failure to investigate and present a competent defense in three particulars: 1) Failing to adequately prepare for the trial of this case by meeting with or in any way attempting to speak with forensic pathologist and expert witness Dr. Edward G. Proctor prior to trial; 2) Failing, during trial, to adequately and sufficiently cross examine Dr. Proctor by having the expert witness demonstrate how the shooting must have occurred and/or manner(s) in which it could not have occurred based upon the forensic evidence and eyewitness accounts; 3) Failing, during trial, to re-call Dr. Proctor to the witness stand following the testimony of State's witness Jeffrey E. Bennick whose eyewitness account made it physically impossible for Petitioner to have been the shooter; 4) Improperly advising the Defendant not to testify and,

further, inducing the Petitioner not to testify in his own behalf when such testimony would have been the only account the jury would have received from the Petitioner himself as to what happened and, further, would have been consistent with the testimony of Bennick (thus further corroborating the impossibility of Petitioner as the shooter , and; 5) Failing to make any attempt to locate and/or otherwise speak with eyewitness Walke (who was also listed as a victim in the assault charge for which Petitioner was ultimately convicted) following information provided by Petitioner that Walke would testify Petitioner was not the shooter on the night in question.

By Order filed May 19, 2015, Judge Cooper found that Petitioner had met his burden of proof with regard to his allegation that he received ineffective assistance of counsel prior to and during his jury trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. The Court further found that Petitioner had established that he was prejudiced by Counsel's deficient representation and that there was a reasonable probability that, but for the errors and omissions of counsel, the outcome of Petitioner's trial would have been different. Respondent subsequently filed a Motion to Reconsider that decision on June 10, 2015, noting that Respondent had not received a copy of the May 19, 2015 Order until June 5, 2015. Petitioner filed a Response to Respondent's Motion on July 10, 2015. By Order of Dismissal filed September 2, 2015, Judge Cooper granted Respondent's Motion to Reconsider and dismissed this PCR action. Petitioner filed his Notice of Appeal from said Order of Dismissal on December 4, 2015. This Notice of Appeal was accompanied by an affidavit of service dated November 23, 2015, from the Horry County Clerk of Court's Office, verifying that the Order of Dismissal had not previously been served upon Petitioner. Petitioner now prays that the writ might be granted in order that he have the opportunity to fully brief the issues

summarized herein.

ARGUMENT

Questions I and II

Did the PCR Court err in reversing its original decision to grant Petitioner a new trial where the record below supported Petitioner's allegation that Trial Counsel was ineffective for failing to adequately cross-examine State witness, Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the Victim and failed to recall Dr. Proctor, after the testimony of eyewitness Jeffrey D. Bennick where the testimony of witness Bennick provided factual information which would have been instrumental in soliciting opinion testimony from this expert witness which would have been substantially favorable to the defense?

FACTUAL SUMMARY

This record reveals on the morning in question Petitioner and the victim got into a verbal altercation inside a bar which eventually travelled outside into the back parking lot and turned physical. By all accounts there were anywhere from six to ten individuals who followed the two outside then proceeded to surround them at various locations and distances as they wrestled. In the midst of the altercation, multiple gunshots went off in quick succession. The first two shots caused superficial wounds to one of the onlookers. The third shot struck the victim in the head fatally wounding him at which point he fell to the ground and Petitioner fled. The State's primary witness Jeffrey Bennick, a manager and bartender employed by the bar, was the closest to the altercation and testified he saw the entire event from start to finish without ever losing sight of either individual until it was over.

Dr. Proctor testified he was the forensic pathologist who examined the victim's body in this case. During the trial Dr. Proctor was admitted as an expert witness in the field of forensic pathology. At the evidentiary hearing on PCR, counsel for both parties stipulated

to Dr. Proctor's qualification as an expert in the field of forensic pathology. Dr. Proctor testified the victim died as a result of a gunshot wound to the head which entered at the midline of the victim's forehead just at the hairline area and travelled front to back, top to bottom, and right to left ultimately settling toward the left jaw. Proctor further testified that there was no stippling nor any gun powder found on the victim or within the wound. Proctor testified gunshot residue and stippling are normally found in cases involving close contact gunshot wounds, specifically gunshot wounds closer than 18 inches. Proctor further testified, however, that residue and/or stippling may not be visible in a "hard contact" gunshot wound, one where the weapon is pressed firmly and directly upon the bullet's entry site at the time of firing. Proctor testified in this case, the absence of both residue and stippling indicates the fatal shot had to have come from a distance of greater than 18-24 inches unless at the time of firing the weapon was pressed directly against the victim's skull with no space in between to allow for stippling and/or powder/residue to be expelled upon the surrounding areas.

Dr. Proctor testified he does not recall ever meeting with or otherwise speaking to either of Petitioners trial attorneys, Robert Richardson or Jeffrey Johnson, prior to the trial of this case. Proctor further testified he was never presented with a scenario (by either the State or the defense) of where and how the victim and his alleged assailant were positioned at the time the fatal shot was fired. Proctor testified that until this Evidentiary Hearing, he was not aware this incident involved a close contact physical altercation between the victim and his alleged assailant and testified that such information is and would have been pertinent.

During trial the State's primary witness Jeffrey Bennick testified that Petitioner and the victim were wrestling, describing them as "locked up" the "entire time". Bennick further

testified that Petitioner and the victim were “arm in arm” with one another, facing each other with each’s hands upon the other’s shoulders wrestling back and forth and never broke apart until the third shot went off at which point the victim fell to the ground and Petitioner ran. At the evidentiary hearing, Proctor testified he was unaware of Bennick testimony and/or this scenario. Utilizing the trial transcript, Petitioner’s counsel demonstrated for Dr. Proctor the exact manner and positioning which Bennick testified the Petitioner and the victim were situated. Proctor testified in that scenario and under those version of facts (Bennick), it would have been physically impossible for Petitioner to have been the shooter given the forensic evidence in this case. Proctor explained that if the two were facing each other, locked arm in arm, hands upon the other’s shoulders, they would have been within the 18-24 inches in which stippling and/or residue is expected to be found. Furthermore, it would have been physically impossible for a hard contact wound such as he’d described earlier to have occurred under that scenario given the entry site of the bullet (midline forehead) and trajectory of its path (right to left), there is no way Petitioner (who is right handed) could have fired such a shot as he would not be at the correct position nor angle to do so. Proctor testified that had he been provided with that scenario and/or been re-called to the stand following Bennick testimony and questioned as to the feasibility of Petitioner being the shooter in light of Bennick testimony, he would have testified that Petitioner could not have been the shooter under those circumstances. While counsel for Respondent did present Proctor during cross examination with multiple alternative “scenarios” as to how the two may have been positioned in order for Petitioner to have been the shooter, these alternative scenarios were not in the record at the time of this trial and are in direct opposition to the only scenario in the record, that provided by Bennick. As Bennick was the State’s primary witness, the State offered no testimony to contradict the precise positioning and manner of

positioning as described in detail by Bennick during the trial of this case.

Petitioner testified he and his family retained Robert Richardson, Jr. and Jeffrey Johnson to jointly represent him in General Sessions Court on these charges. He testified that he is right handed. Petitioner testified since his date of arrest and up until the time of trial he remained in the custody of J. Reuben Long Detention Center. Petitioner testified once he was able to retain Richardson and Johnson, he had numerous meetings with both attorneys at the jail and discussed the evidence against him as well as various trial strategies suggested by counsel. Petitioner testified he maintained his innocence with his attorney's the entire time. Petitioner further testified the manner in which he and the victim were positioned and wrestling was just as described by Bennick and he had relayed this information to both of his attorneys multiple times prior to the trial of this case. Petitioner testified he advised his attorneys he heard the shots come past him and when the first two shots were fired he was still locked arm in arm with the victim but when the third shot went off and the victim fell to the ground he was finally able to break free and, therefore, ran because he did not know who was shooting or who they were shooting at.

Petitioner testified he advised his attorneys that eyewitness and listed victim, Walke, (who'd been hit in the leg with a stray bullet) knew him personally and would be able to testify that Petitioner was not the person who shot him. Petitioner further advised his attorneys Walke would likely be a friendly witness because he knew Petitioner was not guilty of this crime. Petitioner testified that he urged his attorneys to locate and speak to Walke for this reason but his attorneys each expressed strong disagreement with trying to find Walke indicating it was best to just leave him alone since he was listed as a victim.

Petitioner testified he expressed to his attorneys a desire to testify during the trial of

explaining because neither the police nor any other member of law enforcement ever took a statement from him as to what happened and/or his side of the story, it would be the only chance the jury would have to hear from him directly as to what transpired. Petitioner testified when he expressed this desire to testify and his belief it would be important to his case, his attorneys strongly discouraged him from testifying due to his prior criminal history (none of which was for violent crimes such as what he was charged with at the time) and opined his testimony was more likely to result in conviction than the other way around. Petitioner testified due to the trust he'd placed in his attorneys to know what was best and the fear they'd instilled in him about his testimony resulting in conviction, he followed counsels' advice and waived his right to testify.

Lead trial counsel Robert Richardson testified that Petitioner's family retained both himself and Jeffery Johnson to represent Petitioner on the charges for which he was ultimately convicted. Richardson testified Petitioner did, in fact, provide him with a scenario nearly identical to the one described by Bennick during the trial of the case and agreed that Petitioner's testimony would have been consistent with Bennick's. Richardson testified he does not recall ever attempting to speak with Proctor prior to the trial because he did not consider Proctor, an expert witness in the field of forensic pathology, to be material to the case and opined that Proctors testimony neither hurt nor helped the Petitioner's case. Richardson testified co-counsel Jeffrey Johnson conducted the questioning of Proctor. When questioned as to why Proctor was never presented with a scenario (either before or during trial) consistent with that described by Bennick (in a prior statement to police) or by the Petitioner (the two engaged, locked arm in arm, not separated) Richardson indicated his theory was to create space between the two so the bullet could have come from another

shooter nearby therefore he did not deem such a demonstration fruitful. When questioned as to why he did not re-call Proctor to the witness stand following Bennick's testimony he reiterated that this was inconsistent with his desire to create space between Petitioner and the victim thus did not further his purpose. Richardson testified he and Johnson wanted to get Dr. Proctor off the stand once he testified he could not determine whether the fatal wound was from a contact shot or a distant shot.

As to the investigation of Walke, Richardson testified he did not pursue Walke because he did not believe Walke would be helpful. Richardson did, however, testify that Petitioner did tell him that Walke would be helpful and that Petitioner wanted him to find and speak with Walke. Richardson testified ultimately, however, because the Petitioner had told him Walke was "no longer in the area" that he did not see fit to pursue him. Richardson testified, however, at the time Petitioner told him he'd heard Walke had left town, the Petitioner had been locked up for in excess of one year and would have had little way of knowing where Walke may be due to his incarceration.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel

such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

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

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

DISCUSSION

Dr. Leroy Proctor testified during the Petitioner's PCR hearing. He stated that he could not recall speaking with Attorney Richardson or Attorney Johnson before trial testimony. App. p. 574, ll. 10-14. He acknowledged that in his trial testimony he reported finding no powder residue or stipling on the wound. App. 574, ll. 15-23. He stated that his autopsy report reflected entrance wound was midline of deceased forehead "***just at the hairline.***" Bullet traveled right to left and "***was recovered from the soft tissues just behind the angle of the jaw in the left neck.***" App. p. 567, ll. 1-9. The bullet followed a downward trajectory of 15-20 degrees. App. p. 576,

ll. 10-15. His findings were consistent with either a distant shot from further than 18-24 inches away *or* a tight contact wound where all the powder and residue going inside the wound where it could be washed away if there was significant bleeding. App. p. 576, l. 16- p. 577, l. 16. Dr. Proctor subsequently clarified that when he reported and testified that the bullet traveled right to left, he meant it traveled “right to left in the victim. So from midline *to the left side of the victim’s head.*” App. p. 579, ll. 9-15 (Emphasis added).

While it is true that Dr. Proctor testified that, “*particularly with the victim’s head in the chest of the Defendant—it would be very, very difficult to have a midline forward entrance wound, yes sir.*” App. p. 580, ll. 1-5. Of equal significance, however, was his finding that the bullet went in Victim’s forehead at the midline and traveled *right to left* coming out of the left side *of the Victim’s head*. The record establishes that Petitioner is right handed. Common sense dictates that it would be virtually impossible for a right handed shooter to be face to face with the Victim, arms locked in combat, and fire a shot that would travel right to left *inside the Victim’s head*. At trial Dr. Proctor’s testimony did include the following information concerning the trajectory of the bullet that caused the Victim’s fatal wound. “*In this case this gentleman had a single gunshot wound to the head basically in the midline forward just below the hairline. It passed basically superior to inferior, top to bottom, and off to the left side going through the left side of the brain through the basilar skull and through the skull and was recovered from the soft tissues in the posterior head and neck area just behind the angle of the jaw. This would cause extensive injury to the brain, fractures of the skull and resulted in the death of this gentleman.*” App. p. 119, ll. 9-19. At trial he did not clarify, as he did in his PCR testimony, that the reference to a midline entry wound and a left side recovery site for the bullet did not mean the bullet traveled *right to left* from point of entry, but rather the projectile entered the Victim’s forehead at midline and was recovered on the left side of the Victim’s body.

Without proper cross-examination the jury could easily have misunderstood this testimony to mean the bullet *traveled right to left*, when in fact it would have to have traveled left to right from point of impact in order to end up embedded in tissue on the left side of the Victim's head. The majority of Dr. Proctor's testimony dealt with the estimated distance of the shot based upon the absence of residue and stipling. App. p. 117, l. 14-p. 125, l. 21. PCR Counsel attempted to question Dr. Proctor concerning the direction a bullet fired to the midline of the Victim would have to travel in order to end up on the left side of his head, however he responded without directly answering that specific question. App. p. 580, l. 20, p. 581, l. 6. Dr. Proctor's PCR testimony confirms that at the time of the autopsy the only history he was provided concerning the case came to him through the Deputy Coroner who informed him ***"that there had been a dispute at a local bar and that the Victim was shot once in the head."*** App. p. 586, l. 25- p. 587, l. 3.

As previously noted, in his PCR testimony Dr. Proctor acknowledged that had he been aware of the scenario discussed at the PCR hearing with regard to the relative positions of the deceased and Petitioner, he ***"would have had to have said"*** that ***"it would be very, very difficult"*** for Petitioner to have fired the shot that killed the deceased. *See specifically*, App. p. 579, l. 16- p. 580, l. 5. He expressly noted that this was true, ***"particularly with the Victim's head in the chest of the Defendant."*** App. p. 580, ll. 2-3.

In the lower court's Order of Dismissal, reversing its previous grant of a new trial, the Court noted that Petitioner ***"testified the Victim's head was not in his chest when the fatal shot was fired, but was looking up toward the sky."*** Order of Dismissal, p. 5, App. p. 663, para. 1. His PCR testimony, however, expressly states that while they were wrestling, the Victim ***"put his head like that (indicates) inside my chest."*** App. p. 591, ll. 16-21. Petitioner further testified that there was nothing in the trial testimony of eye-witness Bennick that he disagreed

with and stated, “[A]ll of that was true.” App. p. 596, ll. 20-25.

Bennick, who was a manager and bartender at the bar where this incident occurred, testified at Petitioner’s trial. App. p. 240, ll. 1-19. In his trial testimony he stated the following.

Q. Okay, so ---

A. --- The white male actually had his head down like this and was like this and the momentum of the two of them they were like jostling back and forth but they wound up going like I said about 10 yards from the car but the white male’s head was actually down the entire time.

...

There was never any, there was never any punches thrown. His, he was holding on and his head was down actually in the black male’s chest the entire time.

Later, during cross-examination, Petitioner testified that the Victim’s head was down in his chest until the gunshots began. He indicates that after the first shot was heard, “*his head is raised up like this (indicates).*” App. p. 603, ll. 10-25. He went on to say, “*everything, you know what I mean, is so fast. I just remember wrestling, wrestling. I remember his head in my chest for a brief few seconds, but it was in the beginning.*” App. p. 604, ll. 1-4. He went on to testify that he did not know whether the Victim was “*looking straight ahead or up*” when the subsequent shots were fired. The record reflects that Petitioner tried to demonstrate the position of the Victim’s head, but unfortunately the transcript does not document what he physically indicated during that portion of his testimony. App. p. 604, ll. 7-13.

In the May 19, 2015 Order in which the Petitioner was granted a new trial, the Court found Petitioner’s Trial Counsel failed to provide him effective representation within the prevailing norms by failing to “*sufficiently examine Dr. Proctor by providing the specific scenario as to the positioning of the Victim and the alleged assailant (Holland)*” and in failing to recall Dr. Proctor to the witness stand following the testimony of Bennick”. Order filed May 19, 2015, App. p. 642, para. 2. In so ruling, the Court found lead Counsel’s claim that these

actions were part of his overall “*trial strategy*” to create distance between Petitioner and the Victim “*implausible and illogical.*” App. p. 642, para. 2. The Court further found that Trial Counsel was ineffective for failing to “investigate, locate, or speak with Walke” the living victim in the case. The Court also found that Counsel was ineffective for failing to locate this potentially valuable witness simply because Petitioner informed them that Walke had left town. The Court noted Counsel’s duty to investigate witnesses identified by a defendant. The Court went on to reason that Counsel was ineffective for relying on the limited information and resources available to Petitioner who had been locked up in the County Detention Center for more than a year by the time this case was being prepared for trial. App. p. 643, para. 2- p. 644, para. 1. Petitioner did not present testimony from Walke during the PCR proceeding.

Based upon the three specific allegations discussed above, the PCR Court originally set aside Petitioner’s judgments and sentences and granted him a new trial by Order filed May 19, 2015. App. p. 644, para 3.

In its subsequent Motion to Reconsider, Respondent first urged the PCR Court to reverse its findings, and the grant of a new trial, on the ground that the Court’s Order, “*may have misapprehended the standard of review and failed to give deference to trial counsel’s strategic decision to not further question Dr. Proctor.*” App. p. 646, para. 4- p. 648. para. 1. Second, Respondent challenged the Court’s finding *that “it is reasonable to conclude that [Dr. Proctor’s] testimony is likely to have changed the outcome of this case.”* Order filed May 19, 2015, p. 11, app. p. 643, para. 1 and Motion to Reconsider, p. 3, App. p. 648, para. 2. Respondent argued that Dr. Proctor “*opined that there was no way the victim could have been shot in the forehead based on Petitioner’s version of the events.*” App. p. 649, para. 2. Respondent went on to argue that if that scenario were accurate and “*the shot came from somewhere behind Petitioner, and the shot entered the Victim’s forehead, the bullet would*

have had to pass through Petitioner.” App. p. 649, para. 2. Respondent’s logic on this point was faulty for several very important reasons. The scenario Dr. Proctor was asked to consider during his PCR testimony was not “Petitioner’s version” of the events, but rather was entirely consistent with eye witness Bennick’s trial testimony. His testimony indicated that when the two men began to physically fight, they were standing on the passenger side of the car ridden in by the Victim and driven by his female companion. Bennick specifically testified that he himself was standing near the rear passenger tail light. App. p. 254, ll. 1-20.

Bennick testified that the Victim and Petitioner were about ten (10) yards from the rear of the car on the passenger side when they were fighting. He placed himself four (4) to five (5) feet from the back of the car. App.p. 256, ll.15-24. Therefore, Bennick was approximately thirty-four (34) to thirty-five (35) feet away from the two men as they scuffled. Bennick further explained that from his vantage point, *“they were both sideways to me, I could see them both.”* App.p. 258, ll.19-22. When asked what direction the shots came from, Bennick testified that they came from the direction of the altercation. He did not claim, as Respondent implies, that the shots came from *behind* Petitioner. App.p. 258, ll. 11-15. Although Bennick did testify that the Victim had his head down the whole time, he also admitted that when gun shots went off, he *“sort of ducked down a little bit”* and then *“the third shot went off and the white male fell to his back.”* App.p. 259, 5-11. Petitioner’s testimony on the other hand, was that he Victim started out with his head against Petitioner’s chest, but that he changed the position of his head somewhat after the gunfire erupted. Petitioner submits that his recollection of the events makes logical sense. Just as Bennick admits that he ducked down when he heard the gun fire, it is reasonable to believe the Victim would have raised his head when he heard gun fire; thus creating an opportunity for the Victim to get hit in the forehead with a shot that entered his head at the midline at the hairline and ended up on the left side of his neck just behind the jaw.

Although Dr. Proctor emphasized that the shot that killed the victim would have been very, very difficult for Petitioner to have made in light of the positioning of the two men's bodies described by Bennick, *especially in light of the Victim's head being in Petitioner's chest*, he did not say that the shot was otherwise plausible. Indeed, Petitioner would submit that it clearly was not. Nevertheless, had Trial Counsel recalled Bennick and questioned him in light of Bennick's trial testimony, Dr. Proctor has very clearly stated that he would have had to testify that it would have been very, very difficult for Petitioner to have fired that shot. Even if this Court views this issue through the prism of Petitioner's PCR testimony, he would submit that the evidence still supports a finding of ineffectiveness. At trial Dr. Proctor was not even asked about what impact the fact that Petitioner is right handed would have on his opinion. Dr. Proctor's PCR testimony strongly suggests that knowledge of the positioning of the parties at the time the shots were fired, along with the fact that Petitioner is right handed, would have impacted his trial testimony.

Dr. Proctor opined that the fatal gunshot was a distant shot fired from more than 18-24 inches away. Although he did not totally rule out a tight contact wound, neither did he describe finding the kind of stellate tears typically associated with such wounds. Likewise, he did not discuss the likelihood of a tight contact wound in light of the fact that the 9mm slug removed from the victim at autopsy did not exit the victim's head.

Respondent further argued for reconsideration on the ground that Dr. Proctor acknowledged in his PCR testimony that certain hypothetical fact situations proposed by Respondent could be consistent with a shot fired by Petitioner. Petitioner submits that consideration of these scenarios by the PCR Court was improper where each assumes facts not in evidence at Petitioner's trial. The testimony of Bennick at trial was the only eyewitness account before the jury concerning the physical interaction between Petitioner and the Victim before and during the seconds it took for these three shots to be fired.

Respondent went so far as to politely suggest that the findings of the PCR Court in its original order were factually absurd based upon the argument that any shot fired by a third party shooter would have had to come *through* Petitioner in order to hit the victim. This argument was made despite the fact that there was no testimony that the fatal shot had to have been fired straight on in the direction of the Victim. App.p. 649. para 2. To the contrary, the forensic evidence in this case showed that the bullet traveled from midline to the right coming to rest on the *left side of the Victim's head* just behind his jaw. That evidence would logically be consistent with the Victim being shot from a side angle by a shooter firing between the two men as they faced each other in combat.

Respondent additionally argued that the PCR Court incorrectly concluded that the failure of Trial Counsel to adequately cross-examine Dr. Proctor, or to recall him following the testimony of Bennick, likely changed the outcome of Petitioner's trial. App.p. 648, ll. Para. 2. Petitioner most respectfully submits that the PCR Court correctly found that Petitioner had met his burden in establishing prejudice in this case. The testimony presented from Dr. Proctor at the PCR hearing would likely have generated reasonable doubt at Petitioner's trial if it had been heard by Petitioner's jury.

Petitioner strongly disputes Respondent's position, as reflected in their Motion to Reconsider, that there was overwhelming evidence of guilt in this case. Bennick, the only eyewitness to describe the events surrounding the actually physical altercation and the shooting, did not testify to seeing Petitioner with anything in his hand during this altercation. The only witness who claimed to see Petitioner with a gun was the Victim's girlfriend whose testimony may well have been viewed as biased and therefore, suspect, by the jury. The nature of the altercation between Petitioner and the Victim remains an unanswered question in this record and therefore, the jury may have even questioned the girlfriend's role in the dispute between these

two men. In its Motion to Reconsider, Respondent stated that a witness testified ***“to hearing the shots came from where Petitioner and the Victim were fighting.”*** This observation conveniently overlooks the fact that the witness in question, Bennick, gave that testimony in direct response to a question concerning *what direction* the shots came. Likewise, that assertion overlooks Bennick’s testimony from which we can conclude that he was some 34-35 feet away from the fighting men when the shots rang out.

Respondent’s assertion that the failures of trial counsel must be given difference as matters of valid trial strategy is likewise misplaced. App.p. 646, para. 4 - p. 648, para. 1. As Petitioner argued in his Response to Respondent’s Motion to Reconsider, ***“Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness--when counsel articulates a strategy, it is measured under an objective standard of reasonableness.”*** *Abney v. State*, 408 S.C. 41, 46, ___ S.E.2d ___ (Ct. App. 2014) (Emphasis added). Trial Counsel’s failure to more extensively cross-examine Dr. Proctor, or to recall him after Bennick’s testimony, was not objectively reasonable. Bennick testified that Petitioner and the Victim were locked together in combat and never let go of each other during their scuffle until the Victim fell to the ground after the third shot was fired. He described them as ***“arm in arm”*** and ***“locked up”*** the entire time. There was no other version of the facts before Petitioner’s jury. Trial Counsel so called ***“trial strategy”*** to create space between Petitioner and the Victim was therefore, as the PCR Court found in its original order, implausible and illogical and should not insulate him from a finding of ineffectiveness.

The Order of Dismissal entered in this matter in response to Respondent’s Motion to Reconsider gives little insight into the Court reasoning for reversing its original rulings. The Order appears to turn on application of the hypothetical scenarios put to Dr. Proctor during the PCR hearing. As previously argued, the opinions of Dr. Proctor concerning those fictional fact

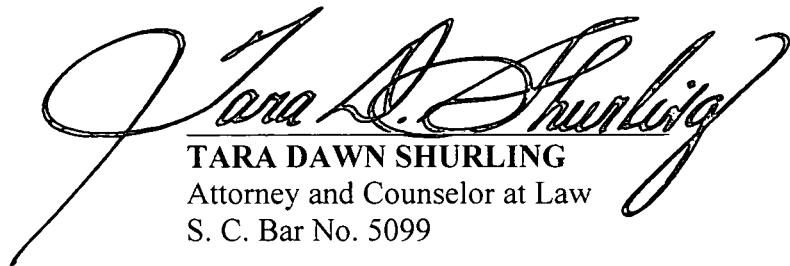
situations should not have been considered by the Court in ruling upon this case where there was no evidence adduced at trial supporting those hypothetical scenarios. In addition, the Court totally reversed itself on the question of whether Trial Counsel's failures might be found to constitute part of a valid trial strategy. Petitioner most respectfully submits that the "trial strategy" described by trial counsel was totally inconsistent with the only eyewitness testimony heard by the jury and therefore was not objectively reasonable.

Petitioner submits that the Order entered by the Court on May 19, 2015, was sound and well supported by the evidence adduced at Petitioner's trial and during his PCR hearing. The grounds advanced by Respondent for reversing the rulings found in that Order were not meritorious and were, in large part, due to misapprehension, of the facts in this case. The PCR Court correctly ruled that Petitioner was entitled to a new trial and erred in granting Respondent's Motion for Reconsideration.

CONCLUSION

For the reasons stated, the Petitioner respectfully asks that this Honorable Court dispense with further briefing and grant him a new trial. Alternatively, asks that the writ be granted and that he be allowed full briefing of the issues summarized herein.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 18th day of May, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-002511

RECEIVED

MAY 29 2016

SC SUPREME COURT

LEMONDE C. HOLLAND,

PETITIONER,

v.

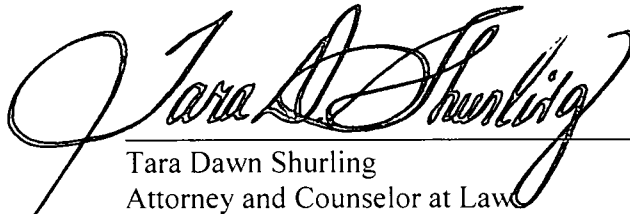
STATE OF SOUTH CAROLINA,

RESPONDENT.

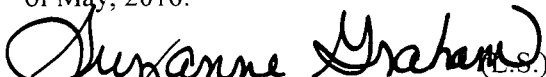
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and Appendix in the above-entitled case has been served upon opposing counsel this the 18th day of May, 2016, by depositing one (1) copy of the same in the U.S. Mail, postage prepaid addressed to:

Jessica Kinard
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 18th day
of May, 2016.


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

LAW OFFICE OF



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May 18, 2016

RECEIVED

MAY 23 2016

SC SUPREME COURT

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

RE: Lemonde C. Holland, 322379 v. State of South Carolina;
Appellate Case No. 2015-002511.

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari, Appendix and the Certificate of Service in the above-captioned case. I would appreciate your returning two (2) clocked copies of the Petition for Writ, Certificate of Service and Cover Sheets for the Appendix in the enclosed self-addressed envelope. Thank you for your assistance in this matter. I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm

Enclosures

cc: Jessica Kinard, Assistant Attorney General (w/enclosures)
Lemonde C. Holland, #322379 (w/enclosure)
James Holland (w/ enclosure)

FIRST CLASS



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